

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1122

SORENSEN COMMUNICATIONS, INC., *et al.*,

PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,

RESPONDENTS

FCC OPPOSITION TO MOTION FOR SUMMARY REVERSAL

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INTRODUCTION

In late 2012, the FCC became aware of a dramatic and unexpected surge in usage of a type of subsidized telephone service – known as Internet Protocol Captioned Telephone Service (IP CTS) – designed for people with hearing loss, but who can speak with their own voice. IP CTS allows persons who are deaf or hard of hearing to use phones with added features that allow them to conduct a phone call by both reading “captions” of what the other caller is saying and using residual hearing to listen to what the other caller is saying. IP CTS is one of several types of telephone service for people with hearing and speech disabilities that are funded by contributions that telecommunications carriers and voice over Internet protocol providers (VoIP) – and indirectly all users of these services – make into a fund administered by the FCC known as the Telecommunications Relay Service (TRS) Interstate Fund. In an order issued in January 2013, the Commission found that the rate of demands for payment from IP CTS providers seeking compensation from the Fund substantially exceeded what the Fund had budgeted for such payments during the 2012-13 fund year.

The FCC determined that this exponential increase in financial demands on the TRS Fund threatened its very survival. Failure to take immediate action, the agency explained, would “put[] all forms of TRS in jeopardy and threaten to deprive people who are deaf or hard of hearing of the benefits of the program,” as well as potentially violating federal law. *Order ¶¶ 6-7.*

The Commission observed that the sudden spike in IP CTS usage was likely attributable to questionable practices by IP CTS providers that were encouraging

use of IP CTS by persons who may not need it. For instance, petitioner CaptionCall was paying audiologists (and others) for referrals, even though this practice is disapproved by the American Academy of Audiology's Code of Ethics. Further, CaptionCall was distributing free phones that have "captions on" set as the default mode – a setting that facilitates unnecessary use by persons without hearing disabilities who live in the same household as legitimate users of IP CTS.

In light of the impact of these questionable practices on the sustainability of the TRS Fund, the Commission adopted interim rules directed at restricting these practices. By their terms, the interim rules will expire on September 3, 2013 (after they have been in effect for six months), while the agency continues to explore more permanent solutions to the problem of funding IP CTS.¹ The interim rules were adopted after the Commission had received "extensive input from interested parties," including the petitioners here. *Order ¶8*. That input included both oral and detailed written presentations. Given the exigent circumstances, the FCC concluded that providing for notice and public comment on the interim rules would be contrary to the public interest: It thus invoked the "good cause" exception in the Administrative Procedure Act (APA) that allows agencies to forego public comments in exceptional situations like this, where harm to important public interests is likely in the absence of prompt action.

Petitioners Sorenson and CaptionCall contend that the Commission failed to

¹ Accompanying the *Order* was a Notice of Proposed Rulemaking that starts a notice-and-comment process seeking long-term solutions to the problem.

justify invoking the good cause exception and forgoing public notice and comment before adopting the interim rules. As we demonstrate below, the Commission fully explained its decision to invoke the good cause exception, and that decision is consistent with both the text of the APA and the relevant case law. Petitioners have fallen far short of the demanding showing required of a party seeking the rarely granted remedy of summary reversal.

BACKGROUND

1. The Regulatory Setting

Telecommunications Relay Services (TRS), mandated by Title IV of the Americans with Disabilities Act of 1990 (ADA),² enable an individual with a hearing or speech disability to communicate by telephone. This is accomplished through TRS facilities operated by providers such as petitioners Sorenson and

CaptionCall. Those providers hire individuals who relay conversations between people who are hearing- or speech disabled and those using standard telephones.

See generally Telecommunications Relay Services, 21 FCC Rcd 8379, 8380-84 (2006); *Sorenson Communications, Inc. v. FCC*, 659 F.3d 1035, 1039-40 (10th Cir. 2011). Section 225 of the Communications Act, 47 U.S.C. § 225, codifies the TRS provisions of the ADA.

That statute and its implementing regulations provide that eligible TRS providers offering interstate TRS services and certain intrastate services will be com-

² Pub. L. No. 101-336, § 401, 104 Stat. 327, 336-69 (1990), adding Section 225 to the Communications Act, 47 U.S.C. § 225.

pensated for their reasonable costs from the Interstate TRS Fund (Fund). These costs are passed on to all consumers of interstate telecommunications – that is, essentially anyone who pays a telephone bill or a bill for VoIP services. *Order ¶5*; 47 U.S.C. § 225(d)(3); 47 C.F.R. § 64.604(c)(5).

