

Before the
Federal Communications Commission
Washington, D.C. 20554

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

ORDER AND NOTICE OF PROPOSED RULEMAKING

Adopted: January 24, 2013

Released: January 25, 2013

Comment Date: (21 days after date of publication in the Federal Register)

Reply Comment Date: (35 days after date of publication in the Federal Register)

By the Commission: Commissioner McDowell issuing a statement; Commissioner Pai approving in part, dissenting in part and issuing a statement.

I. INTRODUCTION

1. In this Order and Notice of Proposed Rulemaking we take immediate, interim steps to address certain practices related to the provision and marketing of Internet Protocol Captioned Telephone Service (IP CTS) that appear to be contributing to a recent and dramatic spike in reimbursement requests to the Interstate Telecommunications Relay Service Fund (TRS Fund or Fund), of sufficient magnitude to constitute a serious threat to the Fund if not promptly and decisively addressed.1 IP CTS 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 use an Internet Protocol-enabled device to simultaneously listen to the other party and read captions of what that party is saying.2 In this Order, we find good cause to adopt without notice

1 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).

2 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 47 C.F.R. § 64.601(12); Telecommunications (continued....)

and comment interim rules (1) prohibiting all referrals for rewards programs (as described below) 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 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. In addition to adopting these interim rules, we clarify our TRS payment rule,³ in an interpretive rule modification not subject to notice and comment, to explicitly provide that the Fund administrator shall not be obligated to pay any request for compensation until it has been established as compensable.

2. The interim rules will take effect in three stages. First, the interim rules prohibiting referrals for rewards will become effective upon publication in the Federal Register. Second, the interim rules requiring a default setting of captions off at the beginning of each call will become effective thirty days after publication in the Federal Register. Third, the interim rules on registration and certification will become effective upon publication in the Federal Register of a notice announcing the approval of such requirements by the Office of Management and Budget under the Paperwork Reduction Act of 1995.⁴ These interim rules will sunset on a common date, which will be either (1) 180 days after the effective date of the interim rules on registration and certification or (2) the effective date of final rules on these issues, whichever date comes sooner.

3. In the accompanying Notice of Proposed Rulemaking (Notice) we seek comment on whether to make permanent, revise, or eliminate any of the interim rules adopted here. We also seek comment on (1) the likely reasons that IP CTS has been experiencing unprecedented and unusually rapid growth; (2) whether to prohibit all provider programs that give away or loan equipment to potential or existing IP CTS users at no cost or below some specified cost level; (3) whether to require each IP CTS provider, as a condition of continuing to offer service to *existing* IP CTS users who have not yet registered for service, (a) to register each such user with the IP CTS provider and (b) as part of the registration process, to obtain from each user certification that the user has a hearing loss that necessitates IP CTS to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users; and (4) whether to adopt any requirements for IP CTS equipment to have labels informing consumers that IP CTS may be used only by persons with hearing disabilities.

II. BACKGROUND

4. TRS enable an individual with a hearing or speech disability to communicate with other individuals “in a manner that is functionally equivalent” to a hearing individual’s ability to communicate

(Continued from previous page) _____
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*).

³ 47 C.F.R. § 64.604(c)(5)(iii)(E).

⁴ Pub. L. No. 104-13, 109 Stat. 163 (May 22, 1995), *codified at* 44 U.S.C. § 3501 *et seq.*

using voice communications services.⁵ This is currently accomplished through TRS facilities staffed by communications assistants (CAs) who relay conversations between persons using various types of assistive communication devices and persons using end user telephone equipment, such as a standard phone, smartphone, or computer.⁶ Captioned Telephone Service (CTS) works by having the hard of hearing user dial the number she or he wishes to call. The user's phone is automatically connected to a captioned telephone CA at the same time she or he reaches the called party. Once connected, the CA re-voices everything the called party says and uses voice recognition technology to automatically transcribe those words into captions.⁷ The captions then are transmitted directly to the user and are displayed, shortly after the called party speaks, on the display of a captioned telephone device, a computer, or a smartphone. The PSTN version of CTS was approved in 2003.⁸ The Internet-based version of CTS (IP CTS) was approved in 2007.⁹ When this service was first established, the Commission set only the minimum standards that apply to all TRS, but did not establish any eligibility criteria specifically for use of this service.

5. Section 225 of the Communications Act of 1934, as amended (Act),¹⁰ and its implementing regulations provide that the costs for providing TRS, including IP CTS, are not charged to the consumers using these services; rather, the costs are passed on to all consumers of telecommunications and VoIP service providers.¹¹ Interstate relay calls and all calls made via Internet-based forms of TRS are funded through mandatory contributions made to the Fund by these providers.¹² Eligible providers of compensable TRS are then entitled to recover their "reasonable" costs of providing service from the

⁵ Under 47 U.S.C. § 225, as amended by Section 103(a) of the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), TRS are defined 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." Pub. L. No. 111-260, 124 Stat. 2751 § 103(a) (Oct. 8, 2010), *technical amendments*, Pub. L. No. 111-265, 124 Stat. 2795 (Oct. 8, 2010), *codified at* 47 U.S.C. § 225(a)(3).

⁶ In a traditional text-based TRS call, a text telephone (TTY) user types the number of the TRS facility and, after reaching the facility, the CA types the number of the party the user desires to call. The CA, in turn, places an outbound voice call to the called party. The CA serves as the "link" in the conversation, converting text messages from the caller into voice messages, and voice messages from the called party into text messages for the TTY user. *See generally Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket Nos. 90-571 & 98-67, CG Docket No. 03-123, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Rcd 12475, 12479-12486, ¶¶ 3-13 (2004) (*2004 TRS Report & Order*).

⁷ The CA is used to re-voice the called party's statements because providers generally claim that the accuracy of voice recognition technology improves when the voice recognition software is "trained" to a particular person's voice.

⁸ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling, CC Docket No. 98-67, 18 FCC Rcd 16121 (2003) (*CTS Declaratory Ruling*).

⁹ *See IP CTS Order*. The Commission has received an application for a new form of IP CTS that proposes to use stenographers to transcribe the oral content of the call, which is pending. *See Application of Miracom USA, Inc. for Certification to Provide IP Captioned Telephone Service* (filed November 23, 2011).

¹⁰ 47 C.F.R. § 225. Section 225 was originally enacted as Title IV of the Americans with Disabilities Act (ADA) and, as discussed above, was amended by the CVAA.

¹¹ *See* 47 U.S.C. § 225(d)(3); 47 C.F.R. § 64.604(c)(5).

¹² *See* 47 U.S.C. § 225(d)(3); 47 C.F.R. § 64.604(c)(5).

Fund in compliance with the Commission's service rules.¹³ IP CTS and interstate CTS providers are paid using a methodology known as the Multi-state Average Rate Structure Plan (MARS Plan), which calculates the compensation rate for IP CTS using a weighted average of the state rates for intrastate CTS. Given this funding methodology, the Commission presently does not require providers to file annual cost and demand data submissions with the Fund administrator for these services.¹⁴ In the absence of such data, the Fund administrator estimates CTS and IP CTS demand projections based on actual historical demand.¹⁵

III. ORDER

A. The Need for Immediate Interim Rules

6. In recent months, IP CTS has been experiencing unprecedented and unusually rapid growth. For example, the total number of minutes for which compensation was requested by providers increased by an average of 11% per month from June to October 2012.¹⁶ In October 2012 alone, requested minutes 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.¹⁷ From January to June 2012, the number of minutes increased by 30% and the average monthly rate of growth doubled for the period June to October 2012.¹⁸ The dramatic recent growth in usage and the disparity between actual and budgeted usage is shown in the graph below.

¹³ See *id.* § 64.604(c)(5)(iii)(E).

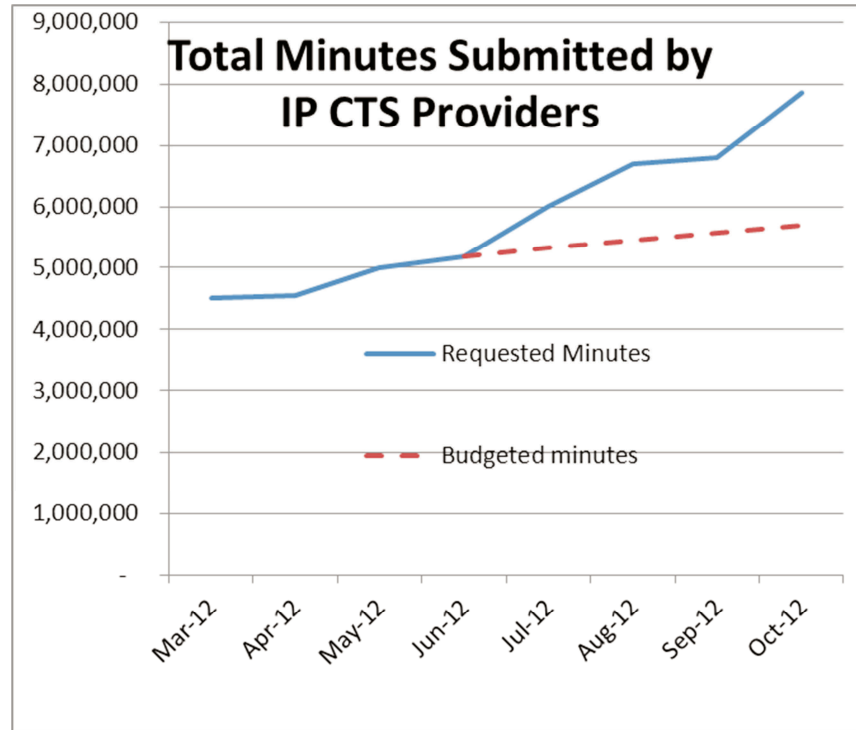
¹⁴ *2007 TRS Rate Methodology Order*, 22 FCC Rcd at 20161, ¶ 38 n.116. However, providers are still required to file other MARS-related data and call data records as requested by the Fund administrator. *Id.*

¹⁵ See, e.g., *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Structure and Practices of the Video Relay Service Program*, CG Docket Nos. 03-123 & 10-51, Order, 27 FCC Rcd 7150, 7155, ¶ 13 n.56 (CGB 2012) (*2012 TRS Rate Order*).

¹⁶ Compiled from TRS service provider documentation supporting monthly requests for reimbursement from the TRS Fund.

¹⁷ The compensation rate for IP CTS is \$1.7730 per minute.

¹⁸ Compiled from TRS service provider documentation supporting monthly requests for reimbursement from the TRS Fund.



As discussed below, we have reason to believe that this growth is being caused by the offering of incentives for referrals to use this service, as well as usage of this service by people without a hearing loss that necessitates the use of IP CTS to communicate in a functionally equivalent manner, and that, 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.

7. The growth in IP CTS witnessed in recent months represents a sudden and sharp departure from the trend of declining rates of growth in usage of this service over three prior years.¹⁹ It is only within recent months that the Commission learned about the extraordinary escalation in this service's usage, as well as the existence of the referrals for rewards programs and the lack of specific eligibility criteria for new users. Although there was a temporary leveling off of usage in September 2012, it was followed by a steep incline in usage in October 2012, confirming our expectation that the program's sudden acceleration of growth will continue in the immediate months ahead – growth that, if left unchecked, could exacerbate the potential for harm to both the Fund and legitimate users of TRS. In particular, 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.²⁰

8. We conclude that protecting such interests at this time outweighs the public interest in

¹⁹ According to TRS service provider documentation supporting monthly requests for reimbursement from the TRS Fund, the average monthly growth rates in total IP CTS minutes submitted for compensation during the last three Fund years were: 14% in 2009-10; 9% in 2010-11; and 7% in 2011-12.

²⁰ The Anti-Deficiency Act provides that an officer or employee of the federal government may not make or authorize an 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).

providing prior notice of the interim rules we now adopt. Moreover, we note that although we did not formally provide notice and an opportunity to comment, we nevertheless received extensive input from interested parties on these issues, including all of the active providers of IP CTS and a number of consumer groups.²¹ In order to allow for notice and comment as soon as feasible, however, we are putting these rules in place for only a short interim period. Because the harm to the Fund appears to result from certain practices addressed in this Order, we believe the most appropriate immediate action is to adopt the few interim rules discussed below, rather than simply to allow the Fund to grow unchecked while we solicit public comment. Such action will enable us to better control the level of TRS disbursements and protect the programmatic, legal, and financial integrity of the TRS program. Conversely, failing to take immediate action to stem such practices could well threaten the availability of this and other relay services that are supported by the Fund for the benefit of legitimate users.²² Moreover, because we believe that a substantial portion of this growth is arising from practices that may be inconsistent with the policies underlying section 225 of the Act and the Commission's implementing regulations, we are concerned that if interim rules are not adopted immediately, the use of questionable practices would continue and even accelerate, adding further to the strain on the Fund. In addition, if the Commission were to follow ordinary notice and comment procedures, IP CTS providers would be able to continue – indeed, to accelerate – the use of potentially inappropriate incentives to recruit and sign up new IP CTS users without first establishing their eligibility for an extended period of time while the rulemaking process is pending.²³

9. To prevent these imminent public harms from occurring and to bring Fund expenditures for this service under control, we find that three immediate measures are necessary. First, because, as discussed below, we find that referrals for rewards programs are likely to unduly and inappropriately incent consumers to obtain equipment and use service that they might not otherwise use, we prohibit all such rewards programs and any other form of direct or indirect inducements, financial or otherwise, to subscribe or use or encourage subscription to or use of IP CTS. Second, to prevent the unnecessary subscription to and use of the service by consumers who do not need IP CTS to communicate in a functionally equivalent manner, we adopt interim rules to require each IP CTS provider, in order to be eligible for compensation from the TRS Fund for providing service to new IP CTS users, to register each new user for service with the IP CTS provider and, as part of the registration process, to obtain from each user a self-certification that the user has a hearing loss that necessitates the use of IP CTS to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users. In addition, where the consumer accepts IP CTS equipment for less than \$75 from any source other than a governmental program that distributes the equipment, the provider must obtain from the user a certification from an independent, third party professional attesting to the necessity for IP CTS. Third, to prevent improper billing of the TRS Fund for the use of IP CTS by individuals who do

²¹ The Consumer Groups (Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), National Association of the Deaf (NAD), Hearing Loss Association of America (HLAA), Association of Late-Deafened Adults, Inc. (ALDA), and the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN)), Hamilton Relay, Inc. (Hamilton), Purple Communications, Inc. (Purple), Sorenson Communications, Inc. (Sorenson) and its wholly-owned subsidiary CaptionCall, LLC (CaptionCall), and Sprint Nextel (Sprint) each filed multiple *ex parte* letters addressing these issues in CG Docket No. 03-123.

