

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

Oral Argument Not Yet Scheduled

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

—————
Nos. 13-1122, 13-1246
—————

SORENSEN COMMUNICATIONS, INC., *ET AL.*,

PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

AND

THE UNITED STATES OF AMERICA,

RESPONDENTS

—————
ON PETITIONS FOR REVIEW OF ORDERS OF
THE FEDERAL COMMUNICATIONS COMMISSION
—————

JONATHAN B. SALLET
ACTING GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

C. GREY PASH, JR.
COUNSEL

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

STATEMENT OF PARTIES, RULINGS AND RELATED CASES

1. Parties

All parties appearing in this Court are listed in petitioners' brief.

2. Rulings Under Review

Misuse Of Internet Protocol (IP) Captioned Telephone Service, 28 FCC Rcd 703 (2013) (JA ____); *Misuse Of Internet Protocol (IP) Captioned Telephone Service*, 28 FCC Rcd 13420 (2013) (JA ____).

3. Related Cases

The agency order on review in No. 13-1122 has previously been before this Court on a motion for summary reversal, which was denied in an Order of October 16, 2013. The agency order on review in No. 13-1246 has previously been before this Court on a motion for stay, which was granted in part and denied in part in an Order of December 6, 2013. We are not aware of any related case pending before this Court or any other court.

TABLE OF CONTENTS

Statement Of The Issues Presented For Review	1
Jurisdiction	2
Statutes and Regulations	3
Counterstatement Of The Case	3
A. Introduction	3
B. The Regulatory Setting	6
C. The Interim Order And NPRM.....	8
D. The Order Adopting Final IP CTS Rules	15
Summary of Argument.....	19
Standard Of Review	22
Argument.....	23
I. The FCC Properly Relied On The APA’s Good Cause Exception To Adopt Interim Rules Without Notice And Comment.	23
II. The Rules Sorenson Challenges Reasonably Deter The Provision Of IP CTS To Persons Who Are Not Deaf Or Hearing-Impaired.	30
A. The Default Captions-Off Rule	31
B. The \$75 Minimum Payment Rule.....	34
C. The IP CTS Marketing Rules Do Not Violate the First Amendment.	43
Conclusion	45
Certificate of Compliance	
Statutes and Regulations	

TABLE OF AUTHORITIES

Cases

<i>Achernar Broadcasting Co. v. FCC</i> , 62 F.3d 1441 (D.C. Cir. 1995).....	22
<i>Ad Hoc Telecommunications Users Comm. v. FCC</i> , 680 F.2d 790 (D.C. Cir. 1982).....	33
* <i>American Fed. of Gov’t Employees v. Block</i> , 655 F.2d 1153 (D.C. Cir. 1981).....	24, 25
<i>Association of Public-Safety Communications Officials-Int’l, Inc. v. FCC</i> , 76 F.3d 395 (D.C. Cir. 1996).....	42
<i>Cablevision Systems Corp. v. FCC</i> , 597 F.3d 1306 (D.C. Cir. 2010).....	43
<i>Cablevision Systems Corp. v. FCC</i> , 649 F.3d 695 (D.C. Cir. 2011).....	22
<i>Cellco Partnership v. FCC</i> , 357 F.3d 88 (D.C. Cir. 2004).....	22
<i>Central Hudson Gas & Elec. v. Public Service Comm’n</i> , 447 U.S. 557 (1980).....	44
<i>Chamber of Commerce of the U.S. v. SEC</i> , 443 F.3d 890 (D.C. Cir. 2006).....	14
* <i>Chevron USA, Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984).....	22, 23
<i>City of Los Angeles v. United States Dept. of Transp.</i> , 165 F.3d 972 (D.C. Cir. 1999).....	22
<i>Dare v. California</i> , 191 F.3d 1167 (9 th Cir. 1999).....	38, 39
<i>FCC v. National Citizens Comm. for Broadcasting</i> , 436 U.S. 775 (1978).....	32
<i>General Instrument Corp. v. FCC</i> , 213 F.3d 724 (D.C. Cir. 2000).....	35
* <i>In re Core Communications, Inc.</i> , 455 F.3d 267 (D.C. Cir. 2006).....	32, 36
<i>Klingler v. Director, Dept. of Revenue</i> , 433 F.3d 1078 (8 th Cir. 2006).....	38
<i>Mack Trucks, Inc. v. EPA</i> , 682 F.3d 87 (D.C. Cir. 2012).....	24, 26
<i>Mainstream Marketing Services v. FCC</i> , 358 F.3d 1228 (10 th Cir.), <i>cert. denied</i> , 543 U.S. 812 (2004).....	44

<i>National Cable & Tel. Ass'n v. FCC</i> , 567 F.3d 659 (D.C. Cir. 2009)	23
<i>National Tank Truck Carriers, Inc. v. EPA</i> , 907 F.2d 177 (D.C. Cir. 1990)	43
<i>Rural Cellular Ass'n v. FCC</i> , 588 F.3d 1095 (D.C. Cir. 2009).....	26
* <i>Sorenson Communications, Inc. v. FCC</i> , 659 F.3d 1035 (10th Cir. 2011)..	7, 23, 37
* <i>United States Steel Corp. v. EPA</i> , 595 F.2d 207 (5th Cir. 1979)	26
<i>Utility Solid Waste Activities Group v. EPA</i> , 236 F.3d 749 (D.C. Cir. 2001)	24
* <i>Verizon v. FCC</i> , 2014WL113946 (D.C. Cir., Jan. 15, 2014)	32

Statutes

5 U.S.C. § 553(b)	23, 24
5 U.S.C. § 553(b)(3)(B)	13, 23
5 U.S.C. § 553(c)	23
5 U.S.C. § 706(2)(A).....	22
28 U.S.C. § 2342(1)	2
28 U.S.C. § 2344.....	2
31 U.S.C. § 1341(a)(1)(A)	10
* 47 U.S.C. § 225	3, 6, 7, 19
47 U.S.C. § 225(a)(3).....	24, 32
47 U.S.C. § 225(b)(1).....	24, 32, 33
47 U.S.C. § 225(d)(3).....	7
47 U.S.C. § 402(a)	2
47 U.S.C. § 610.....	42
Pub. L. No. 101-336, § 401, 104 Stat. 327 (1990).....	6

Regulations

47 C.F.R. § 1.3	19
47 C.F.R. § 1.4(b)(1).....	2
47 C.F.R. § 20.19	42
47 C.F.R. § 64.601(a)(16).....	8

47 C.F.R. § 64.604(c)(5).....	7
47 C.F.R. § 64.604(c)(5)(iii)(B).....	28
47 C.F.R. § 64.604(c)(8).....	43
47 C.F.R. § 68.300.....	42
47 C.F.R. § 68.317.....	42
47 C.F.R. § 68.4.....	42

Administrative Decisions

<i>In the Matter of Telecommunications Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities Internet-Based Captioned Tel. Serv.,</i> 22 F.C.C. Rcd. 379 (2007).....	8
<i>Structure and Practices of the Video Relay Service Program,</i> 26 FCC Rcd 17367 (2011).....	29
<i>Structure and Practices of the Video Relay Service Program,</i> 28 FCC Rcd 8618 (June 10, 2013).....	29
<i>Telecommunications Relay Services,</i> 18 FCC Rcd 16121 (2003).....	33
<i>Telecommunications Relay Services,</i> 19 FCC Rcd 2993 (CGB 2004).....	28
<i>Telecommunications Relay Services,</i> 21 FCC Rcd 8379 (2006).....	6
<i>Telecommunications Relay Services,</i> 23 FCC Rcd 1680 (CGB 2008).....	28
<i>Telecommunications Relay Services,</i> 28 FCC Rcd 9219 (CGB 2013).....	7

Other Authorities

FCC NEWS <i>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</i> (May 7, 2013).....	30
FCC NEWS <i>Sorenson to Pay \$15.75 Million to Settle FCC Investigation into Improper Billing of TRS Fund</i> (May 28, 2013).....	29
<i>Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate</i> (Rolka Loube Saltzer Assoc. May 1, 2013).....	7
<i>Interstate TRS Fund Payment Formula and Fund Size Estimate,</i> Rolka Loube Saltzer Associates (April 30, 2012).....	28
RLSA Monthly Interstate TRS Fund Status Reports.....	8

Strauss & Richardson, *Breaking Down the Telephone Barrier*, 64 TEMP. L. REV.
583 (1991).....7

* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

ADA	Americans With Disabilities Act
CA	Communications assistant
CTS	Captioned Telephone Service
IP CTS	Internet Protocol Captioned Telephone Service
NECA	National Exchange Carrier Association – Administrator of the Interstate TRS Fund prior to July 2011
RLSA	Rolka Loube Saltzer Associates – Administrator of the Interstate TRS Fund
TRS	Telecommunications Relay Service
VRS	Video Relay Service

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

Nos. 13-1122, 12-1246

SORENSEN COMMUNICATIONS, INC., *ET AL.*,

PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,

RESPONDENTS

ON PETITIONS FOR REVIEW OF AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The orders before the Court first adopted emergency interim rules – later followed by permanent rules – to deal with practices of companies that provide Internet Protocol Captioned Telephone Service (IP CTS) for deaf and hearing-impaired individuals. The interim and final rules were intended to help ensure that the costs of providing IP CTS is limited to the provision of service to the deaf and hearing-impaired in accordance with the governing statute.

The questions presented are:

1. Whether, in light of rapidly increasing costs to the fund that reimburses the provision of IP CTS, the FCC reasonably invoked the “good cause” exception of the APA to adopt temporary, interim IP CTS rules without first providing formal public notice and opportunity to comment.
2. Whether the FCC’s rule requiring that equipment have a default setting of captions-off reasonably deters the provision of IP CTS to persons who are not deaf or hearing impaired and do not need it.
3. Whether the FCC’s rule requiring providers to charge at least \$75 for equipment they distribute in order to be reimbursed for use of that equipment reasonably deters the provision of IP CTS to persons who are not deaf or hearing impaired and do not need it.

JURISDICTION

This Court has jurisdiction to review the FCC’s orders in this case pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). The order in No. 13-1122 was released on January 25, 2013. A summary of the order was published in the Federal Register on February 5, 2013. *See* 78 Fed.Reg. 8032. The order in No. 13-1246 was released on August 26, 2013. A summary of the order was published in the Federal Register on August 30, 2013. *See* 78 Fed.Reg. 40582. The petitions for review were filed within 60 days of the applicable dates, as required by 28 U.S.C. § 2344 and 47 C.F.R. § 1.4(b)(1). The cases were consolidated by a December 6, 2013 order of the Court.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Statutory Appendix to this brief.

COUNTERSTATEMENT OF THE CASE

A. 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). IP CTS provides persons who are deaf or hard of hearing with specialized phones that have added features allowing users 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, established pursuant to Section 225 of the Communications Act, 47 U.S.C. § 225.

In an order issued in January 2013, the Commission found that the demands for payment from IP CTS providers seeking compensation from the TRS Fund substantially exceeded – by 38% – the amount that the TRS Fund Administrator had budgeted to that point for such payments during the 2012-13 fund year. The

FCC determined that this dramatic increase in financial demands on the TRS Fund threatened its very survival. Failure to take immediate action, the agency explained, “puts 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 fiscal law. *Misuse Of Internet Protocol (IP) Captioned Telephone Service*, 28 FCC Rcd 703, 706-07 ¶¶ 6-7 (2013) (“*Interim Order*”) (JA ____).

The Commission observed that the sudden spike in IP CTS usage was likely attributable to practices by IP CTS providers that were encouraging use of IP CTS by persons who may not need it. For instance, petitioner CaptionCall, a wholly owned subsidiary of petitioner Sorenson, was paying audiologists (and others) for referrals, even though such an arrangement 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, for example, by persons without hearing disabilities who live in the same household as legitimate users of IP CTS or by guests.

In light of the impact of these questionable practices on the sustainability of the TRS Fund, the Commission adopted interim rules to restrict them. The interim rules were adopted in light of “extensive input from interested parties,” including both oral and detailed written presentations from the petitioners and others. *Interim Order* ¶8 (JA ____). Given the exigent circumstances, however, the FCC concluded that providing for formal 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 forgo public comments in exceptional situations, where harm to important public interests is likely in the absence of prompt action. Along with the interim rules, the Commission adopted a Notice of Proposed Rulemaking commencing a notice-and-comment proceeding seeking permanent solutions to the problem. By their terms, the interim rules were set to expire on September 3, 2013.

In August 2013 the FCC, after receiving extensive additional comments, promulgated final rules establishing the eligibility of existing and new users of IP CTS. Of particular relevance here, the Commission made permanent its interim rule requiring that IP CTS equipment have a default setting of “captions-off.” Under that rule, 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 condition was a reasonable and prudent measure to reduce inadvertent misuse of the service by individuals who do not need it and that would at the same time help protect the financial viability of the Interstate TRS Fund.

Misuse Of Internet Protocol (IP) Captioned Telephone Service, 28 FCC Rcd 13420, 13465 ¶¶96-97 (2013) (“*Final Order*”) (JA ____).

