

**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 Speech-	)	CG Docket No. 03-123
to-Speech Services for Individuals with Hearing	)	
and Speech Disabilities	)	
	)	

**REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING**

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By the Commission:

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## I. INTRODUCTION

1. In this Report and Order and Further Notice of Proposed Rulemaking, the Commission takes the next steps in addressing practices related to the provision and marketing of Internet Protocol Captioned Telephone Service (IP CTS). IP CTS, a form of telecommunications relay service (TRS), permits people who can speak, but who have a hearing loss and 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.<sup>1</sup> The steps the Commission takes today will ensure that this service continues to be available to those who need it, while protecting the service and the Telecommunications Relay Services Fund (TRS Fund, or Fund) from certain improper practices that, if left unaddressed, will adversely impact both the service and the Fund.

2. In the Report and Order, we adopt permanent rules (1) prohibiting referrals-for-rewards programs and other forms of direct or indirect incentives, financial or otherwise, to register for or use IP CTS or for referral of IP CTS customers, as described below; (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, and, (ii) as part of the registration process, to obtain from each consumer a self-certification regarding the consumer's need to use IP CTS and the consumer's understanding that captioning services are provided by a live communications assistant (CA) and that these services are supported by a federal fund; 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, while allowing IP CTS users to obtain an exemption from this provision upon a showing of hardship.<sup>2</sup>

3. These permanent rules amend and/or replace the interim IP CTS rules the Commission adopted in January 2013.<sup>3</sup> For example, we modify the *IP CTS Interim Order's* self-certification

<sup>1</sup> 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) (*2007 IP CTS Order*).

<sup>2</sup> We also provide an exception for mobile and web applications, provided that users must log into such applications and the default switches to captions on only for the limited session while the user is logged on.

<sup>3</sup> See *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 13-24 and 03-123, Order and Notice of Proposed Rulemaking, 28 FCC Rcd 703 (2013) (*IP CTS Interim Order*), review pending (continued....)

language for new users and require providers to obtain an additional certification from consumers that they will not permit non-registered persons to use their devices for IP CTS. In addition, we amend the rules to require IP CTS providers to register and take specified steps to establish the eligibility of *existing* unregistered IP CTS users, as a condition of continuing to offer service to such individuals. We also add provisions: (1) requiring IP CTS equipment to have labels informing consumers that IP CTS may be used only by the person(s) registered to use the equipment; (2) prohibiting all providers from receiving compensation from the Fund for minutes of use generated by consumers using IP CTS equipment, software, and applications that consumers received at no charge or purchased for less than \$75 on or after the effective date of this rule; and (3) requiring applicants seeking to become certified IP CTS providers to submit a compliance plan indicating, among other things, that they will not seek reimbursement from the Fund for service to consumers that do not satisfy our registration or certification requirements.

4. In the accompanying Further Notice of Proposed Rulemaking (Notice), we seek comment on whether and how to revise the current rate methodology for IP CTS. Additionally, the Notice seeks comment on: (1) the extent to which the funding and responsibilities for overseeing and determining eligibility for IP CTS should be shifted to state TRS programs; (2) use of the TRS User Registration Database for IP CTS; (3) the need for mandatory minimum standards specific to IP CTS, including standards on speed and accuracy; (4) requirements for the dissemination of additional educational information about IP CTS on provider websites and in written materials; (5) whether to adopt any low income exceptions to the rule restricting the provision of IP CTS equipment for less than \$75; (6) whether to modify the \$75 minimum price for software and applications; (7) concerns raised in the comments about the default caption-off requirement, for example, relating to volume pre-sets, access to 911 services, and incoming calls; and (8) whether to adopt a general prohibition of providing service to users who do not need IP CTS.

## II. BACKGROUND

5. Section 225 of the Communications Act of 1934, as amended (Act), requires the Commission to ensure that TRS is available, to the extent possible and in the most efficient manner, to people with hearing or speech disabilities.<sup>4</sup> The Act defines TRS as services that 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 using voice communications services.<sup>5</sup> This requirement 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) is one type of TRS that works by having a person who is hard of hearing dial the number she or he wishes to call. The CTS 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 into a voice recognition program that automatically transcribes those words into captions. The captions then are transmitted directly to the caller and are displayed on a captioned telephone device, a computer, or a smartphone. The service also provides captions for incoming calls that are placed using designated phone numbers. The Commission approved compensation for CTS, which allows calls to be made over wireless or wireline devices using the public switched telecommunications network (PSTN) or voice over Internet protocol (VoIP), in

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*sub nom. Sorenson Communications, Inc. and CaptionCall, LLC v. FCC* (D.C. Cir., No. 13-1122, filed Apr. 8, 2013).

<sup>4</sup> 47 U.S.C. § 225(b)(1).

<sup>5</sup> *Id.* § 225(a)(3).

2003.<sup>6</sup> IP CTS, by which the consumer utilizes an Internet protocol-enabled device or Internet-enabled software to simultaneously listen to the other party and read captions of what that party is saying, was approved in 2007.<sup>7</sup> Since that time, this service has been subject to the mandatory minimum standards that apply to all TRS.

