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

No. 13-1246

SORENSON COMMUNICATIONS, INC., *et al.*,

PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,

RESPONDENTS

FCC'S OPPOSITION TO MOTION FOR STAY PENDING JUDICIAL REVIEW

SEAN A. LEV
GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

C. GREY PASH, JR.
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554
(202) 418-1740

NOVEMBER 1, 2013

TABLE OF CONTENTS

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 who have hearing loss, but who can speak with their own voice. IP CTS allows persons who are 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. 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 based on past demand and threatened the sustainability of the fund.

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.

In light of the impact of these questionable practices on the sustainability of the TRS Fund, the Commission in January 2013 adopted interim rules directed at restricting these practices to ensure that IP CTS was used only by eligible individuals. Those rules were in effect for six months. The Commission also adopted at the same time a Notice of Proposed Rulemaking seeking comment on whether to make the interim rules permanent as well as alternatives to those rules.

In August 2013 the FCC, after receiving extensive comments, adopted the *Order* under review, which amended or replaced the interim rules establishing the eligibility of existing and new users of this service. Of particular relevance here, the Commission adopted a rule prohibiting an IP CTS provider from receiving compensation from the TRS Fund for usage of IP CTS equipment received at no charge or for a fee of less than $75. The Commission explained that the offering of such equipment – which is fully usable as a phone by individuals with no hearing loss – for free or at sharply reduced costs has the potential for promoting registration and use by IP CTS customers who do not need the service, thereby resulting in improper payments from the Fund. Notably, most IP CTS providers supported a rule of this kind before the Commission.

In addition, the Commission made permanent its interim rule requiring that IP CTS equipment have a default setting of "captions-off" so that a user is required to take an affirmative step to turn on the captions each time the device is used to

make or receive a phone call. The Commission found that this minimal burden was a reasonable and prudent requirement to reduce misuse of the service and help protect the financial viability of the TRS Fund.

Sorenson's motion fails to meet the very high standard necessary to stay an agency order pending judicial review. The two rules in dispute constitute a rational response to what the Commission reasonably perceived as improper marketing and other practices by IP CTS providers such as Sorenson that threatened the viability of the TRS Fund. Nor do the rules violate the Americans With Disabilities Act (ADA). On the contrary, the ADA amends Section 225 of the Communications Act to direct the Commission to adopt regulations that make TRS available "to the extent possible and in the most efficient manner." The Commission has discretion in determining how to apply that general language to this context, and it reasonably determined that both rules directly promote the efficiency of the TRS program by ensuring that the TRS Fund is not dissipated by ineligible users.

BACKGROUND

1. The Regulatory Setting

Telecommunications Relay Services (TRS), mandated by Title IV of the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, § 401, 104 Stat. 327, 336-69 (1990), enable an individual with a hearing or speech disability to communicate by telephone. This is accomplished through TRS facilities operated by providers such as Sorenson. TRS 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.

Section 225 and its implementing regulations provide that eligible TRS providers offering interstate TRS services and certain intrastate services will be compensated for their reasonable costs from the Interstate TRS 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. *Misuse of Internet Protocol (IP) Captioned Telephone Service*, 28 FCC Rcd 703 ¶ (2013) (*Interim Order*); 47 U.S.C. § 225(d)(3); 47 C.F.R. § 64.604(c)(5).

TRS calls are made using a variety of technologies, one of which is IP CTS. IP CTS permits a person with hearing loss 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).

