

**STATEMENT OF COMMISSIONER AJIT PAI  
APPROVING IN PART AND DISSENTING IN PART**

Re: *Misuse of Internet Protocol (IP) Captioned Telephone Service*, CG Docket No. 13-24;  
*Telecommunications Relay Services for Speech-to-Speech Services for Individuals with Hearing  
and Speech Disabilities*, CG Docket No. 03-123.

Stein's Law holds that if something cannot go on forever, it will stop. Herbert Stein, the law's progenitor, suggested that an unsustainable trend would end of its own accord. In the context of federally sponsored programs, however, an agency may be compelled by circumstance to make it stop. This is such a case.

Let's start with the basics. Internet Protocol Captioned Telephone Service (IP CTS) is an Internet-based service intended to enable people who are deaf or hard of hearing to use a computer, tablet, or similar device, rather than a specialized captioned telephone, to make captioned telephone calls.<sup>1</sup> IP CTS is a superb example of how the transition to IP-based infrastructure and services can help "make available . . . without discrimination . . . communication service" to *all* Americans.<sup>2</sup>

Under our rules, eligible providers of IP CTS service may receive compensation from the federal government's Interstate Telecommunications Relay Service Fund (Fund).<sup>3</sup> The Fund also compensates eligible providers of other telecommunications relay services that are invaluable to Americans with hearing or speech disabilities, such as Video Relay Service (VRS) and Internet Protocol Relay (IP Relay). The problem is that compensation for IP CTS service in particular has been growing at an unsustainable rate since the service's creation. As the chart below reflects,<sup>4</sup> funding for IP CTS has increased by more than 75% *every six months*, and has more than doubled each year. At this pace, IP CTS compensation will reach a half-billion dollars per year within the next 18 months and surpass VRS as the largest program within the Fund shortly thereafter. We have reached the point at which necessity, not discretion, impels reform.

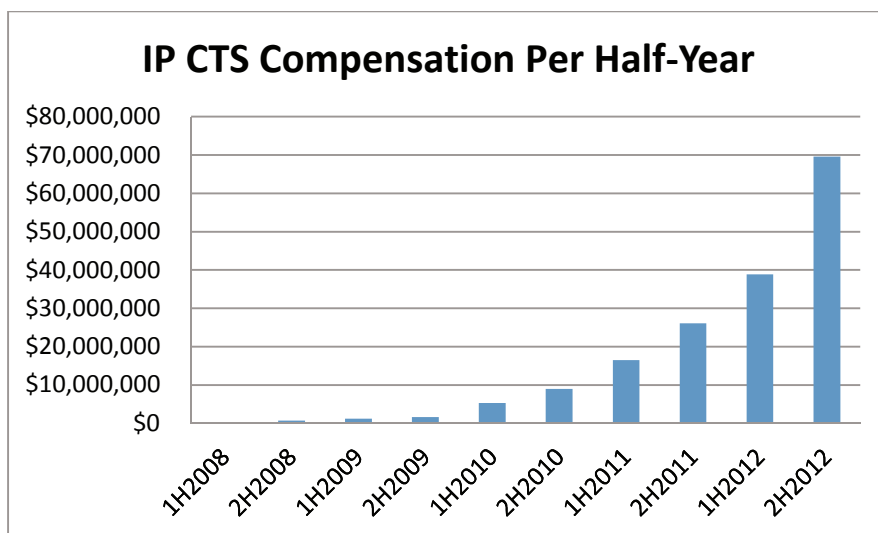
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<sup>1</sup> See FCC Consumer Guide, IP Captioned Telephone Service at 2 (2013), *available at* <http://go.usa.gov/4KvH>.

<sup>2</sup> 47 U.S.C. § 151.

<sup>3</sup> See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Internet-based Captioned Telephone Service*, CG Docket No. 03-123, Declaratory Ruling, 22 FCC Rcd 379 (2007); 47 C.F.R. § 64.606.

<sup>4</sup> Compiled from the monthly reports of the Fund Administrator. See Rolka Loubé Saltzer Associates LLC, Interstate TRS Fund Reports, <http://www.r-l-s-a.com/TRS/Reports.htm>.



Why? Because federal law gives us no other option. The Anti-Deficiency Act prohibits federal officials from authorizing spending that we cannot cover with collected funds.<sup>5</sup> In other words, we cannot simply issue IOUs and hope to collect the money later. If the Fund comes up short, *all* the relay programs it supports will be cut off. That possibility—depriving Americans with a hearing or speech disability of the ability to communicate that most of us just take for granted—is unthinkable. This is why I took seriously the alert from the Chairman’s Office about a month ago that a “recent and dramatic spike in reimbursement requests”<sup>6</sup> related to IP CTS threatened to exhaust the Fund and required immediate action. We have at our disposal three options for protecting the Fund: cutting payments to IP CTS providers, increasing the contributions that all of us pay into the Fund, or addressing the loopholes in our regulations that have allowed this dramatic growth to occur. For any of these options to work before the Fund is exhausted, the Commission must act without the full notice-and-comment process contemplated by the Administrative Procedure Act.<sup>7</sup> But only one of them protects the service provided to existing IP CTS users while shielding all American consumers from paying for unnecessary spending.

