

**Before the
Federal Communications Commission
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Misuse of Internet Protocol (IP) Captioned Telephone Service)	CG Docket No. 13-24
)	
Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities)	CG Docket No. 03-123
)	
)	

ORDER

Adopted: May 9, 2013

Released: May 9, 2013

By the Acting Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. In this Order, the Consumer and Governmental Affairs Bureau (CGB) of the Federal Communications Commission (Commission), pursuant to delegated authority,¹ addresses the following petitions for waiver: (1) Petition for Limited Waiver filed by Hamilton Relay, Inc. (Hamilton), Sprint Communications Company, L.P. (Sprint), and their equipment provider, Captel Inc. (Captel) on February 22, 2013 (Hamilton/Sprint Petition);² (2) Petition for Limited Waiver filed by Purple Communications, Inc. (Purple) on March 1, 2013 (Purple Petition);³ (3) Emergency Petition of Sprint Nextel for Limited Waiver and Clarification filed by Sprint Nextel Corporation (Sprint), on behalf of its subsidiary, Sprint Communications Company L.P., on March 5, 2013 (Sprint Petition); and (4) Emergency Petition for Waiver filed by Sorenson Communications, Inc. (Sorenson) and its wholly owned subsidiary, CaptionCall, LLC (CaptionCall) on March 7, 2013 (CaptionCall Petition). All of the petitions concern recently adopted rules addressing the provision of Internet Protocol Captioned Telephone Service (IP CTS), a form of telecommunications relay service that permits people who can speak, but who have difficulty hearing over the telephone, to speak directly to 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 device.⁴ Each petitioner seeks a waiver of section 64.604(c)(10) of the Commission's rules, which requires IP CTS providers to ensure that equipment and software used in conjunction with their

¹ 47 C.F.R. §§ 0.141, 0.361.

² Hamilton/Sprint filed an Amendment to Petition for Limited Waiver on March 14, 2013 (Hamilton/Sprint Amendment).

³ Purple filed an Addendum to Petition for Limited Waiver on March 14, 2013 (Purple Addendum).

⁴ See 47 C.F.R. § 64.601(a)(12) (defining IP CTS). Generally, IP CTS uses a connection via the public switched telephone network (PSTN) or voice over Internet Protocol (VoIP) for the voice portion of the call, while the connection carrying the captions between the relay service provider and the relay service user is via the Internet. See *Id.*; *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Declaratory Ruling, 22 FCC Rcd 379, 385, ¶ 14 (2007) (*IP CTS Order*).

service have a default setting of captions off, so that IP CTS users must affirmatively turn on captioning for each telephone call initiated or received before captioning is provided.⁵

2. For the reasons explained herein, (1) in regard to the Hamilton/Sprint Petition, we grant a limited waiver for a period of 31 days commencing on March 7, 2013, and terminating on April 7, 2013, conditioned on Hamilton and Sprint remaining in compliance with the default captions-off requirement for an additional 31 days beyond the expiration of the interim default captions-off rule; (2) in regard to the Purple Petition, we grant a limited waiver for a period of 45 days commencing on March 7, 2013, and terminating on April 21, 2013, conditioned on Purple remaining in compliance with the default captions-off requirement for an additional 45 days beyond the expiration of the interim default captions-off rule; (3) in regard to the Sprint Petition, we grant a limited waiver of the default-off requirement, applicable only to Wireless CapTel and WebCapTel software products on mobile phones, laptops, and computers for which the customer must actively set up the IP CTS software feature by individually logging in, and for which the default setting switches to “captions on” only for the limited session during which the user is logged on;⁶ and (4) in regard to the CaptionCall Petition, we deny the waiver request.

II. BACKGROUND

3. On January 25, 2013, the Commission took action to address certain practices related to the provision and marketing of IP CTS that appeared to be contributing to a recent and dramatic spike in reimbursement requests to the Interstate Telecommunications Relay Service Fund (Fund), and which were of sufficient magnitude to constitute a serious threat to the Fund if not promptly and decisively addressed.⁷ Specifically, the Commission adopted interim rules (1) prohibiting all referrals for rewards programs and any other form of direct or indirect inducements, financial or otherwise, to subscribe to or use, or encourage subscription to or use of, IP CTS; (2) requiring each IP CTS provider, in order to be eligible for compensation from the Fund for providing service to new IP CTS users, (i) to register each new IP CTS user, (ii) as part of the registration process, to obtain from each user a self-certification that the user has a hearing loss that necessitates IP CTS to communicate in a manner that is functionally

⁵ 47 C.F.R. § 64.604(c)(10). Petitioners submit their petitions pursuant to 47 C.F.R. § 1.3 and paragraph 35 of *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 13-24 and 03-123, Order and Notice of Proposed Rulemaking, 28 FCC Rcd 703, 723, ¶ 35 (2013) (*IP CTS Misuse Order*).

⁶ Sprint also seeks clarification that the provision, without charge to the user, of the Wireless CapTel and WebCapTel software products, whose purpose is to provide access to IP CTS, is not subject to the interim rules’ prohibition on “direct or indirect inducements, financial or otherwise, to subscribe to or use or encourage subscription to or use of IP CTS” (47 C.F.R. § 64.604(c)(8)) and the requirement for third party certification of a qualifying hearing loss (47 C.F.R. § 64.604(c)(9)(v)). Sprint Petition at 6-7. This order declines to address Sprint’s request for clarification at this time. A number of issues regarding the application of the interim rules adopted in the *IP CTS Misuse Order* are before the Commission and can be addressed in that context. See, e.g., *IP CTS Misuse Order*, 28 FCC Rcd at 726-30, ¶¶ 41-50.