²² Section 225 of the Communications Act requires the Commission to “ensure that interstate and intrastate telecommunications relay services are available to the extent possible and in the most efficient manner. . . .” *See* 47 U.S.C. § 225.

²³ *See Chamber of Commerce of the United States v. SEC*, 443 F.3d 890, 908 (D.C. Cir. 2006) (*Chamber of Commerce*) (stating that the exception excuses failure to follow notice and comment procedures “when the very announcement of a proposed rule itself could be expected to precipitate activity by affected parties that would harm the public welfare”) (internal citations omitted).

not need IP CTS to communicate in a functionally equivalent manner and who are either living in the household or visiting the house or office of an eligible user, we require IP CTS providers to ensure that equipment and software used in conjunction with IP CTS 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. At the same time that we adopt these rules on an interim basis to address these immediate concerns, we seek comment in the accompanying Notice on these and other possible actions to address the sustainability of this service in the long term.

10. *Legal Authority.* As noted above, TRS enables an individual with a hearing or speech disability to communicate with other individuals “in a manner that is functionally equivalent” to a hearing individual’s ability to communicate using voice communications services.²⁴ Section 225(b) of the Act directs the Commission to ensure that TRS services are available to persons with hearing and speech disabilities “to the extent possible and in the most efficient manner.”²⁵ Further, section 225(d) instructs the Commission to adopt regulations implementing section 225, including regulations “establish[ing] functional requirements, guidelines, and operations procedures for [TRS],”²⁶ as well as mandatory “minimum standards” governing the provision of TRS.²⁷ These provisions authorize the interim rules adopted herein, and as discussed below, we conclude that the Commission has authority to adopt these interim rules immediately, without prior notice and opportunity for comment.

11. Section 553 of the Administrative Procedure Act (APA) requires that agencies provide notice of and an opportunity for public comment on their proposed rules except, *inter alia*, “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.”²⁸ The decision not to follow notice and comment procedures has been allowed in emergency situations or where delay could result in serious harm.²⁹ In this case, we find 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.³⁰ In particular, we find that because IP CTS growth is occurring so rapidly, 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, which can take

²⁴ See ¶ 4, *supra*.

²⁵ 47 U.S.C. § 225(b)(1).

²⁶ *Id.* § 225(d)(1)(A).

²⁷ *Id.* § 225(d)(1)(A).

²⁸ 5 U.S.C. § 553(b)(3)(B).

²⁹ *Chamber of Commerce*, 443 F.3d at 908 (D.C. Cir. 2006). See also *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1105-06 (D.C. Cir. 2009) (acknowledging that “the FCC should be given ‘substantial deference’ when acting to impose interim regulations,” and that courts “have deferred to the Commission’s decisions to enact interim rules based on its predictive judgment that such rules were necessary to preserve universal service”) (citations omitted).

³⁰ The Consumer and Governmental Affairs Bureau has had to take such action on occasion in the past. See, e.g., *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Order, 23 FCC Rcd 1680 (CGB 2008) (2008 TRS Fund Size Modification Order); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Order, 19 FCC Rcd 2993 (CGB 2004) (2004 TRS Fund Size Modification Order).

several months, to adopt any rules.³¹ The actions we take in this order thus are aimed at preserving the fiscal integrity of the TRS Fund and ensuring compliance with applicable federal law.

12. The APA further provides that a substantive rule cannot become effective earlier than 30 days after the required publication or service of the rule, except “as otherwise provided by the agency for good cause found and published with the rule.”³² As discussed above, we find good cause to adopt immediately interim rules without the opportunity for public comment because we believe that the imminent harms to the Fund and legitimate TRS users outweigh the public interest in obtaining comment before such rules go into effect. The same good cause reasons for adopting immediately interim rules without the opportunity for public comment apply to making the rules effective as soon as possible. As noted above, any delay in making the rules effective would encourage IP CTS providers, during the period prior to the effective date, to continue and possibly even accelerate the use of inappropriate incentives to recruit and sign up new users without first establishing their eligibility, adding additional uncontrolled growth that could result in TRS payment obligations exceeding the amount available in the Fund. Further, we have no reason to believe that IP CTS providers cannot comply with the rules adopted herein within the prescribed time periods. There are only four providers currently offering IP CTS, and the payment of incentives and registration of new users are matters well within each provider’s immediate ability to control.³³ Accordingly, as noted above, the interim rules on referrals for rewards will become effective upon publication in the Federal Register. Second, the interim rules requiring a default setting of captions off will become effective 30 days after publication in the Federal Register, in order to afford the IP CTS providers a reasonable time to come into compliance with those rules. Third, the interim rules on registration and certification will become effective upon publication in the Federal Register of a notice announcing the approval of such requirements by the Office of Management and Budget under the Paperwork Reduction Act of 1995.³⁴ All of the above interim rules will sunset on a common date, which will be either (1) 180 days after the effective date for the interim rules on registration and certification, unless otherwise extended by the Commission, or (2) the effective date of final rules on these issues, whichever date comes sooner.

B. Referrals for Rewards

13. The recent expansion in usage of IP CTS appears to have been precipitated largely by new referral programs that offer monetary rewards for the referral of customers who sign up for installation of the provider’s IP CTS end user equipment.³⁵ These rewards are being given to third parties, including

³¹ See, e.g., *Amendment of the Commission’s Rules to Permit FM Channel And Class Modifications by Application*, MM Docket No. 92-159, Notice of Proposed Rulemaking, 7 FCC Rcd 4943, 4944, ¶ 6 n.12 (1992) (noting that, at the time, “a typical rulemaking proceeding takes at least six months to complete”).

³² 5 U.S.C. § 553(d). See also 47 C.F.R. § 1.427(a).

³³ Based on the representations made by IP CTS providers in recent meetings with Commission staff, no provider is under contract to make the incentive payments addressed in this order. Moreover, we do not believe that the registration and certification requirement adopted herein will impose significant delays on the initiation of service to new eligible users. Rather, those users seeking to register for IP CTS who purchase equipment for \$75 or more will be able to self-certify, and we expect that many of those eligible users seeking to register for IP CTS who accept their equipment for free or for less than \$75 will have a pre-existing relationship with a third party professional, and thus will be able to obtain the required certification without undue delay.

³⁴ Pub. L. No. 104-13, 109 Stat. 163 (May 22, 1995), *codified at* 44 U.S.C. § 3501 *et seq.*

³⁵ According to TRS service provider documentation supporting monthly requests for reimbursement from the TRS Fund and other information provided to the Commission by IP CTS providers, the share of IP CTS minutes generated by customers recruited through these programs has steadily increased in each month of 2012.

the providers' existing customers, members of the general public,³⁶ and hearing and health care professionals such as audiologists.³⁷ In a variation of these referral programs, providers are also making donations to charities, again contingent on a consumer's receiving the providers' IP CTS phone and service.³⁸

14. We are concerned about these financial incentive programs, which may well be resulting in the registration for and usage of IP CTS by new IP CTS users who do not need these services to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users. By offering rewards to individuals, professionals, and organizations for enlisting customers for IP CTS, the referral programs may indirectly encourage consumers to sign up for this relay service, whether or not they actually need the service to communicate in a functionally equivalent manner, in order to earn money for their friends or for programs and charitable services that they

³⁶ For example, Sorenson, through a program known as the "Customer Referral Program," pays \$50 rewards to persons who refer potential customers who agree to have a device installed for use with Sorenson's CaptionCall IP CTS. See *The CaptionCall Connection*, April 2012, at 1, found at <http://hearingwellclub.wikispaces.com/file/view/NWSLETT_Apr_TA13477_Email.pdf> (last viewed, January 17, 2013). The newsletter states: "You can receive \$50 in rewards for each friend who gets a phone installed!" According to CaptionCall's April 2012 newsletter, once installation is complete, participants receive a gift certificate number that they may then use to "1) Shop directly from a specific merchant's website through www.CaptionCallRewards.com[,] 2) Choose a gift card from a variety of great national retailers and physically go shopping at the retail store[, or] 3) Order a physical Corporate Rewards American Express card to be used anywhere American Express is accepted." Participants in the referral program may obtain and combine multiple certificates for their purchases. *Id.*

³⁷ For example, Sorenson states on its website: "We make it easy and worthwhile for you to share CaptionCall with your patients." See CaptionCall, "Help your patients use the phone with confidence!," found at <<http://www.captioncallpartner.com/>> (last viewed, January 17, 2013). Sorenson sometimes refers to this marketing effort as its "Partner Referral Program." To learn about the Partner Referral Program, readers need to complete the form on the website, and they are promised that a CaptionCall Representative will contact them. *Id.* Similarly, in an online publication named the Hearing Review, described as "the leading, monthly trade magazine for the hearing healthcare industry, providing concise, timely, and accurate information to 21,000 audiologists, hearing instrument specialists, medical professionals, and others allied to the field" (see <<http://www.hearingreview.com/format-about/21216-about-us>> (last viewed, January 17, 2013), an article advertising CaptionCall to audiologists and other professionals states:

The use of loss leaders has become common practice in the hearing care industry to drive traffic. .

..

CaptionCall® Partners is the perfect loss leader solution, meeting all of the above criteria. . . .

Free Service. And now you can provide the CaptionCall Partners phone and service absolutely free to your patients through our Partner Referral Program. . . .

In addition, you can receive compensation for each referral that results in a CaptionCall Partners installation. You can also get a free demo phone for your office, a countertop display with brochures, and other marketing support materials as needed. There is no inventory to stock and no installation or record keeping. We take care of everything. All you need to do is introduce CaptionCall Partners to your patients.

See hearingreview.com, "How to Drive Traffic with a Perfect (Free) 'Loss Leader'" (July 2012), found at <<http://edition.pagesuite-professional.co.uk/launch.aspx?eid=e1be1476-13d2-4569-99a9-5d2aedf58d28>> (last viewed, January 17, 2013) (emphasis added).

³⁸ See, e.g., Center for Hearing and Communication, *Free Captioned Phone from CaptionCall*, found at <<http://www.chchearing.org/news-events/news-announcements/free-captioned-phone>> (last visited, January 17, 2013).

support. As noted above, such practices appear to be having a profound detrimental impact on the Fund. Specifically, payment of such rewards to third parties may well encourage consumers to order IP CTS service just to gain the incentive benefit. For example, one advertisement that urges users to “get a high-quality captioned phone for free while you raise money for CHC!”³⁹ gives users the opportunity to contribute to a favorite charity simply by acquiring an IP CTS device, even if the user does not need the service to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users. By the same token, such incentive rewards programs appear to prompt organizations to advertise a provider’s IP CTS to their members and to encourage those members to produce the promised donations by ordering the provider’s IP CTS.⁴⁰ When a charitable organization promotes registration with an IP CTS provider in order for the organization to receive the \$50 donations that result, such promotions may encourage the organization’s members to order the IP CTS provider’s service in order to support the organization, whether or not they actually need the service to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users.⁴¹ The more customers that sign up to use the provider’s IP CTS, the greater the financial rewards to participants in the incentive programs, and the more compensation the provider is able to collect from the Fund, at no cost to the consumer.⁴² Offering such rewards may have the effect of

³⁹ *Id.*

⁴⁰ For example, Sorenson offers a \$50 donation to customer-selected organizations serving people with hearing loss if a consumer signs up for CaptionCall service. By way of illustration, the Center for Hearing and Communication states on its website that “every CaptionCall order placed using the promotional code **HS1277** will generate a \$50 donation to our programs and services (at no cost to you).” *Id.* Similarly, the Chicago branch of the Association of Late-Deafened Adults promises on its website: “If you agree to have a CaptionCall phone installed, free of charge to you, and use the right promotion code, ALDA Chicago will receive \$50.” *See* ALDA Chicago, *News from ALDA*, found at <<http://www.aldachicago.org/Default.aspx?pageId=544620&mode=PostView&bmi=828771>> (last visited, January 17, 2013). After explaining that there are two ways to order the CaptionCall device, online or by phone, the ALDA Chicago website notes that if you use ALDA Chicago’s promotional code, the \$50 received will “help fund its ongoing efforts to bring camaraderie and support to people with hearing loss in the Chicago area.” *Id.* Likewise, the Sun City Texas Computer Club states on its website: “FREE CAPTIONCALL PHONE PROCEDURE to provide \$50 Rewards Certificate for benefit of Hearing Solutions SIG.” *See* Sun City Texas Computer Club, found at <<http://www.sctxca.org/suncity/clubs-groups/sites/computer/sigs/hearaid/meeting-notes/1206hearaid.html>> (last visited, January 17, 2013) (emphasis in original). Similar statements are made on DeafWired.Com, which promotes the acquisition of CaptionCall devices as a significant source of funding for its sponsored children’s center: “Just this past year we lost our city funding and we’re looking into other funding sources. CaptionCall to the rescue. CaptionCall is partnering with the Rhinelander Children’s Center. For each phone order placed by Rhinelander, CaptionCall will donate \$50 to the children’s program.” *See* Deaf New York City, NY, found at <<http://www.deafwired.com/nyc/support-a-great-cause-get-a-free-captioncall-phone/>> (last visited, January 17, 2013). The website goes on to entice others to attract their friends to the IP CTS program: “Please feel free to forward this to any of your friends who would like to use their voice on the telephone. Please feel free to post on FACEBOOK AS WELL. Support a good cause – the one and only recreational program for Deaf and Hard of Hearing Children & Teens in the tri-state area!!” *Id.* (emphasis in original).

⁴¹ *See, e.g.*, Stuart N – Cochlear Ambassador – Blog Posts, found at <<http://www.cochlearcommunity.com/TarHeel/weblog/15400.html>> (last visited, January 17, 2013) (January 19, 2012 blog by Vernice): “[I]f they give you a phone free and you refer someone else and they order the phone, CaptionCall will pay you \$50.00. That is why so many [in] the community are pushing this phone.”