TRS providers' compensation is determined by the FCC, which has established per-minute compensation rates for various TRS services.³ Current rates range from \$1.2855 per minute to \$6.2390 per minute, depending on the type of relay service. For the most recent twelve-month period for which data are available, the TRS Fund administrator disbursed more than \$784 million from the Fund to TRS providers.⁴

TRS calls are made using a variety of technologies, one of which is IP CTS. IP CTS permits hard of hearing people to speak directly with another party on a telephone call and to both listen to the other party and read captions of what that party is saying, in real-time, on an Internet Protocol (IP)-enabled telephone or other device, such as a laptop computer or tablet. *See* 47 C.F.R. § 64.601(a)(12).

³ The TRS Fund administrator submits to the Commission annually a report of anticipated demand and proposed compensation rates for all forms of TRS, the carrier contribution factor (*i.e.*, how much telecommunications providers must contribute to the Fund) and anticipated fund size. *See, e.g., Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate* (Rolka Loube Salzer Assoc. May 1, 2013)(available at <http://apps.fcc.gov/ecfs/document/view?id=7022307988>). The Commission adopts rates for the upcoming year (July – June) based on this report and other factors. *See, e.g., Telecommunications Relay Services*, 27 FCC Rcd 7150 (CGB 2012).

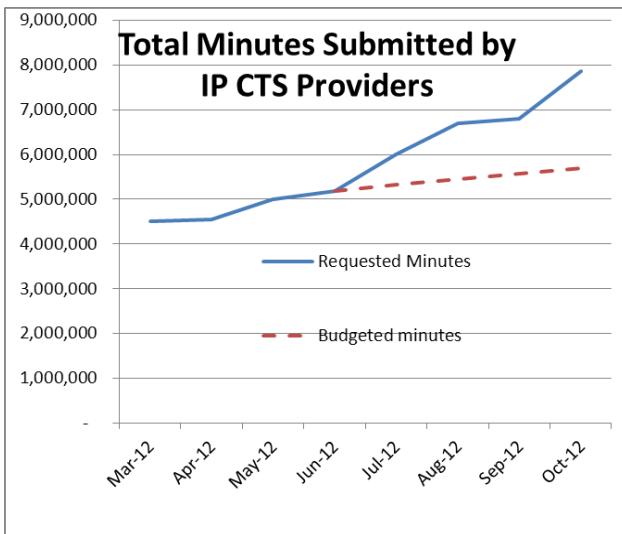
⁴ See monthly reports of the TRS fund administrator for May 2012 – April 2013, available at <http://www.r-l-s-a.com/TRS/Reports.htm>.

2. The Order And NPRM In This Case

1. In the *Order* before the Court in this case, the FCC took limited temporary measures to address an emergency situation that threatened the viability of service to millions of Americans with hearing loss. Specifically, the FCC adopted immediate interim rules intended to “address certain practices relating to the provision and marketing” of IP CTS that the Commission concluded appeared “to be contributing to a recent and dramatic spike in reimbursement requests to the [TRS Fund] of sufficient magnitude to constitute a serious threat to the Fund if not promptly and decisively addressed.” *Misuse of Internet Protocol (IP) Captioned Telephone Service*, 28 FCC Rcd 703 ¶1 (2013) (*Order*). The Commission simultaneously adopted a notice of proposed rulemaking seeking comment on permanent rules to address problems relating to IP CTS. *Id.* at 724-731 ¶¶38-55. The interim rules adopted in the *Order* will expire no later than September 3, 2013, by which date the FCC will have to adopt a new rule if it decides to keep these restrictions in place.⁵

The Commission emphasized the “unprecedented and unusually rapid growth” in IP CTS usage, including an increase of 11% *per month* during the latter part of 2012. *Order* ¶6. It included a chart illustrating the sharp disparity between actual and budgeted usage:

⁵ See *Order* ¶¶70, 71; 78 FED. REG. 14701 (Mar. 7, 2013).



In October 2012 alone, the agency noted, the number of minutes for which IP CTS providers requested compensation “exceeded the minutes budgeted for this service by the Fund Administrator by 38%, and as a consequence, the total requested payout also exceeded the budgeted amount by 38%, almost \$4 million.” *Id.* The Commission further observed that these recent developments “represent[] a sudden and sharp departure from the trend of declining rates of growth in usage of this service over the three prior years.” *Id.* And it explained in stark terms the emergency it faced:

if unchecked, this growth threatens in the very near term to overwhelm the Fund. Because all forms of TRS are supported through one Fund, this puts all forms of TRS in jeopardy and threatens to deprive people who are deaf or hard of hearing of the benefits of the program.

