

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Misuse of Internet Protocol (IP) Captioned	)	CG Docket No. 13-24
Telephone Service)	
)	
Telecommunications Relay Services and	)	CG Docket No. 03-123
Speech-to-Speech Services for Individuals)	
with Hearing and Speech Disabilities)	

PETITION FOR STAY

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September 30, 2013

SUMMARY

The Consumer Groups request that the Commission stay the effectiveness of the \$75 minimum payment rule adopted in the *Order* released on August 26, 2013,¹ as to low income consumers, pending further consideration of the payment requirement pursuant to the Further Notice of Proposed Rulemaking (“FNPRM”) contained in the *Order*. This request covers the provision of rule 64.604(c)(11)(i)² that precludes IP CTS providers that provide equipment, software, or applications to consumers at a charge of less than \$75 from receiving compensation for minutes of IP CTS use generated by consumers using such equipment. The definition of “low income” for the purposes of the stay should be set at 400% of the federal poverty guidelines to match the definition of “low income” under the National Deaf-Blind Equipment Distribution Program.³ Consumer Groups demonstrate below that (1) the challenge to the rule is likely to prevail on the merits, because the \$75 payment rule imposes an unnecessary burden on low-income consumers with hearing loss that is contrary to the policy of Section 225; (2) a significant number of consumers with hearing loss who cannot afford a \$75 payment will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.⁴

¹ *Misuse of Internet Protocol (IP) Captioned Telephone Service, Telecommunications Replay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 13-24 & 03-123, Report and Order and FNPRM, FCC 13-118 (rel. Aug. 26, 2013) (“*Order*”).

² 47 C.F.R. § 64.604(c)(11)(i).

³ *See*, 47 C.F.R. § 64.610(d)(2). Consumer Groups propose that the rule be permitted to take effect as to equipment provided to consumers who do not meet this definition of low income.

⁴ *See, e.g., Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

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)	
Misuse of Internet Protocol (IP) Captioned Telephone Service)	CG Docket No. 13-24
)	
Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities	)	CG Docket No. 03-123
)	

PETITION FOR STAY

Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), the Hearing Loss Association of America (“HLAA”), Association of Late-Deafened Adults, Inc. (“ALDA”), the National Association of the Deaf (“NAD”), the Deaf and Hard of Hearing Consumer Advocacy Network (“DHHCAN”), the American Association for the Deaf-Blind (“AADB”), and the Cerebral Palsy and Deaf Organization (“CPADO”), collectively the “Consumer Groups,” request that the Commission stay the effectiveness of the \$75 minimum payment rule adopted in the Report and Order released in the above-captioned dockets on August 26, 2013,⁵ as to low income consumers, pending further consideration of the payment requirement pursuant to the Further Notice of Proposed Rulemaking contained in the *Order*. Specifically, Consumer Groups request that the Commission stay the provision of rule 64.604(c)(11)(i)⁶ that precludes IP CTS providers that provide equipment, software, or applications to consumers at a charge of less than \$75 from

⁵ *Misuse of Internet Protocol (IP) Captioned Telephone Service, Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 13-24 and 03-123, Report and Order and Further Notice of Proposed Rulemaking, FCC 13-118 (rel. Aug. 26, 2013).

⁶ 47 C.F.R. § 64.604(c)(11)(i).

receiving compensation for minutes of IP CTS use generated by consumers⁷ using such equipment. The definition of “low income” for the purposes of the stay should be set at 400% of the federal poverty guidelines (as defined in 42 U.S.C. § 9902(2)) to match the definition of “low income” under the National Deaf-Blind Equipment Distribution Program (“NDBEDP”).⁸ In addition, consistent with the NDBEDP, persons that are enrolled in a federal program with a lesser income eligibility requirement, such as the Supplemental Nutrition Assistance Program, should also be considered of “low income” status for the purposes of the stay.⁹ Consumer Groups propose that the rule be permitted to take effect as to equipment provided to consumers who do not meet this definition of low income.

The rule should be stayed to ensure that all deaf and hard of hearing consumers, including low income consumers, have access to IP CTS pending adoption of permanent rules, as contemplated by the Americans with Disabilities Act (“ADA”), Section 225 of the Communications Act¹⁰ and well-established Commission policy implementing the functional equivalency standard. As demonstrated herein, the *IP CTS Order’s* minimum charge of \$75 violates the mandate of Section 225 of the Act to make functionally equivalent services available “to the extent possible.”¹¹ The \$75 requirement also fails to meet the standards of the Administrative Procedures Act (“APA”) because the threshold itself was chosen without adequate evidence and the

⁷ Any reference to IP CTS consumers, users, or customers herein includes individuals who consider themselves deaf, hard of hearing, or with some other hearing loss, along with the deaf-blind and those individuals who are both deaf and have physically challenged mobility.

⁸ See, e.g., 47 C.F.R. § 64.610(d)(2); *Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Section 105, Relay Services for Deaf-Blind Individuals*, CG Docket No. 10-210, Report and Order, FCC 11-56, 26 FCC Rcd 5640, ¶¶ 36-37 (2011) (establishing the NDEDP).

⁹ 47 C.F.R. § 64.610(d)(2).

¹⁰ 47 U.S.C. § 225.

¹¹ 47 U.S.C. § 225(d)(1)(D) and (b)(1).

record does not support the Commission's underlying assumption that the \$75 requirement is necessary to prevent fraud and misuse of IP CTS services.¹² Absent a stay, the rule will cause irreparable harm to low income consumers who are deaf or hard of hearing and unable to afford the payment of \$75 to obtain IP CTS equipment.

