

**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
)	
To: The Commission)	

COMMENTS OF PURPLE COMMUNICATIONS, INC.

Purple Communications, Inc. (“Purple”) provides these comments in response to various proposals to further address practices related to the provision and marketing of Internet Protocol Captioned Telephone Service (“IP CTS”).¹ As a leading provider of IP CTS, Purple supports the Commission’s goal of ensuring that this important service remains viable for the sake of those who depend on it. Purple also seeks to protect the service and the Telecommunications Relay Service (“TRS”) Fund from improper practices. Purple appreciates the opportunity to respond to the questions posed in the FNPRM, and offers the following comments and suggestions to assist the Commission in its efforts to ensure the long-term viability of both the service and the TRS Fund.

I. MARS IS AN APPROPRIATE RATE METHODOLOGY FOR IP CTS.

The Commission seeks comment on whether modifications should be made to the current rate methodology for IP CTS, including whether an entirely different methodology would be more

¹ *Misuse of Internet Protocol (IP) Captioned Telephone Service, et al.*, CG Docket Nos. 13-24 and 03-123, Report and Order and Further Notice of Proposed Rulemaking, FCC 13-118 (2013) (hereinafter referred to “Report and Order” or “FNPRM” depending on which section of the document is referenced).

appropriate than the current Multi-state Average Rate Structure Plan (“MARS Plan”).² In particular, the Commission asks whether it should adopt a rate methodology similar to that for VRS and IP Relay, “*i.e.*, based on a weighted average of actual and/or projected costs for each provider.”³ Purple urges the Commission not to adopt a rate methodology based on a weighted average of actual and/or projected costs given that the underlying formula for such a methodology is flawed. The use of a weighted average cost methodology would not effectively reflect market competition in an unbalanced market with a strongly dominant provider. Moreover, the FCC’s historic methodology, which is oriented toward capital intensive utility carriers, is misplaced as applied to TRS services, including IP CTS, because these are labor intensive services, with very low capital investment requirements.⁴ The application of a weighted average cost methodology that does not take into account market imbalance, the disproportional cost of labor or software maintenance expense, or how the service actually works, is not effective and would not further the Commission’s goal of ensuring sustainability, quality, competition, and innovation in the IP CTS market. Purple encourages the Commission to reject any methodology approach that risks eliminating consumer choice, stifling innovation, and destabilizing providers as contrary to the Commission’s goals and the public interest.

After much debate and comment in the record, the Commission adopted the MARS Plan as a mechanism to approximate a competitive market-based rate for captioning services and has wisely

² See FNPRM, ¶ 120.

³ FNPRM, ¶ 121.

⁴ See Comments to Public Notice on Structure and Practices of the Video Relay Services Program, Purple Communications, Inc., CG Docket Nos. 10-51 and 03-123, at 11-12, Addendum A (filed Nov. 14, 2012) (attaching report finding that the Commission should have rejected the weighted average cost formula in the VRS context because it is based on flawed assumptions and undermines the Commission’s goal of increasing competition).

applied that market-based proxy to IP CTS.⁵ Purple sees no reason to artificially develop other forms of market-based rates given the effectiveness of the MARS policy. Accordingly, Purple urges the Commission to maintain the current MARS Plan. If the Commission were to depart from the MARS approach, however, Purple strongly urges the Commission to ensure that any alternative methodology is equally robust and effective at approximating a competitive market-based rate as the current MARS policy. Further, Purple urges the Commission to lock in the market-based rate determined under any such methodology for a period of five years. As contemplated in the FNPRM, the Commission can and should ensure predictability by locking in the rate for a period longer than one year.⁶ By locking in the rate for five years, the Commission could provide the necessary certainty and predictability to IP CTS providers to ensure the long-term viability of IP CTS for consumers who rely upon this critical service. Additionally, while competitive bidding might potentially be an alternative approach to establishing market-based rates for IP CTS in the future, such an approach would be premature at this point given that the IP CTS marketplace currently does not have a sufficient number of providers, and the size of the IP CTS market remains unclear.