Id. at 707 ¶6.

The FCC explained that the IP CTS usage data “indicate that, absent Commission action, there could be insufficient funds available in this Fund year to meet the needs of the Fund, potentially triggering a violation of the Anti-Deficiency Act

and otherwise threatening the availability of the service for consumers of this and other relay services supported by the Fund.” *Id.* ¶7.⁶

2. As interested parties became aware of the Commission’s intention to address this problem, the agency “received extensive input from interested parties on these issues, including all of the active providers of IP CTS and a number of consumer groups.” *Order* ¶8 & n.21 (listing IP CTS providers and consumer groups, including petitioners Sorenson and CaptionCall, who had filed *ex parte* letters in FCC Docket No. 03-123 and participated in meetings with Commission staff). *See also* Appendix to this pleading listing *ex parte* filings.

In January 2013, the Commission announced the adoption of three interim measures directly addressed at the “questionable practices” it believed were largely responsible for the recent spike in IP CTS usage. *See Order* ¶8. As noted above, the interim rules are effective for a limited period – until September 2013 – while the agency conducts a notice-and-comment rule making proceeding to consider whether to adopt more permanent measures. IP CTS providers that fail to comply with these interim rules will not be entitled to receive compensation from the TRS Fund for IP CTS usage. *Id.* at ¶56.

First, the rules prohibit all rewards programs or other forms of financial or other inducements that encourage individuals to subscribe to or use IP CTS. The

⁶ The Anti-Deficiency Act prohibits federal officers or employees from making or authorizing any expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation. 31 U.S.C. § 1341(a)(1)(A).

Commission noted that Sorenson and CaptionCall, for example, maintained financial incentive programs that awarded cash payments for referrals for new customers, as well as payments to audiologists and other professionals who referred patients who became customers for Sorenson's IP CTS service. *See Order ¶¶13-18.* The Commission pointed out that it had prohibited similar programs for other forms of TRS and that the American Academy of Audiology's Code of Ethics specifically disapproves of such referral programs. *See id. ¶¶15, 16, 17, nn.49, 53, 54.*

Second, the rules require IP CTS providers to register all new users and to obtain a self-certification from each new user that he or she has a hearing loss necessitating the use of IP CTS service. The Commission observed that, unlike other forms of TRS, the "unusual ease and convenience" in using IP CTS make it more likely that consumers without hearing loss will nevertheless use the service and thus impose liabilities on the Fund. *Order ¶20* ("consumers who use IP CTS [are] less likely to 'self-screen'"). Other forms of TRS, the Commission pointed out, often require special skills such as knowledge of American Sign Language. *Id.* In contrast, IP CTS devices appear to users to operate in essentially the same manner as ordinary telephones while providing the additional captioning function. There is thus a "greater risk, compared with other forms of TRS, that IP CTS is being used . . . by individuals who do not need the service" *Id.*

In addition, where providers make available IP CTS equipment to new users for less than \$75, the provider must obtain from the user a certification from an independent, third-party professional attesting to the user's need for IP CTS ser-

vice. This provision was intended to minimize the possibility that individuals who do not need the service, but were interested in a free or low-cost telephone, would subscribe to it. *Id.* ¶22.

Third, the rules require IP CTS providers to ensure that the equipment they provide has a default setting of “captions off” at the beginning of each call. This requirement is intended to reduce the possibility that other household members or visitors who do not have a hearing loss will use a phone’s IP CTS capability and impose unnecessary costs on the TRS Fund. *Id.* ¶33. The Commission pointed out that some states already have such a requirement for a related type of service, adding that the “burden to consumers who need to turn on captions can be minimized, for example, by prominently displaying the captioning on-off button on the IP CTS device, as some providers have done.” *Id.* ¶28, n.92. It also explained that, “[w]hile taking one or more additional steps, such as pushing a button, to receive captions may add a small burden to the process of using IP CTS, we preliminarily find that any burden is outweighed by the substantial public interest in preventing the misuse of this service.” *Id.* ¶33.

3. The Commission specifically addressed and rejected arguments that the APA prohibits it from taking even these limited actions without public notice and opportunity to comment in a rule making proceeding.