⁷ The TRS Fund compensates providers for the costs of providing interstate telecommunications relay services (TRS) and, in the case of Internet-based TRS (iTRS), both interstate and intrastate relay services. There are two aspects to this cost recovery scheme: (1) the collection of money from various telecommunications and related services to create a Fund from which TRS providers may be compensated; and (2) the payment of money from the Fund to providers to compensate them for their reasonable costs of providing service. See generally *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Report and Order, and Declaratory Ruling, 22 FCC Rcd 20140 (2007) (*2007 TRS Rate Methodology Order*); *Contributions to the Telecommunications Relay Services Fund*, CG Docket No. 11-47, Report and Order, 26 FCC Rcd 14532 (2011) (*VoIP Contribution Order*).

equivalent to communication by conventional voice telephone users, and (iii) where the consumer accepts IP CTS equipment at a price below \$75 from any source other than a governmental program, to also obtain from the user a certification from an independent, third party professional attesting to the same; and (3) requiring IP CTS providers to ensure that equipment and software used in conjunction with their service have a default setting of captions off at the beginning of each call, so that the consumer must take an affirmative step to turn on the captions each time the consumer wishes to use IP CTS.⁸ The *IP CTS Misuse Order* was accompanied by a Notice of Proposed Rulemaking seeking comment on, among other things, whether to make the interim rules permanent.⁹

4. This order addresses only waiver requests of the interim rule requiring IP CTS providers to ensure that equipment and software used in conjunction with their service have a default setting of captions off at the beginning of each call.¹⁰ The Commission adopted this requirement to address concerns that a default setting of captions on increases the likelihood that individuals who do not need IP CTS to achieve functionally equivalent communication¹¹ may be casually or inadvertently using IP CTS, causing illegitimate minutes of use to be billed to the TRS Fund.¹² The interim default captions-off rule became effective on March 7, 2013,¹³ and is due to expire 180 days later, on September 3, 2013.¹⁴ The Commission explained in the *IP CTS Misuse Order* that, to the extent it is technically infeasible for a particular IP CTS provider to comply with the rule by the effective date, the provider may request additional time by seeking a limited waiver of the effective date, supported by an appropriate showing of good cause.¹⁵

III. DISCUSSION

5. Generally, the Commission's rules may be waived for good cause shown.¹⁶ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹⁷ In addition, the Commission may take into account considerations of hardship,

⁸ *IP CTS Misuse Order*, 28 FCC Rcd at 703-04, ¶ 1.

⁹ *Id.* at 704, ¶ 2.

¹⁰ 47 C.F.R. § 64.604(c)(10)(i).

¹¹ See 47 U.S.C. § 225(a)(3) (defining TRS as “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”).

¹² *IP CTS Misuse Order*, 28 FCC Rcd at 722, ¶ 33.

¹³ See 78 Fed. Reg. 8032 (February 5, 2013).

¹⁴ See 47 C.F.R. §§ 64.604(c)(9)(vii), (c)(10)(ii); 78 Fed. Reg. 14701 (March 7, 2013) (announcing that the relevant expiration date is September 3, 2013).

¹⁵ *IP CTS Misuse Order*, 28 FCC Rcd at 723, ¶ 35, citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*). See also 47 C.F.R. § 1.3 (stating in part: “Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”).

¹⁶ 47 C.F.R. § 1.3.

¹⁷ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

equity, or more effective implementation of overall policy on an individual basis.¹⁸ Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.¹⁹ Moreover, in demonstrating whether a waiver is warranted, the burden of proof rests with the petitioner.²⁰ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.²¹

A. Hamilton/Sprint Petition

6. In their petition, Hamilton, Sprint and Captel explained that beginning on February 27, 2013, they would deploy a Captel software update to make their users' IP CTS phones compliant with the requirement to have a default setting of captions off. They explained that the update cannot be fully activated, however, until the consumer uses the IP CTS service. Specifically, the petition stated that, to download and activate the relevant software to a previously installed Captel IP CTS phone, the consumer must use the phone to place or receive a captioned call and then hang up.²² Similarly, to download the software to new Captel phones that were manufactured and placed in the distribution pipeline before the software update was developed, the petition stated, the consumer must plug in the phone and wait for an initiation-of-service automatic update before the default setting is updated to captions off. If the user places a call before the update download is completed, then that single call would be placed without the captions-off default setting having been activated.²³ Hamilton, Sprint and Captel therefore requested a limited waiver of the requirement for the captions-off default setting, applicable to the first call made by each phone that could not be activated as of March 7, 2013.²⁴ The petitioners did not specify a deadline by which they expected all phones to be compliant.²⁵

7. In an amendment to the petition filed on March 14, 2013, Hamilton, Sprint and Captel confirmed that they began deploying the software update on February 27, 2013, as intended, and reported that as of March 13, 2013, 85 percent of Hamilton's and Sprint's IP CTS phones were updated to implement the captions-off default setting.²⁶ However, Hamilton, Sprint and Captel stated that they have no control over when a consumer will next use his or her phone, and that many IP CTS users are elderly and may use the phone infrequently.²⁷ The amendment proposed an end date for the waiver of April 7, 2013,²⁸ 31 days after the March 7, 2013 effective date.

¹⁸ *WAIT Radio*, 418 F.2d at 1159.

¹⁹ *Northeast Cellular*, 897 F.2d at 1166.

²⁰ *Tucson Radio, Inc. v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971).

²¹ *WAIT Radio*, 418 F.2d at 1157 (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); *Birach Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 1414, 1415 (2003) (*Birach*).

²² Hamilton/Sprint Petition at 2-3.

²³ *Id.* at 3-4.

²⁴ *Id.* at 4-6.

²⁵ Rather, in this petition, the petitioners sought a waiver for phones in the possession of any users who had not made calls to trigger the software update as of the March 7, 2011 effective date.

²⁶ Hamilton/Sprint Amendment at 2.

²⁷ *Id.* at 2-3; Hamilton/Sprint Petition at 3.

²⁸ Hamilton/Sprint Amendment at 3.