Compensation for TRS providers is set by the FCC on a per-minute basis. Current rates range from $1.2855 per minute to $6.2390 per minute, depending on the type of relay service. IP CTS is currently compensated at a rate of $1.7877 per minute. For the July 2012 – June 2013 period, the TRS Fund administrator dis-

bursed more than $784 million from the Fund to TRS providers for all TRS services. Of that amount, $140,489,307 was attributable to IP CTS.[1]

2. The Interim Rules And The Notice Of Proposed Rule Making

In an *Order* adopted in January 2013, the FCC took limited temporary measures to address an emergency situation that threatened the financial viability of the TRS Fund. Specifically, the FCC adopted interim rules intended to "address certain practices related 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." *Interim Order* ¶5. The Commission simultaneously adopted a notice of proposed rulemaking seeking comment on permanent rules; the Commission made clear that it intended to adopt permanent rules prior to September 2013 when the interim rules were scheduled to expire. *Id.* at 724-731 ¶¶38-55. In the January 2013 *Interim Order*, the Commission observed that the recent increase in IP CTS usage "represents a sudden and sharp departure from the trend of declining rates of growth in usage of this service over three prior years," that, if left "unchecked," would "threaten[] in the very near term to overwhelm the Fund." *Id.* at 707 ¶6.

The interim rules prohibited all rewards programs or other forms of financial or other inducements to individuals to subscribe to or use IP CTS. The interim

---

[1] See monthly reports of the TRS Fund administrator for July 2012 – June 2013, available at http://www.r-l-s-a.com/TRS/Reports.htm.

rules also required 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. In addition, where providers made available IP CTS equipment to new users for less than $75, the interim rules required the provider to obtain from the user a certification from an independent, third-party professional attesting to the user's need for IP CTS service. Finally, the interim rules required IP CTS providers to ensure that the equipment they provide has a default setting of "captions-off" at the beginning of each call, 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 unauthorized costs on the TRS Fund.[2]

3. The Adoption Of Permanent IP CTS Rules

In the *Order* under review, the Commission adopted permanent rules addressing practices related to the marketing and provision of IP CTS. *Misuse of Internet Protocol (IP) Captioned Telephone Service*, FCC 13-118 (Aug. 26, 2013) ("*Order*"). These rules amended and/or replaced the interim rules the Commission had adopted in January 2013. In its motion, Sorenson claims that two rules the

---

[2] Each of the four IP CTS providers applied for a waiver of the interim default off rule. In a May 9, 2013 Order, the FCC's staff granted limited waivers of that provision to three of the applicants. *Misuse of Internet Protocol (IP) Captioned Telephone Service*, 28 FCC Rcd 6454. 6457-62 ¶¶6-18 (CGB 2013) (*Waiver Order*). The *Waiver Order* denied Sorenson/CaptionCall's request. Unlike the other waiver applicants, all of whom had been able to come into compliance with the interim rule on or shortly after its effective date, 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.* ¶¶19-27.

Commission adopted lack record support and are irrational – (1) the prohibition of IP CTS providers receiving compensation from the TRS Fund for usage of equipment that they distribute to consumers free or for less than $75, and (2) the requirement that equipment used in conjunction with IP CTS have a default setting of "captions-off" at the beginning of each call.

The Commission's decision to prohibit compensation of providers for services provided via equipment they distribute for free or for less than $75 was based on its conclusion that "the provision of free or minimally priced equipment increases the likelihood that IP CTS will be provided to ineligible users." *Order* ¶42. It pointed out that "IP CTS is unlike other forms of TRS because it does not require special skills such as sign language, is generally automated and invisible to the calling parties, and allows a conversation to flow without interruption." *Id.* The Commission added that because IP CTS devices "function much the same as a conventional telephone but for the addition of captions, once the device is in a consumer's possession, consumers may routinely use the device with captions – as might others in the consumer's household – even if they do not actually need the service for effective communication." *Id*. In fact, the Commission stated, "when using the phone, the unobtrusive nature of IP CTS is such that consumers may not even be aware that captions are turned on or that they have the ability to turn them off." *Id.*

Based on these considerations, the FCC found that "free distribution of such devices is likely to contribute to IP CTS usage by persons who do not have a suffi-

cient degree of hearing loss to require this service to understand conversation over the phone." *Order* ¶42. The Commission therefore concluded that, if IP CTS providers were to offer such equipment for free or for less than $75 it would have "the potential effect of promoting registration for and use of IP CTS by customers who do not need the service for effective communication, resulting in improper payments from the Fund, contrary to the purpose of the TRS program to provide communication services to persons who have a hearing loss and who have difficulty using conventional telephone services." *Id*.