I. BACKGROUND

The *IP CTS Order* added a new subsection to rule 64.604(c) that governs IP CTS equipment, software and applications. It provides in relevant part that: “Any IP CTS provider, including its officers, directors, partners, employees, agents, subcontractors, and sponsoring organizations and entities, *that provides equipment, software or applications to consumers, directly or indirectly, at no charge or for less than \$75*, whether through giveaway, sale, loan, or otherwise, on or after September 30, 2013 shall be ineligible to receive compensation for minutes of IP CTS use generated by consumers using such equipment.”¹³ The practical impact of this rule is to prevent service providers from offering no-cost or low-cost IP CTS equipment to consumers, since by doing so they would forfeit the ability to obtain reimbursement for their costs of providing service. The rule does not prevent consumers from obtaining devices from other sources, but as discussed below such alternative sources do not yet exist in a number of states.

II. ARGUMENT

In determining whether to stay the effectiveness of one of its orders, the Commission applies the four factor test established in *Virginia Petroleum Jobbers Ass'n v. FPC*, as modified in

¹² 5 U.S.C. § 706 (Courts may overturn decisions that are “arbitrary” or “unsupported by substantial evidence.”); *Cross-Sound Ferry Services, Inc. v. ICC*, 738 F.2d 481, 483-484 (D.C. Cir. 1984) (The Commission cannot make decisions based on “a dearth of supporting record evidence.”).

¹³ 47 C.F.R. § 64.604(c)(11)(i) (emphasis added).

*Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*¹⁴ Under this standard, the Commission considers whether (1) the challenge to the rule is likely to prevail on the merits; (2) interested parties will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.¹⁵ Consumer Groups demonstrate below that all four factors support the issuance of the requested partial stay in this case.

A. Petitioners are Likely to Succeed on the Merits

There are multiple, compelling reasons why the Commission should act pursuant to the Further Notice of Proposed Rulemaking to include a low-income exception to the \$75 rule.

1. The \$75 Rule Effectively Precludes Many Low Income Consumers From Obtaining Access to IP CTS

The \$75 rule unreasonably and irrationally excludes consumers from access to IP CTS service based solely on low income, regardless of demonstrated level of hearing loss. As noted above, the \$75 threshold does “not apply in instances where the consumer has obtained IP CTS equipment from a local, state, or federal governmental program.” The Commission supported this exception for state Equipment Distribution Programs (“EDP”) by finding that state EDPs:

or other governmental programs that give out or loan free or reduced cost CTS or IP CTS equipment to their residents do not raise the same concerns as IP CTS provider distributed equipment, because such governmental programs ensure that when equipment is distributed for free or for less than \$75, *individuals receiving this equipment will have been screened by a completely objective third party* with respect to their need for this service, and that individuals who would be better served by other equipment will have been directed to such equipment.¹⁶

¹⁴ *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

¹⁵ *Id.*; see also *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

¹⁶ *Order*, para. 50 (emphasis supplied).

The Consumer Groups applaud the Commission for adopting this exception, and agree that state EDP and similar programs can be relied upon to screen consumers to ensure they have a legitimate need for IP CTS. Contrary to the Commission’s assumption, however, this exception does not resolve the issue of access to IP CTS equipment, software and applications for a huge number of low income consumers that are deaf or hard or hearing, because equipment distribution programs are either non-existent or extremely limited in many states.

First, a number of states, including populous New York, Michigan, and Ohio, do not have a statewide equipment distribution program for low income consumers.¹⁷ In addition to these three states, Delaware, the District of Columbia, and Idaho also do not have statewide EDPs.¹⁸ Second, as the Commission acknowledged, not all states with EDPs distribute IP CTS devices.¹⁹ Third, many state EDPs are chronically underfunded and are subject to the uncertainties of state appropriations processes. Some states have limited the number of consumers who will receive equipment through the EDP in a given state fiscal year to as few as 10 to 25 phones per month. For example, when last we checked, Michigan allowed only 25 additional program participants per month, Tennessee only 16, Connecticut 15, New Hampshire only 10 per month, and other states have had similar restrictions.²⁰ Such limited distribution is unlikely to meet demand, as it

¹⁷ *Misuse of Internet Protocol (IP) Captioned Telephone Service, Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 13-24 and 03-123, Comments of Hearing Loss Association of America, Attachment A (Feb. 26, 2013) (“HLAA Comments”).

¹⁸ *Id.*

¹⁹ *Order*, at n.171.

²⁰ *Telecommunications Relay Services and Speech-to-Speech for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Petitioners’ Supplement to Petition to Mandate Captioned Telephone Relay Service, at 17 (June 10, 2009).

is estimated that the number of Americans with hearing loss is approximately 48 million and growing.²¹

Some states require that when the recipient of an IP CTS phone moves out of state the phone be returned to the state, further limiting access to IP CTS. Thus, in many cases when a person with subsidized IP CTS equipment moves from a state with an EDP to a state without an EDP such as Delaware, the District of Columbia, Idaho, Michigan, Ohio or New York, that consumer will no longer have access to IP CTS after growing dependent upon the service. Even if the consumer moves to a state that does have an EDP, and that has funding available to provide the consumer with a new device, the consumer will have to find out how to obtain a new device from that program. This is a hardship for potential IP CTS users, who are predominantly elderly,²² particularly as some elderly persons may be intimidated by the process of identifying and adopting a new technology product. Many of the states that have an EDP often contract with one provider and therefore, low income IP CTS consumers in those states only have the option of using the IP CTS telephones offered by each state's designated IP CTS provider. This situation also does not meet the functional equivalence standard of Section 225 as hearing consumers, by contrast, have a plethora of options for communications hardware, software and applications in the marketplace and are not limited to one provider.²³

²¹ HLAA Comments, at 5 and 8; Press Release, Johns Hopkins Medicine, Frank Lin, MD, PhD, *New Nationally Representative Estimate Shows Wide Scope of Problem*, (Nov. 14, 2011) (48 million or about 20.3 percent of Americans have hearing loss in at least one ear).