8. On April 19, 2013, Hamilton, Sprint, and CapTel filed an additional *ex parte* letter in which they committed to maintaining each device in full compliance with the captions default-off requirement for at least 180 days from the date such device becomes compliant.²⁹

9. We find good cause to grant the partial waiver requested in the Hamilton/Sprint Petition, as amended, for a period of 31 days. Hamilton, Sprint and CapTel developed a software update to comply with the Commission's new rules, and they engaged in good faith efforts to deploy it on all of their IP CTS phones on a timely basis. However, because downloading the update to each phone required each consumer to place or receive a call using IP CTS, and some consumers did not do so between February 27, 2013, when the update was pushed out, and March 7, 2013, when the rule became effective, it is evident that technical limitations prevented these petitioners from meeting the March 7th deadline.³⁰ Moreover, we find that this waiver request is appropriately narrow in scope in that it (1) requests a waiver of the default captions-off requirement for only one call per user, and (2) requests a waiver period for a short period of only 31 days. Given the diligent efforts demonstrated by Hamilton, Sprint and CapTel to deploy a software solution that would bring their phones into compliance with the rule in a timely fashion, and given the narrow scope of the requested waiver, we find that a grant of the Hamilton/Sprint Petition for a period of 31 days is in the public interest.

10. In their April 19, 2013 *Ex Parte*, Hamilton, Sprint and CapTel committed to maintaining each device subject to the waiver in full compliance with the default captions-off provisions of the *IP CTS Misuse Order* for at least 180 days from the date such device becomes compliant.³¹ Since we are granting them a 31-day waiver, we are conditioning the waiver grants to Hamilton and Sprint on the respective providers remaining in compliance with the default captions-off requirement for an additional 31 days beyond the expiration of the interim default captions-off rule.³²

B. Purple Petition

11. In its petition, Purple requested a limited waiver for its IP CTS to enterprise users using Cisco IP phones.³³ Purple stated that, despite its best efforts, it was unable to complete the requisite software redesign on these phones by the March 7, 2013 deadline,³⁴ and that these phones also require installation by third party information technology (IT) departments, over which Purple has little control.³⁵ In an *ex*

²⁹ Hamilton, Sprint, and CapTel, *Ex Parte* Letter, April 19, 2013, at 2 (Hamilton/Sprint April 19, 2013 *Ex Parte*).

³⁰ See *IP CTS Misuse Order*, 28 FCC Rcd at 723, ¶ 35 (“to the extent that it is technically infeasible for a particular IP CTS provider to comply within this 30-day time period for equipment that is already deployed, the provider may request additional time by seeking a limited waiver of the effective date, supported by an appropriate good cause showing”).

³¹ Hamilton/Sprint April 19, 2013 *Ex Parte* at 2.

³² See 47 C.F.R. § 64.604(c)(10)(ii). This waiver condition is subject to any revisions that the Commission may adopt in rulemaking proceedings in the future.

³³ Purple Petition at 1.

³⁴ *Id.* at 3.

³⁵ *Id.* at 4. Purple also asked, as an alternative to the requested waiver, that the Commission approve a limited exception to the captions-off default requirement that would be applicable to users of the Cisco IP phones in the work environment where the phone is not used by or accessible to others and the consumer provides additional certification assuring that such phone is not accessible to unqualified users. *Id.* at 5-6. This order declines to address Purple's alternative request for a limited exception at this time. A number of issues regarding the (continued....)

parte communication following a meeting on March 7, 2013, Purple further clarified that it needed 25 days, or until April 1, 2013, to complete the software upgrade and an additional limited period of time for approximately 20 governmental organizations and businesses to install the upgrade at individual workplaces.³⁶

12. In its addendum, Purple also requested a limited 45-day waiver for its Clarity Ensemble phones.³⁷ Purple explained that it had not initially requested a waiver for these phones, because at the time it filed the Purple Petition, it had expected to be able to develop and fully deploy the software patch for these devices by the March 7, 2013 deadline.³⁸ However, on March 4, 2013, Purple stated, it learned from Clarity that the software patch can be downloaded to a phone only on the specific day of the week that the phone is configured to download software updates. Because the specific day of the week varies by individual device, not all phones that had been distributed may have been updated by the March 7, 2013 deadline, but were updated within one week of March 7, 2013.³⁹ To address this, Purple also sent e-mails to its customers instructing them to manually set their phones to default off, but Purple stated it is not sure they were able to reach all customers in this way or whether all such customers complied with Purple's instructions.⁴⁰ In addition, Purple reported that there are Ensemble phones still in distributor inventories that cannot be updated with the software patch until the phones are installed and connected to the Internet and the patch is downloaded on the specific day of the week set for the phone by the download schedule, meaning that the phones would be updated within one week of installation.⁴¹

13. On April 18, 2013, Purple filed an additional *ex parte* letter reporting that all Clarity Ensemble phones currently in use have been brought into compliance with the captions default-off requirement, and the remaining phones consist of a limited number of devices that remain in Clarity's warehouse, which will update in accordance with the update schedule when they are put into use by a registered IP CTS user.⁴² Due to the fact that these phones will be put into use and will not be updated until the scheduled update days of the week for the phones, Purple represented that it will not seek reimbursement for IP CTS minutes generated by such phones prior to their scheduled update day and time.⁴³ Purple also reported that it is in the process of working with the IT departments of its enterprise customers to update the Cisco phones and that it has scheduled on-site software installations with 30 of the 35 host companies.⁴⁴ Purple added that 92 percent of the minutes associated with the Cisco phones will be updated by May 30, 2013, 99 percent will be updated by June 14, 2013, and that the Cisco phones

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application of the interim rules adopted in the *IP CTS Misuse Order*, including Purple's proposed exception, are before the Commission and can be addressed in that context. See *IP CTS Misuse Order*, 28 FCC Rcd at 731, ¶ 53.

³⁶ Purple, *Ex Parte* Letter, March 11, 2013, at 1-2 (Purple March 11, 2013 *Ex Parte*). See also Affidavit of Jesse Odom, attached to the Purple Petition (Odom Affidavit).

³⁷ Purple Addendum at 1.

³⁸ *Id.* at 2.

³⁹ *Id.* at 2-3.

⁴⁰ *Id.* at 3.

⁴¹ *Id.*

⁴² Purple, *Ex Parte* Letter, April 18, 2013, at 2 (Purple April 18, 2013 *Ex Parte*).

⁴³ *Id.*, n. 2.