In the Commission's judgment, paying at least $75 "provides a concrete indication" of a consumer's need for IP CTS for effective communications, noting one provider's observation that "'there is no better indication that a user legitimately needs IP CTS than a user's decision to pay his or her own money for the specialized equipment needed to use the service.'" *Order* ¶43. Most other IP CTS providers, with the exception of Sorenson, supported this position. *See id.* ¶36.

The Commission concluded that setting $75 as the minimum price threshold "represents a reasonable balancing of interests," finding that it "is high enough to deter a consumer from purchasing an item if he or she does not need it for communications, but not so high as to make the purchase of equipment overly burdensome." *Order* ¶51.[3]

---

[3] In the rulemaking notice accompanying the *Order*, one of the issues that the Commission stated it would consider is whether it should allow for an exception to the $75 requirement for equipment provided to low-income individuals.
(footnote continued on following page)

The Commission also decided to make permanent the interim rule it had adopted requiring that IP CTS equipment have a default setting of "captions-off," describing it as a "reasonable and prudent" requirement to minimize inadvertent or casual use of the service. *Order* ¶96. The agency explained that while it could not precisely quantify the amount of IP CTS usage attributable to casual or inadvertent use, "it stands to reason that an unregistered individual who makes casual use of an IP CTS telephone is likely to ignore the presence of captions, or to forget, or be unable or unmotivated – or unaware of the option – to turn them off." *Id.* ¶97. In addition, the Commission reasoned that some IP CTS users may need captions in some circumstances, but not others. Thus "defaulting captions to 'on' would mean that IP CTS may be provided to individuals who do not need it and the TRS Fund is inappropriately billed for the cost." *Id.* The Commission found "that a default captions-off requirement is necessary to reduce misuse of the service, and help protect the viability of the Fund in the face of the recent dramatic upsurge in IP CTS usage." *Id.* Some IP CTS providers already were supplying equipment with a default captions-off setting, and some state TRS programs required that equipment distributed pursuant to their state programs also be provided with a captions-off default. *Id.* ¶92.

The Commission recognized that individuals with cognitive or physical disabilities may have difficulty even with the minimal requirement that they push a

---

(footnote continued from preceding page)

Order ¶144. Until that issue is resolved, a waiver of the requirement could be sought in appropriate cases. *See* 47 C.F.R. § 1.3.

button before making or receiving a call to turn captions on. It thus adopted a process for such individuals, or their representatives, to obtain an exemption from the default-off requirement. *Order* ¶99.

ARGUMENT

THE STAY REQUEST SHOULD BE DENIED.

Under well-settled standards, a party seeking a stay pending judicial review must show that: (1) it will likely prevail on the merits; (2) it will suffer irreparable harm unless a stay is granted; (3) other interested parties will not be harmed if a stay is granted; and (4) a stay will serve the public interest. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); D.C. Cir. Rule 18(a)(1). A "stay is an 'intrusion into the ordinary processes of administration and judicial review,' … and accordingly 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citation omitted). An applicant "*must* establish that . . . he is *likely* to suffer irreparable harm in the absence of preliminary relief." *Winters v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008) (emphasis added). The mere possibility of harm is insufficient. *Id*. 22. As we explain below, petitioners have failed to satisfy this stringent standard.[4]

---

[4] The rules Sorenson challenges were published in the Federal Register on August 30, 2013, *see* 78 Fed. Reg. 53684; they became effective on September 30, 2013, the day before Sorenson filed its motion. *See Order* ¶¶168, 171. Thus, Sorenson actually is not seeking a stay but preliminary injunctive relief from the Court, directing the Commission to turn back the clock. A request for an injunction is subject to an even more exacting standard than the standard applicable to stay requests that merely seek to preserve the status quo. *Graddick v. Newman*, 453