⁴² Additionally, we note that having an IP CTS device installed largely is equivalent to signing up for IP CTS, as each device is proprietary and will work only with particular providers’ services. In other words, these devices connect only to the particular service provided by the company that gives out the equipment. For example, installation of a CaptionCall device under the Customer Referral Program results in the registration of the caller with Sorenson’s CaptionCall service, and that caller cannot access IP CTS from any other provider on that device.

enlisting customers who might not otherwise have a reason to use the service.⁴³ Such practices thus not only threaten the Fund, but also may be inconsistent with the very purpose of the TRS program – to provide communication services for people with hearing or speech disabilities who are otherwise unable to use conventional telephone services.⁴⁴

15. For these various reasons, we find good cause to adopt an interim rule expressly prohibiting, for a short term, 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, including inducements that provide incentives for potential users to subscribe to IP CTS or that incent third parties, such as audiologists and other hearing and health professionals, to encourage such subscriptions.⁴⁵ We

⁴³ That there is confusion as to who is eligible to use this service is reflected, for example, by a posting to the Sun City Texas Computer Club website, which notes, “[a]lthough this service can be used by anyone, it is particularly useful to persons who have moderate to severe hearing loss or who are deaf, allowing them to participate in conversations and other voice-based communication in a functionally equivalent way.” Sun City Texas Computer Club, found at <<http://www.sctxca.org/suncity/clubs-groups/sites/computer/sigs/hearaid/meeting-notes/1206hearaid.html>> (last visited, January 17, 2013) (emphasis added). This confusion may be due in part to the comparison that some IP CTS providers have drawn between this service and captioned television. Such comparison may be providing the false impression that IP CTS is available for free to anyone, rather than only to people within the covered classes of individuals with disabilities protected by section 225. See, e.g., the CaptionCall website, which states: “CaptionCall is similar to captioned television, using cutting-edge technology to display written, nearly instant captions.” CaptionCall, *How CaptionCall Works*, found at <https://www.captioncall.com/CaptionCall/CaptionCall_Solution/How-CaptionCall-Works.aspx> (last visited, January 17, 2013). See also Stuart N – Cochlear Ambassador – Blog Posts, found at <<http://www.cochlearcommunity.com/TarHeel/weblog/15400.html>> (last visited, January 17, 2013) (January 19, 2012 blog by Stuart N – Cochlear Ambassador), stating that on IP CTS, “no one is listening to your calls and simultaneously captioning them. A computer with voice recognition is what is doing the captioning.” Statements such as these, which fail to explain that this service is intended for a specific category of users covered by section 225, present the risk that consumers who subscribe to this service will use it or let others in their households use it whether or not it they truly need it to understand conversation better over the telephone, just because it is available and easy to turn on. Such users may not realize either that a CA is participating on the call or that there are costs associated with each use of the service. The Commission will be exploring how to ensure that consumers have complete information about the nature and funding for IP CTS in a subsequent proceeding.

⁴⁴ See 47 U.S.C. § 225(a)(3) (defining TRS to “. . . 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. . . .”). See also *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, CG Docket No. 03-123, Declaratory Ruling, 20 FCC Rcd 1466, 1469, ¶ 8 (2005) (*2005 Financial Incentives Declaratory Ruling*) (TRS is “available to handle calls consumers choose to make, when they choose to make them”); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, 5166, ¶ 60 (*2000 Improved TRS Order*) (“for a TRS user, reaching a CA to place a relay call is the equivalent of picking up a phone and getting a dial tone”); *Federal Communications Commission Clarifies that Certain Telecommunications Relay Services (TRS) Marketing and Call Handling Practices are Improper and Reminds that Video Relay Service (VRS) May Not be Used as a Video Remote Interpreting Service*, CC Docket No. 98-67, CG Docket No. 03-123, Public Notice, 20 FCC Rcd 1471, 1473 (CGB 2005) (*2005 TRS Marketing Public Notice*) (Providers “should not be contacting users of their service and asking them or telling them to make TRS calls. Rather, the provider must be available to handle the calls that consumers choose to make.”).

⁴⁵ In establishing prohibitions against rewards for referrals programs today, among other things, we seek 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 (see 47 C.F.R. §§ 20.19, 68.4, 68.300, and 68.317)) can offer persons with hearing loss a better telephone experience, i.e., greater functional equivalence to conventional voice telephone use.

therefore disagree with Sorenson's argument that we should treat differently the payment of referral fees to hearing specialists and payments to non-experts such as friends and charities.⁴⁶ Although a consumer may not have an incentive to direct a referral fee to his or her audiologist,⁴⁷ the recommendations of health care and hearing professionals carry significant weight with consumers, and when an audiologist or other professional is considering which of the assistive hearing alternatives described above to recommend to a patient, we believe the offering of a reward for recommending IP CTS (or one provider's version of IP CTS) may influence the professional. Indeed, we note that the Code of Ethics of the American Academy of Audiology – whose members include the great majority of the nation's audiologists⁴⁸ – recognizes such a potential conflict of interest by stating that members “shall not give or receive benefits or items of value for receiving or making referrals.”⁴⁹ To the extent that such professionals are offered rewards that incent them to encourage consumers to order and use IP CTS – whether or not such consumers would actually benefit from IP CTS – such rewards may be promoting the use of IP CTS by individuals who do not need this service, or who could benefit more from other assistive devices or hearing technologies.

16. Sorenson claims that we would be departing from Commission precedent if we were to prohibit referral fees paid to audiologists, arguing that the Commission has not prohibited commissions to sales agents for subsidized telephone services (such as low income consumers) in other contexts,⁵⁰ citing to the Lifeline program.⁵¹ However, the Lifeline program is a different program with different considerations, where concerns about waste, fraud and abuse have been addressed in different ways than the approach we take in these interim rules. For example, the Commission has established precise eligibility criteria for Lifeline recipients, with robust eligibility verification and certification requirements and measures to prevent duplicative support that go far beyond the interim registration and certification rules adopted here, as well as requirements specifying disclosures required in the marketing of Lifeline service.⁵² In the TRS context, the Commission has had a history of addressing fraud, abuse and misuse through restrictions on financial incentives such as those we adopt here. For example, in the *2007 TRS Rate Methodology Order*, the Commission stated that payments made to third parties, such as the friends of new customers and charitable organizations selected by customers, rather than directly to the customer, are expressly included in the prohibition against financial incentives.⁵³ That order also prohibited incentives that result in the registration of consumers with a TRS provider, as well as incentives that increase a subscriber's usage of TRS.⁵⁴ The interim rules we adopt today are therefore

⁴⁶ Sorenson, *Ex Parte* Letter, CG Docket No. 03-123, January 7, 2013, at 1 (Sorenson January 7, 2013 *Ex Parte*).

⁴⁷ *See id.*

⁴⁸ *See* <<http://www.audiology.org/about/information/Pages/default.aspx>> (last visited, January 15, 2013)(American Academy of Audiology has 11,000 members) and <<http://www.bls.gov/ooh/healthcare/audiologists.htm#tab-3>> (last visited, January 15, 2013)(Bureau of Labor Statistics, published July 18, 2012, stating that audiologists held about 13,000 jobs in 2010).

⁴⁹ *See* <<http://www.audiology.org/resources/documentlibrary/Pages/codeofethics.aspx>> (last visited, January 15, 2013).

⁵⁰ Sorenson January 7, 2013 *Ex Parte* at 1-2.

⁵¹ *Lifeline & Link Up Reform and Modernization*, WC Docket No. 11-42, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656 (2012) (*Lifeline/Link Up Reform Order*).

⁵² *See generally id.* at 6683-755, ¶¶ 60-225, 6774-79, ¶¶ 271-82 (2012).

⁵³ *See 2007 TRS Rate Methodology Order*, 22 FCC Rcd at 20182, ¶¶ 92-93.

⁵⁴ *Id.*, ¶ 92. *See also 2005 Financial Incentives Declaratory Ruling* (prohibiting a provider's “Brown Bag” program, as it was called, which allowed customers to receive five points for every minute of VRS placed through the (continued....))

consistent with the kinds of actions that the Commission has previously taken to restrict financial incentives in exchange for signing up for or using TRS. Moreover, we note that consumers and most providers have expressed support for a prohibition of referrals for rewards.⁵⁵ Thus, we are not persuaded by Sorenson's attempts to compare the Commission's actions to combat waste, fraud and abuse in other contexts to the actions we take today.

17. Sorenson also argues that its referral incentives program is needed to help promote IP CTS and to compensate professionals for their administrative time.⁵⁶ We disagree for two reasons. First, we believe that providers can effectively promote IP CTS without offering financial rewards for referrals. For example, providers can distribute literature to professionals, including assistive technology specialists and audiologists – without paying for referrals that result in user registrations. In addition, providers may sponsor advertisements in mainstream and disability publications, participate in disability conferences and engage in other activities to inform professionals and the public about the benefits of this service. Second, we believe that any expectation by professionals that they will receive compensation for making such referrals appears to be generally inconsistent with established federal policy. For example, our interim prohibition of referral awards to audiologists and other professionals is consistent with the principles underlying the health care anti-kickback statute, which prohibits the offering or payment of any remuneration in return for (A) referring an individual for the furnishing or arranging for the furnishing of any item or service for which payment may be made under a Federal health care program or (B) in return for purchasing, leasing or ordering any good, facility, service, or item for which payment may be made under a Federal health care program.⁵⁷ The anti-kickback statute was enacted “[i]n light of the concern that decisions of health care providers can be improperly influenced by a profit motive, and in order to protect federal health care programs from additional costs and overutilization.”⁵⁸ Subject to receiving further comment on this and other issues, we find that the underlying public policy reasons for the healthcare anti-kickback statute appear to apply equally to awards for referrals provided to audiologists and other professionals.

18. The temporary prohibition we adopt today includes any programs initiated, sponsored or operated by IP CTS providers that offer financial or other incentives or rewards to third parties for the referral of customers who sign up to use the provider's IP CTS offering, as well as provider programs or

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company, with the customer being able to cash in the points for high speed Internet service); *2005 TRS Marketing Public Notice* (prohibiting direct and indirect financial or other tangible incentives to make relay calls and prohibiting financial incentives or rewards to register with the provider, and emphasizing that financial incentives are prohibited, even when the benefit goes to a third party rather than the consumer); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Order, 20 FCC Rcd 12503, 12505-06, ¶ 6 (2005) (concluding that offering free or discount long distance service to TRS consumers constitutes an impermissible financial incentive, and that the programs “directed at giving the consumer an incentive to make a TRS call in the first place . . . are prohibited”).

⁵⁵ See Consumer Groups, *Ex Parte* Letter, CG Docket No. 03-123, January 7, 2013, at 3 (Consumer Groups Second January 7, 2013 *Ex Parte*) (the second of two *ex parte* letters filed by the Consumer Groups on the same day); Hamilton, *Ex Parte* Letter, CG Docket No. 03-123, December 17, 2012, at 1; Miracom, *Ex Parte* Letter, CG Docket No. 03-123, December 17, 2012, at 2; Purple, *Ex Parte* Letter, December 17, 2012, at 1 (Purple December 17, 2012 *Ex Parte*); Sprint, *Ex Parte* Letter, December 26, 2012.

⁵⁶ Sorenson, *Ex Parte* Letter, CG Docket No. 03-123, December 19, 2012, at 4, 6-8 (one of two *ex parte* letters filed by Sorenson on the same day).

⁵⁷ 42 U.S.C. § 1320a-7b(b)(2).

⁵⁸ Congressional Research Service, *Health Care Fraud and Abuse Laws Affecting Medicare and Medicaid: An Overview*, at 3 (August 10, 2010).

practices offering or providing any payment or other thing of value, directly or indirectly to a potential or existing IP CTS user.⁵⁹ We are reserving judgment at this point pending the further development of a record in response to the accompanying *Notice* as to whether there should be a permanent prohibition on these practices.

C. Registration and Certification Requirements

19. As noted above, during recent months, there has been a sudden and unprecedented spike in the number of IP CTS minutes for which compensation has been sought. This recent and unexpected escalation in minutes raises serious concerns about whether IP CTS is now being made available to and used by some consumers who may not need the service to communicate in a manner that is functionally equivalent to telephone communication by conventional voice telephone users. This sudden swell in IP CTS minutes not only threatens the long term viability of this service for those who truly need it, but also, on a more immediate basis, it threatens to exhaust monies currently available in the Fund for this and other approved TRS within the next few months. For the reasons discussed below, we find it necessary to adopt interim rules requiring certification of eligibility to use this service.

20. IP CTS is distinguishable from most other forms of TRS by its unusual ease and convenience of use. In contrast to other forms of TRS, which often require special skills (*e.g.*, knowledge of American Sign Language by persons who use video relay services) or are designed for very discrete portions of the population with specific communication needs (*e.g.*, people with speech disabilities who need to use specially trained speech-to-speech CAs), consumers who use IP CTS may be less likely to “self-screen” in choosing whether to subscribe to IP CTS. Furthermore, IP CTS is “provided in a way that is automated and invisible to both parties to the call,”⁶⁰ likely making it a more attractive TRS option than other services in which the CA has a known presence. Indeed, one of the central benefits to IP CTS is that, unlike most other forms of TRS, IP CTS is capable of being used without any interruption in the normal flow of a voice telephone conversation.⁶¹ Further, unlike the PSTN-based forms of CTS and many other types of TRS, incoming IP CTS calls are not encumbered by having to first dial an 800 number to reach a CA; rather, the call can be directly dialed to the IP CTS user. Finally, IP CTS offers certain features that may attract its use by individuals who may not necessarily need the service to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users, but rather simply desire such features. For example, a consumer might subscribe to and use IP CTS merely because it provides a transcription of what the other party to a call is saying. Other individuals may use the captions to engage in multiple tasks at the same time, and may not be aware that this is a publicly funded program that supports the costs of captions each time they are produced. And some individuals who do not need captions might sign up for service in order to obtain a free or subsidized highly-amplified phone from the provider. We therefore find that there is a greater risk, compared with other forms of TRS, that IP CTS is being used (with consequent billing of the Fund for the

⁵⁹ In addition to the prohibition against rewards for referrals, the temporary prohibition against any other form of direct or indirect inducements, financial or otherwise, to subscribe or use or encourage subscription to or use of IP CTS would prohibit, for example, a provider from reimbursing a consumer for the cost of his or her examination by a hearing or health professional that would be needed to establish the consumer’s hearing loss or for the cost of obtaining other eligibility documentation.

⁶⁰ *IP CTS Order*, 22 FCC Rcd at 389, ¶ 23.

⁶¹ Thus, to the extent that an IP CTS subscriber is able to hear the other party’s voice, he or she may be able to carry on a telephone conversation at normal speed. In any event, the extent to which the speed of the conversation is slowed down to give the user time to read the captions is largely under the control of the individual user. In many instances, the other party to the call, who may not even be aware that IP CTS is in use, may not detect any differences in the flow of conversation.

minutes used) by individuals who do not need the service to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users.