⁴⁴ *Id.* at 2.

will be brought into complete compliance by July 31, 2013.⁴⁵ Lastly, Purple committed to maintaining each device in full compliance with the captions default-off requirement for at least 180 days from the date such device becomes compliant.⁴⁶

14. We find good cause to grant the limited waivers requested by Purple for a period of 45 days for both the Cisco and Ensemble IP CTS phones distributed by Purple. With respect to the Cisco phones first raised in Purple's petition, the record indicates that Purple has diligently developed a software update to enable Cisco IP phones to comply with the default captions-off requirement and that Purple is working with those IT departments to schedule installation of the upgrade.⁴⁷ The waiver request is appropriately narrow in scope in that it is limited to the unique circumstances associated with developing and implementing software updates for users employed by 35 governmental organizations and businesses.⁴⁸ Although Purple recently informed us that the Cisco IP phones will not be brought into full compliance until July 31, 2013,⁴⁹ we find that granting a waiver until July 31, 2013, which would be a period of nearly five months, would substantially undercut the interim 180-day default captions-off requirement adopted by the Commission in the *IP CTS Misuse Order*.⁵⁰ Purple has represented that the software upgrade needed to bring the Cisco IP phones into compliance would be developed by April 1, 2013,⁵¹ but has failed to explain why it needs until July 31, 2013, which is an additional four months, for the IT departments of its enterprise users to update their software. We therefore do not find good cause to grant Purple a waiver of nearly five months for the Cisco IP phones. Nevertheless, because Purple has diligently developed a software update for its Cisco IP phones, we find that an additional period of 15 days beyond the 30-day request in the original Purple Petition⁵² is appropriately limited in duration and provides enterprise IT departments with an opportunity to install the upgrade. To the extent that any Cisco IP phones were not in compliance with the captions default-off requirement at the end of the waiver period, that is by April 21, 2013, Purple may not submit to the TRS Fund administrator any request for compensation for IP CTS minutes generated by those phones after April 21, 2013, and before they are brought into full compliance. Therefore, we find that a grant of the Purple Petition with respect to the Cisco IP phones for a period of 45 days is in the public interest.

15. With respect to the Clarity Ensemble phones, Purple developed a software update to comply with the default captions-off rule, and attempted to deploy it on a timely basis. However, because downloading the update to each Clarity Ensemble phone was dependent on the day of the week that the particular device received updates, technical constraints prevented full assurance that all phones would receive the updates by the March 7, 2013 deadline. The *IP CTS Misuse Order* expressly contemplated

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See Odom Affidavit; Purple April 18, 2013 *Ex Parte* at 2.

⁴⁸ Although Purple originally stated that there were approximately 20 governmental organizations and businesses (Purple March 11, 2013 *Ex Parte* at 2), Purple more recently informed us that there are 35 such entities. Purple April 18, 2013 *Ex Parte* at 2.

⁴⁹ *Id.*

⁵⁰ See *IP CTS Misuse Order*, 28 FCC Rcd at 720-723, ¶¶ 27-35.

⁵¹ See Purple March 11, 2013 *Ex Parte* at 1-2.

⁵² See Purple Petition at 1.

that waivers could be granted in such circumstances.⁵³ Moreover, the waiver request with respect to the Clarity Ensemble phones was appropriately narrow in scope in that it (1) requested a waiver of the captions-off default requirement for up to a maximum of one week for each device, and (2) requested a reasonable waiver period of 45 days. Because we find that Purple acted in good faith by activating a software solution to bring its Clarity Ensemble phones into compliance with the rule in a timely fashion, and by attempting to mitigate the effects of non-compliance by sending e-mails to each of its users instructing them to set their phones to the captions-off default, we find that there is good cause to grant Purple a waiver from compliance with the default-off requirement for the Clarity Ensemble phones for a period of 45 days. Therefore, we find that a grant of the waiver requested in the Purple Addendum with respect to the Clarity Ensemble phones for a period of 45 days is in the public interest.

16. In its April 18, 2013 *Ex Parte*, Purple committed to maintaining each device subject to the waiver in full compliance with the default captions-off provisions of the *IP CTS Misuse Order* for at least 180 days from the date such device becomes compliant.⁵⁴ Since we are granting to Purple 45-day waivers for both its Cisco IP phones and its Clarity Ensemble phones, we are conditioning our waiver grant to Purple on Purple remaining in compliance with the default captions-off requirement for an additional 45 days beyond the expiration of the interim default captions-off rule.⁵⁵

C. Sprint Petition

17. In the Sprint petition Sprint requested a waiver of the default-off requirement for two of its software products: Wireless CapTel and WebCapTel.⁵⁶ These applications enable a user to access IP CTS and receive captions on mobile phones, laptops, tablets, and computers, instead of using a dedicated IP CTS phone to receive captions. Sprint enumerated multiple steps in which a user must engage to enable these software applications each time the user logs onto its service,⁵⁷ and asserted that because these steps must be followed, another person visiting the home or office is not likely to casually or

⁵³ *IP CTS Misuse Order*, 28 FCC Red at 723, ¶ 35 (“to the extent that it is technically infeasible for a particular IP CTS provider to comply within this 30-day time period for equipment that is already deployed, the provider may request additional time by seeking a limited waiver of the effective date, supported by an appropriate good cause showing”).

⁵⁴ Purple April 18, 2013 *Ex Parte* at 2.

⁵⁵ See 47 C.F.R. § 64.604(c)(10)(ii). This waiver condition is subject to any revisions that the Commission may adopt in rulemaking proceedings the future.

⁵⁶ Sprint Petition at 1.