In addition, the Commission adopted a rule prohibiting an IP CTS provider from receiving compensation from the TRS Fund for the use of IP CTS equipment provided to a customer for free or at a charge of less than \$75. (The interim rules

had allowed providers to offer free phones to users who supplied a certification of need for such service from a hearing care professional. *See Interim Order* ¶¶21-24 (JA ____). The Commission explained that the offering of such equipment – which is fully usable as a telephone by individuals with no hearing loss – for free or at sharply reduced costs has the potential for promoting use by individuals who do not need the service, thereby resulting in improper payments from the Fund. *Final Order*, ¶¶43-44 (JA ____).

B. THE REGULATORY SETTING

Telecommunications Relay Services (TRS), mandated by Title IV of the Americans with Disabilities Act of 1990 (ADA),¹ 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 its subsidiary CaptionCall. Those providers hire individuals who relay conversations between people who are hearing- or speech-impaired and those able to use standard telephones. *See generally Telecommunications Relay Services*, 21 FCC Rcd 8379, 8380-84 (2006); *Sorenson Communications, Inc. v. FCC*, 659 F.3d 1035,

¹ Pub. L. No. 101-336, § 401, 104 Stat. 327, 336-69 (1990), adding Section 225 to the Communications Act, 47 U.S.C. § 225.

1039-40 (10th Cir. 2011). Section 225 of the Communications Act, 47 U.S.C. § 225, codifies the TRS provisions of the ADA.²

Section 225 and its implementing regulations provide eligible TRS providers offering interstate TRS services and certain intrastate services compensation 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. *Interim Order* ¶5 (JA ____); 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. The current rate for IP CTS is \$1.7877 per minute. For the TRS Fund Year that extends from July 2013 – June 2014, the Commission projected

² See Strauss & Richardson, *Breaking Down the Telephone Barrier*, 64 TEMP. L. REV. 583, 584-88 (1991) (discussing history of telecommunications devices for the deaf).

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 Loubé Saltzer 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*, 28 FCC Rcd 9219 (CGB 2013) (*2013 TRS Rate Order*) .

that the TRS Fund would distribute a total of more than \$995 million for all types of TRS. With respect to IP CTS, the Commission projected, prior to adoption of the final IP CTS rules, that \$340 million would be distributed.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)(16). IP CTS does not rely solely on computer captioning, but relies in addition on human communications assistants (CAs) to accurately caption the hearing individual's speech.⁵

C. THE INTERIM ORDER AND NPRM

1. In the *Interim Order*, the FCC took limited temporary measures to address a sudden and swift increase in costs that threatened the viability of TRS

⁴ *2013 TRS Rate Order*, 28 FCC Rcd 9219, 9220 ¶4, 9227 ¶28 (2013). Through the first six months of the fund year, \$65 million has been distributed to IP CTS providers. *See* RLSA Monthly Interstate TRS Fund Status Reports, (available at <http://www.r-l-s-a.com/TRS/Reports.htm> (January 31, 2014)).

⁵ The CA repeats or “revoices” what the hearing party says, and computer voice recognition technology automatically transcribes the CA's voice into text, which is then transmitted directly to the user and displayed on the IP CTS telephone. As a result, the captions appear at nearly the same time as the called party's spoken words. In performing this function, the CA does not participate in the call; there is no interaction with the CA by either party to the call. *In the Matter of Telecommunications Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities Internet-Based Captioned Tel. Serv.*, 22 F.C.C. Rcd. 379, 383 (2007)

service to millions of Americans with hearing loss. Specifically, the FCC adopted immediate 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.” *Misuse of Internet Protocol (IP) Captioned Telephone Service*, 28 FCC Rcd 703 ¶1 (2013) (*Interim Order*) (JA ____). 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 (JA ____).

In adopting the interim rules, 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. *Interim Order* ¶6 (JA ____). 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 three prior years.” *Id.* ¶7 (JA ____). And it explained 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. ¶6 (JA ____).

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 (JA ____).⁶

2. As the Commission’s intention to address this problem became apparent, 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.” *Interim Order* ¶8 & n.21 (JA ____) (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).

In January 2013, the Commission announced the adoption of interim measures directly addressed at the “questionable practices” it believed were largely responsible for the recent spike in IP CTS usage. *See Interim Order* ¶8 (JA ____). *First*, the rules prohibited all rewards programs or other forms of financial or other

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).

inducements that encourage individuals to subscribe to or use IP CTS. The 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 Interim Order* ¶¶13-18 (JA ____). 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 (JA ____).

Second, the rules 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. The Commission observed that, unlike other forms of TRS, the "unusual ease and convenience" in using IP CTS equipment make it more likely that consumers who do not need the service will nevertheless use the service and thus impose liabilities on the Fund. *Interim Order* ¶20 (JA ____). 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 made available IP CTS equipment to new users for free or for less than \$75, the providers were required to obtain from the user a certification from an independent, third-party professional attesting to the user's need for IP CTS service. This provision was intended to minimize the possibility that individuals who do not need the service, but who were attracted by the prospect of a free or low-cost telephone, would subscribe to it. *Id.* ¶22 (JA ____).

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 was intended to reduce the possibility that other household members or visitors who do not have a hearing loss would use a phone's IP CTS capability if it is automatically activated and thereby impose unnecessary costs on the TRS Fund. *Id.* ¶33 (JA ____). 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 (JA ____). 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 (JA ____).

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

Interim Order ¶11 (JA ____). 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 by waiting 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 rule-

making process is pending.” *Id.* ¶8 (JA ____), 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 rules adopted in the *Interim Order* were set to expire on September 3, 2013.

At the same time the Commission adopted the interim rules, it adopted a Notice of Proposed Rule Making seeking comment on whether to make the interim rules permanent as well as alternatives to those rules. *See Interim Order* ¶¶38-55 (JA ____).⁷

⁷ The Commission recognized that some IP CTS providers might be unable to comply fully with the default captions-off rule by the deadline and provided for waivers in those circumstances. *Interim Order* ¶35 (JA ____). Each of the four interstate IP CTS providers applied for a waiver. The FCC’s staff subsequently granted limited waivers to three of the applicants, finding that the requests 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. *Misuse of Internet Protocol (IP) Captioned Telephone Service*, 28 FCC Rcd 6454 ¶¶6-18 (CGB 2013) (“*Waiver Order*”) (JA ____). The *Waiver Order* denied Sorenson/CaptionCall’s request, explaining that unlike the other waiver applicants, 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 (JA ____).

D. THE ORDER ADOPTING FINAL IP CTS RULES

In the second 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*, 28 FCC Rcd 13420 (2013) (“*Final Order*”) (JA ____). (Some of the interim rules expired when they were replaced by the final rules. But because some of the final rules were required to be approved by the Office of Management and Budget, the relevant interim rules were continued in effect until that approval is obtained.)⁸

The Commission made 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 by individuals who do not need it. *Final Order* ¶96 (JA ____); see 47 C.F.R. § 64.604(c)(10). 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 (JA ____). In addition, the Commission reasoned that some IP CTS users may need captions in some circumstances, but not others. Thus “defaulting captions to ‘on’

⁸ See *Interim Order* ¶¶70, 71 (JA ____); 78 FED. REG. 14701 (Mar. 7, 2013); *Final Order* ¶¶163-173 (JA ____).

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.* In adopting the requirement, the Commission noted that some state TRS programs already mandated that equipment distributed pursuant to their state programs be provided with a captions-off default. *Id.* ¶92 (JA ____).

The Commission recognized that individuals with cognitive or physical disabilities may have difficulty even with the minimal requirement that they push a 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. *Final Order* ¶99 (JA ____); 47 C.F.R. 64.604(c)(10)(iv).

The Commission also adopted a rule prohibiting compensation of providers for services provided by means of equipment they distribute for free or for less than \$75. It concluded that “the provision of free or minimally priced equipment increases the likelihood that IP CTS will be provided to ineligible users.” *Final Order* ¶42 (JA ____); 47 C.F.R. 64.604(c)(11). 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 conversa-

tion 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.*

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 sufficient degree of hearing loss to require this service to understand conversation over the phone.” *Final Order* ¶42 (JA ____). 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.” *Final Order* ¶43 (JA ____).

Most other IP CTS providers, with the exception of Sorenson, supported this position. *See id.* ¶36 (JA ____).

The final rule eliminated the interim rule’s provision that permitted distribution of free phones to users who provided certification of need for the service from an independent professional. The Commission concluded that in its experience such an approach “may not be very effective in achieving adequate screening” for a variety of reasons. *Final Order* ¶44 (JA ____). It noted, for example, that there was no “specific numeric eligibility threshold for whether a hearing-impaired individual does or does not need IP CTS” making it difficult “for the Commission to effectively oversee the performance of this important gatekeeping function” *Id.* Moreover, the Commission pointed to numerous “additional issues with the professional certification process that have surfaced under our interim rules” that led it to conclude that “the better course of action” was simply to prohibit compensation of any IP CTS device that is given out by providers for free or for less than \$75. *Id.* ¶¶48-49; *see also* nn. 145-151 (JA ____).

The Commission concluded that setting \$75 as the minimum price threshold “represents a reasonable balancing of interests,” finding that the number “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.” *Final Order* ¶51 (JA ____).⁹

Sorenson moved for summary reversal of the *Interim Order*, arguing that summary reversal was warranted because the Commission failed to provide formal public notice and an opportunity to comment before it adopted the interim rules. In an order of October 16, 2013, the Court denied the motion. Sorenson also sought a stay of the *Final Order* pending judicial review. In an order of December 6, 2013, the Court granted a stay with respect to the rule adopted in the *Final Order* prohibiting compensation of IP CTS providers for minutes of use generated by IP CTS equipment users receive from providers for less than \$75. The Court denied the stay motion as to the rest of the *Final Order*.

SUMMARY OF ARGUMENT

Section 225 instructs that telephone service should be made available to “hearing-impaired ... individuals ... to the extent possible and in the most efficient manner.” 47 U.S.C. § 225. The interim and final rules at issue here addressed the FCC’s concerns that in the case of IP CTS, providers like Sorenson, through its subsidiary Caption-Call, were engaged in practices that increased the likelihood that individuals who do not need IP CTS were nevertheless using it. These prac-

⁹ In the rulemaking notice accompanying the *Final 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. *Final Order* ¶144 (JA ____). Until that issue is resolved, a waiver of the requirement can be sought in appropriate cases. *See* 47 C.F.R. § 1.3.

tices, in the Commission's judgment, were leading to excessive costs that ultimately are borne by all users of telephone service who pay into the Interstate TRS Fund that supports IP CTS and other telecommunication relay services.

The Commission adopted rules on an interim basis in order to address skyrocketing costs that posed a danger to the solvency of the Interstate TRS Fund. The APA specifically provides that where notice and comment is "impracticable, unnecessary, or contrary to the public interest," there is good cause for dispensing with the requirement. The Commission explained why it believed there was a need to act quickly to protect the integrity of the Interstate TRS Fund, and its judgment about the need for swift action should be given weight in these circumstances. The "good cause" exception to notice and comment is a "safety valve" to address emergency situations. This was such a situation, and the agency's action was entirely proper.

The Commission's final rules, which impose minimal burdens on IP CTS users, are entirely reasonable. The default captions-off rule simply requires a user to press one button to turn on the captioning function of an IP CTS telephone in order to deter inadvertent use by persons who do not need – and are therefore not entitled to – IP CTS service. That IP CTS is generally required by statute to be "functionally equivalent" to the telecommunications services available to the hearing population does not divest the Commission of the power to take reasonable steps to ensure that IP CTS is provided only to those individuals who actually need

the service. The requirement that a user press a button to activate captioning is just such a reasonable condition.

The FCC's rule prohibiting compensation for minutes of service used on IP CTS telephones that providers give to customers for less than \$75 is a similarly reasonable protection against abuse of the Interstate TRS Fund. IP CTS telephones can be used by hearing individuals without any inconvenience, as well as by individuals whose hearing loss can be effectively addressed by other devices like hearing aids that do not impose costs on the TRS Fund. The Commission properly concluded that setting the threshold at \$75 represented a reasonable balancing of interests that was high enough to deter consumers from purchasing a phone that he or she does not need but not so high as to make purchase of the equipment overly burdensome for those who need it. Relying in part on its unsatisfactory experience with third-party certification, the Commission explained why it concluded that the \$75 requirement was a better tool for limiting unnecessary use of this service than such certifications or other options favored by Sorenson. That judgment was also entirely reasonable.

Sorenson contends in passing that rules the Commission adopted placing limitations on certain joint marketing practices employed by IP CTS providers, including joint marketing and referrals between them and hearing care professionals, violates the First Amendment. Sorenson's terse discussion of this point, and its failure to include any challenge to the marketing provisions among the list of

issues presented in its brief, should be deemed a waiver. In any event, the Commission adequately explained the basis for these rules, and that explanation easily complies with established First Amendment standards for regulation of commercial speech.

STANDARD OF REVIEW

The Court reviews FCC orders “under the deferential standard mandated by section 706 of the Administrative Procedure Act, which provides that a court must uphold the Commission’s decision unless it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Achernar Broadcasting Co. v. FCC*, 62 F.3d 1441, 1445 (D.C. Cir. 1995) (quoting 5 U.S.C. § 706(2)(A)).