7. Section 225 of the Act,<sup>8</sup> and its implementing regulations, require that the costs caused by CTS be shared by all subscribers to telecommunications and VoIP services.<sup>9</sup> TRS users are to pay rates no greater than those for functionally equivalent voice service.<sup>10</sup> Interstate relay calls and all calls made via Internet-based forms of TRS, including IP CTS, are funded through mandatory contributions made by certain providers to the TRS Fund, overseen by the Fund administrator, currently Rolka Loube Saltzer Associates (RLSA).<sup>11</sup> Providers of compensable TRS are then eligible to recover their reasonable costs of providing service from the Fund in compliance with the Commission's service rules.<sup>12</sup> Compensation rates for IP CTS and interstate CTS providers are determined 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.<sup>13</sup> In the accompanying Notice, we ask whether use of the MARS plan as the rate methodology for this service remains appropriate, given the unusually rapid growth of IP CTS in 2012 and early 2013, the declining minutes of use of CTS upon which the MARS rate is based, and concerns about the accuracy of provider forecasts of IP CTS demand.

8. *IP CTS Interim Order and NPRM.* In 2012, the Commission witnessed an unusually steep increase in the growth of IP CTS minutes. This sudden and unprecedented escalation raised serious concerns for the Commission that threatened to overwhelm and, therefore, jeopardize the Fund for all forms of TRS if not immediately addressed.<sup>14</sup> In particular, data indicated that there was a sudden and

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<sup>6</sup> *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*).

<sup>7</sup> See *2007 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 instead of using CAs to revoice the oral content into a speech recognition program. This application is pending. See Application of Miracom USA, Inc. for Certification to Provide IP Captioned Telephone Service (filed Nov. 23, 2011).

<sup>8</sup> 47 U.S.C. § 225. Section 225 was originally enacted as Title IV of the Americans with Disabilities Act (ADA) and was amended by the Twenty First Century Communications and Video Accessibility Act (CVAA). See Pub. L. No. 111-260, § 103; Pub. L. No. 111-265 (making technical corrections to the CVAA).

<sup>9</sup> See 47 U.S.C. § 225(d)(3); 47 C.F.R. § 64.604(c)(5).

<sup>10</sup> 47 U.S.C. § 225(d)(1)(D).

<sup>11</sup> See *id.* § 225(d)(3); 47 C.F.R. § 64.604(c)(5) (requiring contributions by providers of telecommunications and voice over Internet protocol services).

<sup>12</sup> See *id.* § 64.604(c)(5)(iii)(E).

<sup>13</sup> See *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*).

<sup>14</sup> For example, 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. Additionally, in October 2012 alone, minutes reported by providers exceeded the minutes that the Fund administrator budgeted for this service by 38%. As a result, the total requested payout also exceeded the budgeted amount by 38%, almost \$4 million. See *IP CTS Interim Order*, 28 FCC Rcd at 706, ¶ 6.. After that, IP CTS usage continued to climb until March 2013, the month in which the interim rules took effect. Call data submitted by providers to RLSA for March, April, May, and June 2013 indicate that usage of IP CTS is no longer climbing.

sharp departure from a trend of declining rates of growth in IP CTS usage over the three prior years.<sup>15</sup> The Commission found that absent immediate action, this trend was likely to lead to insufficient funds being available in the 2012-13 Fund year, triggering a violation of the Anti-Deficiency Act, and threatening the availability of all forms of relay services upon which consumers rely.<sup>16</sup> In order to prevent this from occurring, on January 25, 2013, the Commission took swift and immediate action, in the *IP CTS Interim Order*, to prohibit, on an interim basis, provider practices that appeared to be directly causing the sharp increase in IP CTS usage by individuals who did not need this service to communicate in a functionally equivalent manner.<sup>17</sup> Specifically, after meeting with and receiving input from interested consumer and industry stakeholders, the Commission adopted the following interim requirements to ensure that, going forward, IP CTS would be used only by individuals who needed the service: (1) consistent with the broad prohibition on a TRS provider's use of any kind of financial incentives or rewards to use TRS, a specific prohibition against all referrals for rewards programs and any other form of direct or indirect inducements, financial or otherwise, to subscribe to or use, or encourage subscription to or use of, IP CTS; (2) a requirement for 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 consumer a self-certification that 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, and the requirements of such self-evaluation form, and (iii) where the consumer accepts IP CTS equipment free of charge or at a price below \$75 from any source other than a governmental program, to also obtain from the consumer a certification from an independent, third party professional attesting to the same; and (3) a requirement 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. These interim rules became effective on March 7, 2013, with a scheduled expiration date of September 3, 2013.

9. On May 9, 2013, the Consumer and Governmental Affairs Bureau granted limited waivers of the default caption-off requirement of the interim rule to three providers in response to waiver petitions that had been filed by four providers.<sup>18</sup> The Bureau found that the three providers granted limited waivers were in substantial compliance with the order, and were making diligent efforts to come into full compliance.<sup>19</sup> The Bureau denied a waiver to the fourth provider, which was found not to have made a good faith effort to comply with the interim rule.<sup>20</sup>

10. The *IP CTS Interim Order* was accompanied by a Notice of Proposed Rulemaking (NPRM) in which the Commission sought comment on whether to make permanent, revise, or eliminate the interim rules. In addition, the NPRM sought comment on a range of additional matters pertaining to

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<sup>15</sup> The *IP CTS Interim Order* explained that TRS provider documentation, submitted in monthly requests for compensation from the Fund, showed that the average monthly growth rates in total IP CTS minutes over the three prior fund years were 14 percent in 2009-10; 9 percent in 2010-11 and 7 percent in 2011-12. *IP CTS Interim Order*, 28 FCC Rcd at 707, ¶ 7, n.19.