⁵⁷ *Id.* at 3-5. A WebCapTel user who wants to make a captioned call through a computer must (1) open the browser and type the URL of the website, (2) enter the user name and passcode, (3) type the number the user is calling, and (4) click on the “Place Call” button. To receive a captioned call on a computer, the user must (1) ensure that the computer is on and running and opened to the CapTel provider’s access page, (2) enter the user name and passcode, (3) enter the phone number attached to the computer, (4) instruct the calling party to dial a toll-free number and enter the phone number of the phone attached to the computer, and (5) answer the phone when it rings. A user who has downloaded the Wireless CapTel application to the user’s mobile phone and wants to make a captioned call must (1) open up and log onto the application by entering the user name and passcode, (2) wait until the application ensures that the mobile broadband connection is fast enough for a captioned call, (3) enter the number the user is calling, and (4) tap the “Call” button to dial the phone number and enable the captions. To receive a captioned call on a mobile phone, the user must (1) ensure that the application has been opened and that the user name and passcode have been entered, (2) wait until the application ensures that the broadband connection is fast enough for a captioned call, and (3) upon receiving a call, the user must tap the “Answer with Captions” button in order to receive captioning. *Id.*

inadvertently use the computer or mobile phone that has this software.⁵⁸ Sprint acknowledged that once a user enables the application, the captioning stays on for each subsequent call until the application is closed. Sprint stated it is unaware of any technological fix to require that the captions must be turned on each time another call is made subsequent to the application being enabled,⁵⁹ and therefore sought a waiver of the requirement that captions must be turned on each time a call is made for Wireless CapTel and WebCapTel.

18. We find good cause to grant the limited waiver requested in the Sprint Petition, waiving the interim default captions-off requirement as applied to Wireless CapTel and WebCapTel on mobile phones, laptops, tablets, and computers. Given the apparent infeasibility of bringing these software applications into full compliance with our rules, we conclude that considerations of hardship and equity justify grant of a waiver under these special circumstances.⁶⁰ This waiver will expire when the Commission issues an order ruling on the question of whether the interim rule requiring captions to be defaulted off should be made permanent.⁶¹ The waiver applies to the named software applications when used on mobile phones, laptops, tablets, and computers, provided that the following two conditions are satisfied: (1) users must actively set up the IP CTS software feature by individually logging in;⁶² and (2) the default setting switches to “captions on” only for the limited session during which the user is logged on, rather than remaining on indefinitely.⁶³ We believe that the grant of a waiver in these circumstances is consistent with the underlying purpose of the rule,⁶⁴ because this type of software product, which is available only on mobile phones, laptops, tablets and computers, and which is thus likely to be used only by the individual who needs the feature, is not as likely to result in abuse as is an IP CTS device that looks like a home phone and that may be available for use by family members or visitors. Because of the steps that must be taken to access WebCapTel and Wireless CapTel, we agree with Sprint that it is unlikely that a hearing individual would attempt to make a WebCapTel or Wireless CapTel call, even if the person has access to the computer or mobile device with the downloaded applications and knows the log-in information, because it would be easier and more efficient to simply use the regular telephone

⁵⁸ *Id.* at 4-5.

⁵⁹ *Id.* at 5.

⁶⁰ See *WAIT Radio*, 418 F.2d at 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

⁶¹ See *IP CTS Misuse Order*, 28 FCC Rcd at 730-731, ¶¶ 51-54. See also 47 C.F.R. §§ 64.604(c)(9)(vii), (c)(10)(ii). In comments filed on the pending Notice of Proposed Rulemaking, Sprint requested that the final rules exempt web and wireless use of IP CTS from the default-off requirement. Sprint Comments at 8-10 (February 26, 2013).

⁶² In an *ex parte* letter, Sprint explained that both the WebCapTel and Wireless CapTel log-in sites have a “Remember Me” box, which if checked will automatically enter the user’s log-in information and enable the user to access the page that enables the user to make or receive captioned calls. Sprint, *Ex Parte* Letter, March 13, 2013, at 1, n. 1 (Sprint March 13, 2013 *Ex Parte*). We find that the “Remember Me” application qualifies for the limited waiver granted in this order, provided that, each time the user turns on the computer or mobile phone, the user must still go to the WebCapTel or Wireless CapTel web page or application and follow the other steps of the multi-step procedures described by Sprint before the consumer can make use of IP CTS.

⁶³ In the Sprint March 13, 2013 *Ex Parte*, Sprint confirmed that users of WebCapTel and Wireless CapTel who have shut down their computers or mobile devices must follow the multi-step procedures described in the Sprint Petition once they turn on their computers or mobile phones. As explained by Sprint, the WebCapTel and Wireless CapTel applications close when the user turns off the device containing the application. *Id.* at 1.

⁶⁴ See *WAIT Radio*, 418 F.2d at 1159 (D.C. Cir. 1969) (agency to consider “more effective implementation of overall policy on an individual basis”); *Northeast Cellular*, 897 F.2d at 1166.

feature of the device to make or receive calls.⁶⁵ In other words, the personal nature of these devices and the relative simplicity of making an ordinary call on these devices, as compared to making a call with captions, ensures that the purpose of the captions-off default rule is served. We therefore find that grant of a temporary waiver to Sprint as discussed herein to be in the public interest.

D. CaptionCall Petition

19. In its petition, CaptionCall requested a five month waiver of the captions default-off requirement. CaptionCall suggested that the compensation paid for CaptionCall IP CTS be reduced to 85 percent of the IP CTS compensation rate for minutes generated by non-compliant devices during the waiver period.⁶⁶ CaptionCall stated that, after it deployed an upgrade to its software on March 3, 2013, for the purpose of implementing the captions default-off requirement, the relay service was beset by technical glitches and customer confusion, necessitating a reversal of the upgrade only two days later.⁶⁷ According to CaptionCall, technical glitches included static on the audio line, instances when the “captions on” button did not work, and phones in an “unstable state” during the update process.⁶⁸ CaptionCall asserted that these technical glitches are the result of having only five weeks to develop and implement a new user interface, a far shorter period than CaptionCall ordinarily needs to develop and implement software upgrades.⁶⁹ CaptionCall argued that although it delivered notices and instructions to consumers in advance of the software update, and although the user interface to turn on captions was designed to be user friendly by having a button in the middle of the screen saying “Touch Here to Caption This Call,” CaptionCall’s customers were confused by the change and had difficulty operating the interface to turn on captions.⁷⁰ CaptionCall argued that these problems were so severe that CaptionCall temporarily reversed the software upgrade in order to ensure that the upgrade is debugged and that it can present the change to consumers in a more orderly fashion.⁷¹ According to the petition, CaptionCall has begun a trial program to contact customers and educate them individually, and will follow up by deploying new firmware including the default-off feature.⁷² CaptionCall asserted that a 5-month period is needed to evaluate and address the technical glitches, address customer complaints and inquiries, develop and test any necessary patches, and provide customers with detailed information about the change.⁷³ CaptionCall also argued that providing compensation at a reduced 85 percent rate for minutes generated on non-compliant phones would protect the TRS Fund from any ineligible usage⁷⁴ and create an incentive to roll out a complete solution quickly.⁷⁵

⁶⁵ See Sprint Petition at 5.