⁵ See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Report and Order and Declaratory Ruling, 22 FCC Rcd 20140 (2007); see also *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Further Notice of Proposed Rulemaking, 21 FCC Rcd 8379 (2006); see also, e.g., Comments of Hamilton Relay, Inc., CG Docket No. 03-123 (filed Oct. 30, 2006); Reply Comments of Hamilton Relay, Inc., CG Docket No. 03-123 (filed Nov. 13, 2006); Comments of Hands On Video Relay Services, Inc., CG Docket No. 03-123 (filed Oct. 30, 2006); Comments of Verizon, CG Docket No. 03-123 (filed Oct. 30, 2006); Reply Comments of AT&T, Inc., CG Docket No. 03-123 (filed Nov. 13, 2006); Reply Comments of Ultratec, Inc., CG Docket No. 03-123 (filed Nov. 13, 2006).

⁶ See FNPRM, ¶ 125.

II. EVALUATE IMPLEMENTATION OF CENTRALIZED REGISTRATION AND VERIFICATION FOR VRS BEFORE APPLYING TO IP CTS.

The Commission seeks comment on whether the centralized registration and verification processes that it recently adopted for Video Relay Service (“VRS”) should also apply to IP CTS.⁷ Specifically, in its *VRS Structural Reform Order*, the Commission directed the creation of a user registration database (TRS-URD) and implementation of centralized eligibility verification requirements to ensure that VRS registration is limited to those who have a hearing or speech disability.⁸ The Commission now proposes applying the same centralized verification process to IP CTS. Purple believes it would be most efficient and effective to complete the successful implementation of these processes with respect to VRS before attempting to implement them for IP CTS. Doing so will allow the Commission to evaluate the effectiveness of the processes with VRS and determine if the same or modified proposals should be implemented with respect to IP CTS, as well.

III. MIGRATION OF IP CTS OVERSIGHT TO STATE TRS PROGRAMS WOULD BE A MISTAKE.

Purple opposes the Commission’s proposal to transfer the responsibilities for administering and overseeing IP CTS to state TRS programs.⁹ Individual states do not have sufficient time, resources or experience to effectively take over the responsibility of registering and certifying the eligibility of new IP CTS users, in addition to administering IP CTS operations. Indeed, even states with more sophisticated TRS programs, such as California, caution that transferring responsibility to the states would raise significant legal and practical challenges. For example, California emphasizes

⁷ See NPRM, ¶ 128.

⁸ See *Structure and Practices of the Video Relay Services Program, et al.*, CG Docket Nos. 10-51 and 03-123, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 8618, ¶¶ 62-68; see also FNPRM, ¶ 128.

⁹ See FNPRM, ¶ 131.

in its comments that states do not currently have adequate funding to cover the costs of administering the IP CTS program.¹⁰ Additionally, California explains that such a shift would necessitate legislative changes that could take up to 18 months or longer to obtain, and could result in California having to eliminate multi-vendor contracts.¹¹ This would eliminate competition and consumer choice in the IP CTS marketplace.

Furthermore, transferring the responsibilities of overseeing and administering IP CTS to state TRS programs would decentralize the IP CTS program. As a result, IP CTS providers would lack the resources to adequately serve each state independently, and providers instead would be incentivized to provide service only to more highly populated states where they could receive reasonable returns for their time. In less populated states, however, IP CTS service in its current form would likely languish or disappear altogether. This result would be directly contrary to the public interest and the Commission's goal of ensuring that IP CTS continues to be available for the consumers who rely on it.

IV. THE COMMISSION MUST APPROPRIATELY CONSIDER THE NEEDS OF PEOPLE WITH DISABILITIES. A \$75 THRESHOLD TO ACCESS IP CTS ON A SOFTWARE-ONLY DEVICE IS INAPPROPRIATE, REGARDLESS OF INCOME.

Purple agrees with the Commission that it is important to further address the needs of low income consumers by ensuring the widespread availability of IP CTS.¹² The Commission questions whether it should allow for a low-income exception to the prohibition of providing compensation

¹⁰ See Comments of the California Public Utilities Commission and the People of the State of California, CG Docket No. 13-24 and 03-123, at 2 (filed Oct. 23, 2014) (“The CPUC opposes the transfer of the IP CTS program to the states *unless* the FCC ensures that states can adequately fund the program and that states are afforded sufficient time to transition the program in a manner that does not discommode program users.”) (emphasis in original) (“California Comments”).

¹¹ See California Comments at 7-8.