²² *Ex Parte* Letter from Philip J. Macres, counsel for TDI, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-24 & 03-123, at Attachment 1 (Apr. 26, 2013) (RERC-TA survey found that survey “respondents who use a special captioned phone are more likely to be older, retired and live alone).

²³ 47 U.S.C. § 225(b)(1).

A large number of low income persons who are deaf or hard of hearing in the states that lack programs or those states that have only limited programs will be denied the opportunity to use IP CTS due to the \$75 payment requirement. Even if poverty rates are no higher among those with hearing loss than among the population as a whole, one could assume that at least 15% of all persons who need IP CTS equipment are living below the poverty line.²⁴ In general, however, persons with a disability are more likely than others to be in poverty, with a poverty rate of 28.4% for persons aged 18 to 64 with a disability versus 12.5% for those without.²⁵ It is therefore likely that a significant percentage of persons with hearing loss would have difficulty affording \$75 for IP CTS equipment. Many of these potential IP CTS users are older Americans living on fixed incomes.²⁶

This result is inconsistent with Section 225(b)(1) of the Act, which requires the Commission “to make available to all individuals in the United States a rapid, efficient nationwide communications service” including IP CTS, and to insure that such services are available “to the extent possible.”²⁷ Congress did not intend that low income consumers, particularly vulnerable elderly consumers, would be excluded from the protections of Section 225, which is a civil right.

Title IV of the Americans with Disabilities Act of 1990 (“ADA”), which Section 225 of the Act implements, mandates the availability of TRS and defines TRS as a service that enables

²⁴ U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2012*, at 13 (issued Sept. 2013), available at <http://www.census.gov/prod/2013pubs/p60-245.pdf>.

²⁵ *Id.* at 17. The Census Bureau does not report poverty rate by specific type of disability.

²⁶ *Misuse of Internet Protocol (IP) Captioned Telephone Service, Telecommunications Replay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 13-24 and 03-123, Sorenson Communications, Inc. and CaptionCall, LLC’s Request for Stay (Sept. 23, 2013) (“Sorenson’s Request for Stay”) (41% of CaptionCall’s customers are over 80 years old.)

²⁷ 47 U.S.C. § 225(b)(1).

communication “in a manner that is functionally equivalent to the ability of a hearing individual who does not have a speech disability to communicate using voice communication services by wire or radio.”²⁸ The size or growth of the TRS fund does not restrict this civil statutory right under Section 225 and should not prevent the individuals this statute is designed to protect, especially vulnerable low income persons, from obtaining needed IP CTS.

2. IP CTS Minutes Have Leveled Off Such That the Adverse Impact of The \$75 Rule on Low Income Consumers Cannot be Justified Based on Concerns with Fraud or Misuse of IP CTS

The harsh treatment of low income consumers needing IP CTS service is not only inconsistent with Section 225, but is also unnecessary based on the Commission’s findings. In fact, the measures taken in the *IP CTS Interim Order*, which included the third-party certification for equipment less than \$75, were sufficient to resolve the Commission’s chief concern that excessive growth in IP CTS minutes were threatening the interstate TRS Fund (a concern that was not adequately supported in the record). In the *Order*, the Commission acknowledged that “IP CTS usage continued to climb until March 2013, the month in which the interim rules took effect.”²⁹ “[D]ata submitted by providers to RLSA for March, April, May and June 2013 indicate that usage of IP CTS is *no longer climbing*.”³⁰ It noted that “since publication of the interim rules, the program has seen an average of 3.7% decline per month.”³¹

The rule requiring the payment of the \$75 minimum price for equipment, software and applications as a condition of reimbursement for IP CTS minutes of use was imposed after the IP CTS Interim Order and has an effective date of September 30, 2013. The leveling of the minutes

²⁸ 47 U.S.C. § 225(a)(3); Ex Parte Letter of Consumer Groups, at 2 (June 20, 2013).

²⁹ *IP CTS Order*, at ¶ 96, and n.14.

³⁰ *Id.* (emphasis added). The Consumer Groups have not seen the RLSA data for July and August of 2013.

³¹ *IP CTS Order*, at ¶ 96.

of use for IP CTS beginning in March 2013 establishes that this new \$75 payment requirement is not necessary as the Commission has achieved its key objective by prohibiting all referrals for rewards programs and “direct or indirect inducements”³² and taking other measures established last March in the *IP Interim CTS Order*.³³ Accordingly, the Commission’s goal of protecting the TRS Fund would not be affected by staying this aspect of its rules to ensure that all individuals have access to IP CTS as intended by Congress, including low income consumers who are often elderly and rely on IP CTS to communicate in a functionally equivalent manner when using the telephone.

Moreover, the record is nearly bereft of evidence of fraud or misuse in the IP CTS program. In prior filings in this proceeding, the Consumer Groups have “explained that RERCA-TA survey data on CTS usage does not support either fraud or misuse as the source of recent IP CTS growth and that a low incidence of misuse was found among survey respondents.”³⁴ The Consumer Groups noted that “any misuse is likely *de minimis*” and individuals not eligible to use IP CTS telephones would not want to use these phones because they are hard-wired devices and therefore in a fixed location in the home. IP CTS telephones would not provide residential hearing consumers with either the convenience or mobility of wireless or cordless devices that hearing consumers are accustomed to using.³⁵

³² Interim Rule 64.604(c)(8)(i).

³³ *IP CTS Interim Order*, at ¶¶ 14-15.

³⁴ *See, e.g.*, Consumer Group Ex Parte Letter, CG Docket Nos. 13-24, 10-51, and 03-123, at 2 (June 20, 2013); Letter from Philip J. Macres, counsel for TDI, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-24 & 03-123, at 2 (Apr. 26, 2013). CG Docket No. 13-24, Initial IP-CTS Survey by Rehabilitation Engineering Research Center on Telecommunications Access (“RERC-TA”), at 2 (April 12, 2013).

