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February 6, 2014

VIA ELECTRONIC FILING

Hon. Marlene H. Dortch
Secretary
Federal Communications Commission
Washington, DC 20554

Attn: Consumer and Governmental Affairs Bureau

REF: CG Dockets 03-123, 10-51
RE: Application of Miracom USA, Inc. for Certification
To Provide Internet-Based Captioned Telephone Service

Dear Madam Secretary:

This letter addresses the pending application of Miracom USA, Inc. (“Miracom”) to provide Internet-Based Captioned Telephone Service. The Miracom application was filed on November 25, 2011 and amended on May 17, 2012, August 6, 2013 and September 12, 2013 to address either staff concerns or to comply with intervening changes in the Commission’s rules. Miracom provided additional information to the staff on September 10, 2013 and December 11, 2013. Miracom’s certification application has now been pending more than twenty-six months. This delay in action on a relay certification application appears unprecedented and particularly unfortunate as it denies consumers the promise of the improved IP CTS service Miracom’s application promises.

Moreover, based on a recent discussion with the staff, it appears the Bureau’s focus with respect to the Miracom application is with the question of whether Miracom’s proposed service is financially viable. This is troubling on many fronts.

Most notably, the rules contain no financial qualifications standard for relay providers, much less any financial standard for relay provider certification applicants.

Indeed, FCC Rule Section 64.606(b)(2), specifically delineates the decisional criteria for approval of Internet-based relay provider certification applicants. That provision states:

Requirements for Internet-based TRS Provider FCC certification. After review of certification documentation, the Commission **shall certify**, by Public Notice, that the Internet-based TRS provider is eligible for compensation from the Interstate TRS Fund **if the Commission determines that the certification documentation:**

- (i) Establishes that the provision of Internet-based TRS will meet or exceed all non-waived operational, technical, and functional minimum standards contained in §64.604;
- (ii) Establishes that the Internet-based TRS provider makes available adequate procedures and remedies for ensuring compliance with the requirements of this section and the mandatory minimum standards contained in §64.604, including that it makes available for TRS users informational materials on complaint procedures sufficient for users to know the proper procedures for filing complaints.

Emphasis added.

The use of the word “shall” indicates that certification is mandatory if the Commission determines that the applicant will “meet or exceed all non-waived operational, technical, and functional minimum standards contained in §64.604” and has “adequate procedures and remedies for ensuring compliance with the requirements of this section and the mandatory minimum standards contained in §64.604,” including complaint procedures.

As the Supreme Court explains, “The mandatory ‘shall’ ... normally creates an obligation impervious to judicial discretion.” *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). By contrast, “The use of a permissive verb – ‘may review’ instead of ‘shall review’ – suggests a discretionary rather than mandatory review process.” *Rastelli v. Warden, Metro. Correctional Center*, 782 F.2d 17, 23 (2d Cir. 1986). *See also In re Marriage of Hokanson*, 68 Cal. App. 4th 987, 80 Cal. Rptr. 2d 699 (1998); *Independent School Dist. v. Independent School Dist.*, 170 N.W.2d 433, 440 (Minn. 1969).

These are the two and only two decisional criteria that the rules allow the Commission to apply: (1) meeting the minimum mandatory standards and (2) having adequate procedures for ensuring compliance with the rules.

That is the Commission’s rule, and the Commission must follow its own rules. As the Court of Appeals has repeatedly said, rules are rules. In *Reuters, Ltd. v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986) the court explained:¹

¹ *See also McElroy Electronics Corp. v. FCC*, 86 F.3d 248 (D.C.Cir.1996); *Alegria I, Inc., v. FCC*, 905 F.2d 471 (D.C. Cir. 1990).

As we stated at the outset, it is elementary that an agency must adhere to its own rules and regulations. Ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned, *Teleprompter Cable Systems v. FCC*, 543 F.2d 1379, 1387 (D.C.Cir.1976), for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those to whom Congress has entrusted the regulatory missions of modern life.