Today’s order partly pursues that third option and attempts to close some of the loopholes in our regulations—and I accordingly approve that part of the order. Here are two important points of agreement. *First*, growth in the IP CTS program is dramatically greater than expected. The budgeting process for the Interstate TRS Fund follows a yearly cycle, from one July to the next, and the amount collected from telecommunications and VoIP providers is established based on projected demand for each year. For the 2012–2013 funding year, the Administrator projected that IP CTS demand would double and therefore proposed collecting \$128 million to pay the costs of that program.<sup>8</sup> For the first half of that funding year, however, the Administrator has already paid out \$70 million<sup>9</sup> (more than half of the year’s budget); in other words, the IP CTS program will likely cost more than budgeted even if it stops growing

<sup>5</sup> See 31 U.S.C. § 1341(a)(1)(A).

<sup>6</sup> Order at para. 1.

<sup>7</sup> See 5 U.S.C. § 553(b) (requiring notice before an agency adopts rules except “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”).

<sup>8</sup> Rolka Loubé Saltzer Associates LLC, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, Exh. 2 (Apr. 30, 2012), <http://www.r-l-s-a.com/TRS/reports/2012AnnualFiling.pdf>.

<sup>9</sup> Rolka Loubé Saltzer Associates LLC, Interstate TRS Fund Performance Status Report: December 2012, <http://www.r-l-s-a.com/TRS/reports/2012-12TRSStatus.pdf>.

in the last six months of the funding year. And if the growth rate continues (if, in other words, we were to take no action today at all) the IP CTS program may cost \$108–159 million for the second half of the funding year.<sup>10</sup> The order therefore appropriately fixes the FCC’s gaze on the need for swift reform.

*Second*, the order rightly curtails certain marketing practices that have unduly burdened the Fund. One IP CTS provider hands out \$50 gift cards to anyone who signs a friend up for the service<sup>11</sup> and pays audiologists for referrals, even though the latter practice is condemned by the American Academy of Audiology’s Code of Ethics.<sup>12</sup> Other providers hand out equipment that display captions whenever the phone is used by default,<sup>13</sup> meaning the IP CTS provider gets compensated even when someone in the household without a hearing disability uses the device (unless that user takes the affirmative step of turning captions off). Marketing practices like these create incentives and opportunities for the misuse of IP CTS—they permit or even encourage those without hearing loss to get IP CTS equipment and use the service. The order appropriately targets these practices, banning referral fees and requiring IP CTS providers to reconfigure equipment to default to the captions-off setting. These requirements will, I hope, help curtail the growth of the Fund without hindering service to existing consumers, and I trust the Bureau will hold any limited waivers of these requirements to the exacting standard normally required for a waiver of the Commission’s rules.<sup>14</sup>

So far, so good.

Unfortunately, the order does not do all that really needs to be done to curtail waste, fraud, and abuse. In particular, the current order (unlike an earlier version, which I had approved) does not close a loophole in our regulation of IP CTS—one might argue, *the* loophole—which is that there are no safeguards to ensure that the money spent by the Fund actually serves the intended beneficiaries of the program and is not wasted. None. In other words, virtually anyone who wants IP CTS can get it, even if they do not need it. The bill for providing IP CTS services to these customers, moreover, ultimately is picked up by American consumers. Indeed, as the order recognizes, an IP CTS customer who has no hearing disability at all might sign up for the service in order to get a free “transcription of what the other party to a call is saying,” to aid in multi-tasking around the house, or even to get a free phone.<sup>15</sup> This is not how federal funds should be spent, especially when such spending jeopardizes funding for relay services to those who do in fact have a disability.

Although the order does a good job identifying the problem of the lack of standards, it simply does not do enough to solve it. The solution adopted here requires IP CTS providers to collect varying

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<sup>10</sup> The \$108 million figure assumes the growth in the number of minutes of use of IP CTS continues at the same rate it did from June 2012 through November 2012 and excludes prior period adjustments; the \$159 million figure assumes the growth in monthly expenditures for IP CTS continues at the same rate it did from June 2012 through December 2012, which includes prior period adjustments. *See id.*

<sup>11</sup> *Order* at note 37.

<sup>12</sup> *Id.* at para. 15.