21. To address the anticipated near-term impact on the TRS Fund and to ensure that only those individuals for whom TRS truly was intended are using this service – and thereby prevent waste of Fund resources⁶² – we find it necessary and appropriate at this time to adopt, on an interim basis, a registration and certification requirement to ensure that the use of IP CTS is limited to those who have a hearing disability that we believe the Act and the Commission’s rules are intended to address. We believe that the exigent circumstances that now exist require us to take such action to protect the Fund during the 2012-13 Fund year, and to fulfill Congress’s mandate for this service to be available to eligible persons who genuinely need it to communicate by telephone in a manner that is functionally equivalent to telephone use by hearing individuals.⁶³ We further believe that the action we take today is in accordance with section 225’s mandate to provide TRS “to the extent possible and in the most efficient manner” to its intended population.⁶⁴

22. Hamilton has suggested that any consumer who accepts IP CTS equipment for free or at *de minimis* cost should be required to provide a certification from a professional in order to be eligible to use IP CTS, but that any consumer who purchases IP CTS equipment for more than *de minimis* cost could self-certify, because the user has already demonstrated through his or her purchase that the IP CTS telephone is needed.⁶⁵ Consumer groups and two other providers have supported this proposal.⁶⁶ For the reasons stated above, we believe that registration and certification documenting the user’s need for this service are necessary to ensure that only individuals with hearing loss who need this service to communicate in a manner that is functionally equivalent to the manner in which conventional voice telephone users can communicate are using the service. While we generally believe that the most effective means of verifying a user’s need for this service is to have independent third party certification for all users, in order to ease the burden of compliance, we will accept just a self-certification in those instances in which the user has either made a significant financial investment in IP CTS equipment, or received that equipment through a governmental program. We agree with Hamilton that having to pay for IP CTS equipment (*i.e.*, a captioned phone) will generally screen out individuals who do not need this service, because such individuals are less likely to register for service if they must make an investment in equipment. We do not agree, however, that anything above “*de minimis*” is sufficient to serve this purpose. While there is no way at this time to pinpoint the precise cost that will most effectively deter ineligible usage of IP CTS, we believe that setting a floor of at least \$75 in order to qualify for the self-certification-only option represents a reasonable balancing of interests. The amount is high enough to affect most consumers’ purchasing decisions, but not so high as to make the purchase of equipment infeasible. Indeed, we note that a floor of \$75 is well below the listed retail prices for the captioned telephones used with current IP CTS offerings.⁶⁷ Hamilton has suggested that \$99 is a high

⁶² The Commission is mandated to ensure that TRS is provided “in the most efficient manner.” 47 U.S.C. § 225(b)(1).

⁶³ See generally Section III.A (The Need for Immediate Interim Rules), *supra*.

⁶⁴ See 47 U.S.C. § 225(b)(1).

⁶⁵ Hamilton, *Ex Parte* Letter, CG Docket No. 03-123, January 10, 2013, at 1 (Hamilton January 10, 2013 *Ex Parte*); Hamilton, *Ex Parte* Letter, CG Docket No. 03-123, January 14, 2013 (correcting Hamilton January 10, 2013 *Ex Parte*).

⁶⁶ See Sprint, *Ex Parte* Letter, Docket No. 03-123, January 14, 2013 (Sprint January 14, 2013 *Ex Parte*); Purple, *Ex Parte* Letter, Docket No. 03-123, January 15, 2013 (Purple January 15, 2013 *Ex Parte*).

⁶⁷ The Clarity Ensemble telephone used with Purple IP CTS is offered by its manufacturer, Plantronics, for \$229 (see < <http://shop.clarityproducts.com/products/clarity/ensemble/?cat=amplified-captioned-phones> > (last visited, (continued....)

enough price to deter a user from purchasing an item if he or she does not need it for communication.⁶⁸ We are basing the interim rule on the lower \$75 price, however, in order to be cautious about any undue burden on consumers, acknowledging the different financial circumstances of those who need IP CTS. We also find self-certification alone to be sufficient if the individual obtains free or low-cost equipment from a governmental program because such programs themselves screen users to determine their need for IP CTS.⁶⁹

23. We believe that limiting the number of potential users who need to seek third-party certification in this manner for a short period while we determine what permanent certification requirements will best serve the Fund is in the public interest, and will not place an undue burden on legitimate IP CTS users. As to the effect of this rule on low-income individuals who may not be able to afford \$75 for IP CTS equipment, we note that those individuals may be able to obtain IP CTS equipment from state equipment distribution programs,⁷⁰ and in any event may accept free or very low-priced equipment so long as they obtain a third-party certification. Thus, we believe that this interim rule is unlikely to prevent those who truly need access to IP CTS from receiving the service.

24. We therefore adopt an interim rule that requires each IP CTS provider, in order to be eligible for compensation from the TRS Fund for providing service to new IP CTS users, (1) to register each new IP CTS user for service, (2) 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 equivalent to communication by conventional voice telephone users, described in greater detail below, and (3) where the consumer accepts IP CTS equipment for less than \$75 from any source other than a governmental program,⁷¹ to also obtain from the user a certification from an independent, third-party professional⁷² attesting to the same. Such third-party professionals must be qualified to

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January 18, 2013)), the Captel 840i telephone used with Sprint's and Hamilton's IP CTS is listed for \$595, with a discount price of \$99 ([see <https://www.weitbrecht.com/product/captel-840i.html?>](https://www.weitbrecht.com/product/captel-840i.html?) (last visited, January 18, 2013)), and the CaptionCall phone used with Sorenson's IP CTS has a suggested retail price of \$149 ([see <https://www.captioncall.com/CaptionCall/Special-Offers.aspx>](https://www.captioncall.com/CaptionCall/Special-Offers.aspx) (last visited, January 18, 2013)).

⁶⁸ Hamilton January 10, 2013 *Ex Parte* at 2.

⁶⁹ *See generally*, Telecommunications Equipment Distribution Program Association, <http://www.tedpa.org/StateProgram.aspx> (last visited, January 15, 2013) (listing state programs that distribute specialized customer premises equipment, such as IP CTS devices). In addition to these programs, the National Deaf Blind Equipment Distribution Program provides free equipment to people who are deaf-blind in all 50 states and three U.S. territories. *See* 47 C.F.R. § 64.610.

⁷⁰ *See* n.69, *supra*.

⁷¹ Although there are some states that also provide IP CTS devices to their residents at no charge, these state equipment distribution programs generally have a screening process that ensures that those receiving the equipment do not have the financial resources to purchase it on their own and need such devices to be able to communicate by phone. For example, the Pennsylvania equipment distribution program requires applicants to meet income eligibility criteria, specified as having gross income equal to or less than 200% of the federal poverty guidelines as well as to obtain professional certification that an applicant has “a disability or disabilities that prevents him/her from making or receiving telephone calls independently.” *See* http://disabilities.temple.edu/programs/assistive/tddp/docs/TDDP_application_2012-07.pdf (last visited November 30, 2012). By contrast, it is not clear that providers distributing IP CTS equipment have been effectively screening users of their service for eligibility prior to distributing such equipment or registering these persons for the service.

⁷² By requiring the certification from an “independent, third party” professional, we seek to ensure that the professional does not have a connection to the provider, not only including employment by the provider or any affiliate of the provider, but also anyone with a TRS-related business agreement with the provider.

evaluate an individual's hearing loss in accordance with applicable professional standards, and may include community-based 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. Any such professionals must certify in writing that the applicant needs IP CTS to communicate in a manner that is functionally equivalent to conventional voice telephone service experienced by individuals without hearing disabilities. In cases where new users have obtained IP CTS equipment for free or at low cost through a governmental program, we find it reasonable for purposes of our interim rules to permit the provider to rely on documentation demonstrating that the equipment was obtained through one of these programs, in lieu of providing an independent, third-party certification.⁷³ These steps will protect against registration by individuals who do not need captioning, but who are registering merely to receive free or very inexpensive phones (which can readily be used by individuals without any hearing loss). By contrast, we believe those users who purchase equipment for more than \$75 have already demonstrated through their purchase decisions at least a potentially greater likelihood that they need IP CTS,⁷⁴ and thus for purposes of these interim rules, we find that self-certification is sufficient pending our consideration of what permanent requirements might be appropriate as part of the accompanying *Notice*. We also require each IP CTS provider to maintain the confidentiality of such registration and certification information obtained by the provider, and to not disclose such registration and certification information, as well as the content of such information, except as required by law.

25. The self-certification mandated by these interim rules must adhere to several requirements. In particular, an IP CTS provider must obtain from a new user a self-certification that: (1) the user has a hearing loss that necessitates IP CTS to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users; (2) the user understands that the captioning service is provided by a live CA; and (3) the user understands that the cost of the IP CTS calls is funded by the TRS Fund. In addition, this self-certification must be made on a form separate from any other user agreement (such as on a separate page), and requires a separate signature specific to the self-certification.⁷⁵ The first three of these requirements are intended to highlight important information that may be relevant to the consumer's decision to use the service. The requirement to obtain a separate signature on a standalone document – as opposed to the method currently used by some providers of simply adding a check box to a lengthy service agreement – will highlight the importance of providing a true and accurate certification.

26. Because we believe it is imperative to establish these rules immediately and without the benefit of full public comment, we invite feedback from interested parties on the propriety of such requirements for purposes of permanent rules, including any other issues or proposals, in the accompanying *Notice*. For example, Purple contends that “‘softphone’ usage in connection with an off-the-shelf computing device or mobile phone” is less likely to be subject to use by ineligible individuals, and thus advocates excluding such usage from any third-party certification requirement.⁷⁶ Purple does not provide sufficient detail or information to justify adopting its proposal as part of our interim rules, but it and other commenters may seek to support such an approach for purposes of permanent rules. We

⁷³ See *supra*, ¶ 22 and n.69.

⁷⁴ See Hamilton January 10, 2013 *Ex Parte* at 1.

⁷⁵ For the purposes of this requirement, an electronic signature, defined by the Electronic Signatures in Global and National Commerce Act, 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. Cf. 47 C.F.R. § 54.419(a) (allowing electronic signatures under the Lifeline program).

⁷⁶ Purple January 15, 2013 *Ex Parte* at 1.

will adopt final rules as appropriate in light of the comments we receive.

D. Default Captions Off

27. In addition to adopting measures to ensure that IP CTS equipment and service is provided to subscribers who need the service to communicate in a functionally equivalent manner, we seek to prevent billing of the TRS Fund for casual or inadvertent use of IP CTS by other individuals who do not need IP CTS to communicate by phone, in particular those who may be living in a subscriber's household or visiting a subscriber's house or office. It is our understanding that much of the IP CTS equipment that is being distributed at this time provides for captions to be automatically displayed without the need to affirmatively turn the captions on.⁷⁷ In other words, when the equipment setting is defaulted to the captions being turned on, captioned telephone service is provided automatically, and the TRS Fund is billed, unless the person using the IP CTS equipment takes affirmative action to turn the captions off. Further, some equipment is configured such that the user must go through a two-step process to turn captions off, rather than having a clear on/off button visible at all times.

28. To prevent similar misuse of PSTN-based CTS, we understand that a number of states already require a captions-off default setting for intrastate CTS.⁷⁸ The Consumer Groups do not oppose a comparable rule for IP CTS, which would require providers to configure IP CTS devices so that consumers must turn on the captioning capability for each call through the push of a button or other simple affirmative action, so long as the Commission also sets standards for a connection time after the consumer activates the captions.⁷⁹ Hamilton and Sprint support the adoption of a captions-off default setting on a prospective basis,⁸⁰ but Hamilton adds that it should apply to equipment as shipped, such that the consumer can elect to alter the default setting.⁸¹ Hamilton states that “[i]t would be significantly more difficult to implement a software patch to address equipment that has already been deployed to users, and may not be successful in all instances.”⁸² Hamilton therefore asks for sufficient time to prepare a software patch and to notify end users in the event the Commission requires a default-off setting in equipment that is already in the possession of consumers, but does not specify how much time would be needed.⁸³ In addition, Purple “strongly support[s] a requirement that all existing and new special-purpose IP-CTS enabled phones be subject to a ‘default-off’ requirement to be eligible for reimbursement” but seeks an exception to allow “a consumer-initiated ‘default on’ setting” for users that “provide an elevated

⁷⁷ See, e.g., CaptionCall's Product Features web page, found at https://www.captioncall.com/CaptionCall/CaptionCall_Solution/Features.aspx (last visited, January 7, 2013) (describing “automatic captioning” as meaning there is “no need to dial additional numbers to use the captioning service”); Ultratec, Inc., *Ex Parte* Filing entitled *IP Captioned Telephone Best Practices Policy*, CG Docket No. 03-123, September 21, 2012, at 7 (arguing in favor of continuing to permit a captions-on default setting) (*Ultratec Best Practices*). Hamilton and Sprint both sell Ultratec equipment to their customers.

⁷⁸ See, e.g., *id.* (stating that some states require a captions-off default setting).

⁷⁹ Consumer Groups, *Ex Parte* Letter, CG Docket No. 03-123, December 21, 2012, at 3 (Consumer Groups December 21, 2012 *Ex Parte*). The groups whose representatives participated in the meeting reported in this *ex parte* are TDI, NAD, ALDA, and HLAA.

⁸⁰ Hamilton January 10, 2013 *Ex Parte* at 2; Sprint January 14, 2013 *Ex Parte*. See also Miracom USA, Inc. (Miracom) Amendment to Application of Miracom USA, Inc. for Certification to Provide IP Captioned Telephone Service, CG Docket Nos. 03-123 and 10-51, May 16, 2012, at 2-3 (amended its pending application for IP CTS certification to clarify that its IP CTS software would be set for captions to be defaulted off).

⁸¹ Hamilton January 10, 2013 *Ex Parte* at 2-3.

⁸² *Id.* at 2.

⁸³ *Id.* n.3.

certification to the effect that: (a) they understand that the captioning service they enjoy free of charge is provided by a live CA dedicated to each of their captioned calls, and reimbursed by the TRS Fund, (b) their device is not accessed by or easily accessible to ineligible users, and (c) they will not permit the use of captions on their device by any ineligible persons.”⁸⁴

29. Ultratec, however, supports permitting a captions-on default setting, arguing that a captions-off default setting does not provide functionally equivalent telephone service because it requires an extra step by consumers, many of whom are elderly and have limited technical capabilities.⁸⁵ Further, according to Ultratec, those states that require a captions-off default setting for intrastate CTS actually have a slightly higher average number of minutes of use compared with the states that permit the default to be captions on.⁸⁶ Therefore, Ultratec argues, requiring a captions-off default setting would not prevent any misuse or accidental use of IP CTS.⁸⁷

30. Sorenson argues against a “default off” requirement, asserting that it will confuse and inconvenience consumers. Sorenson states that when its CaptionCall phones were configured to allow customers to toggle captioning on and off by pressing a button on the touchscreen, “[s]ome customers inadvertently turned captioning off,” and Sorenson reprogrammed the phones to “default on” in response to the “confusion among CaptionCall customers.”⁸⁸ But Sorenson provides no indication of how many consumers actually had problems, nor does it indicate what instructions it provided to users to ensure that they understood how to turn captioning on and off. In the absence of a more compelling reason to believe otherwise, we anticipate that consumers who are provided with a clear on/off option and an explanation of how to use it can reasonably be expected to learn to turn captioning on at the beginning of each call.