¹² See FNPRM, ¶ 144.

for IP CTS minutes of use generated by equipment that is distributed for less than \$75.¹³ Purple believes this question is misguided, and that no one, regardless of income, should be required to meet a \$75 price threshold in order to access IP CTS on a software-only device. Requiring self-certification, in addition to either third-party certification or meeting the \$75 threshold, is adequate to ensure the eligibility of users accessing IP CTS through software-only devices. The Commission should not eliminate this option for IP CTS users merely as a reaction to one provider's abuse of the rules.

Purple agrees, on this point, with the arguments made by Samuel Bagenstos, Professor of Law at the University of Michigan Law School.¹⁴ Specifically, as stated by Mr. Bagenstos:

[T]he notion that people with disabilities can be forced to pay a fee to ensure that they really need the accommodations they seek contravenes basic principles of disability discrimination law. The ADA generally prohibits covered entities from charging an individual with a disability for an accommodation – even where the charge does nothing more than defray the cost of providing the accommodation. . . . That same principle is implicit in Title IV's requirement of functional equivalence. A payment requirement imposed exclusively on people who use a technological accommodation is, by definition, not equivalent to the fees charged nondisabled consumers. And Title IV expressly recognizes the principle by prohibiting any requirement that the users of relay services pay greater rates than nondisabled users pay for functionally equivalent voice communication services.¹⁵

Additionally, as explained by Mr. Bagenstos, it is well known that people with disabilities “have much higher rates of poverty, and much lower rates of workforce participation, than the general population.”¹⁶ Because of these factors, those individuals are much more likely to be impacted by even relatively small fees. A \$75 fee could deter someone who is poor, or who is

¹³ See Report and Order, ¶¶ 36-59; FNPRM, ¶ 144.

¹⁴ See Request for Stay, Sorenson Communications and CaptionCall, LLC, CG Docket Nos. 13-24 and 03-123, at Exhibit B, Declaration of Samuel Bagenstos (filed Sept. 23, 2013) (“Bagenstos Declaration”).

¹⁵ Bagenstos Declaration, ¶ 16 (internal citations omitted).

¹⁶ Bagenstos Declaration, ¶ 17.

elderly and living on a fixed income, from using IP CTS “even if that service is the only way to provide her the same opportunity to communicate over the telephone as nondisabled individuals enjoy.”¹⁷ As a result, the fee “will encourage individuals with hearing impairments to forgo using captioned telephones and choose some other, inferior way of communicating, even where captioned telephones are necessary to provide those individuals an equal opportunity.”¹⁸ As Mr. Bagenstos emphasizes, “[u]sing financial incentives to encourage individuals with disabilities to accept second-class accommodations is not consistent with basic principles of disability discrimination law.”¹⁹ Purple does not propose an alternative price threshold because using economic means as a proxy for eligibility is an inherently misguided proposition.

V. THERE SHOULD BE NO PRICE THRESHOLD ON IP CTS SOFTWARE AND APPLICATIONS.

For the reasons stated above, Purple urges the Commission not to impose any price threshold on IP CTS software and applications. Through the implementation of proper certification requirements, the Commission can ensure the eligibility of IP CTS software and application users. Implementation of the \$75 price threshold – or any price threshold – for IP CTS software and applications is unnecessary to ensure users’ eligibility and, importantly, would undermine the Commission’s laudable goal of ensuring the widespread availability of IP CTS for consumers regardless of income level. Purple believes that any price threshold is a misguided proxy for eligibility and is not useful as a deterrent against use of IP CTS by those who do not need it. In reality, the nature of the service renders it of extremely limited utility to anyone who does not need it for its intended purpose.

¹⁷ Bagenstos Declaration, ¶ 18.

¹⁸ Bagenstos Declaration, ¶ 19.

¹⁹ Bagenstos Declaration, ¶ 19.

As the Commission itself recently emphasized to the D.C. Circuit, the primary contributors to the spike in the use of the service, and any ineligible users accessing the service, include individuals being given something of value as an incentive to use the service irrespective of need, such as a referral fee or a free phone that they can use like any other phone, and setting IP CTS phones to default to “captions on.”²⁰ The Commission’s January Order created several significant safeguards to check the perverse growth stimulated by one provider’s aggressive and opportunistic attempt to gain market share through incentives designed to encourage use irrespective of need. The Commission’s elimination of referral fees, and the imposition of a (legitimate) third-party verification of eligibility in connection with a free phone, are already working to curb unauthorized use. Furthermore, the Commission’s imposition of setting phones to default to “captions off” is also a very significant step – in that even an ineligible user accepting a free phone would have no incentive to manually initiate captioning in order to use the phone in a non-assistive manner. Purple strongly recommends that the FCC evaluate the effect of these policies on the month-to-month usage submitted by providers during 2013 before placing additional burdens on eligible users that limit access to or the utility of the service.