“Under this ‘highly deferential’ standard of review, the court presumes the validity of agency action ... and must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment.” *Cellco Partnership v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004). In conducting this review, the Court does not sit as “a panel of referees on a professional economics journal,” but rather a “panel of generalist judges obliged to defer to a reasonable judgment by an agency acting pursuant to congressionally delegated authority.” *Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 717 (D.C. Cir. 2011), quoting *City of Los Angeles v. United States Dept. of Transp.*, 165 F.3d 972, 977 (D.C. Cir. 1999).

This case also concerns questions of statutory interpretation under the Communications Act. Judicial review of the Commission’s interpretation of that Act is

governed by *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, if “the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843. Unless the statute “unambiguously forecloses the agency’s interpretation,” a reviewing court must “defer to that interpretation so long as it is reasonable.” *National Cable & Tel. Ass’n v. FCC*, 567 F.3d 659, 663 (D.C. Cir. 2009); *see also Sorenson*, 659 F.3d at 1042 (deferring to FCC’s interpretation of § 225).

ARGUMENT

I. 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. § 553(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 FCC fully explained in the *Interim Order* the need to act quickly (without incurring the delay entailed by full public notice and comment) to put in place interim IP CTS rules in order to respond to a fast-developing problem. The Commission detailed the dire situation it faced as IP CTS providers’ 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. *Interim Order* ¶¶ 6-8 (JA ____).

Such an outcome plainly would have been 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). As the Commission explained, it could also have triggered a violation of the Anti-Deficiency Act, *see Interim Order* ¶7 & n.20 (JA ____). 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. § 553(b), and is precisely the sort of emergency action that the APA’s express good cause 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.2d 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 [did not] involve[] an 'emergency.'" Br. 36. 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 behind this surge to be the questionable practices by providers that it believed were resulting in individuals using IP CTS who do not need it. The Commission sought to curtail those practices through the interim rules. *See Interim Order* ¶¶6-9 (JA ____).¹⁰

There is no suggestion in *Mack Trucks*, on which petitioners heavily rely, 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, *American Fed. of Gov.*

Employees, 655 F.2d at 1156, the exception remains "an important safety valve to

¹⁰ Sorenson contends that record evidence demonstrated that neither fraud nor misuse was a source of the growth of IP CTS and that the Commission would have discovered that if it had provided notice and received formal public comment prior to adopting the interim rules. *See* Br. 6, 17. However, the study it cites was noted and discussed by the Commission in the *Final Order*, which pointed out the study's limitations arising from the nature of the selection of respondents and the fact that they did not appear representative of IP CTS users. *See Final Order* n.311 (JA ____). Moreover, the Commission concluded that since the study indicated that most users who share their IP CTS phones with hearing persons never or only sometimes turn off captioning, the study "appears to support the need for a default-off rule." *Id.*; *see* RERC-TA Study at 17-18 (JA ____).

be used where delay would do 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.

The Commission also explained that following usual notice-and-comment procedures risked undermining the purpose of the TRS program by allowing unchecked expenditures by users who may not need IP CTS to overwhelm the Fund, thus depriving legitimate users of the program’s benefits. *Interim Order* ¶¶6-8 (JA ____). Petitioners suggest that *Mack Trucks* “limited” the exception to situations where providing for formal notice-and-comment procedures would “enable misconduct or allow evasion” of a rule. Br. 38. 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.” 682 F.3d at 95 (emphasis added).

The agency’s experience and expertise making these types of judgments – especially with respect to interim rules – is entitled to substantial weight. *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1105-06 (D.C. Cir. 2009); The rules’ requirements – intended to be in effect only for six months, while the agency undertook a full notice-and-comment rulemaking to find permanent solutions to

the problem – were balanced and focused 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 and leading to usage of IP CTS by individuals who do not need the service.

Petitioners suggest that the Commission had an easy alternative solution available: simply increase rates (or the “contribution factor” that every telecommunications and VoIP provider pays into the Fund). Br. 36-37. But the agency was under no obligation to continue to fund petitioners’ dubious practices, particularly when those practices were undermining the sustainability of the TRS Fund.

Nor is there any basis for petitioners’ supposition that what they describe as a “*de minimis* contribution factor increase” (Br. 36) would solve the problem the Commission identified. Petitioners assert that an increase from 1.053% to 1.085% would have sufficed to rehabilitate the TRS Fund. They cite no evidence, however, for the claim that at that time such an increase would have been sufficient to satisfy ever-increasing IP CTS claims. In any event, even that proposal would have raised the amount carriers – and ultimately all telephone users – would have to contribute to the Fund by nearly \$2,000,000 per month.¹¹ This is hardly “*de*

¹¹The TRS Fund administrator estimated in an April 30, 2012 report that the total revenues upon which the TRS Fund was 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 Saltzer Associates LLC at 3-4 (April 30, 2012). Increasing the contribution factor as proposed by
(footnote continued on following page)

minimis.” In any event, it was entirely reasonable for the agency to conclude that the public interest is better served by restricting on an interim basis the questionable practices that appeared to be at the root of the IP CTS funding problem than by increasing the burden on all telephone users to compensate IP CTS providers like petitioners that engage in those practices. The TRS Fund is not a blank check for IP CTS providers.

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)(5)(iii)(B). Petitioners correctly note (Br. 13) that on two past occasions the Commission has modified the contribution amount mid-year.¹² 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 *Interim Order* n. 30 (JA ____). The funding shortfall here, however, did not stem from matters beyond the control of service providers; it was, in fact, likely attributable to the providers’ own questionable business practices.

(footnote continued from preceding page)

petitioners would have increased carriers’ contribution to the Fund by an additional \$21.63 million annually based on those estimates, or nearly \$2 million per month.

¹² *See Interim Order* n.30 (JA ____), citing *Telecommunications Relay Services*, 23 FCC Rcd 1680 (CGB 2008); *Telecommunications Relay Services*, 19 FCC Rcd 2993 (CGB 2004).

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.” *Interim Order* ¶8 (JA ____). Indeed, the *Interim Order* repeatedly cites these communications, such as filings and presentations made to the Commission – many by petitioners here – pursuant to the agency’s *ex parte* rules. *See, e.g., Interim Order* ¶¶ 8, 16, 17, 22, 29-32, 34, nn.21, 33, 46, 47, 50, 56, 65, 66, 67, 74, 80-91, 101 (JA ____). To be sure, informal communications like these are not a substitute for formal notice-and-comment rulemaking in situations where (unlike here) the APA exception is inapplicable. However, the extent of the communications demonstrate that petitioners had ample opportunity to make their views known to the FCC before the interim rules were adopted; the FCC simply chose a different course from the one petitioners unsuccessfully urged.

The Commission has faced similar problems over the years in administering other programs supported by the TRS Fund.¹³ As a result of its experience, the

¹³ *See, e.g., Structure and Practices of the Video Relay Service Program*, 28 FCC Rcd 8618 ¶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)(available at fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-321216A1.pdf); 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)(available at fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-320774A1.pdf); *Structure and Practices of the Video Relay Service Program*, 26 FCC Rcd 17367, 17373 n.19 (footnote continued on following page)

agency has become sensitive to the need to address problems such as those it identified with respect to IP CTS promptly. Petitioners' claims that the FCC violated the APA fails to give due weight to the agency's hard-won experience. In short, in adopting the interim rules, the FCC properly invoked the APA's safety valve for the very type of emergency situation that provision was designed to address.

**II. THE RULES SORENSON CHALLENGES REASONABLY
DETER THE PROVISION OF IP CTS TO PERSONS WHO
ARE NOT DEAF OR HEARING-IMPAIRED.**

In Section 225, Congress directed the FCC to ensure that TRS be “available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.” Congress expressly delegated to the FCC the authority to “prescribe regulations to implement” Section 225, including regulations “establish[ing] functional requirements, guidelines, and operations procedures for [TRS],” as well as mandatory “minimum standards” governing the provision of TRS. 47 U.S.C. § 225(d)(1)(A), (B). In adopting the two rules challenged here, the Commission was acting to carry out those statutory responsibilities. As shown below, it acted reasonably and consistent with its statutory duties.

(footnote continued from preceding page)

(2011) (citing actions taken by the FCC Inspector General in collaboration with the U.S. Department of Justice).

A. The Default Captions-Off Rule

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 single on-screen or physical button to activate the captioning function, is a minimal burden to 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." *Final Order* ¶97 (JA ____).

Unlike other forms of TRS, IP CTS generally utilizes phones that look like normal telephones, and the service is capable of being used without any disruption of normal telephone use. *See Interim Order* ¶20; *Final Order* ¶42 (JA ____). A hearing person who needs to communicate with another hearing person would have difficulty using other forms of TRS, such as Video Relay Service (VRS), which requires knowledge of American Sign Language, but they would be capable of using an IP CTS capable phone. A hearing person can use the IP CTS phone to have a normal conversation without concern – or perhaps without even noticing – that captions were being displayed, even though the use of that phone would cost the TRS Fund – at the current rate – \$1.78 per minute. The same is true for a person who is hard of hearing who does not need IP CTS because their hearing

impairment can be fully addressed with hearing aids or telephones that provide specially enhanced amplification.

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). Contrary to Sorenson's argument (Br. 34), 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 Verizon v. FCC*, 2014WL113946 (D.C. Cir., Jan. 15, 2014) at *21; *In re Core Communications, Inc.*, 455 F.3d 267, 282 (D.C. Cir. 2006). *See generally FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978).¹⁴

Sorenson contends that the default captions-off rule violates the "functional equivalence" requirement of Section 225 because it requires "adjustments to their equipment" that are not required of hearing persons. Br. 46. 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

¹⁴ Sorenson states that even when consumers remember to activate captions, they may miss the beginnings of calls – where "crucial information" is conveyed. Br. 46. But if the consumer remembers to activate captions before picking up the handset, there is no additional delay in receiving captions. *Final Order* ¶198 n.315 (JA ____).

(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.” *Final Order* ¶98 (JA ____). That is an appropriate judgment that is within the authority Congress delegated to the Commission under Section 225.¹⁵

Sorenson’s primary complaint about the default-off rule appears to be that it impedes functional equivalency “for consumers who are predominantly elderly and often have serious physical and mental infirmities” or “users with disabilities such as ‘mild dementia’” who find “the extra step ... ‘too confusing’ to permit IP CTS usage at all.” Br. 46, 47. However, Sorenson ignores once again the clear language of the statute, which requires the FCC to “ensure that [TRS] 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) (empha-

¹⁵ 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 *Final Order* on review here, 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 does not violate the \$75 requirement. *See Final Order* ¶144 (JA ____).

sis added). The Commission was not insensitive to arguments raised by commenters concerning the needs of hearing-impaired individuals who have additional disabilities. It established explicit procedures for such individuals or their representatives to obtain an exception from the default-off rule. *See Final Order* ¶99 (JA ____). Sorenson asserts (Br. 48) that the certification required for users to qualify for that exception will be too difficult to obtain, although it contends that the Commission acted unreasonably when it failed to adopt the same type of certification in lieu of the \$75 minimum requirement. *See* Br. 43-44. However, there is no requirement in Section 225 that the agency adopt rules that make the TRS program, including IP CTS, available to address disabilities beyond hearing and speech.

B. The \$75 Minimum Payment Rule

Section 225 authorizes the FCC 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.” *Final Order* ¶14 (footnote omitted) (JA ____). Like the captions-off rule, the \$75 minimum payment requirement is a reasonable means of ensuring that TRS funds are directed to those persons who are eligible to receive the service.

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.” *Final Order* ¶36, *see also id.* ¶¶36-38 & nn. 118, 122 (citing comments by both providers and users supporting FCC limits on “giveaway programs”). Sorenson itself states (Br. 54) that “the Commission’s central concern should be identifying the disabled consumers who need IP CTS to use the telephone in a functionally equivalent manner to fully hearing persons.” 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 very low cost. *See Final Order* ¶¶42-43 (JA ____); *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.”).

As the Commission emphasized, “[p]aying at least \$75 for IP CTS equipment . . . provides a concrete indication that the consumer has thought the transaction through sufficiently to have concluded that she or he needs IP CTS for effective communication.” *Final Order* ¶43. “By establishing a threshold price level below which a provider may not directly or indirectly distribute its equipment,” the Commission sought to “increase the likelihood that individuals who might be equally or better served with other technologies available to persons with

hearing loss, such as enhanced amplification telephones, will not choose to sign up for IP CTS solely or primarily because they can obtain telephone equipment that is free or is priced significantly lower than other assistive technologies.” *Ibid.*

Like the default captions-off rule, 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. *Verizon v. FCC*, 2014WL113946 at *21; *In re Core Communications, Inc.*, 455 F.3d at 282.

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.” Br. 41. 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 deaf or hard of hearing persons when other consumers with the means to do so must purchase their own telephones. In other words, the prohibition against the provision of IP CTS telephones for free is a limit on a *subsidy* given for IP CTS services.