³⁵ *See, e.g.*, Consumer Group Ex Parte Letter, CG Docket Nos. 13-24, 10-51, and 03-123, at 2-3 (June 20, 2013).

Rather than misuse or fraud, the record demonstrates that the recent increase in IP CTS minutes of use is primarily due to the legitimate growth in overall usage of TRS as a result of the aging of the “baby boomer” population,³⁶ and outreach efforts by providers and Consumer Groups. Sprint, for example, notes that “the growth that Sprint has seen in the provision of IP CTS usage is what one would expect with the aging of the ‘Baby Boom’ generation, most of whom are already users of the Internet and broadband services or at least are not adverse to learning how to use new technologies.”³⁷ Indeed, it is well established that many people become hard of hearing as they advance in age and that the number of people that are hard of hearing is increasing and will continue to increase.³⁸ Consistent with this phenomenon, a recent study by Johns Hopkins University establishes that one in five Americans 12 years and older are deaf or hard of hearing and that in the United States, “the prevalence of hearing loss is expected to rise.”³⁹ In sum, the growth in IP CTS minutes is attributable to the growth in the population with hearing loss combined with greater consumer awareness of IP CTS. These are natural developments, not indirect indicators of fraud or abuse.

³⁶ See, e.g., Comments of HLLAA, at 2 (“The available data do not support the existence of a large deviation . . . from IP CTS’s historical growth patterns.”).

³⁷ *Misuse of Internet Protocol (IP) Captioned Telephone Service, Telecommunications Replay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 13-24 and 03-123, Comments of Sprint Nextel, at 3 (Feb. 26, 2013) (“Sprint Comments”) (“Even with this aging population, Sprint growth in IP CTS usage has not been ‘unprecedented’ or ‘unusually rapid.’ Rather, on average, Sprint’s rate of growth has been consistent with Sprint’s historical growth patterns.”).

³⁸ *Misuse of Internet Protocol (IP) Captioned Telephone Service, Telecommunications Replay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 13-24 and 03-123, Comments of Consumer Groups, at 3-4 (Feb. 26, 2013) (“Consumer Group Comments”).

³⁹ Frank R. Lin, MD, PhD, John K. Niparko, MD; Luigi Ferrucci, MD, PhD, Vol. 171 *Arch. Intern. Med.* No. 20, at 1851 (Nov. 14, 2011), available at <http://archinte.jamanetwork.com/article.aspx?articleid=1106004#ref-ild15045-2>.

3. The Record Does Not Support the \$75 Threshold

The *IP CTS Order* effectively imposes a requirement that IP CTS phones, software, and applications be priced at \$75 or more in order for IP CTS providers to receive compensation from the interstate TRS Fund. This requirement is unsupported by substantial evidence in the record, unwarranted by the facts, and is arbitrary.⁴⁰ As HLAA notes, as compared to traditional telephones even with advanced features, a \$75 threshold would require hard-of-hearing users to pay at least double what hearing users pay. In fact, CaptionCall has introduced evidence that hearing persons can purchase telephones for less than \$10.⁴¹ HLAA's limited market survey indicates that the average price for a phone comparable to an IP CTS phone was in the range of \$28 to \$35, establishing that the \$75 threshold is far too high.⁴²

In the case of applications for mobile IP CTS, the \$75 is clearly excessive as most smartphone applications are available for \$0.99 to \$10.00.⁴³ Sprint notes *that* it has offered free mobile applications and software for over a year, and this has not created any unusual growth patterns in its number of usage minutes.⁴⁴ In effect, the Commission has imposed a price floor

⁴⁰ 5 U.S.C. § 706 (standard of review under the APA); Courts may vacate agency action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] unsupported by substantial evidence.” *Cross-Sound Ferry Services*, 738 F.2d 483, quoting, 5 U.S.C. § 706(2)(A) and (E).

⁴¹ Sorenson's Request for Stay, at 15.

⁴² HLAA Comments, at 7.

⁴³ HLAA Comments, at 9.

⁴⁴ Sprint Comments at 6 (“The FCC should also eschew any attempt to set a purchase price for the software applications that are necessary for users to obtain IP CTS service using their Android-based or iOS-based wireless devices (Wireless IP CTS) and/or using their computers (WebCapTel). Sprint, for one, has offered a downloadable application *free of charge* to users who have purchased such phones and computers for a little more than a year now and give the fact that *Sprint's growth in IP CTS usage has been within historical norms*, the offering of such software is not contributing to the concerns that led to the adoption of the Interim Order and the issuance of the instant NPRM.”) (emphasis added).

for IP CTS equipment, software and applications that will have the immediate effect of increasing the profit margins of providers. Fixing a threshold also ignores the general trend for prices for IP related equipment, software and applications to decline over time. In fact, it is not clear that setting a minimum price for equipment, software and applications is within the Commission's Title II jurisdiction.⁴⁵

The Commission's leading justification for applying the \$75 threshold to software and applications is that it "set the minimum price at \$75 to be consistent with the minimum price for equipment."⁴⁶ After it imposed this final rule on software and applications, the Commission determined to "seek comment on whether the purchase of IP CTS software and applications raises considerations that make it appropriate to set a different price threshold for software and applications."⁴⁷ The Commission put the proverbial cart before the horse. The application of the \$75 threshold to software and applications violates the APA because it is arbitrary and unsupported by substantial evidence in the record.⁴⁸

The Consumer Groups request that the Commission stay the prohibition in rule 64.604(c)(11)(i)⁴⁹ that prohibits IP CTS providers that provide equipment, software, or applications to consumers at a charge of less than \$75 from receiving compensation for minutes of IP CTS use generated by consumers using such equipment, insofar as it would apply to "low income" consumers as defined earlier. This rule should be stayed pending the outcome of the present FNPRM and while the Commission gathers the data needed to establish a threshold that

⁴⁵ Sprint Comments, at 6.