<sup>16</sup> 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).

<sup>17</sup> *IP CTS Interim Order*, 28 FCC Rcd at 706-709, ¶¶ 6-9.

<sup>18</sup> *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, CG Docket Nos. 13-24, 03-123, 28 FCC Rcd 6454, 6457-63, ¶¶ 6-18 (CGB 2013) (*IP CTS Waiver Order*)

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 6463-68, ¶¶ 19-27.

the provision of IP CTS, including whether to extend the self-certification requirements to existing users; whether to adopt quantitative threshold requirements for IP CTS eligibility; whether professional certification by individuals attesting to their eligibility in order to get a free IP CTS device should be made under penalty of perjury; whether to prohibit the free or significantly subsidized distribution of end user equipment by IP CTS providers; whether to adopt a labeling requirement for end user equipment restricting its use to eligible persons with hearing disabilities; whether the Commission should amend its speed of answer rules for IP CTS in light of the default-off rule; whether to require potential IP CTS providers to describe how they will ensure compliance with the self-certification rules as a pre-condition to receiving certification; and whether the Commission should link provider compensation to compliance with the Commission's new rules on certification and restrictions on rewards and free equipment.<sup>21</sup>

### III. REPORT AND ORDER

#### A. Legal Authority

11. Section 225 of the Act empowered the Commission to adopt the interim rules for IP CTS, and we conclude that it likewise authorizes the rules we adopt in this order. In short: 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.<sup>22</sup> Section 225(b) directs the Commission to ensure that relay services are available to persons with hearing and speech disabilities “to the extent possible and in the most efficient manner.”<sup>23</sup> 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],”<sup>24</sup> as well as mandatory “minimum standards” governing the provision of TRS.<sup>25</sup>

12. We disagree with Sorenson’s claim that the Commission must consider whether “a regulation is needed because it will eliminate misuse that is ‘clearly disproportionate’ to the burden placed on hard-of-hearing individuals.”<sup>26</sup> Sorenson draws that standard by reference to courts’ interpretation of different provisions of the ADA other than section 225, arguing that it should apply here by analogy.<sup>27</sup> To the extent Sorenson suggests that the adoption of section 225 as part of the ADA creates a heightened burden on the Commission to justify its rules implementing that provision, we disagree for several reasons. As a threshold matter, section 225 was incorporated in Title II of the Act, and directs the Commission to prescribe rules to implement that section.<sup>28</sup> Thus, the Commission’s implementation of its statutory authority is governed by the Communications Act and the Administrative Procedure Act (APA),<sup>29</sup> which, among other things, specify the purposes and objectives for which the Commission was created<sup>30</sup> and the scope of and standards for review of Commission actions.<sup>31</sup>

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<sup>21</sup> *IP CTS Interim Order*, 28 FCC Rcd at 724-31, ¶¶ 38-55.

<sup>22</sup> See ¶ 5, *supra*.

<sup>23</sup> 47 U.S.C. § 225(b)(1).

<sup>24</sup> *Id.* § 225(d)(1)(A).

<sup>25</sup> *Id.* § 225(d)(1)(B).

<sup>26</sup> Sorenson, *Ex Parte* Letter at 3 (filed Aug. 12, 2013) (Sorenson August 12, 2013 *Ex Parte*).

<sup>27</sup> *Id.* at 2-3.

<sup>28</sup> See generally 47 U.S.C. § 225.

<sup>29</sup> See generally 5 U.S.C. §§ 551 *et seq.*

<sup>30</sup> See generally 47 U.S.C. § 151.

<sup>31</sup> 5 U.S.C. § 706.

13. Further, the precedent cited by Sorenson involved the application of ADA requirements to the entities governed by those requirements, rather than addressing the standard an agency must meet to adopt rules implementing the ADA. Nor does the text of section 225 itself impose a burden on the Commission of the sort Sorenson suggests.<sup>32</sup> Section 225(b)(1) directs the Commission, “[i]n order to carry out the purposes established under section 151,” to ensure the availability of TRS “to the extent possible and in the most efficient manner.”<sup>33</sup> Congress thus qualified the objective of making TRS “available” by using the caveats “to the extent possible” and “in the most efficient manner,” granting the Commission discretion in implementing that provision. Moreover, the Commission has authority to balance the goals of section 225 when implementing that provision.<sup>34</sup>

14. Similarly, Sorenson asserts that “the text of Title IV of the ADA [incorporating section 225 in the Communications Act] is less protective of telephone companies than the analogous text in other titles [of the ADA] are to employers, bus systems, and building owners.”<sup>35</sup> Even if true, its argument neglects to acknowledge that the requirement of carriers under section 225(c) is to provide TRS “in compliance with the *regulations* prescribed under *this section*”<sup>36</sup> rather than under other provisions of the ADA or on an unqualified basis. Moreover, the scope of functional equivalency is ambiguous, and thus subject to definition by the Commission under the general administrative law principles governing agency actions.<sup>37</sup> Likewise, in “establish[ing] functional requirements, guidelines, and operations procedures”<sup>38</sup> and mandatory “minimum standards”<sup>39</sup> for TRS, the Commission must act, consistent with its mandate, to ensure that TRS is made available “in the most efficient manner.”<sup>40</sup> In this regard, the Commission can take steps to ensure that federal funding for usage of a particular relay service is limited to users that genuinely need that funded relay service, and preclude federal funding for users that do not have such a need—whether because they can use ordinary voice telephone service or because an