(footnote continued on following page)

A. Sorenson Has Failed To Show That It Is Likely To Prevail On The Merits.

Section 225 of the Communications Act, enacted as part of the ADA, directs the Commission to ensure that TRS is available "to the extent possible and in the most efficient manner" to hearing and speech impaired persons in the United States. 47 U.S.C. § 225(b)(1). Congress has thus expressly delegated to the FCC authority to administer Section 225, and under *Chevron* the FCC has the authority to fill the statutory gap provided by Section 225's ambiguous terms so long as its interpretation is based on a permissible construction of the statute. *Sorenson Communications*, 659 F.3d at 1042, *citing Chevron U.S.A. v. NRDC*, 467 U.S. 837, 843 (1984); *see also City of Arlington Texas v. FCC*, 133 S.Ct. 1863, 1868-73 (2013).

As the Commission has explained, the statute thereby authorizes the agency to "take steps to ensure that federal funding for usage of a particular relay service is limited to users that genuinely need that funded relay service, and preclude federal funding for users that do not have such a need – whether because they can use ordinary voice telephone service or because an alternative (such as amplification) would meet their needs." *Order* ¶14 (footnote omitted). The $75 minimum payment and the default captions-off requirements adopted as part of the permanent IP CTS rules are reasonable means for the Commission to implement its delegated authority under the highly general language of Section 225, as explained in *Chevron* and *Brand X*, to ensure that TRS funds are directed to those persons who

---

(footnote continued from preceding page)

U.S. 928, 936-37 (1981) (Powell, J., in chambers); *see also Adams v. Vance*, 570 F.2d 950, 956 (D.C. Cir. 1977)

are eligible to receive the service.

1. The $75 Requirement. Sorenson claims that there is not "a shred of real evidence demonstrating a causal connection between low-cost equipment and improper IP CTS use." Mot. 12. That is not correct. As one commenter observed, "'there is no better indication that a user legitimately needs the service than a user's decision to pay his or her own money for the specialized equipment needed to use the service.'" *Order* ¶36 (citing other comments). Moreover, it was entirely rational for the Commission to conclude that the ease and convenience of using IP CTS equipment increased the likelihood that individuals who do not need the service would nevertheless obtain the equipment and use the service if the equipment were to be distributed free of charge or at a low cost. *See Order* ¶¶42-43; *see also General Instrument Corp. v. FCC*, 213 F.3d 724, 735 (D.C. Cir. 2000) (affirming agency where its interpretation of ambiguous statutory terms was "well-grounded in common sense.").[5] Sorenson does not claim, however, that the record negated such a causal connection. Thus, at a minimum, the $75 requirement involves precisely the sort of predictive judgment that is committed to the Commission's discretion where the record does not provide a definitive answer. *In re Core Communications, Inc.*, 455 F.3d 267, 282 (D.C. Cir. 2006). *See generally FCC v. NCCB*, 436 U.S. 775, 814 (1978).

---

[5] The Commission pointed out that the $75 amount was roughly comparable to the price of specialty amplified telephones and significantly less than the price of the type of telephone sets distributed by IP CTS providers, the list price of which ranged from $149 to $595. *Order* ¶51 & n. 156.

Sorenson contends that the $75 requirement is impermissible under the ADA because "'the ADA generally prohibits covered entities from charging an individual with a disability for an accommodation.'" Mot. 12.[6] However, requiring consumers with disabilities to purchase their own telephone equipment is not a surcharge – it is simply a requirement that providers may not give away telephone equipment to these consumers which other consumers must purchase. In other words, it is simply a limit on the *subsidy* given to some consumers in order to ensure that, as Congress required, the TRS Fund be administered "efficient[ly]" and not in a manner that causes ratepayers to foot the bill for ineligible users. In any event, Section 225 does not guarantee free telephone equipment funded by the TRS Fund. Thus, for example, Section 225 has never guaranteed that deaf or hard of hearing consumers be provided with free text telephones (TTYs) in order to use the oldest form of TRS – the TTY Relay Service.[7]