⁴⁶ *IP CTS Order*, at ¶ 145.

⁴⁷ *Id.*

⁴⁸ 5 U.S.C. § 706(2)(A), (E) and (F).

⁴⁹ 47 C.F.R. § 64.604(c)(11)(i).

is not arbitrary, is supported by actual market conditions, and will not have the practical effect of denying low income persons that are deaf or hard of hearing access to IP CTS. In sum, staying the rule would be consistent with the direction of Congress in Section 225, that functionally equivalent communications services be “available to all individuals in the United States” including those low income persons who happen to be deaf or hard of hearing.⁵⁰

B. Enforcement of the \$75 Rule Would Cause Irreparable Harm to Low-Income Consumers With Hearing Loss

In our forthcoming comments in response to the further NPRM, the Consumer Groups may propose that the Commission adopt a low-income exception and other rule changes to remediate the flaws in the absolute \$75 requirement. However, the extraordinary remedy of an immediate stay of the rule is required to prevent the irreparable harm that individuals with hearing loss will suffer if the \$75 rule were to be implemented prior to Commission consideration and adoption of such remedial measures.

If the rule is not stayed, consumers with hearing loss who are unable to pay \$75 for captioned telephone equipment, and who live in one of the many states without a state equipment distribution program, will be denied access to IP captioned telephone service, and will therefore be unable to communicate effectively, as is their right under Section 225 of the Communications Act. There can be little doubt that, for many elderly Americans who are losing hearing acuity with age, the loss of the ability to communicate by telephone is a severe and irreparable harm. Further, as the record shows, the need for this service is growing along with the Nation’s aging “baby boomer” population. It is well established that many people become hard of hearing as they advance in age and that the number of people that are hard of hearing is increasing and will

⁵⁰ 47 U.S.C. § 225(b)(1) and 225(d)(1)(D).

continue to increase.⁵¹ As already noted, one in five Americans 12 years and older are deaf or hard of hearing, and this percentage is increasing.⁵²

The attached declarations of Ann Liming and Carol Rose confirm the imminent harm faced by significant numbers of low-income individuals in Michigan, one of the states that does not have an equipment distribution program. Ann Liming, a former employee of the Michigan Division on Deaf and Hard of Hearing, has had personal contact with numerous senior citizens who wished to obtain IP CTS equipment, but who she believes would be unable to do so if the \$75 rule is imposed. She also notes that many younger families with children who have hearing loss would find it difficult to afford a \$75 fee due to the many other costs they already face in caring for their children and themselves. She concludes that “The establishment of a \$75 threshold for IP-captioned telephone equipment will penalize low income individuals with hearing loss.”⁵³

Similarly, Carol Rose, a Hearing Technology Resource Specialist in Michigan and a user of IP CTS equipment, explains that as a senior citizen living on a fixed income, she would not have been able to afford the equipment if she had had to pay \$75 for it. “Without the IP-captioned telephone, my ability to understand what other persons are saying on the telephone is significantly limited due to my hearing loss.” Thus, for Rose as for many other low-income individuals, the \$75 rule would severely limit their ability to communicate by telephone.⁵⁴

Theresa Best, the unemployed mother of a 15-year old son with hearing loss, also says that it would be hard for her to afford a payment of \$75 per telephone, as this represents the cost

⁵¹ See Letter from Tamar E. Finn, counsel for TDI, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 03-123 (filed Dec. 21, 2012) (“Consumer Groups’ Dec. 21, 2012 Letter”).

⁵² See note 39, *supra*.

⁵³ Declaration of Ann Liming, attached hereto as Exhibit A.

⁵⁴ Declaration of Carol Rose, attached hereto as Exhibit B.

of a week's worth of groceries for her family. She also has friends in similar situations who she knows would be unable to afford a \$75 payment. As Ms. Best relates, it is bizarre that the parent of a totally deaf child would be able to obtain communications equipment for him at no cost, but the parent of a child with partial hearing loss does not have the same right.⁵⁵

New York is another state without an equipment distribution program, so that residents there who cannot afford a \$75 payment will have no other option for obtaining IP CTS equipment. Laurie Hanin, Ph.D, Executive Director of the Center for Hearing and Communication in New York City, states that many of the individuals served by her organization who have a need for the equipment due to hearing loss would be unable to afford the required payment.⁵⁶ Loretta Murray, who is Executive Director of Mill Neck Services for Deaf Adults in New York State, also believes that individuals served by her organization who have low to modest incomes will be detrimentally impacted by the \$75 requirement. Mill Neck Services assists many low-income and fixed-income individuals with hearing loss who would find a \$75 payment to be prohibitive.⁵⁷

Losing “the chance to engage in a normal life activity” is irreparable harm *per se*. *D'Amico v. New York State Bd. of Law Examiners*, 813 F. Supp. 217, 220 (W.D.N.Y. 1993). The ability to communicate with family, friends, and others by telephone is a normal life activity, and the loss of that ability due to hearing loss is exactly the harm that Section 225 was adopted to prevent. It is therefore certain that, if the \$75 rule is allowed to take effect, a substantial number of persons with hearing loss who are unable to afford IP CTS equipment will be deprived of the ability to communicate fully, and this will constitute irreparable harm.

⁵⁵ Declaration of Theresa Best, attached hereto as Exhibit C.

⁵⁶ Declaration of Laurie Hanin, attached hereto as Exhibit D.

⁵⁷ Declaration of Loretta Murray, attached hereto as Exhibit E.

C. A Stay Will Not Harm Any Other Party

In this case, the only asserted “harm” that the \$75 rule aims to prevent is the risk of “registration for and use of IP CTS by customers who do not need the service for effective communication, resulting in improper payment from the Fund” *Order*, para. 42. As the Consumer Groups have demonstrated in prior filings, the Commission’s action was largely based on the illogical assumption that an increase in IP CTS usage must have been caused by improper registrations and/or usage, despite the absence of any direct evidence of such abuses.⁵⁸ There is no record evidence and no logical basis for inferring that a stay of the \$75 rule would lead to any increase in improper usage. *See* Section II.A.2, *supra*.