²⁰ See FCC’s Opposition to Motion for Stay Pending Judicial Review at 3-4, *Sorenson Commc’ns, Inc. v. FCC*, No. 13-1246 (D.C. Cir., Nov. 1, 2013) (“The Commission concluded that the sudden spike in IP CTS usage was likely attributable to questionable practices employed by IP CTS providers that were encouraging use of IP CTS by persons who may not need it. For instance, petitioner Sorenson Communications was paying audiologists (and others) for referrals to its service, even though this practice is disapproved by the applicable professional ethical code. Further, Sorenson was distributing free phones that had “captions on” set as the default mode – a setting that facilitates unnecessary or inadvertent use by persons without hearing loss who may be present in the same household or office.”).

VI. AN EXCEPTION TO THE DEFAULT CAPTION OFF REQUIREMENT MAKES SENSE IN SITUATIONS WHERE CHANCE OF MISUSE IS REMOTE.

Purple supports the Commission's focus on ensuring that consumers who live alone or have a private phone in a workplace receive functionally equivalent service.²¹ To this end, Purple urges the Commission to implement an exception to the default-off requirement for individuals who live alone (or only with other registered IP CTS users) or work in a situation, such as a private office, where no one else can use the individual's phone.²² As Purple has emphasized in previous filings, the chance of misuse in these types of settings is remote.²³ Implementation of such an exception would be consistent with the Commission's goal of ensuring functional equivalence for IP CTS users while also eliminating misuse of IP CTS devices by non-registered users.

VII. STRONG ENFORCEMENT OF EXISTING, SPECIFIC RULES IS MORE EFFECTIVE THAN A GENERAL PROHIBITION ON PROVIDING SERVICE TO USERS WHO DO NOT NEED THE SERVICE.

Purple strongly supports the Commission's goal of ensuring that IP CTS is provided only to users who need the service. Purple believes this goal is best achieved through the implementation and enforcement of the existing, specific IP CTS rules rather than the imposition of a vague, "catch-all" prohibition. The Commission asks whether it should adopt "a prohibition on IP CTS providers from providing service to consumers who do not genuinely need the service, that is, consumers who do not need an assistive technology to understand a telephone conversation or consumers who can understand a telephone conversation utilizing an assistive technology, such as an amplified phone, that does not entail the expenditure of money from the Interstate TRS Fund."²⁴ Purple strongly

²¹ See FNPRM, ¶ 149.

²² See FNPRM, ¶ 149.

²³ See, e.g., Petition for Limited Waiver, Purple Communications, CG Docket Nos. 13-24 and 03-123, at 4-5 (filed March 1, 2013).

²⁴ FNPRM, ¶ 153.

opposes this standard as unworkable from both a provider and a consumer perspective. This is an extremely subjective standard and will be very difficult for the Commission and for providers to prove in an enforcement context. In addition, such a standard would require providers to collect information about their users that is excessive and inappropriate.

IP CTS providers are certified by the Commission to provide telecommunications services to individuals who meet eligibility criteria as established by the Commission. Imposing liability on providers that goes beyond collecting, verifying and maintaining such information prior to providing service is improper. Telecommunications providers are not audiologists or occupational therapists – who are among the proper parties to evaluate whether a particular individual is best serviced using assisting technologies that do or do not entail the expenditure of money from the Fund. Imposing such a standard on IP CTS providers would be unprecedented, irresponsible and improper. The Commission can more effectively prevent misuse of IP CTS by ensuring that the regulations governing the IP CTS marketplace function properly and are enforced consistently.

Purple recognizes that the Commission has expended tremendous amounts of time, effort, and public resources in its efforts to effectively regulate the IP CTS industry in order to ensure its long-term viability for the consumers who rely on it. The vast majority of these efforts have been directed as a result of the bad faith acts of a single provider seeking to gain a monopolist position in the IP CTS market. Accordingly, rather than unnecessarily add additional layers of rules that burden consumers and penalize providers who are operating within both the letter and the spirit of the rules, the Commission should instead consider taking specific action to enforce its existing rules and prevent future abuse by the provider that has demonstrated a pattern of non-compliance.

Respectfully submitted,



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