<sup>13</sup> *Id.* at para. 27 & note 78.

<sup>14</sup> *See* 47 C.F.R. § 1.3; *NetworkIP v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008) (“[B]efore the FCC can invoke its good cause exception, it *both* ‘must explain why deviation better serves the public interest, and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation,’ [*Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir.1990)]. The reason for this two-part test flows from the principle ‘that an agency must adhere to its own rules and regulations,’ and ‘[a]d hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned, for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action.’ *Reuters Ltd. v. FCC*, 781 F.2d 946, 950–51 (D.C. Cir.1986).”).

<sup>15</sup> *Order* at para. 20.

certifications from users, but the standards are so lax as to be little more than pushing paper; this watered-down requirement gives me serious doubt that the IP CTS cost curve will bend downward anytime soon. For a few reasons related to this point, I respectfully dissent in part.

*First*, the order declines to tie eligibility for IP CTS to *any* objective standard. It does not, for example, require that an individual's hearing loss must be severe (>70 dB HL) or profound (>90 dB HL), as some states require for the distribution of captioned-telephone service devices.<sup>16</sup> Nor does it require that the hearing loss of an individual be at least moderate (>40 dB HL), as recommended by one prominent audiologist.<sup>17</sup> Nor does it require that less expensive alternatives, such as a highly amplified phone, be insufficient to meet the consumer's need. Rather, the order adopts an amorphous standard under which hearing loss must be determined by a third party to be sufficient to necessitate access to IP CTS—a standard almost entirely in the eye of the beholder. Some audiologists may certify that all their patients meet the standard, even those with minimal hearing loss. Others may refuse to certify a patient because they don't believe IP CTS is "necessitated," even if it really is the best option. Without some objective standard, I have little hope that this certification will have any meaning.<sup>18</sup>

*Second*, the order exempts an entire class of users from having to obtain a third-party certification at all. If a consumer pays at least \$75 for IP CTS equipment, he or she does not have to obtain *any* certification from a trained professional to be eligible for free IP TCS service; instead, he or she may self-certify. This despite the fact that the order acknowledges elsewhere that a consumer may purchase an IP CTS device for reasons (such as free transcription) unrelated to the statutory purpose of providing individuals with hearing disability functionally equivalent telephone service.<sup>19</sup>

*Third*, the order does not require that either third-party certifications or self-certifications be signed under penalty of perjury. Common in many federal programs, including the Commission's own Lifeline program,<sup>20</sup> that reasonable step deters fraud and makes clear to signers the consequences of a false certification. Absent that requirement, certifications are either meaningless (because there are no consequences for falsehood) or needlessly misleading (because there are undisclosed consequences for falsehood, including perhaps wire or mail fraud).

*Finally*, the interim rules for certification and eligibility are clearly targeted at the practices of one provider—Sorenson, which provides free equipment to users—but the problems the Fund faces today are attributable to industry-wide practices. Indeed, although the order suggests that the recent marketing practices of Sorenson have caused the unexpected growth this year, the IP CTS program has been growing at a rapid clip year after year. And the lack of eligibility requirements applies equally to all IP CTS providers, not just Sorenson. Indeed, no provider today can certify that each and every one of its customers is eligible for IP CTS service, even under the relaxed standards the order adopts.

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<sup>16</sup> *Id.* at para. 45.

<sup>17</sup> *Id.* at para. 46 (recommendation of Dr. Ingrid McBride, Director of Audiology for the Department of Speech and Hearing Science of Arizona State University).

<sup>18</sup> The need for an objective standard is heightened by the fact that any number of individuals across disparate disciplines, including "educators" and "social workers," may vouch that the individual meets the (again) amorphous qualified-to-evaluate-an-individual's-hearing-loss standard. *See id.* at para. 24.

<sup>19</sup> Critically, there is no evidence that the program's substantial growth only has been among users who do not pay for IP CTS equipment. Indeed, the program's growth predates the offering of free equipment. Accordingly, it does not make sense for our third-party certification requirement to target only those who receive free equipment. *All* who sign up for IP CTS should be required to obtain certification from a qualified professional before receiving free service.

<sup>20</sup> *See* 47 U.S.C. § 54.410(d)(3).

Telecommunications relay services such as IP CTS are vital to many Americans with disabilities. We must ensure that every dollar that leaves the Interstate TRS Fund to deliver such services is spent appropriately. And we must do so now, given the unsustainable demands IP CTS is placing on the Fund and Americans' general expectation that the government will adopt appropriate safeguards against waste, fraud, and abuse in federal programs. Today's order appropriately identifies the problem and takes some steps toward solving it, but it does not adopt the eligibility standards that will supply Fund-supported IP CTS only to those in need. Accordingly, I approve in part and dissent in part.