But, even if that were not the case, the *Order* reveals that since the adoption of interim rules in January 2013, the previous growth in IP CTS minutes of use has reversed to an average *decline* in usage of 3.7% per month. *Order*, para. 96. IP CTS usage and the corresponding cost to the TRS Fund have declined under the interim rules, even without an absolute \$75 payment rule in place. There is no reason to believe that a suspension of the \$75 payment rule limited to low-income consumers would result in any renewed growth in minutes of use. Thus, even if the Commission’s speculative conclusions about potential harm were correct, which has not been shown, a continuation of the interim rules would be sufficient to prevent any such harm during the pendency of a stay.

⁵⁸ *See, e.g.*, Comments of Telecommunications for the Deaf and Hard of Hearing, Inc., Association of Late-Deafened Adults, Inc., National Association of the Deaf, Deaf and Hard of Hearing Consumer Advocacy Network, Cerebral Palsy and Deaf Organization, California Coalition of Agencies Serving the Deaf and Hard of Hearing, and American Association of the Deaf-Blind at 3-4, CG Docket Nos. 13-24, 03-123 (filed Feb. 26, 2013).

D. A Stay Will Serve the Public Interest

For all the reasons stated in preceding sections, especially Sections II.A.1 and II.B above, access to IP CTS equipment and services is necessary to promote the national policy goals adopted by Congress in the Americans With Disabilities Act and in Section 225 of the Communications Act, which was adopted as part of the ADA. Senator Simon, one of the sponsors of the ADA, described telephone usage as “[o]ne of the most pervasive aspects of our lives, in our personal and business affairs,” adding that “[n]ot being able to use this communication tool is one of the major barriers to productive, normal life.”⁵⁹ Removing a barrier to communication by persons with disabilities is a matter of public interest, and the requested stay will promote that interest.

By contrast, as noted in the preceding section, the requested stay will not jeopardize the TRS fund and therefore will have no negative impact on the public interest.

III. CONCLUSION

For the foregoing reasons, the Commission should adopt an interim order staying the effectiveness of rule 64.604(c)(11)(i) with respect to IP CTS equipment provided to low income consumers only. The definition of “low income” for the purposes of the stay should be set at 400% of the federal poverty guidelines (as defined in 42 U.S.C. § 9902(2)) to match the definition of “low income” under the National Deaf-Blind Equipment Distribution Program (“NDBEDP”).⁶⁰ In addition, consistent with the NDBEDP, persons that are enrolled in a federal program with a lesser income eligibility requirement, such as the Supplemental Nutrition Assistance Program, should also be considered of “low income” status for the purposes of the

⁵⁹ 135 Cong. Rec. S10765 (daily ed. Sept. 7, 1989) (statement of Sen. Simon).

⁶⁰ See note 8, *supra*.

stay.⁶¹ Such stay should remain in effect until the FCC completes its rulemaking pursuant to the Further Notice of Proposed Rulemaking contained in the *Order*, or until the *Order* is otherwise modified or vacated.

Respectfully submitted,

/s/ Tamar Finn (electronically signed)

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⁶¹ 47 C.F.R. § 64.610(d)(2).

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September 30, 2013

EXHIBIT A
DECLARATION OF ANN LIMING

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Misuse of Internet Protocol (IP) Captioned Telephone Service	)	CG Docket No. 13-24
)	
Telecommunications Relay Services and Speech-To-Speech Services for Individuals with Hearing And Speech Disabilities	)	CG Docket No. 03-123
)	

DECLARATION OF ANN LIMING

1. My name is Ann Liming. I am a resident of Lansing, Michigan. I am the former president of the Hearing Loss Association of America (“HLAA”) Board of Trustees, now retired. I was also the chair of the Hearing Loss Association of Michigan’s Advocacy Committee, and also previously worked for the Michigan Division on Deaf and Hard of Hearing. I make this declaration on my own behalf.
2. I am providing this declaration in support of the Petition for Stay filed in the above-referenced dockets by Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), and the Hearing Loss Association of America (“HLAA”).
3. I understand that the FCC has adopted a rule under which minutes of use from IP-captioned telephones that are provided to consumers for less than \$75 will be ineligible for reimbursement from the TRS Fund.
4. Based on my experience in the hearing loss community, I believe the FCC’s decision to implement a \$75 threshold could impact many low income people in Michigan, including elderly people and those who are deafblind but have some vision.

5. Most deafblind persons in Michigan are unemployed and would not be able to purchase an IP-captioned telephone for themselves. But, those persons with limited vision could certainly benefit from such technology by maintaining independence and contact with the outside world. I have personally demonstrated both the CapTel and Caption Call IP-captioned telephones to a deafblind person who had enough vision to be able to read the captions when enlarged. Thus, this technology could clearly benefit a number of individuals in Michigan, but a \$75 cost to obtain such a phone would place the technology out of reach of many in this community.
6. Of course, the same is true for many seniors with hearing loss, many of whom are on a fixed income and would not be able to afford a \$75 charge to obtain such a device. In my prior work at the Michigan Division on Deaf and Hard of Hearing, I received frequent calls from senior citizens spending their winters in Florida, where there was an equipment distribution program, calling for phones for their older parents in Michigan so they could keep in touch with them while living in the south. As Michigan does not have an equipment distribution program (unlike Florida), many low income deaf, deafblind, and hard of hearing Michigan residents would have no other means to obtain an IP-captioned telephone device absent a privately-sponsored free or low cost equipment distribution program.
7. Children will also be impacted by the FCC's \$75 threshold. Many young families in Michigan and in other states already struggle to equip children for school and to pay for healthcare and other costs such as hearing aids for a child with a hearing loss. An IP-captioned phone, which would open communications opportunities for such children, may simply be unobtainable for many young families struggling to make ends meet.