More importantly, the purpose of that limit, as we have explained, is to ensure that the TRS Fund be administered “in the most efficient manner,” and not in a manner that is likely to cause ratepayers to foot the bill for ineligible users. Thus, as with the caption-off requirement, the \$75 requirement is a tool of fiscal responsibility that applies the agency’s expertise to formulate a policy that will

best meet three intersecting goals: (1) ensuring that individuals who need the service have access to IP CTS, (2) ensuring that public monies are not spent where they do not directly advance that purpose, and (3) ensuring that the financial interests of private companies like Sorenson do not take precedence over the customers that they are supposed to serve. This balancing of competing interests contained in statutes like Section 225 is quintessentially the task of an expert agency, as the Tenth Circuit recently recognized in a related context. *Sorenson*, 659 F.3d at 1045 (“FCC has discretion to balance the objectives of § 225 when they conflict”).

Nor does Section 225 otherwise guarantee the provision of 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.¹⁶ And the Commission has consistently “distinguished between the provision of relay service, which is explicitly mandated by section 225, and the provision of equipment, which is not.” *Final Order* ¶56 (JA ____).

Sorenson’s claim (Br. 42) that the *Final Order* “explicitly justifies the required fee as a *disincentive* to using” IP CTS is incorrect. As the Commission explained, the purpose of the proscription against free or low cost distribution of IP CTS phones is to focus use of this government-funded program on those who are hard of hearing and have a need for the service. “[W]here consumers must make

¹⁶ See <http://www.fcc.gov/guides/711-telecommunications-relay-service>.

an investment in an IP CTS equipment purchase, they are far less likely to acquire such equipment if they do not need the service.” *Final Order* ¶43 (JA ____). The Commission added that the requirement increases the “likelihood that individuals who might be equally or better served with other technologies available to persons with hearing loss, such as enhanced amplification phones, will not choose to sign up for IP CTS solely or primarily because they can obtain telephone equipment that is free or is priced significantly lower than other assistive technologies.” *Id.* There was support in the record for this conclusion as well as for the determination that \$75 reflected a reasonable amount that “is high enough to deter a consumer from purchasing an item if he or she does not need it for communication, but no so high as to make the purchase of equipment overly burdensome.” *Id.* ¶51; *see also Interim Order* ¶22 (JA ____).¹⁷

Sorenson and amici point 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). But 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 “most efficient manner” standards contained in the language of Section

¹⁷ Commenters supported a restriction on providers distributing free or low cost IP CTS phones. *See* [Hamilton comments 5, Sprint comments 3, Miracom comments 12] JA _____. The record also supported the Commission’s decision to draw the line at \$75. *See Final Order* ¶51 nn. 154-57; *Interim Order* ¶22 (JA ____); [Hamilton comments 5; Miracom comments 12] JA _____.

225 are not present in those other provisions of the ADA that are not contained in the Communications Act, nor are those other section limited only to “hearing-impaired and speech-impaired individuals.” Additionally, the analysis in those cases 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.*

In this regard, the Commission pointed out that the \$75 amount was roughly comparable to the price of specialty amplified telephones and less than the price of the type of the sophisticated specialty telephone sets distributed by IP CTS providers (other than Sorenson who has provided them free), the list price of which ranged from \$149 to \$595. *Final Order* ¶51 & n. 156 (JA___). Thus, Sorenson’s comparison with the cheapest telephones available that it asserts can be purchased for \$10 (Br. 41) is unwarranted.¹⁸

¹⁸ Amicus HLAA’s attack on the \$75 minimum rule is puzzling since it generally supported such a rule before the agency. HLAA asserts that the “FCC has incorrectly claimed ... that ‘HLAA approves setting the price threshold at \$75,’” adding that “[n]owhere in HLAA’s filings with the agency did it approve of the \$75
(footnote continued on following page)

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. Br. 44. But the Commission explained that its experience with requiring certification under the interim rules led it to conclude that it is not an adequate mechanism for identifying consumers who need IP CTS. *Final Order* ¶44 (JA ____). The Commission noted, for example, that there was no specific established eligibility 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." *Id.* ¶45 (JA ____).

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 (JA ____) (citing instances in which "ses-

(footnote continued from preceding page)

figure." HLAA Br. 13, quoting *Final Order* ¶39 (JA ____). HLAA is, of course, free to change its mind about whether the \$75 minimum is appropriate, but the Commission accurately characterized the comments that were before it. HLAA had said clearly in its comments to the agency that "IP CTS equipment should not be distributed for free to all; instead only income eligible consumers should have access to free phones, others should have access to phones provided at a minimum cost of \$75." HLAA Comments at 4; *see also id.* at 7 (JA ____) ("If the Commission determines there is a need to set a *de minimus* [sic] cost for the phones, we suggest setting the '*de minimus* cost' at phones that cost less than \$75.").

sions have been arranged by a provider, to which consumers are 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 (JA ____).

Finally, the Commission emphasized that the availability of a phone provided at no charge – a singular focus of provider marketing materials – served to distort the certification process by encouraging consumers “to believe they are simply getting a free phone with great features,” rather than enrolling in a federal program limited to the hearing and speech-impaired. *Id.* ¶48. *See id.* at ¶46. Cases cited by Sorenson involving other provisions of the ADA (Br. 41-42) did not involve circumstances where federally funded entities such as IP CTS providers have an incentive to promote unreliable certifications that may lead to use of the service by individuals who do not need it.

The Commission 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. 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.” *Final Order* n.151 (JA ____).

A study funded by Sorenson and on which it relies (Br. 12) makes clear that many individuals with modern hearing aids or other assistive aids can use ordinary telephone service and thus do not need IP CTS. *See Kochkin Study* 28, 35 (JA

____). Statutory provisions and existing FCC rules mandate that virtually all ordinary telephone sets be hearing-aid compatible, reflecting the expectation that many of the millions of people with hearing aids are capable of communicating effectively by using ordinary telephones, without needing to use specialized and costly relay services and related equipment. *See* 47 U.S.C. § 610; 47 C.F.R. §§ 20.19, 68.4, 68.300, 68.317. As the Commission observed, “The *IP CTS Interim Order* specifically sought to minimize any inadvertent encouragement of IP CTS use when other telephone accessibility solutions (*e.g.*, phones with hearing aid compatibility and/or amplification required by Commission rules) could offer persons with hearing loss a better telephone experience, *i.e.*, greater functional equivalence to conventional voice telephone use.” *Final Order* ¶20 (JA ____); *see also Interim Order* ¶15 & n.45 (JA ____).

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). Contrary to Sorenson’s arguments, there is not a “less restrictive alternatives” doctrine (Br. 40, 43) that limits agency discretion to select among policy choices that serve the public interest. 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).

C. The IP CTS Marketing Rules Do Not Violate the First Amendment.

Sorenson concludes its argument with a brief, and oblique, suggestion that rules adopted by the Commission relating to IP CTS providers' marketing practices violate the First Amendment. Br. 53-55. This argument, or indeed any challenge to these particular rules, will not be found in the list of issues for review set forth in its brief, and should therefore be deemed to have been waived. As the Court has held, "[i]t is hardly necessary for us to decide an issue of constitutionality which petitioner does not even set forth as an issue in the case and to which it refers only obliquely." *Cablevision Systems Corp. v. FCC*, 597 F.3d 1306, 1312 (D.C. Cir. 2010).

In any event, the marketing rules about which Sorenson complains comport with the First Amendment. The rules simply prohibit IP CTS providers from employing reward referral programs and other forms of direct or indirect financial or other incentives to get people to register for or use IP CTS, as well joint marketing arrangements between providers and hearing health professionals. *See* 47 C.F.R. § 64.604(c)(8). The Commission "agree[d] with the vast majority of commenters that this prohibition will reduce the risk that IP CTS will be used by ineligible users." *Final Order* ¶ 19 (JA ____). As the Commission explained, "a joint marketing arrangement between an IP CTS provider and a hearing health profes-

sional rewards the professional for encouraging the consumer to register for or use the IP CTS provider's service, whether or not the consumer needs such service to communicate by telephone." *Final Order* ¶ 28 (JA ____). The Commission pointed out that its restrictions were consistent with actions it had taken limiting such practices for other types of TRS, noting that such rewards and incentives "transform[] the TRS program from a means of achieving functionally equivalent communications service for persons with disabilities into 'an opportunity for their financial gain.'" *Id.* ¶21 and n.71 (JA ____). Finally, the Commission emphasized that these rules do not "bar providers from conducting such advertising or otherwise informing consumers and the general public about their services." *Id.* ¶25 (JA ____).

The FCC obviously has a substantial interest in ensuring that public funds paid to IP CTS providers go only to pay for services to hearing-impaired individuals in accordance with Section 225. As the Commission explained, the restrictions on use of financial incentives and marketing practices directly advance that goal by prohibiting practices that would encourage abuse of the program in a manner that narrowly addresses the problems the Commission identified. The adoption of the restriction were accordingly well within the agency's authority to regulate IP CTS providers' commercial speech under the First Amendment. *See Central Hudson Gas & Elec. v. Public Service Comm'n*, 447 U.S. 557, 563 (1980); *Mainstream Marketing Services v. FCC*, 358 F.3d 1228, 1237 (10th Cir.), *cert. denied*, 543 U.S. 812 (2004).

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review.

Respectfully submitted,

Jonathan B. Sallet
Acting 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
Fax (202) 418-2819

February 5, 2014

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7)(B), I hereby certify that the accompanying “Brief for the Federal Communications Commission” was prepared using a proportionally spaced 14 point typeface and contains **11,399** words as measured by the word count function of Microsoft Office Word 2010.

/s/ C. Grey Pash, Jr.

C. Grey Pash, Jr.

February 5, 2014

STATUTES AND REGULATIONS

5 U.S.C. § 553	1
47 U.S.C. § 225	2
47 U.S.C. § 610	7
47 C.F.R. § 64.601(a)(16).....	11
47 C.F.R. § 64.604(c)(5)	12
47 C.F.R. § 64.604(c)(8)	21
47 C.F.R. § 64.604(c)(9)	21
47 C.F.R. § 64.604(c)(10)	24
47 C.F.R. § 64.604(c)(11)	26
47 C.F.R. § 68.4	28
47 C.F.R. § 68.300	29
47 C.F.R. § 68.317	29

5 U.S.C. § 553

UNITED STATES CODE ANNOTATED
 TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
 PART I. THE AGENCIES GENERALLY
 CHAPTER 5. ADMINISTRATIVE PROCEDURE
 SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

§ 553. Rule making

* * * * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

- (1)** a statement of the time, place, and nature of public rule making proceedings;
- (2)** reference to the legal authority under which the rule is proposed; and
- (3)** either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

- (A)** to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
- (B)** 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 procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

* * * * *

47 U.S.C. § 225

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

§ 225. Telecommunications services for hearing-impaired and speech-impaired individuals

(a) Definitions

As used in this section--

(1) Common carrier or carrier

The term “common carrier” or “carrier” includes any common carrier engaged in interstate communication by wire or radio as defined in section 153 of this title and any common carrier engaged in intrastate communication by wire or radio, notwithstanding sections 152(b) and 221(b) of this title.

(2) TDD

The term “TDD” means a Telecommunications Device for the Deaf, which is a machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system.

(3) Telecommunications relay services

The term “telecommunications relay services” means telephone transmission services that provide the ability for an individual who is deaf, hard of hearing, deaf-blind, or who has a speech disability to engage in communication by wire or radio with one or more individuals, in a manner that is functionally equivalent to the ability of a hearing individual who does not have a speech disability to communicate using voice communication services by wire or radio.

(b) Availability of telecommunications relay services

(1) In general

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.

(2) Use of general authority and remedies

For the purposes of administering and enforcing the provisions of this section and the regulations prescribed thereunder, the Commission shall have the same authority, power, and functions with respect to common carriers engaged in intrastate communication as the Commission has in administering and enforcing the provisions of this subchapter with respect to any common carrier engaged in interstate communication. Any violation of this section by any common carrier engaged in intrastate communication shall be subject to the same remedies, penalties, and procedures as are applicable to a violation of this chapter by a common carrier engaged in interstate communication.

(c) Provision of services

Each common carrier providing telephone voice transmission services shall, not later than 3 years after July 26, 1990, provide in compliance with the regulations prescribed under this section, throughout the area in which it offers service, telecommunications relay services, individually, through designees, through a competitively selected vendor, or in concert with other carriers. A common carrier shall be considered to be in compliance with such regulations--

(1) with respect to intrastate telecommunications relay services in any State that does not have a certified program under subsection (f) of this section and with respect to interstate telecommunications relay services, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the Commission's regulations under subsection (d) of this section; or

(2) with respect to intrastate telecommunications relay services in any State that has a certified program under subsection (f) of this section for such State, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the program certified under subsection (f) of this section for such State.

(d) Regulations

(1) In general

The Commission shall, not later than 1 year after July 26, 1990, prescribe regulations to implement this section, including regulations that--

(A) establish functional requirements, guidelines, and operations procedures for telecommunications relay services;

(B) establish minimum standards that shall be met in carrying out subsection (c) of this section;

(C) require that telecommunications relay services operate every day for 24 hours per day;

(D) require that users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination;

(E) prohibit relay operators from failing to fulfill the obligations of common carriers by refusing calls or limiting the length of calls that use telecommunications relay services;

(F) prohibit relay operators from disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of the call; and

(G) prohibit relay operators from intentionally altering a relayed conversation.

