

March 17, 2014

VIA EMAIL

Hon. Thomas E. Wheeler, Chairman
Federal Communications Commission
Washington, DC 20554

RE: Ensuring Functional Equivalent Telephone Service
For Deaf and Hard of Hearing Persons
REF: CG Dockets 03-123, 10-51

Dear Mr. Chairman:

This office represents Miracom USA, Inc. (“Miracom”), an applicant for certification to provide Internet Protocol Captioned Telephone Relay Service (“IP CTS”) to deaf and hard of hearing persons. Miracom filed its certification application in November of 2011, some 28 months ago.

I write you because FCC inaction is resulting in denying to deaf and hard of hearing persons significantly improved IP CTS service in violation of the Commission’s obligations under Section IV of the Americans with Disabilities Act, 47 U.S.C. Sec. 225. Miracom seeks to meet personally with you to discuss the matters set forth below.

Your longstanding commitment to persons with disabilities is well known in the deaf and hard of hearing community. Just three weeks ago, you stated that “Ensuring universal access is a critical and enduring value of this Commission.” And you applauded the Commission’s action to “extend the benefits of new technology and new standards to deaf and hard-of-hearing persons.”

Members of the deaf and hard of hearing community have made it plain to the Commission that current IP CTS offerings suffer in terms of functional equivalency.

At the recent FCC workshop, held February 18, 2014, seeking input on research needed to improve Telecommunications Relay Service (“TRS”), Hearing Loss Association of America Director of Public Policy Lise Hamlin explained that although IP

CTS has great potential, it has yet to be proven to be functionally equivalent to a traditional phone. She explained that “the error rate is very high, the delay between speech and text is very long, and it gets longer as the conversation goes on.” She went on to say that mobile captioning is not supported on many mobile phones.

The deficiencies Ms. Hamlin highlighted in her presentation demonstrate that currently available IP CTS is not functionally equivalent to the telephone service provided hearing persons. Hearing persons do not have to contend with significant unintelligible audio from persons who call them. Hearing persons do not suffer delays in voice communication which render real time communication problematic. And hearing persons have no impediments in using available mobile communications.

Miracom’s proposed Innocaption mobile IP CTS service addresses each of the deficiencies Ms. Hamlin discussed. Miracom provides a significant improvement in accuracy, on the order of 95 percent. Miracom provides captions in only a few seconds, versus the 8-10 second delay of existing captioning providers. And Miracom’s service is specifically designed to be provided on a mobile telephone. Moreover, Miracom’s is the only mobile IP CTS service which would allow a consumer to receive inbound calls seamlessly. This is a significant breakthrough in IP CTS service. A hearing caller need only dial the mobile consumer’s captioned telephone number to be connected to the consumer. No other provider offers this functionally equivalent service.

Miracom has demonstrated its service to the offices of various Commissioners, to the Consumer and Governmental Affairs Bureau, and to the offices of the Managing Director and Strategic Planning and Policy Analysis. No one has disputed that Miracom offers significant improvements in IP CTS functionality.

Miracom has also demonstrated its service to various deaf and hard of hearing consumer groups. Consumers who have demoed Miracom’s service have embraced Miracom’s enhanced functionality. In a February 14, 2014, ex parte submission in Docket’s, Claude Stout, Executive Director of Telecommunications for the Deaf, Inc., noted that

Consumer Groups understand that the FCC is considering Miracom's application to offer its InnoCaption mobile captioned telephone relay service (TRS). Consumer Groups believe it's time for competition in mobile captioned telephone market, which at the moment has only one provider. Consumers and industry alike benefit from the kinds of innovation that occur when more than one provider is in the market. In this

case, Miracom is offering a technology that is different from those of other vendors in the market and [provides significant] improvements in the provision of captioned telephone services.

You have spoken repeatedly of the need for network access by persons with disabilities. Miracom's service would provide a key constituency with improved access to the telephone network and for the first time allow deaf and hard of hearing consumers to seamlessly receive inbound mobile calls. Yet, Miracom's application has been pending now some 28 months without FCC action. That delay is unprecedented, unwarranted and contrary to governing law. No existing relay provider has been forced to wait this length of time to obtain a Commission decision on its certification application.