The agency explained that the APA provides an express exception to the public notice and comment requirement “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules

issued) that notice and public procedures thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(3)(B). Here, the Commission explained that it found

good cause to adopt immediate interim rules to address the recent, unprecedented and unusually rapid increase in IP CTS minutes of use in order to maintain the integrity of the Fund, to sustain this service and other forms of TRS for legitimate users during the coming months, and to help avoid increasing mid-year the amount that telecommunications and VoIP providers must pay into the Fund in order to account for the rapid growth caused by these potentially improper practices.

Order ¶11. The Commission emphasized that the IP CTS growth was so rapid that “it would be impracticable and contrary to the public interest to delay remedial action until after completion of the notice and comment process” and that the action it was taking was “aimed at preserving the fiscal integrity of the TRS Fund and ensuring compliance with applicable federal law.” *Id.* The Commission also observed that, if it were to provide notice and comment, “IP CTS providers would be able to continue – indeed to accelerate – the use of potentially inappropriate incentives to recruit and sign up new IP CTS users without first establishing their eligibility for an extended period of time while the rulemaking process is pending.”

Id. ¶8, citing Chamber of Commerce of the U.S. v. SEC, 443 F.3d 890, 908 (D.C. Cir. 2006) (good cause “exception excuses notice and comment in emergency situations . . . where delay could result in serious harm . . . or when the very announcement of a proposed rule itself could be expected to precipitate activity by affected parties that would harm the public welfare”).

The Commission also adopted at the same time a Notice of Proposed Rule Making seeking comment on whether to make the interim rules permanent as well as alternatives to those rules. *See Order ¶¶38-55.*

Commissioner Pai filed a separate statement concurring in part and dissenting in part. Noting that the “demands IP CTS is placing on the Fund” are “unsustainable,” he would have taken even more stringent immediate steps “to curtail waste, fraud, and abuse” in the provision of IP CTS service. *Statement of Commissioner Ajit Pai*, 28 FCC Rcd at 749, 751.

3. Subsequent Events

The Commission recognized in adopting the interim default caption-off rule that some IP CTS providers might be unable to modify equipment and software already being used by their consumers by the deadline specified in the interim rules and specifically provided for waivers in those circumstances. *Order ¶35*. Each of the four IP CTS providers applied for a waiver.

In a May 9, 2013 order, the FCC’s staff (acting on authority delegated by the Commission) granted limited waivers of the default caption-off provision of the interim rules to three of the applicants. *Misuse of Internet Protocol (IP) Captioned Telephone Service*, DA 13-1045 (CGB May 9, 2013) (*Waiver Order*). The *Waiver Order* explained that the waivers were justified in light of those applicants’ diligent efforts to comply with the rules, the fact that most of their phones were in compliance, and the short waiver period sought to bring the remaining units into compliance. *Id.* ¶¶6-18. The *Waiver Order* denied Sorenson/CaptionCall’s request.

Unlike the other waiver applicants, the order explained, nearly all of CaptionCall’s phones were not in compliance with the rule, and “CaptionCall has failed to provide a reasonable explanation for its conscious choice not to comply – or even to make a good faith effort to comply – with the rule.” *Id.* ¶21; *see id.* at ¶¶19-27.⁷

Sorenson filed an application for Commission review of the staff *Waiver Order* on June 7, 2013. That application is pending before the Commission.

ARGUMENT

A. THE STANDARD FOR SUMMARY DISPOSITION

Summary disposition is extraordinary relief that is “rarely granted.” *See Handbook of Practice and Internal Procedures* at 36 (D.C. Cir. Dec. 1, 2011). It will be granted only “where the merits of the appeal or petition for review are *so clear* that ‘plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect our decision.’” *Cascade Broadcasting Group, Ltd. v. FCC*, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (emphasis added; citation omitted). As this Court has explained, “[a]gency action will be subject to summary review … only where the moving party has carried the heavy burden of demonstrating that the record and the motions papers comprise a basis adequate to allow the ‘fullest consideration necessary to a just determination.’” *Cascade Broadcast-*

⁷ The FCC staff also rejected Sorenson/CaptionCall’s offer to be compensated at an 85% rate from the TRS Fund in lieu of compliance with the interim rules. The staff concluded that this was “not an adequate substitute for compliance with the captions-off rule,” noting that the waiver request “does not indicate how this figure was developed, and there is no quantitative evidence as to the amount of unauthorized use that will result from CaptionCall’s noncompliance.” *Id.* ¶26.

ing, 822 F.2d at 794, quoting, *Sills v. Bureau of Prisons*, 761 F.2d 792, 794 (D.C. Cir. 1985). Sorenson's motion falls far short of meeting this exacting standard. The Commission took an interim and limited step to address a quickly escalating emergency, and the Court should follow its ordinary practice of deciding this case only after full briefing and oral argument.