(2) Technology

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.

(3) Jurisdictional separation of costs

(A) In general

Consistent with the provisions of section 410 of this title, the Commission shall prescribe regulations governing the jurisdictional separation of costs for the services provided pursuant to this section.

(B) Recovering costs

Such regulations shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction. In a State that has a certified program under subsection (f) of this section, a State commission shall permit a common carrier to recover the costs incurred in providing intrastate telecommunications relay services by a method consistent with the requirements of this section.

(e) Enforcement

(1) In general

Subject to subsections (f) and (g) of this section, the Commission shall enforce this section.

(2) Complaint

The Commission shall resolve, by final order, a complaint alleging a violation of this section within 180 days after the date such complaint is filed.

(f) Certification

(1) State documentation

Any State desiring to establish a State program under this section shall submit documentation to the Commission that describes the program of such State for implementing intrastate telecommunications relay services and the procedures and remedies available for enforcing any requirements imposed by the State program.

(2) Requirements for certification

After review of such documentation, the Commission shall certify the State program if the Commission determines that--

(A) the program makes available to hearing-impaired and speech-impaired individuals, either directly, through designees, through a competitively selected vendor, or through regulation of intrastate common carriers, intrastate telecommunications relay services in such State in a manner that meets or exceeds the requirements of regulations prescribed by the Commission under subsection (d) of this section; and

(B) the program makes available adequate procedures and remedies for enforcing the requirements of the State program.

(3) Method of funding

Except as provided in subsection (d) of this section, the Commission shall not refuse to certify a State program based solely on the method such State will implement for funding intrastate telecommunication relay services.

(4) Suspension or revocation of certification

The Commission may suspend or revoke such certification if, after notice and opportunity for hearing, the Commission determines that such certification is no longer warranted. In a State whose program has been suspended or revoked, the Commission shall take such steps as may be necessary, consistent with this section, to ensure continuity of telecommunications relay services.

(g) Complaint

(1) Referral of complaint

If a complaint to the Commission alleges a violation of this section with respect to intrastate telecommunications relay services within a State and certification of the program of such State

under subsection (f) of this section is in effect, the Commission shall refer such complaint to such State.

(2) Jurisdiction of Commission

After referring a complaint to a State under paragraph (1), the Commission shall exercise jurisdiction over such complaint only if--

(A) final action under such State program has not been taken on such complaint by such State--

(i) within 180 days after the complaint is filed with such State; or

(ii) within a shorter period as prescribed by the regulations of such State; or

(B) the Commission determines that such State program is no longer qualified for certification under subsection (f) of this section.

47 U.S.C. § 610

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER VI. MISCELLANEOUS PROVISIONS

§ 610. Telephone service for disabled

(a) Establishment of regulations

The Commission shall establish such regulations as are necessary to ensure reasonable access to telephone service by persons with impaired hearing.

(b)(1) Except as provided in paragraphs (2) and (3) and subsection (c), the Commission shall require that customer premises equipment described in this paragraph provide internal means for effective use with hearing aids that are designed to be compatible with telephones which meet established technical standards for hearing aid compatibility. Customer premises equipment described in this paragraph are the following:

(A) All essential telephones.

(B) All telephones manufactured in the United States (other than for export) more than one year after August 16, 1988 or imported for use in the United States more than one year after such date.

(C) All customer premises equipment used with advanced communications services that is designed to provide 2-way voice communication via a built-in speaker intended to be held to the ear in a manner functionally equivalent to a telephone, subject to the regulations prescribed by the Commission under subsection (e).

(2)(A) The regulations prescribed by the Commission under paragraph (1), shall exempt from the requirements established pursuant to subparagraphs (B) and (C) of paragraph (1) only--

(i) telephones used with public mobile services;

(ii) telephones used with private radio services; and

(iii) secure telephones.

(iv) Redesignated (iii)

(B) The Commission shall periodically assess the appropriateness of continuing in effect the exemptions for telephones and other customer premises equipment described in subparagraph (A) of this paragraph. The Commission shall revoke or otherwise limit any such exemption if the Commission determines that--

(i) such revocation or limitation is in the public interest;

(ii) continuation of the exemption without such revocation or limitation would have an adverse effect on hearing-impaired individuals;

(iii) compliance with the requirements of subparagraph (B) or (C) of paragraph (1) is technologically feasible for the telephones to which the exemption applies; and

(iv) compliance with the requirements of subparagraph (B) or (C) of paragraph (1) would not increase costs to such an extent that the telephones to which the exemption applies could not be successfully marketed.

(C) Redesignated (B)

(3) The Commission may, upon the application of any interested person, initiate a proceeding to waive the requirements of paragraph (1)(B) of this subsection with respect to new telephones, or telephones associated with a new technology or service. The Commission shall not grant such a waiver unless the Commission determines, on the basis of evidence in the record of such proceeding, that such telephones, or such technology or service, are in the public interest, and that (A) compliance with the requirements of paragraph (1)(B) is technologically infeasible, or (B) compliance with such requirements would increase the costs of the telephones, or of the technology or service, to such an extent that such telephones, technology, or service could not be successfully marketed. In any proceeding under this paragraph to grant a waiver from the requirements of paragraph (1)(B), the Commission shall consider the effect on hearing-impaired individuals of granting the waiver. The Commission shall periodically review and determine the continuing need for any waiver granted pursuant to this paragraph.

(4) For purposes of this subsection--

(A) the term “essential telephones” means only coin-operated telephones, telephones provided for emergency use, and other telephones frequently needed for use by persons using such hearing aids;

(B) the term “telephones used with public mobile services” means telephones and other customer premises equipment used in whole or in part with air-to-ground radiotelephone services, cellular radio telecommunications services, offshore radio, rural radio service, public land mobile telephone service, or other common carrier radio communication services covered by title 47 of the Code of Federal Regulations, or any functionally equivalent unlicensed wireless services;

(C) the term “telephones used with private radio services” means telephones and other customer premises equipment used in whole or in part with private land mobile radio services and other communications services characterized by the Commission in its rules as private radio services; and

(D) the term “secure telephones” means telephones that are approved by the United States Government for the transmission of classified or sensitive voice communications.

(c) Technical standards

The Commission shall establish or approve such technical standards as are required to enforce this section. A telephone or other customer premises equipment that is compliant with relevant technical standards developed through a public participation process and in consultation with interested consumer stakeholders (designated by the Commission for the purposes of this section) will be considered hearing aid compatible for purposes of this section, until such time as the Commission may determine otherwise. The Commission shall consult with the public, including people with hearing loss, in establishing or approving such technical standards. The Commission may delegate this authority to an employee pursuant to section 155(c) of this title. The Commission shall remain the final arbiter as to whether the standards meet the requirements of this section.

(d) Labeling of packaging materials for equipment

The Commission shall establish such requirements for the labeling of packaging materials for equipment as are needed to provide adequate information to consumers on the compatibility between telephones and hearing aids.

(e) Costs and benefits; encouragement of use of currently available technology

In any rulemaking to implement the provisions of this section, the Commission shall specifically consider the costs and benefits to all telephone users, including persons with and without hearing loss. The Commission shall ensure that regulations adopted to implement this section encourage the use of currently available technology and do not discourage or impair the development of improved technology. In implementing the provisions of subsection (b)(1)(C), the Commission shall use appropriate timetables or benchmarks to the extent necessary (1) due to technical feasibility, or (2) to ensure the marketability or availability of new technologies to users.

(f) Periodic review of regulations; retrofitting

The Commission shall periodically review the regulations established pursuant to this section. Except for coin-operated telephones and telephones provided for emergency use, the Commission may not require the retrofitting of equipment to achieve the purposes of this section.

(g) Recovery of reasonable and prudent costs

Any common carrier or connecting carrier may provide specialized terminal equipment needed by persons whose hearing, speech, vision, or mobility is impaired. The State commission may allow the carrier to recover in its tariffs for regulated service reasonable and prudent costs not charged directly to users of such equipment.

(h) Rule of construction

Nothing in the Twenty-First Century Communications and Video Accessibility Act of 2010 shall be construed to modify the Commission's regulations set forth in section 20.19 of title 47 of the Code of Federal Regulations, as in effect on October 8, 2010.

47 C.F.R. § 64.601

CODE OF FEDERAL REGULATIONS
 TITLE 47. TELECOMMUNICATION
 CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
 SUBCHAPTER B. COMMON CARRIER SERVICES
 PART 64. MISCELLANEOUS RULES RELATING TO COMMON CARRIERS
 SUBPART F. TELECOMMUNICATIONS RELAY SERVICES AND RELATED
 CUSTOMER PREMISES EQUIPMENT FOR PERSONS WITH DISABILITIES

§ 64.601 Definitions and provisions of general applicability.

(a) For purposes of this subpart, the terms Public Safety Answering Point (PSAP), statewide default answering point, and appropriate local emergency authority are defined in 47 CFR 64.3000; the terms pseudo-ANI and Wireline E911 Network are defined in 47 CFR 9.3; the term affiliate is defined in 47 CFR 52.12(a)(1)(i), and the terms majority and debt are defined in 47 CFR 52.12(a)(1)(ii).

* * * * *

(16) Internet Protocol Captioned Telephone Service (IP CTS). A telecommunications relay service that permits an individual who can speak but who has difficulty hearing over the telephone to use a telephone and an Internet Protocol-enabled device via the Internet to simultaneously listen to the other party and read captions of what the other party is saying. With IP CTS, the connection carrying the captions between the relay service provider and the relay service user is via the Internet, rather than the public switched telephone network.

* * * * *

47 C.F.R. § 64.604

§ 64.604 Mandatory minimum standards.

The standards in this section are applicable December 18, 2000, except as stated in paragraphs (c)(2) and (c)(7) of this section.

* * * * *

(c) Functional standards--

(5) Jurisdictional separation of costs--

(i) General. Where appropriate, costs of providing TRS shall be separated in accordance with the jurisdictional separation procedures and standards set forth in the Commission's regulations adopted pursuant to section 410 of the Communications Act of 1934, as amended.

(ii) Cost recovery. Costs caused by interstate TRS shall be recovered from all subscribers for every interstate service, utilizing a shared-funding cost recovery mechanism. Except as noted in this paragraph, with respect to VRS, costs caused by intrastate TRS shall be recovered from the intrastate jurisdiction. In a state that has a certified program under § 64.606, the state agency providing TRS shall, through the state's regulatory agency, permit a common carrier to recover costs incurred in providing TRS by a method consistent with the requirements of this section. Costs caused by the provision of interstate and intrastate VRS shall be recovered from all subscribers for every interstate service, utilizing a shared-funding cost recovery mechanism.

(iii) Telecommunications Relay Services Fund. Effective July 26, 1993, an Interstate Cost Recovery Plan, hereinafter referred to as the TRS Fund, shall be administered by an entity selected by the Commission (administrator). The initial administrator, for an interim period, will be the National Exchange Carrier Association, Inc.

(A) Contributions. Every carrier providing interstate telecommunications services (including interconnected VoIP service providers pursuant to § 64.601(b)) and every provider of non-interconnected VoIP service shall contribute to the TRS Fund on the basis of interstate end-user revenues as described herein. Contributions shall be made by all carriers who provide interstate services, including, but not limited to, cellular telephone and paging, mobile radio, operator services, personal communications service (PCS), access (including subscriber line charges), alternative access and special access, packet-switched, WATS, 800, 900, message telephone service (MTS), private line, telex, telegraph, video, satellite, intraLATA, international and resale services.

(B) Contribution computations. Contributors' contributions to the TRS fund shall be the product of their subject revenues for the prior calendar year and a contribution factor determined annually by the Commission. The contribution factor shall be based on the ratio between expected TRS Fund expenses to the contributors' revenues subject to contribution. In the event that contributions exceed TRS payments and administrative costs, the contribution factor for the

following year will be adjusted by an appropriate amount, taking into consideration projected cost and usage changes. In the event that contributions are inadequate, the fund administrator may request authority from the Commission to borrow funds commercially, with such debt secured by future years' contributions. Each subject contributor that has revenues subject to contribution must contribute at least \$25 per year. Contributors whose annual contributions total less than \$1,200 must pay the entire contribution at the beginning of the contribution period. Contributors whose contributions total \$1,200 or more may divide their contributions into equal monthly payments. Contributors shall complete and submit, and contributions shall be based on, a "Telecommunications Reporting Worksheet" (as published by the Commission in the Federal Register). The worksheet shall be certified to by an officer of the contributor, and subject to verification by the Commission or the administrator at the discretion of the Commission. Contributors' statements in the worksheet shall be subject to the provisions of section 220 of the Communications Act of 1934, as amended. The fund administrator may bill contributors a separate assessment for reasonable administrative expenses and interest resulting from improper filing or overdue contributions. The Chief of the Consumer and Governmental Affairs Bureau may waive, reduce, modify or eliminate contributor reporting requirements that prove unnecessary and require additional reporting requirements that the Bureau deems necessary to the sound and efficient administration of the TRS Fund.