⁶⁶ CaptionCall Petition at 11.

⁶⁷ *Id.* at 6-7.

⁶⁸ *Id.*

⁶⁹ *Id.* at 3-5.

⁷⁰ *Id.* at 7, n.13, Attachment 2. Attachment 2 is a copy of the “CaptionCall Flyer” that was sent to consumers.

⁷¹ *Id.* at 8-9.

⁷² *Id.* at 8.

⁷³ *Id.* at 9-10.

⁷⁴ *Id.* at 3.

⁷⁵ *Id.* at 1.

20. On April 22, 2013, Sorenson and CaptionCall filed a declaration supplementing the CaptionCall Petition.⁷⁶ While largely repeating material already included in the declaration supporting the original petition,⁷⁷ the declaration did provide some additional information, stating, among other things, that (1) among the technical problems with the initially deployed firmware was a bug, present in all phones receiving the compliance upgrade, that caused “a randomly occurring 20-second delay between the time the customer pressed the ‘captions on’ button and the time captions turned on;”⁷⁸ (2) on March 19, 2013, CaptionCall deployed to 115 customers updated firmware that has apparently fixed this bug, as well as the other technical problems in the compliant firmware;⁷⁹ (3) CaptionCall nonetheless chose to postpone full compliance with the default captions-off rule in order to develop an improved user interface for the captions-on mechanism and provide training and support for the change to default-off;⁸⁰ and (4) CaptionCall does not plan to achieve full compliance with the default captions-off rule until August 19, 2013, after deployment of its new firmware is rolled out to its users in three stages, depending on their CaptionCall usage.⁸¹

21. We deny the CaptionCall Petition. Unlike Hamilton, Sprint, and Purple, which were mostly (Hamilton and Sprint) or partially (Purple) compliant as of March 7, 2013, and were on a path to complete or nearly complete compliance within 31-45 days of the March 7 deadline, *all* of CaptionCall’s phones were *non-compliant* as of March 7 (or shortly thereafter),⁸² and all but a very small number continue to be non-compliant.⁸³ Moreover, 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. CaptionCall pointed to technical glitches as a key factor in its decision to reverse the compliance upgrade two days after it was deployed.⁸⁴ However, the CaptionCall Petition provided few technical details regarding the nature of

⁷⁶ Sorenson and CaptionCall, *Ex Parte* Letter, April 22, 2013 (CaptionCall April 22, 2013 *Ex Parte*), and attached Declaration of Bruce Peterson, Senior Director of Marketing (Peterson Dec.).

⁷⁷ See CaptionCall Petition, Attachment 1, Declaration of Michael Holm, Senior Director of Engineering (Holm Dec.).

⁷⁸ Peterson Dec., ¶ 11. The declaration did not provide an estimate of how often this randomly occurring delay occurs, or how many customers actually experienced the delay.

⁷⁹ *Id.*, ¶ 15.

⁸⁰ *Id.*, ¶¶ 16-19. According to the supplemental filing, based on customer feedback “CaptionCall determined that the captions-on mechanism, a green bar, proved to be confusing for customers.” *Id.*, ¶ 16. In addition, CaptionCall was concerned that it had not had time to “provide customers adequate training and support,” such as the “customized, in-person training” that customers received upon initial installation of their phones and that CaptionCall claims is “the level of service they expect.” *Id.*, ¶ 17. Therefore, “CaptionCall concluded that its default-on [sic] interface was insufficient, and that a deployment of even the debugged version created an unacceptable risk of customer alienation.” *Id.*, ¶ 18.

⁸¹ *Id.*, ¶ 20. CaptionCall initially requested a five-month waiver, *i.e.*, until August 7, 2013. CaptionCall explained that its roll-out of firmware will provide varied levels of training for its users, with some receiving face-to-face training, some receiving training and education through a phone call, and some, referred to as “casual or incidental users,” receiving direct mail and email support. CaptionCall reported that these different levels of education are necessary because users with the “most ingrained habits and behaviors will require the most support.” *Id.*

⁸² See CaptionCall Petition at 8; Holm Dec., ¶ 10 (on March 5, 2013, CaptionCall began reversing its implementation of a compliant firmware upgrade).

⁸³ As noted (¶ 20, *supra*), CaptionCall has corrected the technical problems in its initially deployed firmware and has deployed that compliant and apparently bug-free firmware to 115 customers. Peterson Dec., ¶ 15.

⁸⁴ See CaptionCall Petition at 6-9.

these technical problems, and no estimate as to the number of phones or calls affected by technical problems.⁸⁵ CaptionCall's most recent filing, submitted more than six weeks after the compliance deadline, while providing some additional information regarding these technical glitches, still omitted any estimate of the frequency with which technical problems disrupted service or the number of customers affected.⁸⁶ Further, although CaptionCall asserted that it received numerous complaints from users after the initial deployment,⁸⁷ CaptionCall provided no estimate as to how many of the complaints were the result of actual technical problems, as opposed to consumers being simply confused by, or displeased with, the new default-off requirement or its implementation by CaptionCall.