B. THE FCC PROPERLY RELIED ON THE APA'S GOOD CAUSE EXCEPTION TO ADOPT INTERIM RULES WITHOUT NOTICE AND COMMENT.

1. The Administrative Procedure Act generally requires federal agencies to publish notice of proposed rules in the Federal Register and allow opportunity for public comment. 5 U.S.C. § 533(b), (c). An agency, however, may forgo this requirement “for good cause.” *Id.* § 553(b)(3)(B). Good cause exists when affording notice and soliciting comments is “impracticable, unnecessary, or contrary to the public interest.” *Id.*

The good-cause exception to the notice and comment requirements of § 553 is to be “narrowly construed.” *American Fed. of Gov. Employees v. Block*, 655 F.2d 1153, 1156 (D.C.Cir.1981); *see Order ¶11*. But far from invoking the exception simply because it “finds it inconvenient to follow” ordinary notice-and-comment requirements, *Action on Smoking and Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 800 (D.C. Cir.1983), the FCC fully explained the need to act quickly (without incurring the delay entailed by full public notice and comment) in order to respond to a fast-developing emergency.

As discussed above (*see pp. 5-6, supra*), the Commission detailed the dire

situation it faced as financial demands on the TRS Fund had rapidly escalated and threatened to “overwhelm the Fund,” thereby placing at risk all forms of TRS for individuals with disabilities. *Order ¶¶ 6-8.*

Not only would that outcome be contrary to the agency’s statutory duty to ensure that TRS are “available … to hearing-impaired … individuals in the United States, 47 U.S.C. § 225(a)(3), (b)(1), but it could also trigger a violation of the Anti-Deficiency Act, *see Order, ¶7 & n.20.* Taking urgent action to ensure that TRS remain available to those who need those services and to prevent violations of federal law is in the “public interest” under 5 U.S.C. § 533(b), and is precisely the sort of emergency action that the APA’s express exception from notice-and-comment requirements was designed to permit. *See, e.g., Mack Trucks, Inc. v. EPA,* 682 F.3d 87, 93-95 (D.C. Cir. 2012) (good cause is shown where there is a “real emergency” and “when ordinary procedures – generally presumed to serve the public interest – would in fact harm that interest”); *Utility Solid Waste Activities Group v. EPA,* 236 F.3d 749, 754-55 (D.C. Cir. 2001) (good cause may be shown ““when an agency finds that due and timely execution of its functions would be impeded by the notice otherwise required in [§553]””); *American Fed. of Gov’t Employees v. Block,* 655 F.3d 1153, 1157 (D.C. Cir. 1981) (good cause shown in emergency situation where harm to industry and consumers likely and action limited to interim, temporary rules).

2. Petitioners’ contrary arguments rest on a misunderstanding of the Commission’s reasoning and a mischaracterization of the governing law. They assert,

for example, that “marketing practices, customer certification, and default caption settings [do not] involve an ‘emergency.’” Mot. at 16. But the Commission did not claim that those practices themselves were the emergency. Rather, the emergency the agency faced was the impact of the recent surge in IP CTS usage on the TRS Fund. The FCC reasonably identified the likely culprit of this surge to be the questionable practices it sought to curtail through the interim rules. *See Order ¶¶6-9.*

Perhaps recognizing that cases involving disputed evidentiary findings present especially poor vehicles for summary reversal, petitioners do not seriously contest the agency’s factual basis for believing that the questionable practices it identified were likely responsible for the surge in financial demands on the TRS Fund. *See Mot. 14* (seeking to preserve for full briefing and argument claims alleging failure to engage in reasoned decision-making). Petitioners assert in passing that the agency failed to properly consider their submissions regarding the interim rule for a default “captions off” setting, Mot. at 10-11, but the agency in fact considered petitioners’ purported evidence and properly rejected it. *Order, ¶¶30-32* (explaining that “total household usage [of IP CTS] is not a useful statistic for identifying how much ineligible usage has occurred” because lower total IP CTS minutes in mixed (hearing-impaired/non-hearing-impaired) households could result from the latter group making calls that otherwise would be made by the former). Petitioners also repeatedly assert that the interim rules place an undue burden on hard of hearing persons who also suffer from memory problems. Mot.

at 12-13, 18, 20. But the agency explained that “[t]he burden to consumers who need to turn on captions can be minimized, for example, by prominently displaying the captioning on-off button on the IP CTS device, as some providers have done.” *Order*, n.92 (citing evidence). Petitioners may disagree with that judgment, but their second-guessing of such determinations is not a basis for summary reversal.