<sup>32</sup> See, e.g., *Wheeler v. Hurdman*, 825 F.2d 257, 262 (10th Cir. 1987) (“In our review of the antidiscrimination laws we must be mindful of their remedial purposes, and liberally interpret their provisions to that end. . . . Such interpretation, however, cannot be used as a justification for rewriting the statutes. Legislative ends are circumscribed by statutory means. Thus, while the case before us deals with a charge of discrimination, the root of our inquiry is one of statutory interpretation.”). Cf. *Ober United Travel Agencies, Inc. v. U.S. Dept. of Labor*, 135 F.3d 822, 825 (D.C. Cir. 1998) (“[W]e have recognized that in a post-*Chevron* era such policy-oriented canons of statutory construction” as “the old maxim of statutory interpretation that remedial statutes are to be liberally construed” “may not be used to evaluate agency interpretations of ambiguous statutes”).

<sup>33</sup> 47 U.S.C. § 225(b)(1).

<sup>34</sup> *Sorenson Communications, Inc. v. FCC*, 659 F.3d 1035, 1045 (10th Cir. 2011) (*Sorenson II*) (“The FCC has discretion to balance the objectives of § 225 when they conflict.”).

<sup>35</sup> *Sorenson* Aug. 12, 2013 *Ex Parte* at 3.

<sup>36</sup> 47 U.S.C. § 225(c) (emphasis added).

<sup>37</sup> See, e.g., *Telecommunications Relay Services and Speech-To-Speech Services For Individuals With Hearing and Speech Disabilities*, CG Docket No. 03-123, Order on Reconsideration, 21 FCC Rcd 8050, 8057, ¶ 15 (2006) (“As the Commission explained, TRS providers are obligated to provide functionally equivalent service, and that functionality is defined by the applicable mandatory minimum standards.”); *Sorenson II*, 659 F.3d at 1042 (“Section 225 does not define ‘functionally equivalent’ and therefore leaves the definition to the FCC. . . . Consistent with this authority, the FCC has determined that ‘functional equivalency is met when the service complies with the mandatory minimum standards applicable to the specific service.’”) (citing *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 843-44 (1984); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (“[A]mbiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in a reasonable fashion.”)).

<sup>38</sup> 47 U.S.C. § 225(d)(1)(A).

<sup>39</sup> *Id.* § 225(d)(1)(B).

<sup>40</sup> *Id.* § 225(b)(1).

alternative (such as amplification) would meet their needs. The Commission's actions in this order do just that, reflecting its evaluation of the relative advantages and disadvantages of the identified alternatives in that regard.<sup>41</sup> So long as providers satisfy their obligations under the Commission's regulations implementing section 225, their obligations under section 225(c) are met.

15. As discussed in greater detail below, our evaluation of the relative advantages and disadvantages of particular regulatory approaches to IP CTS is informed by the Commission's experiences with TRS generally, and under the *IP CTS Interim Order* more specifically. In particular, some alternative regulatory approaches that arguably might place somewhat fewer burdens on users would be subject to potential circumvention and abuse by providers—something the Commission has found to be a recurring problem in the TRS context.<sup>42</sup> For example, after initially addressing restrictions on the provision of financial incentives in exchange for signing up for or using TRS, the Commission ultimately had to reiterate and expand that holding based on providers' evolving practices attempting similar actions that (at least arguably) were not squarely addressed by the holdings that had come before.<sup>43</sup> The Commission likewise has cataloged other types of abusive practices, which it has taken

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<sup>41</sup> This evaluation includes, among other things, the Commission's predictive judgments about certain issues for which the record does not provide a definitive answer. We disagree with Sorenson's suggestion that *BellSouth v. FCC* stands for the proposition that the Commission cannot rely on predictive judgments where there is (in Sorenson's view) a lack of evidence of "misuse" of IP CTS. Sorenson August 12 *Ex Parte* at 2 (citing *BellSouth v. FCC*, 469 F.3d 1052, 1060 (D.C. Cir. 2006)). Rather, in *BellSouth*, the court found that the record included evidence that affirmatively contradicted elements of the Commission's analysis, which the Commission had not adequately addressed. *BellSouth*, 469 F.3d at 159-60 (discussing evidence that several large purchasers had not been harmed by the relevant provision in BellSouth's special access tariff, and stating that although an agency's predictive judgments within its expertise are entitled to particularly deferential review, "the deference owed agencies' predictive judgments gives them no license to ignore the past when the past relates directly to the question at issue"). Here, by contrast, the Commission is not ignoring the past, but is instead analyzing the available evidence and making predictive judgments only where justified.