22. Even more fatal to CaptionCall's request is its failure to adequately explain why it could not have simply addressed the technical problems and achieved full compliance within a short time after the March 7, 2013 compliance date. In this regard, CaptionCall's supplemental filing confirmed that the technical bugs in CaptionCall's compliant firmware were eliminated in an update deployed to 115 customers on March 19, 2013, less than two weeks after the March 7th compliance date.⁸⁸ CaptionCall acknowledged that the users who received the March 19th firmware update "have not complained about technical glitches."⁸⁹ Yet, rather than deploying the corrected firmware to the rest of its customers, CaptionCall chose instead to postpone compliance for an additional five months.⁹⁰ The Commission's *IP CTS Misuse Order* contemplated the grant of waivers primarily for reasons of technical infeasibility.⁹¹ Given the success of CaptionCall's March 19th firmware deployment, we find that it has not shown good cause for a waiver on this basis.

23. CaptionCall also cited customer confusion as part of the reason for reversing its compliance and part of its justification for a five-month waiver; however, it did not explain why any such customer confusion rendered it unable to comply in a timely fashion. By contrast, other providers have been able largely to meet the March 7, 2013, deadline with respect to their dedicated wireline IP CTS phones, despite having to redesign software or firmware and manage responses to customer complaints and confusion.⁹² Moreover, CaptionCall appears to have made little effort to prevent customer confusion through consumer education and outreach efforts that would explain the default-off rule, either prior to or

⁸⁵ See Holm Dec., ¶¶ 8-9.

⁸⁶ See Peterson Dec., ¶ 11.

⁸⁷ CaptionCall Petition at 6-9.

⁸⁸ Peterson Dec., ¶ 15.

⁸⁹ *Id.*

⁹⁰ Compliance was postponed in order to allow additional time for CaptionCall to perfect its design of the user interface for the captions control mechanism. *Id.*, ¶ 16. Although the declaration cited, as an additional reason, the need to adequately educate CaptionCall customers prior to deployment (*id.*, ¶ 17), CaptionCall provided no reason why such efforts could not have been undertaken much sooner, in conjunction with the correction of the original interface described in the supplemental filing. See *id.*, ¶ 15. Instead, CaptionCall chose to postpone such education efforts, and terminate its compliance with the default-off rule, while pursuing further improvements to the technical interface. See *id.*, ¶ 18.

⁹¹ See *IP CTS Misuse Order*, 28 FCC Rcd at 723, ¶ 35; ¶ 20, *supra*.

⁹² See ¶¶ 9, 15, *supra*; Sprint, Hamilton, Ultratec and Weitbrecht Communications, Inc., *Ex Parte* Letter, April 16, 2013 (Sprint *et al.* April 16, 2013 *Ex Parte*). See also Peterson Dec., ¶ 14 ("The customer feedback CaptionCall has received is consistent with the complaints documented in [other providers'] filings").

after the deployment of compliant software.⁹³ Indeed, some of CaptionCall's customers' confusion appears to have been of its own making.⁹⁴ We are particularly troubled that CaptionCall unilaterally reversed its compliant software upgrade after only two days, and has chosen to remain noncompliant for more than five months, while Hamilton and Sprint, which have a comparable customer base and which also received numerous consumer complaints in regard to the captions default-off requirement, nonetheless were able to bring their IP CTS phones into full compliance within a month.⁹⁵ By unilaterally choosing to reverse and postpone its compliance with the interim rule, in order to avoid "an unacceptable risk of customer alienation,"⁹⁶ CaptionCall has provided itself with a significant competitive advantage, including the opportunity to capture customers alienated from competitors who will be in compliance with the default-off rule during the extended waiver period CaptionCall has requested.⁹⁷ To grant Sorenson a waiver of the requested length under these circumstances would be clearly contrary to basic principles of equity and nondiscrimination, and not in the public interest.⁹⁸

24. Further, while devoting resources to its customer interface improvement project, CaptionCall has not reported taking a single action since the reversal of its compliance to mitigate the effects of its non-compliance. For example, CaptionCall could have informed consumers that they should turn off the captions on CaptionCall's noncompliant phones when they do not need them or when others are using the

⁹³ See CaptionCall Petition at 5-6, Attachment 2. CaptionCall complained it had little time to prepare customers (Peterson Dec., ¶ 7), but the time it did have does not appear to have used wisely. Although the default captions-off rule was the only interim rule in the *IP CTS Misuse Order* with an immediate impact on existing customers, CaptionCall's notice to its existing IP CTS customers contains only a single sentence describing the default captions-off rule.

⁹⁴ The sparse information provided by CaptionCall to its customers appears to have affirmatively generated customer confusion by stating baldly that "[a]ll captioned telephone users are required to turn on captions at the beginning of each call." CaptionCall Petition, Attachment 2. CaptionCall's March 2013 newsletter to customers similarly stated that "all captioned telephone users are required to manually turn captions on at the beginning of every call." *The CaptionCall Connection* (March 2013). These statements logically could be interpreted to mean that, in order to be able to keep their IP CTS phones and continue receiving the service, users *must* turn on captions on every call, whether or not they actually need to use captions for a particular call. In fact, the petition acknowledges that a number of CaptionCall customers did interpret CaptionCall's notice in that way. See CaptionCall Petition at 8; Peterson Dec., ¶ 12 ("some customers thought that if they did not select captioning on for every call, they would either have to give their phone back, or that other telephones in their house would cease to function"). To require consumers to always turn on the captions on an IP CTS device is, of course, utterly contrary to the plain meaning and purpose of the rule, which clearly states that equipment and software should be configured so that IP CTS users "must affirmatively turn on captioning for each telephone call initiated or received *before captioning is provided.*" 47 C.F.R. § 64.604(10)(i) (emphasis added).

⁹⁵ See ¶ 9, *supra*; Sprint *et al.* April 16, 2013 *Ex Parte*.

⁹⁶ Peterson Dec., ¶ 18.

⁹⁷ In addition, by delaying its compliance, CaptionCall has provided itself with an extended period to perfect the design of an efficient and "user-friendly" captions control mechanism, an opportunity not available to its more compliant competitors.