There is no suggestion in *Mack Trucks*, 682 F.3d 87, on which petitioners heavily rely (Mot. at 4, 19), that agencies may invoke the good cause exception *only* when facing emergencies involving the environment, matters of life or death, or national security. While the good-cause exception is to be narrowly construed, it is “an important safety valve to be used where delay would cause real harm.”

United States Steel Corp. v. EPA, 595 F.2d 207, 214 (5th Cir. 1979). Indeed, this Court in *Mack Trucks* rejected the EPA’s reliance on the good-cause exception only because the rule at issue there did “not remedy any real emergency at all.” 682 F.3d at 93.⁸ As shown above, that is not the case here. In addition, none of the “good cause” cases cited by petitioners arose in the context of a motion for

⁸ In any event, the Commission here explained that following the usual notice-and-comment procedures risked undermining the purpose of the TRS program by allowing unchecked expenditures to overwhelm the Fund and thus deprive legitimate users of the program’s benefits. *Order* ¶¶6-8. Petitioners suggest that *Mack Trucks* “limited” the exception to situations where following regular notice-and-comment procedures would “enable misconduct or permit evasion of [a] rule.” Mot. at 19. In fact, the *Mack Trucks* Court merely offered an illustrative “example” of when the exception may properly be invoked: where compliance with the usual procedures would “defeat the purpose of the proposal—if, for example, announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent.” *Id.* at 95 (emphasis added).

summary reversal.

Petitioners claim (Mot. at 6) that the growth in IP CTS simply reflected a common pattern in usage of a new technology in which there is a sharp period of growth as consumers discover the new technology. But that assertion does not square with the facts. As the Commission pointed out, the average monthly growth rate of IP CTS usage had actually been declining for three years prior to 2012. *See Order* n.19. It was thus reasonable for the Commission to conclude that the sharp increase in growth during the latter part of 2012 was likely caused by IP CTS providers' questionable practices that must be addressed immediately by interim rules.

The agency's experience and expertise making these types of judgments – especially with respect to interim rules and in the context of a summary reversal motion – is entitled to substantial deference. *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105-06 (D.C. Cir. 2009); *Cascade Broadcasting*, 822 F.2d at 794. The rules' requirements – in effect only for six months, while the agency undertakes a full notice-and-comment rulemaking to find permanent solutions to the problem – are balanced and focus specifically on practices that the Commission reasonably believed were primary contributors to the dramatic spike in IP CTS providers' requests for compensation from the Fund. In all events, the reasonableness of the Commission's understanding on this issue is a matter that can and should be considered in the ordinary course after full briefing and review of the record.

Petitioners also posit that the Commission had an easy alternative solution available: simply increase rates (or the "contribution factor" that every telecom-

munications and VoIP provider pays into the Fund). Mot. at 16. Such a course would obviously serve petitioners' own interests by insuring a growing, government-mandated source of revenue, but the agency was under no obligation to continue to permit petitioners to engage in dubious practices that undermine the sustainability of the TRS Fund.

Nor is there any basis for petitioners' supposition that "a modest contribution factor increase" (Mot. at 17) would be a panacea. Petitioners assert that an increase from 1.053% to 1.085% would have sufficed to rehabilitate the TRS Fund. *See, e.g.*, Mot. at 16. They cite no evidence, however, for the claim that this increase would have been sufficient to meet the increasing IP CTS claims. In any event, even that proposal would raise the amount carriers – and ultimately all telephone users – would have to contribute to the Fund by nearly \$2,000,000 *per month*.⁹ Petitioners may view this increase in financial burdens as only "modest" (Mot. at 7, 16, 17), but the FCC is obligated to preserve the integrity of the TRS Fund and to avoid imposing unnecessary costs on telephone users nationwide.¹⁰ It

⁹ The TRS Fund administrator estimated in an April 30, 2012 report that the total revenues upon which the TRS Fund is based for FY 2012-2013 were \$67.6 billion, that the total fund cash requirement for 2012-13 was \$711.4 million, and that the contribution factor would need to be .01053. *Interstate TRS Fund Payment Formula and Fund Size Estimate*, Rolka Loube Salzer Associates LLC at 3-4 (April 30, 2012). Increasing the contribution factor as proposed by petitioners would increase carriers' contribution to the Fund by an additional \$21.63 million annually based on those estimates, or nearly \$2 million per month.