<sup>42</sup> See, e.g., *Structure and Practices of the Video Relay Services 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, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 8618, 8668-69, ¶¶ 130-31 (2013) (*VRS Structural Reform Order*) ("[r]egarding waste, fraud, and abuse, recent experience confirms that, in adopting rules aimed at curbing existing abuses, the Commission cannot foresee the specific forms that waste, fraud, or abuse may take in the future," and thus "in furtherance of our mandate under section 225(b)(1) to ensure that TRS is available 'in the most efficient manner' and the goals underlying the provision and regulation of TRS, we adopt a general prohibition on VRS providers engaging in fraudulent, abusive, and wasteful practices, *i.e.*, practices that threaten to drain the TRS Fund by causing or encouraging (1) false TRS Fund compensation claims, (2) unauthorized use of VRS, (3) the making of VRS calls that would not otherwise be made, or (4) the use of VRS by consumers who do not need the service in order to communicate in a functionally equivalent manner"). See also *id.* at 8623, ¶ 6 ("providers' self-interest in maximizing their compensation from the Fund may make them less effective at carrying out the Commission's TRS policies"). Although the Commission sought to address this issue in the VRS context in part through a general rule prohibiting VRS providers from engaging in fraudulent, abusive, and wasteful practices, it is unclear whether the types of waste, fraud, or abuse likely to arise in the context of IP CTS—such as provision of service to users that do not genuinely need the service—would be as readily-identifiable based on available data alone. Nonetheless, we seek comment in the FNPRM on whether to adopt a similar rule in the IP CTS context.

<sup>43</sup> See, e.g., *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 (CGB 2005) (*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 company, with the customer being able to cash in the points for high speed Internet service); *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 (CGB 2005) (*2005 TRS Marketing* (continued....))

steps to address as they emerged.<sup>44</sup> As discussed in greater detail below, under the *IP CTS Interim Order* there likewise is evidence of providers acting contrary to the policies underlying the rules.<sup>45</sup> Although the Commission has taken other actions to address these issues, such as adopting provider certification requirements and other regulations, this backdrop nonetheless informs our evaluation of the viability of various alternative regulatory approaches here.

## B. Prohibition of Referrals for Rewards and Other Incentives

16. For the reasons noted below, consistent with the existing broad prohibition on a TRS provider's use of any kind of financial incentives or rewards to use TRS services, we adopt on a permanent basis a rule specifically prohibiting IP CTS providers from providing referrals for rewards programs and certain other forms of direct or indirect incentives, financial or otherwise, for the purpose of getting consumers to register for or use IP CTS. As discussed below, we revise the language of this prohibition from the rule adopted on an interim basis to ensure that the rule cannot be construed to prohibit advertising and noncommercial speech—something the Commission never intended to prohibit. We also adjust the terminology to prohibit direct or indirect “incentives” rather than “inducements” to register for or use IP CTS. We believe that the term “incentives” is more consistent with the *2005 Financial Incentives Declaratory Ruling*<sup>46</sup> and better captures our intent to prohibit any kind of reward for signing up such consumers or getting them to use the service, rather than prohibit advertising and outreach conducted to simply educate consumers about this service. Finally, this prohibition now refers to rewards that provide incentives to a consumer to “register,” rather than “subscribe” to use IP CTS because we believe this more accurately describes the way that consumers sign up to use this service.

17. *Background.* In the *IP CTS Interim Order*, the Commission described various marketing practices by which an IP CTS provider had been offering monetary rewards for the referral of customers who signed up for the installation of the provider's IP CTS equipment.<sup>47</sup> These rewards were being given by the provider to its customers, members of the general public, and to hearing and health care

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*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 (CGB 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”); *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, 20173-75, ¶¶ 89-94 (2007) (*2007 TRS Rate Methodology Order*) (“clarify[ing] that providers may not offer consumers financial or other incentives, directly or indirectly, to make TRS calls” and “set[ting] forth in greater detail the kinds of incentives that are impermissible under our rules”); *VRS Structural Reform Order*, 28 FCC Rcd at 8669, ¶ 133 (codifying a rule in the VRS context that will “encompass, but not be limited by, the Commission's numerous prior declaratory rulings describing wasteful, fraudulent, and abusive practices that violate section 225”).

<sup>44</sup> See, e.g., *Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 5545, 549-51, ¶ 4 (2011) (detailing the results of investigations finding illicit VRS activities).

<sup>45</sup> See, e.g., section III.C.1, *infra* (discussing evidence of potential abuse of and/or efforts to circumvent the requirement for third-party certification of a user's need for IP CTS as required under the interim rules).

<sup>46</sup> See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67 and CG Docket No. 03-123, Declaratory Ruling, 20 FCC Rcd 1466 (CGB 2005) (*2005 Financial Incentives Declaratory Ruling*).