(C) Registration Requirements for Providers of Non-Interconnected VoIP Service.

(1) Applicability. A non-interconnected VoIP service provider that will provide interstate service that generates interstate end-user revenue that is subject to contribution to the Telecommunications Relay Service Fund shall file the registration information described in paragraph (c)(5)(iii)(C)(2) of this section in accordance with the procedures described in paragraphs (c)(5)(iii)(C)(3) and (c)(5)(iii)(C)(4) of this section. Any non-interconnected VoIP service provider already providing interstate service that generates interstate end-user revenue that is subject to contribution to the Telecommunications Relay Service Fund on the effective date of these rules shall submit the relevant portion of its FCC Form 499-A in accordance with paragraphs (c)(5)(iii)(C)(2) and (3) of this section.

(2) Information required for purposes of TRS Fund contributions. A non-interconnected VoIP service provider that is subject to the registration requirement pursuant to paragraph (c)(5)(iii)(C)(1) of this section shall provide the following information:

- (i) The provider's business name(s) and primary address;
- (ii) The names and business addresses of the provider's chief executive officer, chairman, and president, or, in the event that a provider does not have such executives, three similarly senior-level officials of the provider;
- (iii) The provider's regulatory contact and/or designated agent;
- (iv) All names that the provider has used in the past; and
- (v) The state(s) in which the provider provides such service.

(3) Submission of registration. A provider that is subject to the registration requirement pursuant to paragraph (c)(5)(iii)(C)(1) of this section shall submit the information described in paragraph (c)(5)(iii)(C)(2) of this section in accordance with the Instructions to FCC Form 499–A. FCC Form 499–A must be submitted under oath and penalty of perjury.

(4) Changes in information. A provider must notify the Commission of any changes to the information provided pursuant to paragraph (c)(5)(iii)(C)(2) of this section within no more than one week of the change. Providers may satisfy this requirement by filing the relevant portion of FCC Form 499–A in accordance with the Instructions to such form.

(D) Data Collection and Audits.

(1) TRS providers seeking compensation from the TRS Fund shall provide the administrator with true and adequate data, and other historical, projected and state rate related information reasonably requested to determine the TRS Fund revenue requirements and payments. TRS providers shall provide the administrator with the following: total TRS minutes of use, total interstate TRS minutes of use, total TRS investment in general in accordance with part 32 of this chapter, and other historical or projected information reasonably requested by the administrator for purposes of computing payments and revenue requirements.

(2) Call data required from all TRS providers. In addition to the data requested by paragraph (c)(5)(iii)(C)(1) of this section, TRS providers seeking compensation from the TRS Fund shall submit the following specific data associated with each TRS call for which compensation is sought:

(i) The call record ID sequence;

(ii) CA ID number;

(iii) Session start and end times noted at a minimum to the nearest second;

(iv) Conversation start and end times noted at a minimum to the nearest second;

(v) Incoming telephone number and IP address (if call originates with an IP–based device) at the time of the call;

(vi) Outbound telephone number (if call terminates to a telephone) and IP address (if call terminates to an IP–based device) at the time of call;

(vii) Total conversation minutes;

(viii) Total session minutes;

(ix) The call center (by assigned center ID number) that handled the call; and

(x) The URL address through which the call is initiated.

(3) Additional call data required from Internet-based Relay Providers. In addition to the data required by paragraph (c)(5)(iii)(C)(2) of this section, Internet-based Relay Providers seeking compensation from the Fund shall submit speed of answer compliance data.

(4) Providers submitting call record and speed of answer data in compliance with paragraphs (c)(5)(iii)(C)(2) and (c)(5)(iii)(C)(3) of this section shall:

(i) Employ an automated record keeping system to capture such data required pursuant to paragraph (c)(5)(iii)(C)(2) of this section for each TRS call for which minutes are submitted to the fund administrator for compensation; and

(ii) Submit such data electronically, in a standardized format. For purposes of this subparagraph, an automated record keeping system is a system that captures data in a computerized and electronic format that does not allow human intervention during the call session for either conversation or session time.

(5) Certification. The chief executive officer (CEO), chief financial officer (CFO), or other senior executive of a TRS provider with first hand knowledge of the accuracy and completeness of the information provided, when submitting a request for compensation from the TRS Fund must, with each such request, certify as follows:

I swear under penalty of perjury that:

(i) I am ---- (name and title), --an officer of the above-named reporting entity and that I have examined the foregoing reports and that all requested information has been provided and all statements of fact, as well as all cost and demand data contained in this Relay Services Data Request, are true and accurate; and

(ii) The TRS calls for which compensation is sought were handled in compliance with Section 225 of the Communications Act and the Commission's rules and orders, and are not the result of impermissible financial incentives or payments to generate calls.

(6) Audits. The fund administrator and the Commission, including the Office of Inspector General, shall have the authority to examine and verify TRS provider data as necessary to assure the accuracy and integrity of TRS Fund payments. TRS providers must submit to audits annually or at times determined appropriate by the Commission, the fund administrator, or by an entity approved by the Commission for such purpose. A TRS provider that fails to submit to a requested audit, or fails to provide documentation necessary for verification upon reasonable request, will be subject to an automatic suspension of payment until it submits to the requested audit or provides sufficient documentation.

(7) Call data record retention. Internet-based TRS providers shall retain the data required to be submitted by this section, and all other call detail records, other records that support their claims for payment from the TRS Fund, and records used to substantiate the costs and expense data

submitted in the annual relay service data request form, in an electronic format that is easily retrievable, for a minimum of five years.

(E) Payments to TRS providers.

(1) TRS Fund payments shall be distributed to TRS providers based on formulas approved or modified by the Commission. The administrator shall file schedules of payment formulas with the Commission. Such formulas shall be designed to compensate TRS providers for reasonable costs of providing interstate TRS, and shall be subject to Commission approval. Such formulas shall be based on total monthly interstate TRS minutes of use. The formulas should appropriately compensate interstate providers for the provision of TRS, whether intrastate or interstate.

(2) TRS minutes of use for purposes of interstate cost recovery under the TRS Fund are defined as the minutes of use for completed interstate TRS calls placed through the TRS center beginning after call set-up and concluding after the last message call unit.

(3) In addition to the data required under paragraph (c)(5)(iii)(C) of this section, all TRS providers, including providers who are not interexchange carriers, local exchange carriers, or certified state relay providers, must submit reports of interstate TRS minutes of use to the administrator in order to receive payments.

(4) The administrator shall establish procedures to verify payment claims, and may suspend or delay payments to a TRS provider if the TRS provider fails to provide adequate verification of payment upon reasonable request, or if directed by the Commission to do so. The TRS Fund administrator shall make payments only to eligible TRS providers operating pursuant to the mandatory minimum standards as required in this section, and after disbursements to the administrator for reasonable expenses incurred by it in connection with TRS Fund administration. TRS providers receiving payments shall file a form prescribed by the administrator. The administrator shall fashion a form that is consistent with 47 CFR parts 32 and 36 procedures reasonably tailored to meet the needs of TRS providers.

(5) The Commission shall have authority to audit providers and have access to all data, including carrier specific data, collected by the fund administrator. The fund administrator shall have authority to audit TRS providers reporting data to the administrator.

(6) The administrator shall not be obligated to pay any request for compensation until it has been established as compensable. A request shall be established as compensable only after the administrator, in consultation with the Commission, or the Commission determines that the provider has met its burden to demonstrate that the claim is compensable under applicable Commission rules and the procedures established by the administrator. Any request for compensation for which payment has been suspended or withheld in accordance with paragraph (c)(5)(iii)(L) of this section shall not be established as compensable until the administrator, in consultation with the Commission, or the Commission determines that the request is compensable in accordance with paragraph (c)(5)(iii)(L)(4) of this section.

(F) Eligibility for payment from the TRS Fund.

(1) TRS providers, except Internet-based TRS providers, eligible for receiving payments from the TRS Fund must be:

(i) TRS facilities operated under contract with and/or by certified state TRS programs pursuant to § 64.606; or

(ii) TRS facilities owned or operated under contract with a common carrier providing interstate services operated pursuant to this section; or

(iii) Interstate common carriers offering TRS pursuant to this section.

(2) Internet-based TRS providers eligible for receiving payments from the TRS fund must be certified by the Commission pursuant to § 64.606.

(G) Any eligible TRS provider as defined in paragraph (c)(5)(iii)(F) of this section shall notify the administrator of its intent to participate in the TRS Fund thirty (30) days prior to submitting reports of TRS interstate minutes of use in order to receive payment settlements for interstate TRS, and failure to file may exclude the TRS provider from eligibility for the year.

(H) Administrator reporting, monitoring, and filing requirements. The administrator shall perform all filing and reporting functions required in paragraphs (c)(5)(iii)(A) through (c)(5)(iii)(J) of this section. TRS payment formulas and revenue requirements shall be filed with the Commission on May 1 of each year, to be effective the following July 1. The administrator shall report annually to the Commission an itemization of monthly administrative costs which shall consist of all expenses, receipts, and payments associated with the administration of the TRS Fund. The administrator is required to keep the TRS Fund separate from all other funds administered by the administrator, shall file a cost allocation manual (CAM) and shall provide the Commission full access to all data collected pursuant to the administration of the TRS Fund. The administrator shall account for the financial transactions of the TRS Fund in accordance with generally accepted accounting principles for federal agencies and maintain the accounts of the TRS Fund in accordance with the United States Government Standard General Ledger. When the administrator, or any independent auditor hired by the administrator, conducts audits of providers of services under the TRS program or contributors to the TRS Fund, such audits shall be conducted in accordance with generally accepted government auditing standards. In administering the TRS Fund, the administrator shall also comply with all relevant and applicable federal financial management and reporting statutes. The administrator shall establish a non-paid voluntary advisory committee of persons from the hearing and speech disability community, TRS users (voice and text telephone), interstate service providers, state representatives, and TRS providers, which will meet at reasonable intervals (at least semi-annually) in order to monitor TRS cost recovery matters. Each group shall select its own representative to the committee. The administrator's annual report shall include a discussion of the advisory committee deliberations.

(I) Information filed with the administrator. The Chief Executive Officer (CEO), Chief Financial Officer (CFO), or other senior executive of a provider submitting minutes to the Fund for compensation must, in each instance, certify, under penalty of perjury, that the minutes were

handled in compliance with section 225 and the Commission's rules and orders, and are not the result of impermissible financial incentives or payments to generate calls. The CEO, CFO, or other senior executive of a provider submitting cost and demand data to the TRS Fund administrator shall certify under penalty of perjury that such information is true and correct. The administrator shall keep all data obtained from contributors and TRS providers confidential and shall not disclose such data in company-specific form unless directed to do so by the Commission. Subject to any restrictions imposed by the Chief of the Consumer and Governmental Affairs Bureau, the TRS Fund administrator may share data obtained from carriers with the administrators of the universal support mechanisms (see § 54.701 of this chapter), the North American Numbering Plan administration cost recovery (see § 52.16 of this chapter), and the long-term local number portability cost recovery (see § 52.32 of this chapter). The TRS Fund administrator shall keep confidential all data obtained from other administrators. The administrator shall not use such data except for purposes of administering the TRS Fund, calculating the regulatory fees of interstate common carriers, and aggregating such fee payments for submission to the Commission. The Commission shall have access to all data reported to the administrator, and authority to audit TRS providers. Contributors may make requests for Commission nondisclosure of company-specific revenue information under § 0.459 of this chapter by so indicating on the Telecommunications Reporting Worksheet at the time that the subject data are submitted. The Commission shall make all decisions regarding nondisclosure of company-specific information.

(J) [Reserved by 76 FR 63563]

(K) All parties providing services or contributions or receiving payments under this section are subject to the enforcement provisions specified in the Communications Act, the Americans with Disabilities Act, and the Commission's rules.

(L) Procedures for the suspension/withholding of payment.

(1) The Fund administrator will continue the current practice of reviewing monthly requests for compensation of TRS minutes of use within two months after they are filed with the Fund administrator.

(2) If the Fund administrator in consultation with the Commission, or the Commission on its own accord, determines that payments for certain minutes should be withheld, a TRS provider will be notified within two months from the date for the request for compensation was filed, as to why its claim for compensation has been withheld in whole or in part. TRS providers then will be given two additional months from the date of notification to provide additional justification for payment of such minutes of use. Such justification should be sufficiently detailed to provide the Fund administrator and the Commission the information needed to evaluate whether the minutes of use in dispute are compensable. If a TRS provider does not respond, or does not respond with sufficiently detailed information within two months after notification that payment for minutes of use is being withheld, payment for the minutes of use in dispute will be denied permanently.

(3) If the VRS provider submits additional justification for payment of the minutes of use in dispute within two months after being notified that its initial justification was insufficient, the

Fund administrator or the Commission will review such additional justification documentation, and may ask further questions or conduct further investigation to evaluate whether to pay the TRS provider for the minutes of use in dispute, within eight months after submission of such additional justification.