8. The establishment of a \$75 threshold for IP-captioned telephone equipment will penalize low income individuals with hearing loss. Based on my experience with many low income Michigan residents with a hearing loss, I urge the Commission to review its decision and provide a low-income exception to the \$75 threshold it has established, or to otherwise withdraw that requirement from its rules until it is able to establish a more equitable system for determining TRS funding eligibility that does not disenfranchise low income individuals.

I affirm under penalty of perjury that the foregoing is true and correct.

/s/ Ann Liming _____
Ann Liming
Lansing, Michigan

Dated: September 30, 2013

EXHIBIT B
DECLARATION OF CAROL ROSE FOUTS

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Misues of Internet Protocol (IP) Captioned Telephone Service	)	CG Docket No. 13-24
)	
Telecommunications Relay Services and Speech- To -Speech Services for Individuals with Hearing And Speech Disabilities	)	CG Docket No. 03-123
)	

DECLARATION OF CAROL ROSE FOUTS

1. My name is Carol Rose Fouts. I am a Hearing Technology Resource Specialist, which is a volunteer position with the Hearing Loss Association of Michigan, a group composed mainly of hard-of-hearing persons with the goal of helping others with the same disability achieve the best hearing possible for them. I make this declaration on my own behalf.
2. I am providing this declaration in support of the Petition for Stay filed in the above-referenced dockets by Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”) and the Hearing Loss Association of America (“HLAA”).
3. I am a resident of Grand Marais, Michigan. I am 71 years old and have a profound hearing loss. In Michigan there is currently no statewide relay equipment distribution program for low income individuals.
4. I recently received an IP-captioned telephone from a captioned telephone service provider. To obtain the IP-captioned telephone, I provided the service provider with a form signed by a medical professional attesting to the fact that I needed the IP-captioned telephone. My understanding is that without this signed form, I would have been required to pay \$75 for the IP-captioned telephone I received.

5. I understand that the FCC has adopted a new rule under which minutes of use from IP-captioned telephones that are provided to consumers for less than \$75 are ineligible for reimbursement from the TRS Fund, regardless of whether a professional certifies to the user's need.
6. The IP-captioned telephone that I received allows me to read the words spoken by other persons during a telephone call. Without the IP-captioned telephone, my ability to understand what other persons are saying on the telephone is significantly limited due to my hearing loss.
7. I am a senior citizen on a fixed income. I would not have been able to afford the IP-captioned telephone I received if I had had to pay \$75. And, because my state does not have an equipment distribution program, but for the equipment program offered by my IP-captioned telephone service provider, I would have been otherwise unable to obtain an IP-captioned telephone.
8. The establishment of a \$75 threshold for IP-captioned telephone equipment needlessly penalizes low income individuals (including fixed income senior citizens like myself) who are deaf or hard of hearing. Because fixed income senior citizens may not otherwise be able to afford an IP-captioned telephone absent a captioned telephone service provider program such as the one by which I obtained my IP-captioned telephone, the \$75 threshold established by the FCC will deny IP-captioned telephone service to a large group of individuals that could significantly benefit from such technology.
9. I urge the Commission to reconsider its decision to establish a \$75 equipment threshold for eligibility for TRS Fund reimbursement. This threshold will undoubtedly harm low income individuals that may not be able to otherwise afford an IP-captioned telephone

but for free or low cost equipment distribution programs offered by IP-captioned telephone service providers, especially in states like Michigan where no equipment programs are offered.

I affirm under penalty of perjury that the foregoing is true and correct.



Carol Rose Fouts
Grand Marais, Michigan

Dated: Sept. 30, 2013

EXHIBIT C
DECLARATION OF THERESA BEST

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Misuse of Internet Protocol (IP) Captioned	)	CG Docket No. 13-24
Telephone Service)	
)	
Telecommunications Relay Services and Speech-	)	CG Docket No. 03-123
To -Speech Services for Individuals with Hearing)	
And Speech Disabilities)	

DECLARATION OF THERESA BEST

1. My name is Theresa Best. I am a resident of Stockbridge, Michigan. I make this declaration on my own behalf.
2. I am providing this declaration in support of the Petition for Stay filed in the above-referenced dockets by Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), and the Hearing Loss Association of America (“HLAA”).
3. I understand that the FCC recently has adopted a new rule that minutes of use from IP-captioned telephones that are provided to consumers for less than \$75 are ineligible for reimbursement from the TRS Fund, regardless of whether a professional certifies to the user’s need. Because of this rule, IP-captioned telephone service providers will be required to charge consumers a minimum of \$75 for a device before the service will be eligible for TRS Fund reimbursement.
4. The \$75 threshold is unfair to families struggling to make ends meet, and should be revoked.
5. I have a son with a hearing loss. Both of my sons also have injuries resulting in high medical costs. And, I have recently become unemployed due to downsizing by my former employer. As such, for a family trying to make ends meet on a limited budget, a \$75

fee is unaffordable. To put it another way: it is the same as a week's worth of groceries. Families should not be forced to choose between a week's worth of groceries or a beneficial communications tool for their child.