Nor does the principle of functional equivalence require that the Commis-

---

[6] Sorenson relies extensively on a declaration by Professor Samuel Bagenstos that is attached to the motion. We note that this document is not part of the record and that the FCC has had no practical opportunity to respond to the legal arguments contained in this declaration because it was first submitted to the agency as an attachment to Sorenson's motion for administrative stay that was filed with the Commission on September 23, 2013. Moreover, the declaration is composed entirely of legal arguments, and we question the permissibility of supplementing a motion that is already at the page limits with an additional 12 pages of legal arguments in the form of a declaration. F.R.A.P. Rule 18 appears to contemplate that sworn submissions accompanying a stay motion should be limited to "sworn statements supporting facts subject to dispute."

[7] *See* http://www.fcc.gov/guides/711-telecommunications-relay-service.

sion permit the provision of free equipment, or otherwise override section 225's instruction to the agency to provide TRS "in the most efficient manner." 47 U.S.C. 225(b)(1). The Commission has thus consistently "distinguished between the provision of relay service, which is explicitly mandated by section 225, and the provision of equipment, which is not." *Order* ¶56.[8]

Sorenson also complains that the Commission did not adequately explain why the company's alternative proposal to allow individuals whose need was independently certified and who showed that they had a hearing aid or cochlear implant to receive free IP CTS phones would not "better confirm need than a $75 payment." Mot. 2, 13. But the Commission explained that its experience with requiring certification under the interim rules suggested that it may not be an adequate mechanism for identifying consumers who need IP CTS. *Order* ¶44. The Commission noted, for example, that there was no specific established eligi-

---

[8] The motion points to several cases relating to fees charged for priority parking placards to support its position. *See Klingler v. Director, Dept. of Revenue*, 433 F.3d. 1078 (8th Cir. 2006); *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999). First, those cases involve Titles II and III of the ADA, not Title IV, which adopted Section 225 of the Communications Act. The "functionally equivalent" and "efficient manner" standards contained in the language of Section 225 are not present in those other provisions of the ADA. Additionally, the analysis in the cases cited by Sorenson turned on whether the charge "constitutes a charge that nondisabled people would not incur." *Dare*, 191 F.3d at 1171. In the IP CTS context, hearing telephone users purchase their own equipment; hence, prohibiting providers from giving away IP CTS equipment does not expose people with disabilities to a charge that nondisabled people would not or do not incur. The Court in *Dare* specifically noted that "[i]f nondisabled people pay the same fee for an equivalent service, the charge to disabled people would not constitute a surcharge on a 'required' measure." *Id.*

bility threshold for whether a person with a hearing loss needs IP CTS for functionally equivalent communications, thus making it difficult for third-party professionals to exercise their judgment and for the Commission to effectively oversee the performance of this "gatekeeping function." *Order* ¶45. In addition, the Commission's experience led it to be skeptical about the reliability and independence of the many third party professionals who would be providing such certifications. *See id.* ¶47 (citing instances in which "sessions have been arranged by a provider, to which consumers were invited to obtain a free hearing analysis and a free IP CTS phone at the same time and location"). *See also id*. nn.149, 150. Cases cited by Sorenson involving other provisions of the ADA did not involve circumstances where federally funded entities such as IP CTS providers have an incentive to promote unreliable certifications.

The Commission also acknowledged that "the fact that a consumer has a hearing aid or a cochlear implant certainly makes it more likely that he or she may need IP CTS," but it explained that such a requirement would not "ensure" that any particular consumer would need IP CTS, and that in any event the proposal to substitute this criterion for the $75 minimum payment did not address the agency's "concerns about abuse of the certification process." *Order* n.151.