<sup>47</sup> *IP CTS Interim Order*, 28 FCC Rcd 710-12, ¶¶ 13-14. These were described in detail in the *IP CTS Interim Order*, and so we do not repeat them here.

professionals, such as audiologists.<sup>48</sup> The Commission found good cause to justify the immediate adoption of an interim rule prohibiting these referrals for rewards programs and any other form of direct or indirect inducements, to subscribe to or use, or encourage subscription to or use of, IP CTS.<sup>49</sup> In an accompanying NPRM, the Commission sought comment on whether to make permanent, revise, or eliminate this interim rule, as well as on any alternatives or additional proposals, weighing the potential benefits of the proposed rule against the potential costs.<sup>50</sup>

18. The record contains overwhelming support for the referrals for rewards prohibition, with nearly all consumer groups and providers agreeing on the need for this rule.<sup>51</sup> For example, CTIA states that not only do such rewards encourage consumers to enroll who do not otherwise need TRS, but the monetary incentives themselves also add to the costs of providing IP CTS, in turn necessitating higher TRS Fund contributions.<sup>52</sup> The Consumer Groups agree that reward programs “have the potential to indirectly encourage consumers to use IP CTS regardless of whether they actually need the service to communicate in a functionally equivalent manner,” and that permanently prohibiting such programs will help “ensure that IP CTS is used only by those with a legitimate need for the service.”<sup>53</sup> Others suggest that this prohibition should come as no surprise to providers because a ban against financial incentives for relay calls has been in place for several years.<sup>54</sup> While supporting the ban, Hamilton raises concerns about the intended scope of the prohibition, seeking clarification that it does not restrict all wholesale/retail business arrangements.<sup>55</sup> Only one commenter, Sorenson, argues against this prohibition, maintaining that referral fees to audiologists and other hearing loss specialists provide the “most efficient form of outreach” to consumers who require IP CTS.<sup>56</sup> It further suggests that it is “highly implausible”

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<sup>48</sup> *Id.* at 710-11, ¶ 13. In a variation of these referral programs, the provider was also making donations to charities on behalf of consumers, contingent on the consumer signing up for the provider’s IP CTS phone and service. *Id.*

<sup>49</sup> *Id.* at 708-09, ¶ 9, 710-16, ¶¶ 13-18.

<sup>50</sup> *Id.* at 724-25, ¶ 39.

<sup>51</sup> *See, e.g.* Comments of Telecommunications for the Deaf and Hard of Hearing, Inc., Association of Late-Deafened Adults, Inc., National Association of the Deaf, Deaf and Hard of Hearing Consumer Advocacy Network, Cerebral palsy and Deaf Organizations, California Coalition of Agencies Serving the Deaf and Hard of Hearing, and American Association of the Deaf-Blind (collectively “Consumer Groups”) at 4, 5; Purple Comments at 4 (referral fees create “perverse incentives,” and may encourage people to sign up for the service even if they do not need it for effective communications); CTIA Comments at 5 (make rule permanent to “protect the integrity and sustainability of the TRS Fund”); USTelecom Comments at 6-7 (agreeing that a ban on referral fees is a way for the Commission to ensure that only qualified users benefit from the provision of IP CTS and noting that referral programs “diminish the availability of limited TRS resources by encouraging consumers who would not qualify for IP CTS to order the service” just to gain the benefit); HLAA Comments at 6 (noting that “[f]inancial or other rewards or incentives tend to shift the focus from the service to the reward”); Sprint Comments at 4-5 (supporting a permanent rule prohibiting referrals for rewards and suggesting that the Commission take enforcement action for its violation).

<sup>52</sup> CTIA Comments at 5.

<sup>53</sup> Consumer Groups Comments at 4-5 (adding that businesses and relay vendors “should not be stimulating business for their monetary benefit by creating a consumer need for the service”).

<sup>54</sup> *See, e.g.*, Miracom Comments at 6–8 (the Commission has prohibited any kind of financial incentive to place TRS calls for eight years, since the Commission’s 2005 *Financial Incentives Declaratory Ruling*).

<sup>55</sup> Hamilton Comments at 2. Hamilton notes that wholesale arrangements should not constitute a direct or indirect inducement because they do not encourage subscription to or use of IP CTS. *See also* Hamilton *Ex Parte* Letter, August 15, 2013, at 3 (Hamilton August 15, 2013 *Ex Parte*) (arguing that so long as the retailer charges \$75 or more for the equipment, wholesale/retail arrangements are acceptable).

<sup>56</sup> Sorenson Reply Comments at 6. Sorenson maintains that locating eligible subscribers in other ways “more than doubles the cost per customer acquisition.” Sorenson Comments at 11.

that audiologists are behaving unethically by referring individuals who do not require the service.<sup>57</sup> Finally, Sorenson finds the language of the prohibition against all “direct or indirect inducements” to be too broad, claiming it could be read to encompass any form of outreach or advertising,<sup>58</sup> as well as ordinary wholesale and dealer arrangements.<sup>59</sup> Sorenson adds in an *ex parte* letter that it believes that a prohibition on advertising would be a violation of First Amendment rights.<sup>60</sup> While insisting that the rule is unnecessary, Sorenson nevertheless recommends that, if a ban is adopted, it be limited to payments to end users, charities or professionals who certify that end users require IP CTS.<sup>61</sup>

19. *Discussion.* The Commission adopts on a permanent basis the interim proscription against IP CTS referrals for rewards, as well as any other provider programs that offer or provide payments or incentives to sign up for or use this service. We agree with the vast majority of commenters that this prohibition will reduce the risk that IP CTS will be used by ineligible users. The Commission found in the *IP CTS Interim Order* that such incentive programs, the growth of which appears to have coincided with the sudden and unexpected spike in IP CTS usage,<sup>62</sup> may well have been incenting consumers to use the service whether or not it was actually needed.<sup>63</sup> More specifically, by enabling potential customers and third parties to earn money or any other reward either directly or for their friends or charitable organizations, these incentive programs would, if not prohibited, continue to encourage IP CTS use by individuals who do not need it to obtain functionally equivalent telephone service.<sup>64</sup>