⁹⁸ See *WAIT Radio*, 418 F.2d at 1159 (considerations of equity should be taken into account in deciding on waiver requests); *Northeast Cellular*, 897 F.2d at 1166 (to prevent discriminatory application, waiver justification "must explain why deviation better serves the public interest and articulate the nature of the special circumstances" justifying waiver).

phone, and instructed consumers on how to do so.⁹⁹ CaptionCall has not provided any indication that it has provided, or intends to provide, such instruction at any time during the five months period during which it requests permission to remain noncompliant.¹⁰⁰ To make matters worse, CaptionCall is exacerbating the problem by continuing to distribute non-compliant phones without a short term plan to bring the phones into compliance – knowing that such phones will remain noncompliant for an extended period of time after distribution – and without undertaking any consumer education to train consumers to use the captions-off feature.

25. By contrast, the compliant software patch developed by Hamilton and Sprint is included in all Captel phones manufactured after March 7, 2012, and is downloaded into all previously produced phones as soon as the service-initiation update occurs or an initial call is made.¹⁰¹ Similarly, Purple reports that all phones and software used with its ClearCaptions service are shipped with a captions-off default setting, and it has developed and is deploying updates for existing phones and software that prevents or reverses user-initiated changes in the default setting.¹⁰² On the other hand, all of the phones distributed by CaptionCall since March 7, 2013, are still non-compliant, and as discussed above, CaptionCall continues to distribute and install non-compliant phones to consumers who may not even know that the phones are not compliant and who may not have been told how to mitigate such non-compliance. CaptionCall's failure to make its IP CTS phones compliant in a timely manner causes additional concerns because, as compared to other IP CTS phones that enable users to switch captions off in a fairly simple manner, the current configuration of CaptionCall's phones makes this task more complicated due to the need for users to take several steps to turn off captions.¹⁰³

26. We also find that CaptionCall's offer to be compensated at an 85 percent rate is not an adequate substitute for compliance with the captions-off rule. The CaptionCall Petition does not indicate how this figure was developed, and there is no quantitative evidence as to the amount of unauthorized use that will result from CaptionCall's noncompliance.¹⁰⁴

⁹⁹ By contrast, when Purple learned that many of its Clarity Ensemble phones would not be compliant as of the March 7, 2013 deadline, Purple attempted to mitigate the effects of non-compliance by sending e-mails to each of its users instructing them to set their phones to the captions-off default. *See* Purple Addendum at 3.

¹⁰⁰ CaptionCall's supplemental filing refers only to various measures taken prior to the compliance date to inform customers of the nature of IP CTS and verify subscribers' identity and eligibility for the service, indicating that "CaptionCall is further updating its materials supporting customer training to address these points." Peterson Dec., ¶ 5. Neither the CaptionCall Petition nor the supplemental filing makes any mention of instructing customers how to adjust the default setting to captions off or to warn family members or friends to turn captions off when using the customer's IP CTS phone. Indeed, the declaration states that, prior to adoption of the interim default captions-off rule, CaptionCall had been "developing solutions to notify consumers at the beginning of the call that only qualified users could use IP CTS" but that it terminated such efforts. *Id.*, ¶ 5.

¹⁰¹ *See* Hamilton/Sprint Petition at 2-4.

¹⁰² Purple Petition at 3.

¹⁰³ *See* Letter from John T. Nakahata, Christopher J. Wright, and Charles Breckinridge, Wiltshire & Grannis LLP, to Kris Monteith, Acting Chief, Consumer and Governmental Affairs Bureau, January 8, 2013, at 6, n. 14 (indicating that a consumer must first access a "menu" screen before pressing a button to turn captions off).

¹⁰⁴ We also find that continuing to compensate CaptionCall, even at a reduced rate, for service to its noncompliant equipment, while other providers have conscientiously complied, would risk providing CaptionCall with an unwarranted competitive advantage. *See* ¶ 24, *supra*.

27. In summary, CaptionCall has failed to “plead with particularity”¹⁰⁵ facts that would establish “special circumstances warranting a deviation from the general rule.”¹⁰⁶ For the reasons stated above, we find that CaptionCall has failed to demonstrate good cause for grant of a waiver, and we deny the CaptionCall Petition.

IV. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 4(i) and 4(j) and 225 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 225, and sections 0.141, 0.361 and 1.3 of the Commission’s rules, 47 C.F.R. §§ 0.141, 0.361 and 1.3, this Order IS ADOPTED.

29. IT IS FURTHER ORDERED that the Petition for Limited Waiver filed by Hamilton Relay, Inc., Sprint Communications Company, L.P., and Captel Inc. on February 22, 2013, and amended on March 14, 2013, IS GRANTED for a period of 31 days beginning on March 7, 2013, and ending on April 7, 2013, CONDITIONED UPON Hamilton Relay, Inc., Sprint Communications Company, L.P. and Captel, Inc. abiding by the requirements of section 64.604(c)(10) of the Commission’s rules, 47 C.F.R. § 64.604(c)(10), for a period of 31 days after the expiration of that interim rule.

30. IT IS FURTHER ORDERED that the Petition for Limited Waiver filed by Purple Communications, Inc., on March 1, 2013, and the Addendum to Petition for Limited Waiver filed by Purple Communications, Inc., on March 14, 2013, ARE GRANTED to the extent discussed above, for a period of 45 days beginning on March 7, 2013, and ending on April 21, 2013, CONDITIONED UPON Purple Communications, Inc., abiding by the requirements of section 64.604(c)(10) of the Commission’s rules, 47 C.F.R. § 64.604(c)(10), for a period of 45 days after the expiration of that interim rule.

31. IT IS FURTHER ORDERED that the Emergency Petition of Sprint Nextel for Limited Waiver and Clarification filed by Sprint Nextel Corporation on March 5, 2013, IS GRANTED to the extent discussed above.

32. IT IS FURTHER ORDERED that the Emergency Petition for Waiver filed by Sorenson Communications, Inc. and CaptionCall, LLC on March 7, 2013, IS DENIED.

33. IT IS FURTHER ORDERED that this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Acting Chief
Consumer and Governmental Affairs Bureau

¹⁰⁵ *WAIT Radio*, 418 F.2d at 1157 (citing *Birach*, 18 FCC Rcd at 1415).

¹⁰⁶ *Northeast Cellular*, 897 F.2d at 1166.