¹⁰ See 47 U.S.C. § 225(d)(3), (e)(providing for creation to TRS funding mechanism that the FCC is directed to enforce); *Structure and Practices of the Video Relay Service*, FCC 13-82 at ¶¶17-18.

was reasonable for the agency to believe that the public interest is better served by restricting on an interim basis the questionable practices that appear to be at the root of the IP CTS funding problem rather than by increasing the burden on all telephone users to compensate IP CTS providers like petitioners that engage in those questionable practices.

The Commission establishes the amount of contributions that must be paid into the Fund on an annual basis. 47 C.F.R. § 64.604(c)(iii)(B). Petitioners correctly note (Mot. at 7, 18) that on two past occasions the Commission has modified the contribution amount mid-year.¹¹ In those cases, however, the need to revise the contribution amount arose not only because of unanticipated growth in TRS usage, but also because of changes that the Commission itself had made to the methodology for establishing compensation or to changes in the entities required to make contributions. *See* discussion in orders cited at n. 13. The funding shortfall here, however, did not stem from matters beyond the control of service providers; it was likely attributable to the providers' own business practices.

As the FCC pointed out, it had "received extensive input from interested parties on these issues, including all of the active providers of IP CTS and a number of consumer groups." *Order ¶8*. Indeed, the *Order* repeatedly cites these communications, such as filings and presentations made to the Commission – many by

¹¹*See Order* n.30, citing *Telecommunications Relay Services*, 23 FCC Rcd 1680 (CGB 2008); *Telecommunications Relay Services*, 19 FCC Rcd 2993 (CGB 2004).

petitioners here – pursuant to the agency’s *ex parte* rules. *See, e.g., Order ¶¶ 8, 16, 17, 22, 29-32, 34, nn.21, 33, 46, 47, 50, 56, 65, 66, 67, 74, 80-91, 101.* While these informal communications of course are not a substitute for formal notice-and-comment rulemaking in situations where (unlike here) the APA exception is inapplicable, petitioners’ real complaint is not that they were unable to communicate their views to the FCC, but that the FCC chose a different course from the one petitioners had recommended.

Ensuring that TRS funds are appropriately employed is a problem that the FCC has faced on a number of occasions.¹² As a result of its experience, the agency has become aware of the need to promptly address funding problems such as those it identified with respect to IP CTS. Petitioners’ request for summary reversal fails to give due weight to the agency’s experience and expertise in such matters. The Commission properly invoked the APA’s safety valve for the very type of emergency situation that provision was designed to address.

CONCLUSION

For the reasons set forth above, the motion should be denied.

¹²See, e.g., *Structure and Practices of the Video Relay Service Program*, FCC 13-82 ¶1 (June 10, 2013) (adopting measures to reform the Video Relay Service program “which for many years has been beset by waste, fraud, and abuse and by compensation rates that have become inflated well above actual cost”); FCC NEWS *Sorenson to Pay \$15.75 Million to Settle FCC Investigation into Improper Billing of TRS Fund* (May 28, 2013); FCC NEWS *AT&T To Pay \$18.25 Million To Settle FCC Investigation of Improperly Billing Fund That Supports Accessibility of Telecommunications Services to Persons With Disabilities* (May 7, 2013).

Respectfully submitted,

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July 1, 2013

APPENDIX

*(Ex Parte Filings In FCC CG Docket No. 03-123
Relating to IP-CTS Interim Rules)*