(4) If the provider meets its burden to establish that the minutes in question are compensable under the Commission's rules, the Fund administrator will compensate the provider for such minutes of use. Any payment by the Commission will not preclude any future action by either the Commission or the U.S. Department of Justice to recover past payments (regardless of whether the payment was the subject of withholding) if it is determined at any time that such payment was for minutes billed to the Commission in violation of the Commission's rules or any other civil or criminal law.

(5) If the Commission determines that the provider has not met its burden to demonstrate that the minutes of use in dispute are compensable under the Commission's rules, payment will be permanently denied. The Fund administrator or the Commission will notify the provider of this decision within one year of the initial request for payment.

(M) Whistleblower protections. Providers shall not take any reprisal in the form of a personnel action against any current or former employee or contractor who discloses to a designated manager of the provider, the Commission, the TRS Fund administrator or to any Federal or state law enforcement entity, any information that the reporting person reasonably believes evidences known or suspected violations of the Communications Act or TRS regulations, or any other activity that the reporting person reasonably believes constitutes waste, fraud, or abuse, or that otherwise could result in the improper billing of minutes of use to the TRS Fund and discloses that information to a designated manager of the provider, the Commission, the TRS Fund administrator or to any Federal or state law enforcement entity. Providers shall provide an accurate and complete description of these TRS whistleblower protections, including the right to notify the FCC's Office of Inspector General or its Enforcement Bureau, to all employees and contractors, in writing. Providers that already disseminate their internal business policies to its employees in writing (e.g. in employee handbooks, policies and procedures manuals, or bulletin board postings--either online or in hard copy) must include an accurate and complete description of these TRS whistleblower protections in those written materials.

(N) In addition to the provisions set forth above, VRS providers shall be subject to the following provisions:

(1) Eligibility for reimbursement from the TRS Fund.

(i) Only an eligible VRS provider, as defined in paragraph (c)(5)(iii)(F) of this section, may hold itself out to the general public as providing VRS.

(ii) VRS service must be offered under the name by which the eligible VRS provider offering such service became certified and in a manner that clearly identifies that provider of the service. Where a TRS provider also utilizes sub-brands to identify its VRS, each sub-brand must clearly

identify the eligible VRS provider. Providers must route all VRS calls through a single URL address used for each name or sub-brand used.

(iii) An eligible VRS provider may not contract with or otherwise authorize any third party to provide interpretation services or call center functions (including call distribution, call routing, call setup, mapping, call features, billing, and registration) on its behalf, unless that authorized third party also is an eligible provider, or the eligible VRS provider is a VRS CA service provider and the authorized third party is the provider of the Neutral Video Communication Service Platform, except that a VRS CA service provider may not contract with or otherwise authorize the provider of the Neutral Video Communication Service Platform to perform billing on its behalf.

(iv) To the extent that an eligible VRS provider contracts with or otherwise authorizes a third party to provide any other services or functions related to the provision of VRS other than interpretation services or call center functions, that third party must not hold itself out as a provider of VRS, and must clearly identify the eligible VRS provider to the public. To the extent an eligible VRS provider contracts with or authorizes a third party to provide any services or functions related to marketing or outreach, and such services utilize VRS, those VRS minutes are not compensable on a per minute basis from the TRS fund.

(v) All third-party contracts or agreements entered into by an eligible provider must be in writing. Copies of such agreements shall be made available to the Commission and to the TRS Fund administrator upon request.

(2) Call center reports. VRS providers shall file a written report with the Commission and the TRS Fund administrator, on April 1st and October 1st of each year for each call center that handles VRS calls that the provider owns or controls, including centers located outside of the United States, that includes:

(i) The complete street address of the center;

(ii) The number of individual CAs and CA managers; and

(iii) The name and contact information (phone number and e-mail address) of the manager(s) at the center. VRS providers shall also file written notification with the Commission and the TRS Fund administrator of any change in a center's location, including the opening, closing, or relocation of any center, at least 30 days prior to any such change.

(3) Compensation of CAs. VRS providers may not compensate, give a preferential work schedule or otherwise benefit a CA in any manner that is based upon the number of VRS minutes or calls that the CA relays, either individually or as part of a group.

(4) Remote training session calls. VRS calls to a remote training session or a comparable activity will not be compensable from the TRS Fund when the provider submitting minutes for such a call has been involved, in any manner, with such a training session. Such prohibited involvement

includes training programs or comparable activities in which the provider or any affiliate or related party thereto, including but not limited to its subcontractors, partners, employees or sponsoring organizations or entities, has any role in arranging, scheduling, sponsoring, hosting, conducting or promoting such programs or activities.

* * * * *

(8) Incentives for use of IP CTS.

(i) An IP CTS provider shall not offer or provide to any person or entity that registers to use IP CTS any form of direct or indirect incentives, financial or otherwise, to register for or use IP CTS.

(ii) An IP CTS provider shall not offer or provide to a hearing health professional any direct or indirect incentives, financial or otherwise, that are tied to a consumer's decision to register for or use IP CTS. Where an IP CTS provider offers or provides IP CTS equipment, directly or indirectly, to a hearing health professional, and such professional makes or has the opportunity to make a profit on the sale of the equipment to consumers, such IP CTS provider shall be deemed to be offering or providing a form of incentive tied to a consumer's decision to register for or use IP CTS.

(iii) Joint marketing arrangements between IP CTS providers and hearing health professionals shall be prohibited.

(iv) For the purpose of this paragraph (c)(8), a hearing health professional is any medical or non-medical professional who advises consumers with regard to hearing disabilities.

(v) Any IP CTS provider that does not comply with this paragraph (c)(8) shall be ineligible for compensation for such IP CTS from the TRS Fund.

(9) IP CTS registration and certification requirements.

(i) IP CTS providers must first obtain the following registration information from each consumer prior to requesting compensation from the TRS Fund for service provided to the consumer. The consumer's full name, date of birth, last four digits of the consumer's social security number, address and telephone number.

(ii) Self-certification prior to demarcation date. IP CTS providers, in order to be eligible to receive compensation from the TRS Fund for providing IP CTS, also must first obtain a written certification from the consumer, and if obtained prior to the demarcation date, such written certification shall attest that the consumer needs IP CTS to communicate in a manner that is functionally equivalent to the ability of a hearing individual to communicate using voice communication services. The certification must include the consumer's certification that:

(A) The consumer has a hearing loss that necessitates IP CTS to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users;

(B) The consumer understands that the captioning service is provided by a live communications assistant; and

(C) The consumer understands that the cost of IP CTS is funded by the TRS Fund.

(iii) Self-certification on or after demarcation date. IP CTS providers must also first obtain from each consumer prior to requesting compensation from the TRS Fund for the consumer, a written certification from the consumer, and if obtained on or after the demarcation date, such certification shall state that:

(A) The consumer has a hearing loss that necessitates use of captioned telephone service;

(B) The consumer understands that the captioning on captioned telephone service is provided by a live communications assistant who listens to the other party on the line and provides the text on the captioned phone;

(C) The consumer understands that the cost of captioning each Internet protocol captioned telephone call is funded through a federal program; and

(D) The consumer will not permit, to the best of the consumer's ability, persons who have not registered to use Internet protocol captioned telephone service to make captioned telephone calls on the consumer's registered IP captioned telephone service or device.

(iv) The certification required by paragraphs (c)(9)(ii) and (iii) of this section must be made on a form separate from any other agreement or form, and must include a separate consumer signature specific to the certification. Beginning on the demarcation date, such certification shall be made under penalty of perjury. For purposes of this section, an electronic signature, defined by the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq., as an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record, has the same legal effect as a written signature.

(v) Third-party certification prior to demarcation date. Where IP CTS equipment is or has been obtained by a consumer from an IP CTS provider, directly or indirectly, at no charge or for less than \$75 and the consumer was registered in accordance with the requirements of paragraph (c)(9) of this section prior to the demarcation date, the IP CTS provider must also obtain from each consumer prior to requesting compensation from the TRS Fund for the consumer, written certification provided and signed by an independent third-party professional, except as provided in paragraph (c)(9)(xi) of this section.

(vi) To comply with paragraph (c)(9)(v) of this section, the independent professional providing certification must:

(A) Be qualified to evaluate an individual's hearing loss in accordance with applicable professional standards, and may include, but are not limited to, community-based social service

providers, hearing related professionals, vocational rehabilitation counselors, occupational therapists, social workers, educators, audiologists, speech pathologists, hearing instrument specialists, and doctors, nurses and other medical or health professionals;

(B) Provide his or her name, title, and contact information, including address, telephone number, and email address; and

(C) Certify in writing that the IP CTS user is an individual with hearing loss who needs IP CTS to communicate in a manner that is functionally equivalent to telephone service experienced by individuals without hearing disabilities.

(vii) Third-party certification on or after demarcation date. Where IP CTS equipment is or has been obtained by a consumer from an IP CTS provider, directly or indirectly, at no charge or for less than \$75, the consumer (in cases where the equipment was obtained directly from the IP CTS provider) has not subsequently paid \$75 to the IP CTS provider for the equipment prior to the date the consumer is registered to use IP CTS, and the consumer is registered in accordance with the requirements of this paragraph (c)(9) on or after the demarcation date, the IP CTS provider must also, prior to requesting compensation from the TRS Fund for service to the consumer, obtain from each consumer written certification provided and signed by an independent third-party professional, except as provided in paragraph (c)(9)(xi) of this section.

NOTE to paragraphs (c)(9)(ii), (iii), (iv), (v) and (vii): The date demarking which certification obligations apply to which consumers shall be the date when notice of OMB approval of the amendments to the registration and certification requirements is published. The FCC will publish a notice of the effective date along with a corrective amendment to specify the demarcation date.

(viii) To comply with paragraph (c)(9)(vii) of this section, the independent third-party professional providing certification must:

(A) Be qualified to evaluate an individual's hearing loss in accordance with applicable professional standards, and must be either a physician, audiologist, or other hearing related professional. Such professional shall not have been referred to the IP CTS user, either directly or indirectly, by any provider of TRS or any officer, director, partner, employee, agent, subcontractor, or sponsoring organization or entity (collectively "affiliate") of any TRS provider. Nor shall the third party professional making such certification have any business, family or social relationship with the TRS provider or any affiliate of the TRS provider from which the consumer is receiving or will receive service.

(B) Provide his or her name, title, and contact information, including address, telephone number, and email address.

(C) Certify in writing, under penalty of perjury, that the IP CTS user is an individual with hearing loss that necessitates use of captioned telephone service and that the third party professional understands that the captioning on captioned telephone service is provided by a live communications assistant and is funded through a federal program.

(ix) In instances where the consumer has obtained IP CTS equipment from a local, state, or federal governmental program, the consumer may present documentation to the IP CTS provider demonstrating that the equipment was obtained through one of these programs, in lieu of providing an independent, third-party certification under paragraphs (c)(9)(v) and (vii) of this section.

(x) Each IP CTS provider shall maintain records of any registration and certification information for a period of at least five years after the consumer ceases to obtain service from the provider and shall maintain the confidentiality of such registration and certification information, and may not disclose such registration and certification information or the content of such registration and certification information except as required by law or regulation.

(xi) IP CTS providers must obtain registration information and certification of hearing loss from all IP CTS users who began receiving service prior to March 7, 2013. Notwithstanding any other provision of paragraph (c)(9) of this section, IP CTS providers shall be compensated for compensable minutes of use generated prior to the registration deadline by any such users, but shall not receive compensation for minutes of IP CTS use generated on or after the registration deadline by any IP CTS user who has not been registered.

NOTE to paragraph (c)(9)(xi): The deadline for compliance with the requirement for IP CTS providers to register consumers who began service prior to March 7, 2013 shall be 180 days after OMB approval has been obtained, and IP CTS providers shall be permitted to receive compensation for minutes of use generated by such consumers prior to the registration deadline. The FCC will publish a notice of the effective date along with a corrective amendment to specify the deadline for compliance.

(10) IP CTS default settings.

(i) IP CTS providers must ensure that their equipment and software applications used in conjunction with their service have a default setting of captions off, so that all IP CTS users must affirmatively turn on captioning for each telephone call initiated or received before captioning is provided.

(ii) Each IP CTS provider shall ensure that each IP CTS telephone they distribute, directly or indirectly, shall include a button, icon, or other comparable feature that is easily operable and requires only one step for the consumer to turn on captioning.

(iii) For software applications on mobile phones, laptops, tablets, computers or other similar devices, the requirements of this paragraph (c)(10) are satisfied so long as:

(A) Consumers must log in to access the IP CTS software feature with a unique ID and password, and

(B) The default setting switches to captions on only while the consumer is logged in, and does not remain on indefinitely.