Financial viability is not a decisional standard under the rules governing TRS. To deny an application on a standard that is nowhere contained within the Commission's rules or even in any of its myriad of published policies or orders would be the very type of arbitrary and capricious agency action repeatedly condemned by the Court of Appeals. *See Radio Athens, Inc., (WATH) v. FCC.*, 401 F.2d 398, 404 (1968). *See also Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3-4 (D.C. Cir. 1987); *Salzer v. FCC*, 778 F.2d 869, 871-72 (D.C. Cir. 1985); *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1358 (D.C. Cir. 1993).

Indeed this concept is expressly incorporated within FCC Rule Section 0.445(e), which states in pertinent part: "No person is expected to comply with any requirement or policy of the Commission unless he or she has actual notice of that requirement or policy or a document stating it has been published as provided in this paragraph."

In a slightly different vein, as the Review Board said in *Robert L. Mohr dba Advanced Electronics*, 18 Rad. Reg. 2d 215 (Rev Bd 1970), "Section 552(a)(1)(B) of the APA by its terms requires administrative agencies to publish their procedural rules of general applicability in the Federal Register. One of the prime objectives of this provision was to put an end to 'File cabinet rules,' unknown to the public and trotted out by Federal agencies on an ad hoc basis when remembered."

For similar reasons, denying Miracom's application on the basis of an assumed lack of financial viability would accord the applicant disparate treatment. *See, e.g., Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C.Cir. 1965). *See also Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005). We are aware of no decision of the FCC failing to grant a relay provider certification based on an analysis of its financial viability. To impose such a requirement on Miracom – without regard to the fact that no rule has even promulgated such a standard – again would be plainly arbitrary and capricious.

With respect to relay compensation, the Commission sets the rates for relay compensation based on its analysis of providers' costs and it is up to relay providers to operate in accordance with the rules within that cost structure. *See FCC Rule Section 64.604(c)(5)(E)*. Even though the rules do not require relay certification applicants to provide financial data, Miracom did so in response to a Bureau request. That data clearly

showed that Miracom was financially viable. (Of course any concept of what the Commission considers to be “financial viability” is nowhere set forth in any rule or published policy). Although we understand the Commission has concerns that certain IP Captioned Telephone providers are being overcompensated, the Commission has made no reduction in the IP CTS compensation rate. Nevertheless, as Miracom has explained repeatedly to the Bureau, should there be a substantial IP CTS rate reduction, Miracom might have to adjust its mode of operation while maintaining compliance with the rules. So would every other provider.

Miracom must emphasize however, that it and various consumers have pointed out the failings of existing IP Captioned Telephone Service providers to provide real functionally equivalent service as evidenced by their substantial captioning delays and high error rates. And Miracom has suggested that compensation should be pegged to performance in terms of speed of captioning and accuracy. In denying an applicant like Miracom that proposes improved service both in terms of speed of captioning and accuracy, the Commission could justifiably be criticized for compromising functional equivalency in order to minimize the cost of relay service. Nowhere in Section 225 of the Act is such a choice sanctioned.

In fact the specific Congressional wording of Section 225 states “The Commission shall ensure that regulations prescribed to implement this section encourage, consistent with section 157(a) of this title, the use of existing technology and do not discourage or impair the development of improved technology.” Denying an application that proposes an improvement in the technology for delivering relay services based on a standardless evaluation of “financial viability” hardly comports with this statutory mandate.

Accordingly, Miracom requests that the Commission forthwith grant its long pending application for certification to provide Internet-based Captioned Telephone Service without further delay.

Very truly yours

/s/

George L. Lyon, Jr.
Counsel, Miracom USA, Inc.

cc: Chairman Tom Wheeler (via email)
Commissioner Mignon Clyburn (via email)
Commissioner Agit Pai (via email)
Commissioner Jessica Rosenworcel (via email)
Commissioner Michael O’Rielly (via email)
Ruth Milkman, Esquire (via email)
Maria Kirby, Esquire (via email)
Rebekah Goodheart, Esquire (via email)

Priscilla Delgado Argeris, Esquire (via email)
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