Miracom has met repeatedly with CGB, with representatives of the Managing Director's office and with the Chief of the Office of Strategic Planning and Policy Analysis to ascertain any issues with its application and to address any issues or concerns the Commission may have. Miracom has amended its application to address any intervening changes in FCC rules governing IP CTS. And Miracom promptly responded to two separate requests asking for information not even required to be included in its certification application.¹

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;

¹ Miracom's 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 in response to staff requests.

(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.²

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.³ At no point has it been suggested that Miracom's certification application fails to meet these decisional criteria or that there is any deficiency in its application.

In a recent meeting with CGB, Miracom asked whether any additional information was necessary to act on its application. No additional information was requested. A similar request was made to the Office of Managing Director and was met with a similar reply. The most recent inquiry to CGB with respect to the application was met with the terse response that there has been no change in the application's status.

On January 31, 2014, I spoke via telephone with your legal advisor, Maria Kirby. At that time she expressed the view that the delay in action on Miracom's application was unwarranted. Yet, still no Commission action on the application has been forthcoming.

² The use of the word "shall" directs 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" instead of "shall" suggests a discretionary rather than mandatory 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).

³ As the Court of Appeals has repeatedly said, the FCC must follow its own rules. *Reuters, Ltd. v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986). 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).

It is noteworthy that Congress has specifically proscribed the type of delay Miracom has encountered. 47 U.S.C. Section 147(b) directs that, “The Commission shall determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed.” Miracom plainly proposes both new service and new technology, including the institution of seamless mobile inbound calling; yet the Commission is now 16 months past the Congressional deadline to act on Miracom’s application.

It appears from discussions with both CGB and the Office of Managing Director that the lack of action on Miracom’s application stems from a concern as to the size of the Interstate Telecommunications Relay Service (“TRS”) Fund. As was stated in substance on a telephone call with representatives from the Office of Managing Director, “Your client would be another mouth to feed from the fund.”

That comment brings up an obvious issue relating to the Commission's obligations under Section IV of the ADA, Section 225 of the Communications Act. Under this provision, the Commission’s obligation is to provide functionally equivalent relay service to those deaf and hard and hearing persons needing it. As was apparent from Ms. Hamlin’s comments at the February 18, 2014, workshop existing IP CTS relay suffers in terms of both error rate and speed of captioning, as well as in terms of mobility. Thus, consumers who need IP CTS to communicate functionally equivalent to hearing persons over the telephone are being denied the functional equivalency the ADA guarantees them.

If in fact, the Commission is delaying approval of Miracom’s application in order to limit the growth of the Interstate TRS Fund that action is plainly at odds with the Commission's obligation under Section 225. Section 225 provides that

In order to carry out the purposes established under section 151 of this title, to make available to all individuals in the United States a rapid, efficient nationwide communication service, and to increase the utility of the telephone system of the Nation, the **Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible** and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.

(Emphasis added).

Miracom is well aware of Commission concerns with the growth of IP CTS and the fact that one or more existing IP CTS providers may have engaged in marketing practices that encouraged use of the service by persons not actually needing the service in order to communicate over the telephone. This is plainly a legitimate Commission concern.

Yet, while this concern is plainly a basis to take steps to ensure that only persons legitimately needing to use relay services actually use these services, and to ensure that providers not market to persons who do not need the services, it is no basis to deny consumers a service that would significantly resolve existing issues with IP Captioned Telephone Service functionality of accuracy, speed of captioning, and mobility.

Allowing only the provision of inferior IP CTS service in order to limit demand and therefore limit growth of the Interstate TRS Fund hardly comports with the obligations Congress imposed on the FCC when it enacted Section 225 of the Act.

In light of the above discussion, Miracom requests to meet with you personally to discuss the inordinate delay in the processing of its application and to demonstrate personally to you the benefits its service would provide members of the deaf and hard of hearing community.

Very truly yours,

/s/

George L. Lyon, Jr.
Counsel to Miracom USA, Inc.
202-669-0442