31. Sorenson also argues that the company’s experience in switching to “default on” disproves the notion that defaulting to captions off will reduce the number of ineligible minutes of IP CTS use.⁸⁹ But the data Sorenson offers are of little value inasmuch as Sorenson’s starting point was not the same as the “default off” rule we adopt here. Prior to the switch, Sorenson did not require that the user turn captions on for each call, but rather configured the phones so that, absent affirmative action, captions would remain in the state in which the phone was previously used.⁹⁰ Although it was easier then for users to turn captions off on Sorenson’s phones than it is now, affirmative action was still required to do so whenever captions were previously on, and thus it is logical to expect that some ineligible captioned calls were being made by, for instance, individuals who simply ignored the captions rather than turning them off.

32. Sorenson also states that average monthly IP CTS minutes of use are higher in households with only hard-of-hearing individuals than in “mixed” households that also include non-hard-of-hearing individuals.⁹¹ But total household usage is not a useful statistic for identifying how much ineligible usage

⁸⁴ Purple January 15, 2013 *Ex Parte* at 1. See also Purple December 17, 2012 *Ex Parte* at 1-2.

⁸⁵ Ultratec *Best Practices* at 7.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Sorenson, *Ex Parte* Letter, CG Docket No. 03-123, January 15, 2013, at 1-2 (Sorenson January 15, 2013 *Ex Parte*).

⁸⁹ *Id.* at 2.

⁹⁰ *Id.*

⁹¹ *Id.* at 3.

has occurred. For instance, lower total IP CTS minutes in mixed households could result from the non-hard-of-hearing residents making calls that would otherwise be made by the hard of hearing user. Many of those calls may be made with a mobile phone or another phone in the home, thus causing a lower number of captioning minutes, while other calls by non-hard-of-hearing individuals could be made on the CaptionCall phone, with the captions still on. Thus, the data fail to prove Sorenson's point.

33. To avoid misuse of IP CTS, and to ensure that the Fund is used for functionally equivalent telephone service for people with disabilities, we are requiring on an interim basis that all providers ensure that equipment and software used in conjunction with their IP CTS have captions turned off as the default setting. In other words, we are requiring that each time a user initiates or answers an IP CTS call, the user must affirmatively turn on the captions in order to use IP CTS. While 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 burden⁹² is outweighed by the substantial public interest in preventing the misuse of this service. As explained earlier, IP CTS is "provided in a way that is automated and invisible to both parties to the call,"⁹³ is capable of being used without any interruption in the normal flow of a voice telephone conversation, and offers certain features that may attract its use by individuals who may not necessarily need the service to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users.⁹⁴ Because of these IP CTS attributes, with a captions-on setting, the likelihood increases that individuals who do not need IP CTS may be casually or inadvertently using IP CTS, causing illegitimate minutes of use to be billed to the Fund.⁹⁵ For these same reasons, we also require, on an interim basis, that IP CTS equipment not provide consumers the option of changing the default setting from captions-off to captions-on, as proposed by Hamilton.⁹⁶ At this time, we likewise do not adopt Purple's proposed exception for users who "provide an elevated certification."⁹⁷ Even well-intentioned users may find it difficult to ensure that there is no unnecessary use of captioning once it is turned on; by contrast, the burden on the consumer to simply press a "captions on" button or similar method appears to be minimal.

34. Regarding the Consumer Groups' suggestion that we set standards for connection time after the consumer activates the captions,⁹⁸ we note that the Commission's speed of answer rules⁹⁹ currently

⁹² 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. *See, e.g.*, CapTel 840i How-to Guide at 26 (explaining the use of the captions on/off button, and that the red light surrounding the button is lit when the captions are on), found at <http://www.captel.com/customer_service/kb/index.php/article/captel-840i-how-to-guide> (last visited, January 14, 2013); ClearCaptions web site, found at <<http://www.clearcaptions.com/cisco/>> (last visited, January 14, 2013) ("With ClearCaptions for Cisco, your employees with hearing loss press one button to hear and read their calls.").

⁹³ *IP CTS Order*, 22 FCC Rcd at 389, ¶ 23.

⁹⁴ *See generally* ¶ 20, *supra*.

⁹⁵ Although Ultratec asserts that states with a captions-off requirement have slightly higher average minutes of use than states without such requirement, the lack of specific quantitative data underlying this assertion prevents us from determining whether Ultratec's study controlled for the average overall telephone usage in each state or other variables that may have affected Ultratec's results. Absent a well-documented, statistically sound study demonstrating the contrary, we find insufficient evidence to counter our reasoned conclusion that misuse of IP CTS is likely as long as the equipment is defaulted to "on" and requires individuals to affirmatively turn the captions off to avoid using the service.

⁹⁶ *See* Hamilton January 10, 2013 *Ex Parte* at 3.

⁹⁷ *See* Purple January 15, 2013 *Ex Parte* at 1.

⁹⁸ Consumer Groups December 21, 2012 *Ex Parte* at 3.

require that 85% of all calls be answered within 10 seconds, measured daily.¹⁰⁰ Although we are not revisiting this requirement for the purpose of adopting an interim rule requiring a captions-off default setting, in the *Notice* we seek comment on whether the speed of answer requirements should be amended with respect to IP CTS. Similarly, we seek comment in the accompanying *Notice* on Purple's proposed exception for devices located in a consumer or work environment in which the devices are not accessible to non-eligible persons, and the user certifies that he or she will not permit non-qualified users to utilize the captioning services provided on the device.¹⁰¹

35. In order to afford the IP CTS providers an opportunity to make any software and other changes necessary to implement a captions-off default setting, the requirements adopted herein will become effective 30 days after their publication in the Federal Register. We are mindful of Hamilton's concern that it may take some time to develop a software patch for equipment already deployed with consumers. Therefore, 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.¹⁰² In adopting these rules requiring a default setting of captions off, we emphasize that the rules are interim and will expire at the same time as the expiration of the registration and documentation requirements.¹⁰³ In the accompanying *Notice*, we invite comment from interested parties on whether to adopt such requirements as permanent rules, and we will adopt final rules as we deem appropriate in light of the record.

E. Provider Compensation

36. We also take this opportunity to remind providers that, under existing law, they are not entitled to collect payment from the TRS Fund for service that does not constitute compensable TRS under the statute and our rules.¹⁰⁴ Thus, service to a user who is not "deaf, hard of hearing, deaf-blind, or who [does not have] a speech disability," or service that otherwise does not meet the requirements in our rules and orders, does not qualify for reimbursement from the TRS Fund.¹⁰⁵ Therefore, regardless of the

(Continued from previous page) _____

⁹⁹ Although the Consumer Groups December 21, 2012 *Ex Parte* uses the term "connection time," the Commission's rules use the term "speed of answer." See 47 C.F.R. § 64.604(b)(2). Both terms have the same meaning and refer to time by which a connection to a CA is made. We use the term speed of answer here to be consistent with the language of the rules.

¹⁰⁰ *Id.*

¹⁰¹ See Purple January 15, 2013 *Ex Parte* at 1; Purple December 17, 2012 *Ex Parte* at 1-2.

¹⁰² See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.") (citations omitted).

¹⁰³ See Section III.C, *supra*.

¹⁰⁴ 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."); 47 C.F.R. §§ 64.601(a)(21); 64.604(c)(5)(iii)(E) (payments to TRS providers are based on total monthly TRS minutes of use). See also *Publix Network Corp.; Customer Attendants, LLC; Revenue Controls Corp.; Revenue Controls Corp.; SignTel, Inc.; and Focus Group, LLC*, Order to Show Cause and Notice of Opportunity for Hearing, 17 FCC Rcd 11487, 11495, ¶ 19 (2002) (*Publix*).

¹⁰⁵ See *id.*

outcome of this proceeding, the Commission may, for example, request providers to submit to the Commission a description of the reasonable practices they are using to ensure that they are not requesting payment from the TRS Fund for service that does not constitute compensable TRS. Providers whose submissions do not adequately establish that they are requesting compensation only for service to eligible users may be denied compensation for IP CTS minutes.

37. To address any possible ambiguity in our existing rules as to when TRS providers are entitled to compensation, we also amend section 64.604(c)(5)(iii)(E) of the Commission's rules (governing payments to TRS providers) to clarify that the administrator shall not be obligated to pay any request for compensation until it has been established as compensable.¹⁰⁶ A request will be established as compensable only after the administrator or the Commission determines that the provider has met its burden to demonstrate that the claim is properly compensable under these rules and the procedures established by the administrator in consultation with the Commission. We clarify that any request for compensation for which payment has been suspended or withheld in accordance with section 64.604(c)(5)(iii)(L) of the Commission's rules will not be considered compensable until the administrator, in consultation with the Commission, or the Commission makes a final determination that the request is compensable in accordance with that provision.

IV. NOTICE OF PROPOSED RULEMAKING

A. The Recent Increase in IP CTS Minutes of Use

38. As discussed in the Order, IP CTS has been experiencing unprecedented and unusually rapid growth. The Commission seeks comment to better understand the source of this growth. How much of the growth of IP CTS is related to fraud or misuse? Is the increased growth related to referrals for rewards programs? Is such growth attributable to the free distribution of equipment? Are there other factors to which this growth can be attributed? For example, is the growth in IP CTS the result of a natural growth curve, wherein consumer acceptance of new products is initially slow, followed by a period of rapid growth that ultimately levels off? We ask commenters to provide us with specific data supporting their responses to these questions so that we can better understand the IP CTS growth phenomenon. We also direct the TRS Fund administrator to collect and analyze data to determine the source of growth in IP CTS, to submit into the record aggregate, redacted data on the growth, and to incorporate IP CTS growth projections in its next TRS contribution factor recommendation.¹⁰⁷

B. Referrals for Rewards

39. In the accompanying Order, we adopt interim rules prohibiting all referrals for rewards programs or other financial inducements to subscribe to IP CTS. Specifically, we prohibit any program initiated, sponsored, or operated by IP CTS providers that offer financial or similar incentives or rewards to third parties for the referral of customers who sign up to use the provider's IP CTS offering, or who have a device or software installed that is needed for use with the provider's IP CTS offering, and any other form of direct or indirect inducements, financial or otherwise, to subscribe to or use, or encourage

¹⁰⁶ Because this revision to section 64.604 does not impose new substantive rules but rather clarifies existing rules, it constitutes an interpretive rule for which the Commission need not seek prior notice and obtain public comment. See 5 U.S.C. § 553(b)(A). See also *Syncor Intern. Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) ("an interpretive rule can construe an agency's substantive regulation as well as a statute").

¹⁰⁷ See Consumer Groups, *Ex Parte* Letter, January 14, 2013; HLAA, *Ex Parte* Letter, January 14, 2013. Because the Fund administrator must determine Fund projections in time for the Commission to approve rates for the 2013-14 Fund year, the administrator will necessarily have to incorporate these growth projections into any decision-making it conducts to determine the contribution factor for the upcoming Fund year.

subscription to or use of IP CTS. We seek comment on whether we should adopt this proposal permanently, as well as any alternatives. We ask commenters to weigh the potential benefits of the proposed rules against the potential costs. We also seek comment on whether we should address any other activities related to referrals for rewards programs or other financial inducements to subscribe to or use IP CTS, and if so, what the appropriate scope and nature of those requirements should be. Again, we ask commenters offering additional proposals to weigh the potential benefits of such proposals against the potential costs.

C. Provider Dissemination of Free End IP CTS User Equipment

40. In recent months, some providers have initiated programs to give away or loan end user IP CTS equipment to IP CTS users who subscribe to their services.¹⁰⁸ Just as we are concerned about the potential for certain marketing programs to incent improper use of IP CTS, we are similarly concerned that the recent spike in IP CTS usage may be the direct result of these equipment giveaway or loan programs. Specifically, by giving away devices at no cost, these programs may be encouraging consumers to obtain and use the free equipment whether or not they actually need the service to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users. Many such phone devices are modern and attractive, and often provide enhanced sound amplification – features that are likely to entice consumers with or without hearing loss to seek their acquisition. Because of the ease and convenience of using such devices, which function much the same as a conventional telephone but for the addition of captions,¹⁰⁹ once in a consumer’s possession, the consumer may begin to routinely use the device – as might others in the consumer’s household – even if they do not need the service to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users. In fact, when using the phone, the unobtrusive nature of IP CTS is such that consumers may not even be aware that captions are turned on or that they have the ability to turn them off. In this manner, the free distribution or loan of such devices may be contributing to heightened 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, and may be contributing to the recent acceleration in usage of this service. As holds true for the rewards programs discussed above, the more customers that sign up to acquire free devices to use the provider’s IP CTS, the more compensation the provider may seek to collect from the Fund, at no cost to the customer. Offering such free equipment, thus, may have the effect of enlisting customers who might not otherwise have a reason to use the service, an effect that is inconsistent with the purpose of the TRS program to provide communication services to persons who have difficulty using conventional telephone services.¹¹⁰ By contrast, when a consumer is required to pay some amount of money for an IP CTS phone, that individual has the incentive to first consider whether he or she needs the service, *i.e.*, to evaluate whether the benefit from the service is worth the cost of the specialized phone.

¹⁰⁸ For example, Sorenson has the following add on its CaptionCall website: “Free! Limited time offer! Sign up today and get CaptionCall for Free—regularly \$149.” Found at <http://captioncallphone.com/?gclid=CIXPytHR8rMCFcqY4AodkVwAdQ> (last viewed, January 17, 2013). Apparently, this limited time offer has been in effect for at least several months, and we are not aware of any announced termination date. In addition to the general concerns we raise about the free distribution program, we note that the specter of a limited time offer may encourage consumers to quickly take advantage of an offer they believe is about to end.

¹⁰⁹ *IP CTS Order*, 22 FCC Rcd at 389, ¶ 23; *see also* ¶ 20, *supra*, explaining that IP CTS is unlike other forms of TRS because it does not require special skills such as sign language, is generally automated and invisible to the calling parties, and allows a conversation to flow without interruption.

¹¹⁰ *See, e.g., 2000 Improved TRS Order*, 15 FCC Rcd at 5148.