Under settled administrative law principles, the FCC "need not demonstrate that it has made the *only* acceptable decision, but rather that it has based its decision on a reasoned analysis supported by the evidence before the Commission." *Association of Public-Safety Communications Officials-Int'l, Inc. v. FCC*, 76 F.3d

395, 398 (D.C. Cir. 1996). That a petitioner might have chosen another policy if it had been the decision maker does not provide a basis to reject the agency's choice. *National Tank Truck Carriers, Inc. v. EPA*, 907 F.2d 177, 183 (D.C. Cir. 1990).

2. The Captions-Off Default. The FCC's decision to adopt the default captions-off requirement as a permanent rule was likewise based on the common sense conclusion that a phone that is set to default to captions-on facilitates misuse and that the captions-off default, which simply requires the push of a button to activate the captioning function, is a minimal burden, if a burden at all, to most users. "[I]t stands to reason," the Commission stated, "that an unregistered individual who makes casual use of an IP CTS telephone is likely to ignore the presence of captions, or to forget, or to be unable or unmotivated – or unaware of the option – to turn them off." *Order* ¶97. As to those users who may have physical or mental handicaps and for whom such a requirement would be a burden, the Commission provided a procedure to obtain an exemption. See *id*. ¶99.

The Commission's decision that a captions-on default poses an unacceptable risk of abuse falls easily within the agency's discretion in determining what rules are necessary to ensure that IP CTS service is available "to the extent possible and in the most efficient manner …." 47 U.S.C. § 225(b)(1). As noted above, and contrary to Sorenson's argument (Mot. 17), these are the sort of predictive judgments that are committed to the Commission's discretion where the record does not provide a definitive answer. *See In re Core Communications, Inc.*, 455 F.3d at

282.[9]

Sorenson also contends that the default captions-off rule violates the "functional equivalence" requirement of Section 225 because it fails to "'provide access in a manner that is as convenient and easily manageable as the manner in which nondisabled individuals receive access." Mot. 15. But Section 225 defines TRS to mean services that provide the ability for the speech or hearing-impaired to communicate "in a manner that is functionally equivalent" to that of a hearing individual without a speech impairment. 47 U.S.C. 225(a)(3). In providing for functional equivalence, the statute does not require that covered services (much less associated equipment) be identical. *See Ad Hoc Telecommunications Users Comm. v. FCC*, 680 F.2d 790, 797 (D.C. Cir. 1982). Here, the Commission reasonably found that the requirement "to push one additional button when dialing or when receiving a call … will not interfere with the functional equivalence of the IP CTS experience for most consumers." *Order* ¶98. That is an appropriate judgment that is within the authority Congress delegated to the Commission under Section 225.[10]

---

[9] Sorenson states that even when consumers remember to activate captions, "they may miss the beginnings of calls – where crucial information is conveyed." Mot. 15. But if the consumer remembers to activate captions before picking up the handset, there is no additional delay in receiving captions. *Order* ¶98 n. 315.

[10] It should be noted that IP CTS is not the only type of captioned telephone service. Consumers also have available to them traditional captioned telephone service (CTS), which was authorized by the FCC as a form of TRS in 2003, prior to the development of IP CTS. *Telecommunications Relay Services*, 18 FCC Rcd 16121 (2003). Hard of hearing individuals need only standard telephone service to use CTS. CTS is not subject to the rules adopted in the *Order* on review here,

(footnote continued on following page)

B. Sorenson Has Failed To Demonstrate That It Will Suffer Irreparable Injury Absent A Stay.

"The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974)). To obtain the extraordinary relief it seeks, Sorenson therefore must demonstrate that the irreparable injury it alleges is "both certain and great," "actual and not theoretical." *Id.* In other words, petitioners must provide "proof indicating that the [alleged] harm is certain to occur in the near future," *id.*, if the rules about which it complains remain in effect pending judicial review. It has not done so here.