20. Sorenson argues that this type of incentive is the “most efficient means of outreach to hard-of-hearing consumers who require IP CTS.”<sup>65</sup> This approach may well help providers to reach some legitimate, eligible users, but it also tends to encourage enrollment in and use of IP CTS simply to obtain the incentive. Sorenson further suggests that it is “highly implausible” that audiologists are behaving unethically and referring ineligible users.<sup>66</sup> In fact, as noted in the *IP CTS Interim Order*, an audiologist’s referral of any consumer, eligible or not, in exchange for a fee would appear to be unethical conduct.<sup>67</sup> However, whether an audiologist is behaving ethically or not does not resolve our overall concern. As explained in the *IP CTS Interim Order*, the offering or provision of a reward for recommending a specific brand of IP CTS may influence an audiologist to recommend this service even when a client does not

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<sup>57</sup> Sorenson Comments at 13.

<sup>58</sup> Sorenson Reply Comments at 7.

<sup>59</sup> Sorenson Comments at 14.

<sup>60</sup> See Sorenson *Ex Parte* Letter, CG Docket No. 03-123 (July 3, 2013) (Sorenson July 3, 2013 *Ex Parte*).

<sup>61</sup> Sorenson Comments, at 14, 15.

<sup>62</sup> *IP CTS Interim Order*, 28 FCC Rcd at 710, ¶ 13 & n. 35. As noted above, after the Commission adopted the interim rules banning such programs, the unusual growth in IP CTS usage appears to have ceased.

<sup>63</sup> *Id.* at 711-13, ¶ 14.

<sup>64</sup> *Id.* at 711-13, ¶ 14. For example, the *Interim Order* cites one advertisement that urged users to “get a high-quality captioned phone for free while you raise money for CHC!,” giving users the opportunity to contribute to a favorite charity simply by acquiring an IP CTS device, even if the user did not need the service to communicate in a manner that is functionally equivalent to communication by voice telephone users. *Id.*

<sup>65</sup> Sorenson Comments at 10.

<sup>66</sup> *Id.* at 13.

<sup>67</sup> As we noted in the *IP CTS Interim Order*, accepting such financial reward would appear to be contrary to the American Academy of Audiology’s Code of Ethics, which prohibits members from giving or receiving benefits or items of value for receiving or making referrals. *IP CTS Interim Order*, 28 FCC Rcd at 713-14, ¶ 15 (citations omitted).

need this service, or could benefit more from other assistive devices or hearing technologies.<sup>68</sup> As we also noted, the patient-professional (or client-professional) relationship is likely to prompt patients to give considerable weight to recommendations made by their health care and hearing professionals, resulting in the use of IP CTS by individuals who do not truly need the service to communicate by phone. The *IP CTS Interim Order* specifically sought to minimize any inadvertent encouragement of IP CTS use when other telephone accessibility solutions (e.g., phones with hearing aid compatibility and/or amplification required by Commission rules)<sup>69</sup> could offer persons with hearing loss a better telephone experience, i.e., greater functional equivalence to conventional voice telephone use.<sup>70</sup>

21. The rules we adopt are consistent with the types of actions the Commission previously has taken to restrict financial incentives in exchange for signing up for or using TRS.<sup>71</sup> In these prior orders, the Commission consistently has maintained that rewards or incentives offered or provided either directly to consumers or to third parties, in exchange for a consumer's registration for or increased use of TRS, are expressly included in the prohibition against financial incentives.<sup>72</sup> This prohibition includes a provider's payments to consumers for using the service or, in this instance, for signing up for the service.<sup>73</sup> Offering financial incentives to consumers, the Commission has said, transforms the TRS program from a means of achieving functionally equivalent communications service for persons with disabilities into "an opportunity for their financial gain."<sup>74</sup>

22. Further, registration incentives raise particular concerns for IP CTS due to the unique characteristics of this service. As we explained in the *IP CTS Interim Order*, IP CTS is unlike other forms of TRS because it does not require special skills such as sign language, is generally automated and

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<sup>68</sup> *IP CTS Interim Order*, 28 FCC Rcd at 713-14, ¶ 15.

<sup>69</sup> See 47 C.F.R. §§ 20.19, 68.4, 68.300, 68.317.

<sup>70</sup> *IP CTS Interim Order*, 28 FCC Rcd at 703, ¶ 15, n.45.

<sup>71</sup> See *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 company, with the customer being able to cash in the points for high speed Internet service); *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 (2005) (*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").

<sup>72</sup> See *2007 TRS Rate Methodology Order*, 22 FCC Rcd at 20182, ¶¶ 92-93. 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 noting that providers seeking compensation from the Fund "may not offer consumers financial and similar incentives, directly or indirectly, to use their service." *Id.* at 20182, ¶ 92, 20183, ¶ 96. The Commission explained that a "financial incentive program is not permissible even in circumstances where the benefit goes to a third party" (*id.* at 20182, ¶ 93), adding that contributions made to charitable organizations, e.g., based on the number of calls made by a consumer or based on a provider's failure to meet specific performance standards, are among the prohibited incentives (*id.* at 20182, ¶ 92).