(iv) Hardship exception. If a consumer has a cognitive or physical disability that significantly impedes the ability of the consumer to turn on captioning at the start of each call, the IP CTS provider may set that consumer's IP CTS telephone to have a default of captions on, provided that the consumer submits, in addition to the self-certification required under paragraphs (c)(9)(ii) or (iii) of this section, the following to the IP CTS provider:

(A) A self-certification, dated and made under penalty of perjury, that the requirement to turn on captioning at the start of each call significantly impedes the consumer's ability to make use of captioned telephone service, provided that such certification shall be made by the consumer's spouse or legal guardian or a person with power of attorney where the consumer is not competent to provide the required self-certification; and

(B) A certification from a licensed, independent, third party physician in good standing, dated and made under penalty of perjury, that the consumer has a physical or mental disability or functional limitation that significantly impedes the consumer's ability to activate captioning at the start of each call, including a brief description of the basis for such statement. Such physician shall be the consumer's primary care physician or a physician whose specialty is such that the physician is qualified to make such certification and shall provide his or her name, title, area of specialty or expertise, and contact information, including address, telephone number, and email address on such certification. Providers shall not accept a certification from any physician referred to the IP CTS user, either directly or indirectly, by any provider of TRS or any officer, director, partner, employee, agent, subcontractor, or sponsoring organization or entity (collectively "affiliate") of any TRS provider. Nor shall the physician making such certification have any business, family or social relationship with and shall not have received any payment, referral, or other thing of value from the TRS provider or any affiliate of the TRS provider from which the consumer is receiving service.

(C) Each IP CTS provider shall maintain detailed records of all consumers, who, because of a showing of hardship under this section, have been permitted to receive IP CTS equipment with a setting of default captions on, including the dated and signed consumer and physician certifications submitted by each such consumer pursuant to this paragraph (c)(10)(iv), for a period of at least five years after the consumer ceases to obtain service from the provider. Each IP CTS provider shall maintain the confidentiality of such certification information, and may not disclose such certification information or the content of such certification information except as required by law or regulation.

(D) Each IP CTS provider shall submit, on a monthly basis and subject to confidentiality requirements, a report to the Commission on the consumers who have received a hardship exception pursuant to this paragraph (c)(10)(iv), which shall include a list of such newly excepted individuals (with names redacted), including the dates on which each individual registered for IP CTS with the provider and was provided with IP CTS equipment with a default setting of captions on, the area of specialty or expertise of the certifying physician accompanying each hardship certification, and the basis for granting each hardship exception.

(v) 911 Calling. Each IP CTS provider may turn captions on automatically for 911 calls so long as the provider remains in compliance with the provisions of this paragraph (c)(10) for all other types of calls.

(11) IP CTS Equipment.

(i) Any IP CTS provider, including its officers, directors, partners, employees, agents, subcontractors, and sponsoring organizations and entities, that provides equipment, software or applications to consumers, directly or indirectly, at no charge or for less than \$75, whether through giveaway, sale, loan, or otherwise, on or after September 30, 2013 shall be ineligible to receive compensation for minutes of IP CTS use generated by consumers using such equipment. An IP CTS provider may provide software or applications at no charge or for less than \$75 to a consumer who has already paid a minimum of \$75 for equipment, software or applications to that IP CTS provider without affecting the IP CTS provider's eligibility to receive compensation for minutes of IP CTS use generated by that consumer. This paragraph (c)(11)(i) of this section shall not apply in instances where the consumer has obtained IP CTS equipment from a local, state, or federal governmental program.

(ii) No person shall use IP CTS equipment or software with the captioning on, unless:

(A) Such person is registered to use IP CTS pursuant to paragraph (c)(9) of this section; or

(B) Such person was an existing IP CTS user as of March 7, 2013, and either paragraph (c)(9)(xi) of this section is not yet in effect or the registration deadline in paragraph (c)(9)(xi) of this section has not yet passed.

(iii) IP CTS providers shall ensure that any newly distributed IP CTS equipment has a label on its face in a conspicuous location with the following language in a clearly legible font: "FEDERAL LAW PROHIBITS ANYONE BUT REGISTERED USERS WITH HEARING LOSS FROM USING THIS DEVICE WITH THE CAPTIONS ON." For IP CTS equipment already distributed to consumers by any IP CTS provider as of the effective date of this paragraph, such provider shall distribute to consumers equipment labels with the same language as mandated by this paragraph for newly distributed equipment, along with clear and specific instructions directing the consumer to attach such labels to the face of their IP CTS equipment in a conspicuous location. For software applications on mobile phones, laptops, tablets, computers or other similar devices, IP CTS providers shall ensure that, each time the consumer logs into the application, the notification language required by this paragraph appears in a conspicuous location on the device screen immediately after log-in.

NOTE to paragraph (c)(11)(iii): The deadline for compliance with the requirement for IP CTS providers to distribute to consumers equipment labels along with instructions for applying the labels to equipment already distributed to consumers shall be thirty days after OMB approval has been obtained. The FCC will publish a notice of the effective date along with a corrective amendment to specify the deadline for compliance.

(iv) IP CTS providers shall maintain, with each consumer's registration records, records describing any IP CTS equipment provided, directly or indirectly, to such consumer, stating the amount paid for such equipment, and stating whether the label required by paragraph (c)(11)(iii) of this section was affixed to such equipment prior to its provision to the consumer. For consumers to whom IP CTS equipment was provided directly or indirectly prior to the effective date of this paragraph (c)(11), such records shall state whether and when the label required by paragraph (c)(11)(iii) of this section was distributed to such consumer. Such records shall be maintained for a minimum period of five years after the consumer ceases to obtain service from the provider.

* * * * *

47 C.F.R. § 68.4

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 68. CONNECTION OF TERMINAL EQUIPMENT TO THE TELEPHONE
NETWORK
SUBPART A. GENERAL

§ 68.4 Hearing aid-compatible telephones.

(a)(1) Except for telephones used with public mobile services, telephones used with private radio services, and cordless and secure telephones, every telephone manufactured in the United States (other than for export) or imported for use in the United States after August 16, 1989, must be hearing aid compatible, as defined in § 68.316. Every cordless telephone manufactured in the United States (other than for export) or imported into the United States after August 16, 1991, must be hearing aid compatible, as defined in § 68.316.

(2) Unless otherwise stated and except for telephones used with public mobile services, telephones used with private radio services and secure telephones, every telephone listed in § 68.112 must be hearing aid compatible, as defined in § 68.316.

(3) A telephone is hearing aid-compatible if it provides internal means for effective use with hearing aids that are designed to be compatible with telephones which meet established technical standards for hearing aid compatibility.

(4) The Commission shall revoke or otherwise limit the exemptions of paragraph (a)((1) of this section for telephones used with public mobile services or telephones used with private radio services if it determines that (i) such revocation or limitation is in the public interest; (ii) continuation of the exemption without such revocation or limitation would have an adverse effect on hearing-impaired individuals; (iii) compliance with the requirements of § 68.4(a)(1) is technologically feasible for the telephones to which the exemption applies; and (iv) compliance with the requirements of § 68.4(a)(1) would not increase costs to such an extent that the telephones to which the exemption applies could not be successfully marketed.

47 C.F.R. § 68.300

§ 68.300 Labeling requirements.

(a) Terminal equipment approved as set out in this part must be labeled in accordance with the requirements published by the Administrative Council for Terminal Attachments and with requirements of this part for hearing aid compatibility and volume control.

(b) As of April 1, 1997, all registered telephones, including cordless telephones, as defined in § 15.3(j) of this chapter, manufactured in the United States (other than for export) or imported for use in the United States, that are hearing aid compatible, as defined in § 68.316, shall have the letters “HAC” permanently affixed thereto. “Permanently affixed” shall be defined as in paragraph (b)(5) of this section. Telephones used with public mobile services or private radio services, and secure telephones, as defined by § 68.3, are exempt from this requirement.

47 C.F.R. § 68.317

§ 68.317 Hearing aid compatibility volume control: technical standards.

(a) An analog telephone complies with the Commission's volume control requirements if the telephone is equipped with a receive volume control that provides, through the receiver in the handset or headset of the telephone, 12 dB of gain minimum and up to 18 dB of gain maximum, when measured in terms of Receive Objective Loudness Rating (ROLR), as defined in paragraph 4.1.2 of ANSI/EIA-470-A-1987 (Telephone Instruments With Loop Signaling). The 12 dB of gain minimum must be achieved without significant clipping of the test signal. The telephone also shall comply with the upper and lower limits for ROLR given in table 4.4 of ANSI/EIA-470-A-1987 when the receive volume control is set to its normal unamplified level.

Note to paragraph (a): Paragraph 4.1.2 of ANSI/EIA-470-A-1987 identifies several characteristics related to the receive response of a telephone. It is only the normal unamplified ROLR level and the change in ROLR as a function of the volume control setting that are relevant to the specification of volume control as required by this section.

(b) The ROLR of an analog telephone shall be determined over the frequency range from 300 to 3300 HZ for short, average, and long loop conditions represented by 0, 2.7, and 4.6 km of 26 AWG nonloaded cable, respectively. The specified length of cable will be simulated by a complex impedance. (See Figure A.) The input level to the cable simulator shall be -10 dB with respect to 1 V open circuit from a 900 ohm source.

(c) A digital telephone complies with the Commission's volume control requirements if the telephone is equipped with a receive volume control that provides, through the receiver of the

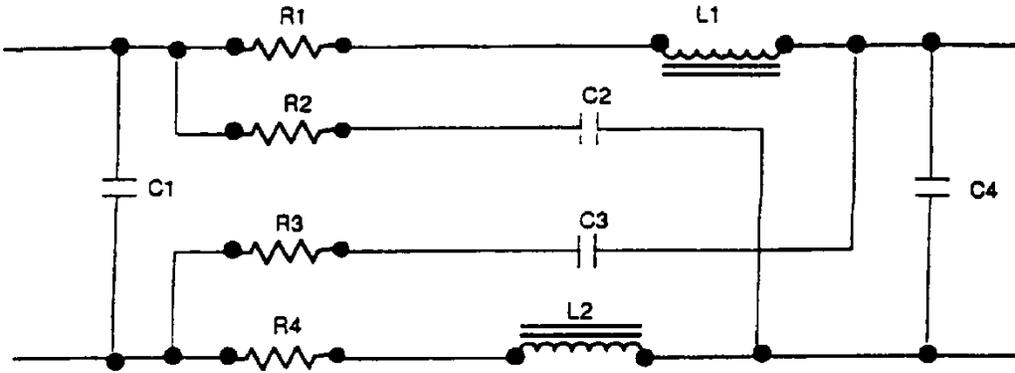
handset or headset of the telephone, 12 dB of gain minimum and up to 18 dB of gain maximum, when measured in terms of Receive Objective Loudness Rating (ROLR), as defined in paragraph 4.3.2 of ANSI/EIA/TIA-579-1991 (Acoustic-To-Digital and Digital-To-Acoustic Transmission Requirements for ISDN Terminals). The 12 dB of gain minimum must be achieved without significant clipping of the test signal. The telephone also shall comply with the limits on the range for ROLR given in paragraph 4.3.2.2 of ANSI/EIA/TIA-579-1991 when the receive volume control is set to its normal unamplified level.

(d) The ROLR of a digital telephone shall be determined over the frequency range from 300 to 3300 Hz using the method described in paragraph 4.3.2.1 of ANSI/EIA/TIA-579-1991. No variation in loop conditions is required for this measurement since the receive level of a digital telephone is independent of loop length.

(e) The ROLR for either an analog or digital telephone shall first be determined with the receive volume control at its normal unamplified level. The minimum volume control setting shall be used for this measurement unless the manufacturer identifies a different setting for the nominal volume level. The ROLR shall then be determined with the receive volume control at its maximum volume setting. Since ROLR is a loudness rating value expressed in dB of loss, more positive values of ROLR represent lower receive levels. Therefore, the ROLR value determined for the maximum volume control setting should be subtracted from that determined for the nominal volume control setting to determine compliance with the gain requirement.

(f) The 18 dB of receive gain may be exceeded provided that the amplified receive capability automatically resets to nominal gain when the telephone is caused to pass through a proper on-hook transition in order to minimize the likelihood of damage to individuals with normal hearing.

(g) These incorporations by reference of paragraph 4.1.2 (including table 4.4) of American National Standards Institute (ANSI) Standard ANSI/EIA-470-A-1987 and paragraph 4.3.2 of ANSI/EIA/TIA-579-1991 were approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of these publications may be purchased from the American National Standards Institute (ANSI), Sales Department, 11 West 42nd Street, 13th Floor, New York, NY 10036, (212) 642-4900. Copies also may be inspected during normal business hours at the following locations: Consumer and Governmental Affairs Bureau, Reference Information Center, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554; and the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.



Component	0.914 km (3 kft)	1.83 km (6 kft)
R ₁ , R ₄	124 Ω	249 Ω
R ₂ , R ₃	174 Ω	312 Ω
C ₁ , C ₄	0.0113 μF	0.0226 μF
C ₂ , C ₃	0.0122 μF	0.0255 μF
L ₁ , L ₂	0.336 mH	0.983 mH

Notes:

(1) All values are ±1%.

(2) 2.7 km (9 kft) and 4.6 km (15 kft) can be made up of cascaded sections of the above.

Loop Simulator for 26 AWG Cable

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

**SORENSEN COMMUNICATIONS, INC.
AND CAPTIONCALL, LLC, PETITIONER**

v.

**FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, RESPONDENTS.**

CERTIFICATE OF SERVICE

I, C. Grey Pash, Jr., hereby certify that on February 5, 2014, I electronically filed the foregoing Brief for the Federal Communications Commission 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
Walter E. Anderson
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.