Sorenson's one-paragraph discussion of irreparable injury relies on a declaration of CaptionCall CEO Pat Nola that "CaptionCall has already suffered severe losses … [and that the] unlawful requirements in the *Order* will cause further losses …." Mot. 19. These claims are highly misleading. The declaration relies on claimed revenue losses for a period during which Sorenson had specifically chosen *not* to comply with the interim default-off rules, and the Commission had denied its request for waiver – thus virtually none of the IP CTS usage on devices used by its subscribers was eligible for compensation. *See* Nola Decl. ¶¶12-13; *see also* n.2 above. As a result, Sorenson's claimed revenue losses if a stay is not

---

(footnote continued from preceding page)

including the $75 requirement and the default captions-off requirement. In addition, many state TRS programs provide TRS equipment, including both CTS and IP CTS devices, free of charge to low-income individuals with hearing loss, which is consistent with the Commission's $75 requirement. *See Order* ¶144.

granted are based on the consequences it faced as a result of its *failure* to comply with the interim default-off rule. It has not shown that it would face similar losses if the rule is not stayed pending judicial review. In that case, assuming it complies with the default-off rule, Sorenson would receive compensation from the TRS Fund for its subscribers' usage, unlike its experience during the period the interim rules were in effect where it, unlike all other IP CTS providers, *did not* comply with the default-off rules for several months, and it was denied compensation for usage of those devices during that period.

There is no basis in the Nola declaration or the motion to conclude that Sorenson will suffer any cognizable revenue losses pending judicial review *if* it complies with the default-off rule. It similarly is not possible to conclude on the basis of the Nola declaration that the $75 minimum payment rule led to the reduction in new subscribers or reduced usage by existing subscribers that it claims to have faced after the adoption of the interim rules. Moreover, there is no evidence in the record of this proceeding that individuals who need IP CTS have been dissuaded from obtaining it because of this one-time charge for equipment to use a service that is otherwise free to them.

C. A Stay Would Not Be In The Public Interest.

The FCC has a responsibility, imposed by Section 225 of the Communications Act, to "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." 47 U.S.C.

§ 225(b)(1). With compensation to providers of all TRS services now approaching $800 million annually, and with IP CTS accounting for more than $140 million of that total, ensuring to the extent possible that the TRS fund supports services for eligible individuals who in fact need such assistance is a substantial public interest. The two rules challenged here by Sorenson protect the TRS Fund and ensure its availability to hard of hearing individuals by imposing minimal obligations. Notably, none of the other IP CTS providers supported Sorenson's complete opposition to these rules, and those other providers have not complained of an inability to comply with them.

It is well established that courts should afford substantial deference to the FCC's judgments on what is in the public interest in such circumstances because "'the responsibilities for assessing the wisdom of ... policy choices and resolving the struggle between competing views of the public interest are not judicial ones, and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated.'" *AT&T Corp. v. FCC*, 220 F.3d 607, 621 (D.C. Cir. 2000), *quoting FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

CONCLUSION

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

Respectfully submitted,

Sean A. Lev
General Counsel

Jacob M. Lewis
Associate General Counsel

/s/ C. Grey Pash, Jr.

C. Grey Pash, Jr.
Counsel

Federal Communications Commission
Washington, D. C. 20554
(202) 418-1740

November 1, 2013

13-1246

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

SORENSON COMMUNICATIONS, INC., *ET AL.*,
PETITIONERS

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, RESPONDENTS.

CERTIFICATE OF SERVICE

I, C. Grey Pash, Jr., hereby certify that on November 1, 2013, I electronically filed the foregoing Opposition to Motion for Stay Pending Judicial Review 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.

Christopher J. Wright
Timothy J. Simeone
John T. Nakahata
Wiltshire & Grannis LLP
1200 Eighteenth Street, N.W.
12th Floor
Washington, D.C. 20036
Counsel for: Sorenson Communications, Inc. and CaptionCall, LLC

Finnuala K. Tessier
Robert B. Nicholson
U.S. Department of Justice
Antitrust Div., Appellate Section
950 Pennsylvania Avenue, N.W.
Room 3224
Washington, D.C. 2030
Counsel for: USA

/s/ C. Grey Pash, Jr.