41. For these reasons, we propose to prohibit all provider programs that give away or loan equipment to potential or existing IP CTS users at no cost or at *de minimis* cost and seek comment on this proposal.¹¹¹ We propose to define “*de minimis* cost” for the purposes of this rule as a cost that is small enough so as to generally not be a factor in the consumer’s decision to acquire the IP CTS equipment or software.¹¹² We tentatively conclude that the distribution of equipment for a *de minimis* cost will have the same effect as giving such equipment away for free. We believe that only if the cost of such equipment is more than *de minimis*, even if discounted from its full production cost, will consumers have sufficient incentive to determine whether the benefits of purchasing the equipment outweighs its costs.¹¹³ We seek comment on these proposals, including our definition of *de minimis* cost, whether any rule should be based on a higher price point, and the impact that free or *de minimis* cost equipment can have on a consumer’s acquisition of IP CTS equipment and use of IP CTS. In addition, we seek comment on the extent to which governmental programs are able to provide IP CTS equipment to people with limited incomes, making the free distribution of equipment by providers unnecessary. Commenters are also invited to offer alternative definitions of *de minimis* cost for our consideration. In addition, we seek comment on whether we should adopt any prohibitions with regard to the free or *de minimis* cost distribution of software that facilitates the use of IP CTS. Finally, we seek comment on whether we should address any other aspects of IP CTS equipment and software, and if so, what the appropriate scope and nature of those requirements should be. We ask commenters to weigh the potential benefits of such proposed rules against the potential costs.¹¹⁴

D. Registration, Threshold Eligibility and Certification Requirements

42. In the accompanying Order, we adopt interim rules requiring each IP CTS provider, in order to be eligible for compensation from the TRS Fund for providing service to *new* IP CTS users, (1) to register each new IP CTS user for service, (2) as part of the registration process, to obtain from each user

¹¹¹ We note that IP CTS equipment can be distinguished from VRS equipment because the requirement adopted in the VRS context for provider-distributed equipment to be interoperable across providers has not yet been applied to IP CTS providers. *See generally Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Declaratory Ruling and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5442 (2006) (*VRS Interoperability Declaratory Ruling*). As a consequence, as noted in Section III.B, *supra*, each IP CTS provider’s equipment is proprietary and will work only with the IP CTS of particular providers.

¹¹² This proposed definition of “*de minimis*” is similar to the definition of “nominal” adopted by the Commission in the *ACS Report and Order*. *See Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010; Amendments of the Commission’s Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision*, CG Docket No. 10-213, WT Docket No. 96-198, CG Docket No. 10-145, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, 14621, ¶ 152 (2011) (*ACS Report and Order*).

¹¹³ For example, at present, many IP CTS devices sell for \$99, a price point which is comparable to several off-the-shelf telephones used by the general public and which may allow for such consumer assessments. *See* Hamilton January 10, 2013 *Ex Parte* at 2.

¹¹⁴ We are not addressing equipment giveaway programs for other services such as VRS at this time, but plan to address such matters in other proceedings. *See, e.g., Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 10-51, CG Docket No. 03-123, Further Notice of Proposed Rulemaking, 26 FCC Rcd 17367, 17389-17394, ¶¶ 41-52 (2011); *Additional Comment Sought on Structure and Practices of the Video Relay Service (VRS) Program and on Proposed VRS Compensation Rates*, CG Docket No. 03-123, CG Docket No. 10-51, Public Notice, 27 FCC Rcd 12959, 12961-12962 (2012).

a self-certification that the user has a hearing loss that necessitates IP CTS to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users, and (3) where the consumer accepts IP CTS equipment for less than \$75 from any source other than a governmental program, to obtain from the user a certification from an independent, third party professional attesting to the same. We seek comment on whether to make these interim requirements permanent for new IP CTS users. We also seek comment on whether we should include existing users within these requirements. In other words, we also seek comment on whether we should require each IP CTS provider, as a precondition to continuing to be eligible for compensation from the TRS Fund for providing service to *existing* IP CTS user, (1) to register each existing IP CTS user and as part of the registration process, (2) to obtain from each existing user a self-certification that the user has a hearing loss that necessitates IP CTS to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users, and (3) where the existing user accepts (or has accepted) IP CTS equipment for less than \$75 from any source other than a governmental program, to also obtain a certification from an independent, third party professional attesting to the same.¹¹⁵ We seek comment on whether these or other certification requirements would be necessary if the Commission bars the provision of equipment for free or at *de minimis* cost. In addition, we seek comment on whether, where certification from independent, third party professionals is required, such certification should be made under penalty of perjury as an added layer of assurance that the individual's disability satisfies our eligibility requirements.¹¹⁶ We also seek comment on whether such requirements will effectively fulfill Congress's directive to the Commission, in section 225 of the Communications Act, to ensure that TRS is available, "to the extent possible and in the most efficient manner," to persons with hearing and speech disabilities.¹¹⁷ Will the proposed requirements be effective in covering the population intended for IP CTS, while excluding those who otherwise are able to communicate effectively by phone? Commenters who do not believe these are the appropriate requirements should offer alternative requirements that can be used to ensure that only eligible individuals who are intended to benefit from this service (*i.e.*, to receive functionally equivalent telephone service) are permitted to use it. We also ask commenters to weigh the potential benefits of the proposed rules against the potential costs.

43. We seek comment as well on whether to adopt the same specifications as in the interim rules for the form and content of any self-certifications, or different specifications. Specifically, we seek comment on whether to require the self-certification to state that (1) the user has a hearing loss that necessitates IP CTS to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users; (2) the user understands that the captioning service is provided by a live communications assistant (CA); and (3) the user understands that the cost of the IP CTS calls is funded by the federal TRS Fund. We further seek comment on whether the self-certification must be made on a form separate from any other user agreement (such as on a separate page), and require a separate signature specific to the self-certification. Finally, we seek comment on whether such self-

¹¹⁵ As would be the case for a new user, an existing user who has obtained equipment from a governmental program would be able to present documentation to the provider demonstrating that the equipment was obtained through one of these programs instead of presenting a third-party certification.

¹¹⁶ See, e.g., *Lifeline/Link Up Reform Order*, 27 FCC Rcd at 6709-11, ¶¶ 111-14, 6712, ¶ 120 (amending 47 C.F.R. § 54.410 to require, among other measures to reduce fraud, abuse, and waste in the Lifeline program, that eligible telecommunications carriers obtain initial and annual self-certifications by consumers, under penalty of perjury, establishing their eligibility for Lifeline support). See also 47 C.F.R. § 54.416(a) (requiring eligible telecommunications carriers themselves to certify annually, under penalty of perjury, that they have policies and procedures in place to ensure that Lifeline subscribers are eligible and that they are in compliance with all federal Lifeline certification procedures).

¹¹⁷ 47 U.S.C. § 225(b)(1).

certification should be made under penalty of perjury.¹¹⁸

44. We also seek comment on whether to adopt any quantitative threshold requirements to be eligible to use IP CTS. By way of background, the severity of an individual's hearing loss is often determined by the additional loudness above a nominal threshold to which a sound must be amplified before an individual can detect it. In this manner, levels of hearing loss are frequently classified in the following categories, defined in terms of the level of amplification, in decibels of gain (abbreviated as dB HL), necessary for the individual to detect the sound:

- Mild - between 26 and 40 dB HL
- Moderate - between 41 and 54 dB HL
- Moderately severe - between 55 and 70 dB HL
- Severe - between 71 and 90 dB HL
- Profound - 91+ dB HL
- Totally Deaf - no hearing at all¹¹⁹

45. Some states have established eligibility threshold requirements for programs distributing adaptive telecommunications equipment, free of charge, to qualifying residents. Hearing loss thresholds used for these programs may be relevant because they are established for purposes of determining whether adaptive equipment, including equipment specifically designed for use with CTS and/or IP CTS service, is necessary to enable a person to communicate effectively by telephone. Although most state equipment programs do not use quantified hearing loss criteria for determining eligibility to receive assistive devices,¹²⁰ at least three states – North Dakota, Washington, and Wisconsin – do set mandatory or recommended criteria requiring that an individual's hearing loss be severe to profound in order to receive a CTS device.¹²¹ As noted above, a “severe” hearing loss is commonly defined as a hearing threshold between 71 and 90 dB HL, and a “profound” hearing loss is commonly defined as a hearing threshold of 91+ dB HL.

46. Alternatively, in her *ex parte* declaration, Dr. Ingrid McBride, Director of Audiology for the Department of Speech and Hearing Science of Arizona State University, explains that arriving at a definitive value for either hearing loss or speech discrimination as a threshold for use of CTS has its

¹¹⁸ See, e.g., *Lifeline/Link Up Reform Order*, 27 FCC Rcd at 6709-12, cited in note 116, *supra*.

¹¹⁹ See e.g., National Research Council, *Hearing Loss: Determining Eligibility for Social Security Benefits*, p. 59 (National Academy of Sciences, 2005) found at <http://www.nap.edu/openbook.php?record_id=11099&page=59> (last visited, January 17, 2013); Hear-it.org, “Definition of Hearing Loss,” found at <<http://www.hear-it.org/Defining-hearing-loss>> (last visited, January 17, 2013).

¹²⁰ Instead, they usually require a general certification from an audiologist or other professional that the applicant has a disability preventing effective use of the telephone without the requested device. Frequently, these programs also require an audiogram to accompany the certification.

¹²¹ The North Dakota program distributes free equipment only to individuals that have a communication disability (“communication disability” being defined as inability to use a telephone that can be readily purchased from a retail store) that is significant enough to be considered a “severe” hearing loss. The Washington and Wisconsin programs offer equipment for individuals with all levels of hearing loss, but the program application forms indicate that CapTel phones (the phones offered by the program for use with CTS) are for individuals with severe to profound hearing loss.

practical limitations.¹²² Nevertheless, Dr. McBride goes on to suggest that the need exists for a reasonable proxy to simplify the certification process and to allow those individuals who already have a pure tone audiogram to utilize such audiogram rather than be required to undergo a battery of speech discrimination tests.¹²³ Dr. McBride adds: “A measure utilizing the average dB loss in the better ear is a convenient and cost effective proxy from which we can predict to a reasonable degree that a sufficient level of speech discrimination deficit will justify the sue of CTS.”¹²⁴ Explaining that even with a moderate hearing loss of 40 dB “the amount of conversational speech signal missed can be as high as 60 percent or more,” Dr. McBride recommends “the use of the threshold standard for defining moderate hearing loss, greater than 40 dB hearing loss in the better ear, as the basic objective qualification standard to use CTS.”¹²⁵ Dr. McBride qualifies her recommendation with the additional recommendation that the objective standard, however, must be supplemented with the alternative standard that qualifies the individual to use CTS if, in the reasonable opinion of a hearing professional, the individual is not capable of using the telephone system in a manner that is functionally equivalent to communication by conventional voice telephone users.¹²⁶

47. The Consumer Groups, on the other hand, argue that any dB criteria would be arbitrary, and that even with a hearing loss of 40 dB, the amount of average conversational speech signal missed can be as high as 60 percent or more.¹²⁷ The Consumer Groups add that there is no evidence that user self-certification is not currently working or that IP CTS users are engaged in fraud,¹²⁸ and thus support the self-certification user verification made in the Ultratec *Best Practices* proposal, which is also supported by Hamilton and Sprint.¹²⁹ In commenting on whether the Commission should adopt any quantitative eligibility requirements, and if so, what those requirements ought to be, we ask commenters to address the criteria used by states, the proposal by Dr. McBride, including her proposal for an alternative means of establishing eligibility, the Spytek/Vogler *Ex Parte*, and the *ex parte* filings of the Consumer Groups. In addition, we ask commenters who oppose quantitative requirements to propose alternative eligibility requirements. We also ask commenters to weigh the potential benefits of establishing quantitative and other threshold eligibility criteria against the potential costs. Finally, to the extent that states establish eligibility threshold requirements that not only apply to the acquisition of subsidized equipment, but also apply to the use of CTS, these requirements apply to both intra- and interstate CTS calls made over the PSTN. We seek feedback on whether we should similarly allow states to use their own eligibility thresholds for IP CTS calls made by their residents to the extent that these exceed our federal standards,

¹²² Dr. Ingrid K. McBride, *Ex Parte* Declaration, dated January 2, 2013, filed January 9, 2013, at 3 (McBride Declaration).

¹²³ *Id.* at 3.

¹²⁴ *Id.* at 3-4.

¹²⁵ *Id.* at 4.

¹²⁶ *Id.* See also Linda Kozma-Spytek and Dr. Christian Vogler, *Ex Parte* Letter, December 20, 2012 (explaining that audiograms are notoriously poor predictors of speech recognition performance by people with hearing loss and that imposing criteria based on a single value derived from an audiogram would exclude people from using IP CTS whose speech recognition performance is too poor to allow them access to alternatives) (Spytek/Vogler *Ex Parte*).

¹²⁷ Consumer Groups Second January 7, 2013 *Ex Parte* at 2.

¹²⁸ *Id.*

¹²⁹ *Id.* at 2-3; Consumer Groups, *Ex Parte* Letter, January 7, 2013, at 1-2 (Consumer Groups First January 7, 2013 *Ex Parte*); Consumer Groups, *Ex Parte* Letter, December 27, 2012; TDI, *Ex Parte* Letter, December 19, 2012; HLAA, *Ex Parte* Letter, December 20, 2012. See also Ultratec *Best Practices* at 3-5; Spytek/Vogler *Ex Parte*; Hamilton, Comments of Hamilton Relay, Inc. in Support of IP CTS “Best Practices” Policy, November 1, 2012, at 2.; Sprint, *Ex Parte* Letter, December 21, 2012.

so long as such state requirements do not conflict with federal law.

48. We also propose to make permanent our interim rule requiring each IP CTS provider to maintain the confidentiality of such registration and certification information obtained by the provider, and to not disclose such registration and certification information, as well as the content of such registration and certification information except as required by law. We seek comment on these proposals and any alternatives, including other eligibility criteria that should be required to become registered to use IP CTS. If the Commission adopts permanent rules requiring third party certification of the user's need for IP CTS, we also seek comment on which professionals should qualify as resources for providing such certification. We also ask commenters to weigh the potential benefits of the proposed rules against the potential costs.

49. We further propose that providers be required, within a 90-day grace period, to obtain registration and certification from their existing users, and that IP CTS providers that fail to register existing users within this grace period be required to cease providing service to any unregistered users or to any users who fail to provide the required certification immediately upon expiration of this grace period. We seek feedback on how to best implement a transition period for these requirements, if adopted, and ask commenters that do not believe that 90 days is the appropriate length of time for a transition period for registration of existing users to offer alternative proposals and include the reasons for such proposals. We note that in the Commission's reform of the Lifeline program, the Commission required carriers to recertify the eligibility of all existing Lifeline subscribers by December 31, 2012, which was seven months after the effective date of the certification requirement.¹³⁰ While so long a grace period may not be necessary here because the number of IP CTS subscribers is much smaller than the number of Lifeline subscribers, are there other reasons, such as the need to obtain certification from a professional, that would make a period longer than 90 days appropriate? Finally, we ask commenters to weigh the potential benefits of the rules proposed above against the potential costs.