6. I also think it is extremely unjust that parents of a child who is totally deaf can obtain communications equipment for their child at no cost, while I am required to pay \$75 because my son has partial hearing. I do not understand why the FCC would want to pick and choose among disabilities in such an arbitrary way.
7. I am very fortunate that my son compensates extremely well with his hearing loss. However, I have a friend who also has a son with hearing loss. This child has had many issues. He has an I.E.P in school (individual education program), and has a hard time dealing with some situations. This is a very loving household with two working parents. I know first-hand they would not be able to pay \$75 for an IP-captioned telephone. The money would instead go to the child's hearing aids or education.
8. This fee will force parents to choose what they can pay for when it comes to their child. Because I feel I have to choose and am unable to buy my children enough for their most basic needs, this makes me feel like a failure as parent.
9. I also worry about the effect the \$75 fee could have on seniors that are living on a social security budget trying to call doctors and pharmacies and not being able to understand because of a hearing loss. This technology could have a great impact on their lives, but may be out of reach for them if unable to afford the initial cost.
10. I grew up watching my mother struggle in the "hearing world." I also watched my aunt become an advocate the hearing impaired. And, now I have a son who amazes me at his every opportunity. Even though he has a hearing loss, he does not let it stop him from do-

ing anything or feeling left out. My son, my mother, and my aunt are incredible people who inspire me. I provide this declaration in utter frustration because I think of all the people who are losing the option of something so simple because of an artificially determined fee.

11. Based on the foregoing, I strongly urge the FCC to reconsider its decision to establish a \$75 equipment cost requirement for eligibility for TRS Fund reimbursement. This fee harms persons with hearing loss, especially those on a tight budget.

I affirm under penalty of perjury that the foregoing is true and correct.

/s/ Theresa Best
Theresa Best
Stockbridge, Michigan

Dated: Sept. 30, 2013

EXHIBIT D
DECLARATION OF LAURIE HANIN

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Misuse of Internet Protocol (IP) Captioned	)	CG Docket No. 13-24
Telephone Service)	
)	
Telecommunications Relay Services and Speech-	)	CG Docket No. 03-123
To-Speech Services for Individuals with Hearing)	
And Speech Disabilities)	

DECLARATION OF LAURIE HANIN

1. My name is Laurie Hanin. I am Executive Director of the Center for Hearing and Communication (“CHC”). My business address is 50 Broadway, 6th Floor, New York, NY 10004.
2. The Center for Hearing and Communication is a non-profit organization. It is a leading hearing center offering state-of-the-art hearing testing, hearing aid fitting, speech therapy and full range of services for people of all ages with hearing loss. We have offices in New York City and Florida that meet all types of hearing and communication needs.
3. I am providing this declaration in support of the Petition for Stay filed by Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”) and the Hearing Loss Association of America (“HLAA”).
4. I understand that the FCC has adopted a rule under which minutes of use from IP-captioned telephones that are provided to consumers for less than \$75 will be ineligible for reimbursement from the TRS Fund.
5. Based on my experience in the hearing loss community, and in my capacity as Executive Director of the Center for Hearing and Communication, I can attest that the FCC’s

decision to implement such a \$75 threshold will impact many low income people in New York, especially as that state does not have its own equipment distribution program. Many members of this community are low income or on a fixed income, and will struggle to afford a \$75 fee for an IP-captioned telephone device.

6. Based on my experience with many low income New York residents with a hearing loss, I urge the Commission to remove the \$75 threshold requirement from its rules and establish a system for determining IP-captioned telephone service TRS Fund eligibility that does not exclude low income individuals.

I affirm under penalty of perjury that the foregoing is true and correct.

/s/ Laurie Hanin _____
Laurie Hanin
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(917) 305-7999 (TTY)
www.CHChearing.org

Dated: September 30, 2013

EXHIBIT E
DECLARATION OF LORETTA MURRAY

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Misuse of Internet Protocol (IP) Captioned Telephone Service	)	CG Docket No. 13-24
)	
Telecommunications Relay Services and Speech- To -Speech Services for Individuals with Hearing And Speech Disabilities	)	CG Docket No. 03-123
)	

DECLARATION OF LORETTA MURRAY

1. My name is Loretta Murray. I am Executive Director of Mill Neck Services for Deaf Adults. The Mission of the Mill Neck Family of Organizations (“Mill Neck”) is to enhance the quality of life for people who are deaf, or who have other special communication needs, through excellence in individually designed educational, vocational or spiritual programs and services. My business address is 40 Frost Mill Road, PO Box 100 Mill Neck, NY 11765.
2. I am providing this declaration in support of the Petition for Stay filed in the above-referenced dockets by Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), and the Hearing Loss Association of America (“HLAA”).
3. I understand that the FCC has adopted a new rule under which minutes of use from IP-captioned telephones that are provided to consumers for less than \$75 are ineligible for reimbursement from the TRS Fund, regardless of whether a professional certifies to the user’s need.
4. Mill Neck Services believes that individuals that we serve who have low to modest incomes will be detrimentally impacted by the cost established by the FCC for individuals to receive a TRS-eligible IP-captioned telephone. Based on our long experience as-

sisting persons with hearing loss, we believe that many senior citizens using Mill Neck Audiology who are on fixed incomes will be significantly impacted by the FCC's fee. The mission of Mill Neck Audiology is to provide quality audiological services to children and adults. Our certified audiologists are members of the American Speech/Language/Hearing Association (ASHA) and the American Academy of Audiology (AAA), and are licensed by New York State. We provide complete audiological services to both children and adults. Our audiological team provides aural rehabilitative services to adults, including hearing aid and evaluation, selection, counseling and dispensing (including custom ear molds and swim molds and assistive listening devices). We also provide hearing screenings for people of all ages in communities throughout our local area.

5. Based on our extensive experience serving low income and fixed income individuals with hearing loss, the establishment of a \$75 threshold for IP-captioned telephone equipment will be prohibitive to many individuals that could significantly benefit from such technology.
6. Mill Neck urges the Commission to reevaluate its decision to establish a \$75 fee for IP-captioned telephone TRS Fund reimbursement eligibility. This fee will harm many low income individuals that will not be able to afford an IP-captioned telephone for such an amount.

I affirm under penalty of perjury that the foregoing is true and correct.

/s/ Loretta Murray _____

Loretta Murray

Executive Director, Mill Neck Services

Dated: Sept. 30, 2013