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|---------------|--|
| Dec. 14, 2012 | Letter to Marlene H. Dortch from John Goodman on behalf of Purple Communications, Inc. |
| Dec. 19, 2012 | Letter to Marlene H. Dortch from Christopher J. Wright on behalf of Sorenson Communications, Inc. and CaptionCall LLC |
| Dec. 19, 2012 | Letter to Marlene H. Dortch from John T. Nakahata on behalf of Sorenson Communications, Inc. and CaptionCall LLC |
| Dec. 19, 2012 | Letter to Chairman Julius Genachowski and Commissioners from Telecommunications for the Deaf and Hard of Hearing, Inc., Association of Late-Deafened Adults, Inc., Hearing Loss Association of America, National Association of Deaf, and Deaf and Hard of Hearing Consumer Advocacy Network |
| Dec. 20, 2012 | Letter to Marlene H. Dortch from John Goodman on behalf of Purple Communications, Inc. |
| Dec. 20, 2012 | Letter to Chairman Julius Genachowski and Commissioners from Linda Kozma-Spytek on behalf of Gallaudet University Technology Access Program |
| Dec. 20, 2012 | Letter to Chairman Julius Genachowski and Commissioners from Brenda Battat on behalf of the Hearing Loss Association of America |
| Dec. 21, 2012 | Letter to Marlene H. Dortch from Rosemary C. Harold on behalf of Hamilton Relay, Inc. |
| Dec. 21, 2012 | Letter to Marlene H. Dortch from Michael B. Fingerhut on behalf of Sprint Nextel |
| Dec. 26, 2012 | Letter to Marlene H. Dortch from Michael B. Fingerhut on behalf of Sprint Nextel |

- Jan. 7, 2013 Letter to Marlene H. Dortch from John T. Nakahata on behalf of CaptionCall LLC
- Jan. 7, 2013 Letter to Marlene H. Dortch from Philip J. Macres on behalf of Telecommunications for the Deaf and Hard of Hearing, Inc., Association of Late-Deafened Adults, Inc., Hearing Loss Association of America, National Association of Deaf, and Deaf and Hard of Hearing Consumer Advocacy Network
- Jan. 7, 2013 Letter to Marlene H. Dortch from Philip J. Macres on behalf of Telecommunications for the Deaf and Hard of Hearing, Inc., Association of Late-Deafened Adults, Inc., Hearing Loss Association of America, National Association of Deaf, and Deaf and Hard of Hearing Consumer Advocacy Network
- Jan. 8, 2013 Letter to Marlene H. Dortch from Tamar E. Finn on behalf of Telecommunications for the Deaf and Hard of Hearing, Inc.
- Jan. 9, 2013 Declaration of Dr. Ingrid K. McBride
- Jan. 10, 2013 Letter to Marlene H. Dortch from David A. O'Connor on behalf of Hamilton Relay, Inc.
- Jan. 11, 2013 Letter to Marlene H. Dortch from Philip J. Macres on behalf of Telecommunications for the Deaf and Hard of Hearing, Inc., Association of Late-Deafened Adults, Inc., Hearing Loss Association of America, National Association of Deaf, and Deaf and Hard of Hearing Consumer Advocacy Network
- Jan. 14, 2013 Letter to Marlene H. Dortch from Philip J. Macres on behalf of Telecommunications for the Deaf and Hard of Hearing, Inc., Association of Late-Deafened Adults, Inc., Hearing Loss Association of America, National Association of Deaf, and Deaf and Hard of Hearing Consumer Advocacy Network
- Jan. 14, 2013 Letter to Marlene H. Dortch from Michael B. Fingerhut on behalf of Sprint Nextel
- Jan. 14, 2013 Letter to Marlene H. Dortch from David A. O'Connor on behalf of Hamilton Relay, Inc.

- Jan. 14, 2013 Letter to Marlene H. Dortch from Brenda Battat on behalf of the Hearing Loss Assocation of America
- Jan. 15, 2013 Letter to Marlene H. Dortch from John T. Nakahata on behalf of Sorenson Communications, Inc. and CaptionCall LLC
- Jan. 15, 2013 Letter to Marlene H. Dortch from John Goodman on behalf of Purple Communications, Inc.
- Jan. 16, 2013 Letter to Marlene H. Dortch from John T. Nakahata on behalf of Sorenson Communications, Inc. and CaptionCall LLC
- Jan. 17, 2013 Letter to Marlene H. Dortch from Brenda Battat on behalf of the Hearing Loss Ass'n of America

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SORENSEN COMMUNICATIONS, INC., *et al.*,)
Petitioners)
v.) **No. 13-1122**
FEDERAL COMMUNICATIONS COMMISSION)
and THE UNITED STATES OF AMERICA,)
Respondents)

CERTIFICATE OF SERVICE

I, C. Grey Pash, Jr., hereby certify that on July 1, 2013, I electronically filed the foregoing FCC Opposition To Motion For Summary Reversal with the Clerk of the Court for the United States Court of Appeals for the D. C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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