50. We further propose to require applicants seeking certification as IP CTS providers, including any applicants with pending applications for certification to whom certification has not been granted as of the effective date of this proposed rule, to submit to the Commission a description of how they will ensure that they do not request or collect payment from the TRS Fund for service to users who do not satisfy the eligibility criteria contained in the rules proposed herein, and an explanation of how those measures provide such assurance. Applicants whose submissions do not adequately establish that they have adequate measures and procedures in place to ensure that they will serve only eligible users will be denied IP CTS certification. We seek comment on this proposal.

E. Default Captions Off

51. In the accompanying Order, we raise the concern that individuals who do not need CTS to communicate in a functionally equivalent manner and who are either living in the household or visiting the house or office of an eligible IP CTS user are likely to use the IP CTS equipment and service, resulting in improper billing of the TRS Fund. We therefore adopt interim rules requiring IP CTS providers to ensure that equipment and software used in conjunction with their service have captions turned off as the default setting 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. We seek comment on whether we should make this interim rule permanent, and if so, whether it should be changed in any way. We ask commenters to weigh the cost of a requirement for a default setting of captions off against the benefits of such a requirement.

¹³⁰ *Lifeline/Link Up Reform Order*, 27 FCC Rcd at 6717, ¶ 130.

52. The Consumer Groups support a rule requiring providers to configure IP CTS devices so that consumers turn on the captioning capability through the push of a button or other simple positive action, rather than defaulting to captions on, so long as the Commission also sets standards for connection time after the consumer activates the captions.¹³¹ We note that the Commission's speed of answer rules already require that 85% of all calls be answered within 10 seconds, measured daily.¹³² We seek comment on whether the current speed of answer rules are appropriate for IP CTS or whether such rules should be amended with respect to IP CTS. We ask commenters to weigh the cost of any amended speed of answer rules against the benefits of such amended rules.

53. Purple supports IP CTS equipment with a default of captions off, with an exception for devices located in a consumer or work environment where the devices are not accessible to non-eligible persons and the user certifies that he or she will not permit non-qualified users to utilize the captioning services provided on the device.¹³³ We seek public comment on whether we should adopt the proposed exception. We ask commenters to weigh the cost of adopting the requirement for a default of captions off without the exception proposed by Purple against the benefits of not including the exception.

54. Ultratec supports permitting a default of captions on, arguing that a default of captions off is not functionally equivalent telephone service because it involves an extra step by consumers, many of whom are elderly and have limited technical capabilities.¹³⁴ Ultratec adds that those states that require a captions-off default setting for intrastate CTS actually have a slightly higher average number of minutes of use compared with the states that permits the default to be captions on.¹³⁵ Ultratec therefore argues that requiring a default setting of captions off would not prevent any misuse or accidental use of IP CTS.¹³⁶ We ask Ultratec and other parties to submit detailed quantitative data that address Ultratec's assertions, including data that show how CTS usage in each state compares with average overall telephone usage in those states and other possible variables that may affect state-by-state variations in IP CTS usage.

F. Notification Label

55. To further prevent casual or inadvertent use of IP CTS, we also seek comment on whether we should require that each piece of new IP CTS equipment have a label on its face in a conspicuous location specifying that FCC regulations require that captions may be used only by people with hearing loss who require captions to fully understand telephone conversations. We also seek comment on whether we should require, for equipment that is already in the hands of users, that IP CTS providers send such labels to their registered users of this service, with specific instructions directing users to affix such labels on the front of their IP CTS equipment in a conspicuous location. In addition, we seek comment on whether we should require that the same information be provided on the caption screen when the equipment is turned on and in captions-off mode, as well as during the time period after the user pushes the "captions on" button (or takes some other similar action to initiate captioning) and before captioning commences. We ask commenters to weigh the costs of these labeling and display requirements against the benefits of such requirements.

¹³¹ Consumer Groups December 21, 2012 *Ex Parte* Letter at 3.

¹³² 47 C.F.R. § 64.604(b)(2).

¹³³ Purple December 17, 2012 *Ex Parte* Letter at 1-2.

¹³⁴ Ultratec *Best Practices* at 7.

¹³⁵ *Id.*

¹³⁶ *Id.*

V. CONCLUSION

56. In the order above, we adopt interim rules barring all IP CTS providers from conducting any 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. We also conclude that providers engaging in such practices will not be eligible to receive compensation for IP CTS from the TRS Fund. In addition, we adopt interim rules requiring each IP CTS provider, in order to be eligible for compensation from the TRS Fund for providing service to new IP CTS users, (1) to register each new IP CTS user for service, (2) 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 equivalent to communication by conventional voice telephone users, and (3) 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. We also require IP CTS equipment to have a default setting of captions off at the beginning of each call, so that the consumer must affirmatively turn on the captions each time the consumer wishes to use IP CTS. In addition, the Commission adopts a final procedural rule amending section 64.604(c)(5)(iii)(E) of the Commission's rules (governing payments to TRS providers) to clarify that the TRS Fund administrator shall not be obligated to pay any request for compensation until it has been established as compensable by the administrator in consultation with the Commission or by the Commission. In the *Notice*, we seek comment on whether to make permanent the rules adopted in the order as well as alternatives to these rules. In addition, we seek comment on whether we should prohibit all IP CTS provider programs that give away or loan equipment to potential or existing IP CTS users at no cost or at *de minimis* cost and whether we should adopt any requirements for IP CTS equipment to have labels informing consumers that IP CTS may be used only by persons with hearing disabilities. The Commission intends to issue a separate Notice of Proposed Rulemaking (NPRM) to seek comment on other aspects of IP CTS reform. Beyond the immediate actions we take in this order, this subsequent NPRM will take a more in-depth look at ways for the IP CTS program to fully meet the needs of qualifying persons with hearing loss, while preventing fraud, waste and abuse in this program.

VI. PROCEDURAL MATTERS

A. Congressional Review Act

57. The Commission will send a copy of this Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.¹³⁷

B. Regulatory Flexibility

58. As required by the Regulatory Flexibility Act,¹³⁸ the Commission has prepared a Final Regulatory Flexibility Certification (FRFC) of the expected economic impact on small entities of the final rules and interim rules adopted in the Order and an Initial Regulatory Flexibility Certification (IRFC) of the expected economic impact on small entities of the rules proposed in this Notice. The FRFC is set forth in Appendix A, and the IRFC is set forth in Appendix B. The Commission will send a copy of the Order and the Notice, including the FRFC and the IRFC, to the Chief Counsel for Advocacy of the Small Business Administration.

¹³⁷ 5 U.S.C. § 801(a)(1)(A).

¹³⁸ *Id.* § 603.

C. Paperwork Reduction Act

59. *Paperwork Reduction Act of 1995 Analysis.* The Order contains new and modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198,¹³⁹ we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

60. In this present document, we have assessed the effects of imposing various requirements on IP CTS providers and on consumers of IP CTS. We recognize that these requirements are necessary to detect and prevent abuse and waste in the IP CTS program. We take these actions to ensure the sustainability of the program upon which individuals with hearing disabilities have come to rely for their daily communication needs. In doing so, we have balanced preserving the sustainability of the IP CTS program and minimizing the information collection burden for consumers and small business concerns, including those small businesses with fewer than 25 employees. For example, in adopting requirements for IP CTS providers, in order to be eligible for compensation from the TRS Fund for providing service to new IP CTS users, to register the users and obtain from the users certification of hearing loss necessitating use of IP CTS, the rule affords considerable flexibility by allowing those consumers who have purchased their IP CTS equipment for more than \$75, or obtained equipment from a governmental program, to self-certify as to their hearing loss. Nevertheless, such procedures are necessary to limit use of IP CTS to those who actually have a hearing loss that necessitates use of the service.

61. The Notice contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and OMB to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due 21 days after date of publication of this Order in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198,¹⁴⁰ we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

D. *Ex Parte* Presentations

62. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.¹⁴¹ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral

¹³⁹ See 44 U.S.C. § 3506(c)(4).

¹⁴⁰ See 44 U.S.C. § 3506(c)(4).

¹⁴¹ 47 C.F.R. §§ 1.1200–1.1216.

ex parte presentations are reminded that memoranda summarizing the presentations must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b).¹⁴² In proceedings governed by rule 1.49(f)¹⁴³ or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

E. Comment Filing Procedures

63. Pursuant to Sections 1.415 and 1.419 of the Commission's rules,¹⁴⁴ interested parties may file comments and reply comments regarding the *Notice* on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS).¹⁴⁵

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the Commission's Electronic Comment Filing System (ECFS): <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

64. Documents in CG Docket Nos. 13-24 and 03-123 will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th Street SW,

¹⁴² *Id.* § 1.1206(b).

¹⁴³ *Id.* § 1.49(f).

¹⁴⁴ *Id.* §§ 1.415 and 1.419.

¹⁴⁵ *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

Room CY-A257, Washington, D.C. 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

65. People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

VII. ORDERING CLAUSES

66. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2, 4(i), (4)(j) and 225 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j) and 225, this Order and Notice of Proposed Rulemaking is hereby ADOPTED.

67. IT IS FURTHER ORDERED that the revisions to section 64.604(c)(5)(iii)(E) of the Commission's rules, 47 C.F.R. § 64.604(c)(5)(iii)(E), adopted herein shall become effective 30 days after publication of a summary in the Federal Register, pursuant to 5 U.S.C. § 553(d) and section 1.427(a) of the Commission's rules, 47 C.F.R. § 1.427(a).

68. IT IS FURTHER ORDERED that the interim rules on referrals for rewards, 47 C.F.R. § 64.604(c)(8), SHALL BE effective upon publication of a summary in the Federal Register, pursuant to 5 U.S.C. § 553(d)(3) and section 1.427(b) of the Commission's rules, 47 C.F.R. § 1.427(b).

69. IT IS FURTHER ORDERED that the interim rules requiring a default setting of captions off, 47 C.F.R. § 64.604(c)(10), SHALL BE effective 30 days after publication of a summary in the Federal Register, pursuant to 5 U.S.C. § 553(d) and section 1.427(a) of the Commission's rules, 47 C.F.R. § 1.427(a).

70. IT IS FURTHER ORDERED that the interim rules on new user registration, and certification, 47 C.F.R. § 64.604(c)(9), SHALL BE effective upon publication in the Federal Register of a notice announcing the approval of such requirements by the Office of Management and Budget under the Paperwork Reduction Act of 1995¹⁴⁶ and an effective date of the rules.

71. IT IS FURTHER ORDERED that the interim rules adopted in this Order, 47 C.F.R. §§ 64.604(c)(8), (c)(9), and (c)(10), SHALL CEASE TO BE EFFECTIVE 180 days after the effective date for the interim rules on registration, and certification, 47 C.F.R. § 64.604(c)(9), or on the effective date of final rules on these issues, whichever date is sooner.

¹⁴⁶ Pub. L. No. 104-13, 109 Stat. 163 (May 22, 1995), *codified at* 44 U.S.C. § 3501 *et seq.*

72. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order and Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Certification, to the Chief Counsel for advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A
Final Regulatory Flexibility Certification

1. The Regulatory Flexibility Act (RFA)¹ requires that an agency prepare a regulatory flexibility analysis for rulemaking proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”² The RFA generally defines “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”³ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁴ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁵

2. In the Order, in response to an urgent public interest need to curtail misuse of Internet Protocol captioned telephone service (IP CTS),⁶ the Commission adopts interim rules prohibiting all referrals for rewards programs and any other form of direct and indirect inducements, financial or otherwise to subscribe or use or encourage subscription to or use of IP CTS. The Commission also adopts interim rules requiring each IP CTS provider, in order to be eligible for compensation from the TRS Fund for providing service to new IP CTS users, (1) to register each new IP CTS user for service, (2) 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 equivalent to communication by conventional voice telephone users, and (3) where the consumer accepts IP CTS equipment at a price below \$75 from any source other than a governmental program, to obtain from the user a certification from an independent, third party professional attesting to the same. The Commission also requires IP CTS equipment to have a default setting of captions off at the beginning of each call, so that the consumer must affirmatively turn on the captions each time the consumer wishes to use IP CTS.

3. In addition, the Commission adopts a final rule amending section 64.604(c)(5)(iii)(E) of the Commission’s rules (governing payments to TRS providers)⁷ to clarify that the TRS Fund administrator shall not be obligated to pay any request for compensation until it has been established as

¹ See 5 U.S.C. § 603. The RFA, 5 U.S.C. § 601 *et seq.*, has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

² See 5 U.S.C. § 605(b).

³ *Id.* § 601(6).

⁴ *Id.* § 601(3) (incorporating by reference the definition of “small business concern” in Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

⁵ 15 U.S.C. § 632.

⁶ 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 47 C.F.R. § 64.601(12); *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*).

⁷ 47 C.F.R. § 64.604(c)(5)(iii)(E).

compensable.⁸ As a result, a request will be established as compensable only after the administrator or the Commission determines that the provider has met its burden to demonstrate that the claim is properly compensable under the rules and the procedures established by the administrator in consultation with the Commission.

4. In recent months, IP CTS has been experiencing unusually rapid growth. The Commission is concerned that usage of this service by people who may not need the assistance of IP CTS, along with improper incentives for referrals to use this service are contributing substantially to this sudden, rapid increase in IP CTS minutes of use.

5. With regard to the criterion of the economic impact of this Order, the Commission concludes that IP CTS providers fit within the business classification of Wired Telecommunications Carriers.⁹ The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers, for which the small business size standard is all such firms having 1,500 or fewer employees.¹⁰ Collectively, there are four IP CTS providers that are authorized by the Commission to offer these services. Only one of these entities is a small business under the SBA size standard. Therefore, the interim rules and the final rule will not have a significant economic impact on a substantial number of small entities.

6. The Commission therefore certifies, pursuant to the RFA, that the interim rules and the final rule adopted in this Order will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the Order, including a copy of this certification, to the Chief Counsel for Advocacy of the SBA. In addition, a copy of the Order and this certification will be published in the Federal Register.¹¹

⁸ Because this revision to section 64.604 does not impose new substantive rules but rather clarifies existing rules, it constitutes an interpretive rule for which the Commission need not obtain public notice and comment. *See* 5 U.S.C. § 553(b)(A). *See also Syncor Intern. Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (“an interpretive rule can construe an agency’s substantive regulation as well as a statute”).

⁹ *See* NAICS Code 517110 (2007).

¹⁰ 13 C.F.R. § 121.201, NAICS Code 517110 (2007).

¹¹ *See* 5 U.S.C. § 605(b).

APPENDIX B

Initial Regulatory Flexibility Certification

1. The Regulatory Flexibility Act (RFA)¹ requires that an agency prepare a regulatory flexibility analysis for notice-and-comment rulemaking proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”² The RFA generally defines “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”³ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁴ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁵

2. In the Notice of Proposed Rulemaking (Notice), the Commission seeks comment on its proposal to adopt rules prohibiting all referrals for rewards programs and any other form of direct or indirect inducements, financial or otherwise, to subscribe or encourage subscription to or use of Internet Protocol captioned telephone service (IP CTS).⁶ The Commission also seeks comment on its proposal to adopt a rule prohibiting IP CTS providers from providing to consumers, directly or indirectly, equipment at no cost or at *de minimis* cost, whether through giveaway, sale, loan or otherwise. In addition, the Commission seeks comment on its proposal to require each IP CTS provider, in order to be eligible for compensation from the TRS Fund for providing service to *new* IP CTS users, to (1) register each new IP CTS user for service, and as part of the registration process, to (2) 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 equivalent to communication by conventional voice telephone users, and (3) where the consumer accepts IP CTS equipment at a price below \$75 from any source other than a governmental program, the provider must also obtain from the user a certification from an independent, third party professional attesting to the same. The proposed rule also would require each IP CTS provider, as a condition of continuing to offer service to *existing* IP CTS users who have not yet registered for service, (1) to register each such user with the IP CTS provider and as part of the registration process, to (2) obtain from each user certification that the user has a hearing loss that necessitates IP CTS to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users. Lastly,

¹ See 5 U.S.C. § 603. The RFA, 5 U.S.C. § 601 *et seq.*, has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

² See 5 U.S.C. § 605(b).

³ *Id.* § 601(6).

⁴ *Id.* § 601(3) (incorporating by reference the definition of “small business concern” in Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

⁵ 15 U.S.C. § 632.

⁶ 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 47 C.F.R. § 64.601(12); *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*).

the Commission seeks comment on its proposals to require IP CTS equipment to have a default setting of captions off, so that the consumer must affirmatively turn on the captions each time the consumer wishes to use IP CTS, and to require IP CTS equipment to have labels informing consumers that IP CTS may be used only by persons with hearing disabilities.

3. In recent months, IP CTS has been experiencing unusually rapid growth. The Commission is concerned that usage of this service by people who may not need the assistance of IP CTS, along with improper incentives for referrals to use this service are contributing substantially to this sudden, rapid increase in IP CTS minutes of use.

4. With regard to the criterion of the economic impact of this Notice, the Commission concludes that IP CTS providers fit within the business classification of Wired Telecommunications Carriers.⁷ The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers, for which the small business size standard is all such firms having 1,500 or fewer employees.⁸ Collectively, there are four IP CTS providers that are authorized by the Commission to offer these services. Only one of these entities is a small business under the SBA size standard. Therefore, the Notice, if adopted would not have a significant economic impact on a substantial number of small entities.

5. The Commission therefore certifies, pursuant to the RFA, that the proposals in this Notice, if adopted, will not have a significant economic impact on a substantial number of small entities. If commenters believe that the proposals discussed in the Notice require additional RFA analysis, they should include a discussion of these issues in their comments and additionally label them as RFA comments. The Commission will send a copy of the Notice, including a copy of this initial certification, to the Chief Counsel for Advocacy of the SBA. In addition, a copy of the Notice and this initial certification will be published in the Federal Register.⁹

⁷ See NAICS Code 517110 (2007).

⁸ 13 C.F.R. § 121.201, NAICS Code 517110 (2007).

⁹ See 5 U.S.C. § 605(b).

APPENDIX C
Final Rule

The Commission amends 47 C.F.R. part 64 as follows:

PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation to part 64 continues to read as follows:

Authority: 47 U.S.C. 154, 254(k); 403(b)(2)(B), (c), Pub. L. 104-104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 227, 228, 254(k), 616, 620, and the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, unless otherwise noted.

2. Amend section 64.604 by revising paragraph (c)(5)(iii)(E) to read as follows:

§ 64.604 Mandatory minimum standards.

* * * * *

(c) * * *

(5) * * *

(iii) * * *

(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 § 64.604, 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 of this chapter 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.

* * * * *

APPENDIX D
Interim Rule

The Commission amends 47 C.F.R. part 64 as follows:

PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation to part 64 continues to read as follows:

Authority: 47 U.S.C. 154, 254(k); 403(b)(2)(B), (c), Pub. L. 104-104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 227, 228, 254(k), 616, 620, and the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, unless otherwise noted.

2. Amend section 64.604 by adding paragraphs (c)(8), (9), and (10) to read as follows:

§ 64.604 Mandatory minimum standards.

* * * * *

(c) * * *

(8) Inducements for Use of IP CTS. (i) An IP CTS provider shall not offer or provide to any person or entity any form of direct or indirect inducements, financial or otherwise, to subscribe to or use or encourage subscription to or use of IP CTS. IP CTS providers offering or providing such inducements shall be ineligible for any compensation for IP CTS from the TRS Fund.

(ii) This paragraph shall cease to be effective on the same date as paragraph (c)(9) of this section ceases to be effective.

(9) IP CTS Registration and Certification Requirements.

(i) IP CTS providers, in order to be eligible to receive compensation from the TRS Fund for providing IP CTS to a new consumer, must first register the new consumer applying for service by obtaining the following registration information: the consumer's name, address and telephone number.

(ii) IP CTS providers, in order to be eligible to receive compensation from the TRS Fund for providing IP CTS to a new consumer, also must first obtain a written certification attesting 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 communications services.

(iii) The certification required by paragraph (c)(9)(ii) of this section 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 the IP CTS calls is funded by the TRS Fund.

(iv) The certification required by paragraph (c)(9)(ii) 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. For purposes of this rule, 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) In instances where IP CTS equipment is obtained by a new consumer for less than \$75, the IP CTS provider must also, in order to be eligible to receive compensation from the TRS Fund, obtain written certification provided and signed by an independent third-party professional, except as provided in paragraph (c)(9)(v)(D) of this section.

(A) In instances where certification from an independent third-party professional is required, such professionals must 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) In instances where certification from an independent third-party professional is required, such third-party professionals must certify in writing that the IP CTS consumer 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.

(C) In instances where certification from an independent third-party professional is required, such third-party professional must provide his or her name, title, and contact information, including address, telephone number, and e-mail address.

(D) In instances where the new consumer has obtained equipment from a governmental program, the new 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.

(vi) Each IP CTS provider shall maintain the confidentiality of any registration and certification information obtained by the provider, 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.

(vii) This paragraph shall cease to be effective 180 days after its effective date.

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

(ii) This paragraph shall cease to be effective on the same date as paragraph (c)(9) of this section ceases to be effective.

APPENDIX E
Proposed Rule

The Commission proposes to amend 47 C.F.R. part 64 as follows:

PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation to part 64 continues to read as follows:

Authority: 47 U.S.C. 154, 254(k); 403(b)(2)(B), (c), Pub. L. 104-104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 227, 228, 254(k), 616, 620, and the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, unless otherwise noted.

2. Amend section 64.604 by revising paragraphs (c)(8), (9), and (10), and by adding paragraph (c)(11) as follows:

§ 64.604 Mandatory minimum standards.

* * * * *

(c) * * *

(8) Inducements for Use of IP CTS. An IP CTS provider shall not provide to any person or entity any form of direct or indirect inducements, financial or otherwise, to subscribe to or use or encourage subscription to or use of IP CTS. IP CTS providers offering or providing such inducements shall be ineligible for any compensation for IP CTS from the TRS Fund.

(9) IP CTS Registration and Certification Requirements.

(i) IP CTS providers, in order to be eligible to receive compensation from the TRS Fund for providing IP CTS, must first register the consumer by obtaining the following registration information: the applicant's name, address and telephone number.

(ii) 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 attesting 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 communications services.

(iii) The certification required by paragraph (c)(9)(ii) of this section 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 the IP CTS calls is funded by the TRS Fund.

(iv) The certification required by paragraph (c)(9)(ii) 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. For purposes of this rule, 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) In instances where IP CTS equipment is or has been obtained by a consumer for less than \$75, the IP CTS provider must also, in order to be eligible to receive compensation from the TRS Fund, obtain written certification provided and signed by an independent third-party professional, except as provided in paragraph (c)(9)(v)(D) of this section.

(A) In instances where certification from an independent third-party professional is required, such professionals must 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) In instances where certification from an independent third-party professional is required, such third-party professional must certify in writing that the IP CTS consumer 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.

(C) In instances where certification from an independent third-party professional is required, such third-party professional must provide his or her name, title, and contact information, including address, telephone number, and e-mail address.

(D) In instances where the consumer has obtained equipment from a 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.

(vi) Each IP CTS provider shall maintain the confidentiality of any registration and certification information obtained by the provider, 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.

(vii) IP CTS providers may continue to provide IP CTS to existing IP CTS subscribers without obtaining registration information and certification of the existing subscriber's hearing loss for a period of 90 days following the effective date of this paragraph (c)(9) of this section.

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

(ii) When IP CTS equipment is in operation with captions off, and during the time period after the user of IP CTS takes action to initiate captioning and before any such captioning commences, the IP CTS provider must display on the screen of the user's IP CTS equipment the following message: "FCC regulations permit the use of captions only by people with hearing loss who require captions to communicate effectively using the telephone."

(11) IP CTS Equipment.

(i) An IP CTS provider shall not provide to consumers, directly or indirectly, equipment at no cost or at *de minimis* cost, whether through giveaway, sale, loan, or otherwise. For the cost to be above *de minimis* cost, the cost must be large enough such that the consumer is likely to consider such cost in determining whether the benefit received from the IP CTS service is worth the cost of the specialized equipment or software. IP CTS providers providing such equipment or software at no cost or for a *de minimis* cost shall be ineligible to receive compensation for minutes of IP CTS use generated by consumers receiving, directly or indirectly, equipment or software at no cost or at *de minimis* cost.

(ii) IP CTS providers shall ensure that any equipment newly distributed for use with IP CTS has a label on its face in a conspicuous location specifying that FCC regulations permit the use of captions only by people with hearing loss who require captions to communicate effectively using the telephone. For IP CTS equipment already distributed to users by any IP CTS provider as of the effective date of this paragraph, such provider shall distribute to users equipment labels specifying that FCC regulations permit the use of captions only by people with hearing loss who require captions to communicate effectively using the telephone, along with specific instructions directing the users to place such labels on the face of their IP CTS equipment in a conspicuous location.

2. Section 64.606 is amended by adding paragraph (a)(2)(ii)(F) as follows:

§ 64.606 Internet-based TRS provider and TRS program certification.

(a) * * *

(2) * * *

(ii) * * *

(F) In the case of applicants to provide IP CTS or IP CTS providers, a description of measures taken by such applicants or providers to ensure that they do not and will not request or collect payment from the TRS Fund for service to consumers who do not satisfy the registration and certification requirements in § 64.604(c)(9), and an explanation of how these measures provide such assurance.

* * * * *

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

*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.*

I support this Order and Notice of Proposed Rulemaking with caution and with the hopes that the Commission will carefully assess whether these interim measures adequately curb unnecessary growth in the Interstate Telecommunications Relay Service Fund (Fund). The interim Order is intended to serve as an immediate means to slow the recent spike in demand for the Fund but should not pre-judge permanent changes to the rules.

I look forward to working with my colleagues and all stakeholders as we examine the evidence in the record. We must find solutions that fulfill our statutory obligations to ensure that an individual with a hearing disability is able to communicate “in a manner that is functionally equivalent”¹ to a hearing individual’s ability to communicate with voice communications services as well as make sure that the Fund is administered in a fiscally conservative manner. After all, the Fund is ultimately financed by consumers.

¹ See 47 U.S.C. § 225, as amended by Section 103(a) of the Twenty-First Century Communications and Video Accessibility Act of 2010.

**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.¹ 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.²

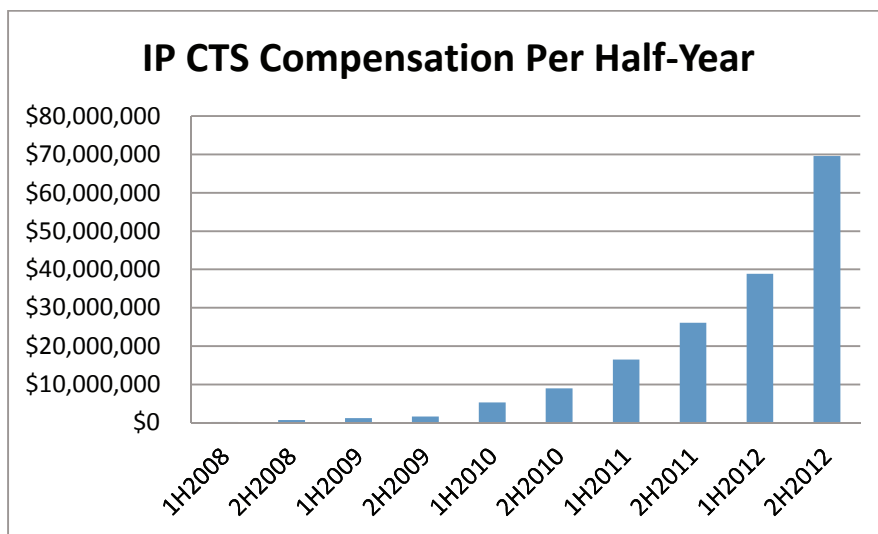
Under our rules, eligible providers of IP CTS service may receive compensation from the federal government's Interstate Telecommunications Relay Service Fund (Fund).³ The Fund also compensates eligible providers of other telecommunications relay services that are invaluable to Americans with hearing 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,⁴ 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.

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

² 47 U.S.C. § 151.

³ 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.

⁴ Compiled from the monthly reports of the Fund Administrator. See Rolka Loube 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.⁵ 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”⁶ 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.⁷ 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.⁸ For the first half of that funding year, however, the Administrator has already paid out \$70 million⁹ (more than half of the year’s

⁵ See 31 U.S.C. § 1341(a)(1)(A).

⁶ Order at para. 1.

⁷ 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”).

⁸ 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>.

⁹ 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>.

budget); in other words, the IP CTS program will likely cost more than budgeted even if it stops growing 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.¹⁰ 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 service¹¹ and pays audiologists for referrals, even though the latter practice is condemned by the American Academy of Audiology’s Code of Ethics.¹² Other providers hand out equipment that display captions whenever the phone is used by default,¹³ 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.¹⁴

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.¹⁵ 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.

¹⁰ 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.*

¹¹ *Order* at note 37.

¹² *Id.* at para. 15.

¹³ *Id.* at para. 27 & note 78.

¹⁴ *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).”).

¹⁵ *Order* at para. 20.

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 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.¹⁶ Nor does it require that the hearing loss of an individual be at least moderate (>40 dB HL), as recommended by one prominent audiologist.¹⁷ 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.¹⁸

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.¹⁹

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,²⁰ 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

¹⁶ *Id.* at para. 45.

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

¹⁸ 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.

¹⁹ 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.

²⁰ *See* 47 U.S.C. § 54.410(d)(3).

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.

* * *

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.