<sup>73</sup> *Id.* (prohibited actions include "offering financial incentives or rewards to register with the provider, add the provider to the consumer's speed dial list, or to become a provider's 'VIP' customer").

<sup>74</sup> *2005 Financial Incentives Declaratory Ruling*, 20 FCC Rcd at 1469, ¶ 8. See also HLA Comments at 6 ("[f]inancial or other rewards or incentives tend to shift the focus from the service to the reward").

invisible to the calling parties, and allows a conversation to flow without interruption.<sup>75</sup> And since IP CTS phones offer many, if not all, of the same features and functions available on conventional phones, consumers can subscribe to and use IP CTS without sacrificing the availability of any ordinary voice communication functionality, should they be able to use it. As a result, we believe that consumers are less likely to “self-screen” in choosing whether to subscribe to IP CTS than in choosing whether to subscribe to other forms of TRS.<sup>76</sup> And since IP CTS, like other Fund-supported relay services, is costly to provide,<sup>77</sup> ensuring that IP CTS is made available “in the most efficient manner”<sup>78</sup> to those consumers who actually need it requires us to pay special attention to the manner in which this unusually transparent service is marketed to consumers.

23. Consistent with the Commission’s earlier financial incentives rulings, and for the additional reasons discussed above, we prohibit all referrals for rewards programs and any other form of direct or indirect consumer incentives, financial or otherwise, that are initiated, sponsored or operated by TRS providers, to register for or use IP CTS. For the reasons stated above, we also prohibit the offering or provision of incentives to third parties, such as audiologists and other hearing health professionals, to increase consumer registration for or use of IP CTS. We find that these incentives are likely to waste the Fund’s resources on payments for services used by individuals who may not need the service and therefore are inconsistent with the goals and objectives of section 225 of the Communications Act.

24. As noted above, although supporting the general prohibition of referrals for rewards, Hamilton is concerned that a literal interpretation of the rule could be construed to prohibit legitimate marketing and outreach practices. Specifically, Hamilton seeks clarification that the rule would not prohibit (1) wholesale/retail business arrangements wherein a third party contracts with an IP CTS equipment distributor to buy IP CTS equipment at wholesale and sells that equipment for a profit at a retail price of \$75 or more; and (2) wholesale/ retail arrangements where the retailer is an audiologist or other independent hearing professional who purchases the phone from an IP CTS equipment distributor or wholesaler and sells the phone at retail for a price of \$75 or more. Hamilton believes that such arrangements are benign because they represent an outsourcing of advertising and marketing by the IP CTS provider, and there is no benefit to the IP CTS user in connection with such wholesale/retail arrangement. Hamilton adds that in the case of an audiologist, when the audiologist is acting in the same capacity as any other wholesale of IP CTS equipment, and is not issuing eligibility certifications to consumers at the time of the retail sale, there does not appear to be the same policy concern that the audiologist is being improperly compensated by the provider.<sup>79</sup> Likewise, Sorenson asks the Commission to make clear that any prohibition on referrals for rewards only applies to end users, charities, or hearing health professionals responsible for certifying the particular end user of IP CTS, and not to advertising or wholesale arrangements. Sorenson also alleges that the language prohibiting referrals for rewards could be interpreted to prohibit noncommercial speech in violation of the First Amendment.<sup>80</sup> Finally, Sorenson argues that when the consumer pays \$75 or more for the equipment, that serves as an independent check on the eligibility of the individual to receive service, and that advertising is an important method of informing consumers of the usefulness and availability of the service.<sup>81</sup>

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<sup>75</sup> See *IP CTS Interim Order*, 28 FCC Rcd at 716, ¶ 20.

<sup>76</sup> See *id.*

<sup>77</sup> The current compensation rate for IP CTS is \$1.7877 per minute.

<sup>78</sup> 47 U.S.C. § 225(b)(1).

<sup>79</sup> See Hamilton Comments at 2-4.

<sup>80</sup> See Sorenson July 3, 2013 *Ex Parte* at 2-5.

<sup>81</sup> See Sorenson Comments at 13-16.

25. We acknowledge that advertising is a legitimate way for providers to market their specific IP CTS offerings to consumers and note that neither the interim rules nor the rules proposed in the *IP CTS Interim Order*<sup>82</sup> bar providers from conducting such advertising or otherwise informing consumers and the general public about their services. Rather, as noted above, the Commission's prohibition against provider activities that directly or indirectly offer or provide incentives or rewards is consistent with the previous prohibitions imposed by the Commission with respect to incentives and rewards for the registration or use of all forms of TRS.<sup>83</sup> Nevertheless, to address the concerns raised by Hamilton and Sorenson and to clarify our intent, we modify the language of this prohibition to explicitly prohibit IP CTS providers from (1) offering or providing to any person or entity any form of direct or indirect incentive, financial or otherwise, to register for or use IP CTS and (2) offering or providing to a third party hearing health professional,<sup>84</sup> any direct or indirect incentive, financial or otherwise, that is tied to a consumer's decision to register for or use IP CTS.<sup>85</sup>

26. Similarly, with regard to the distribution of IP CTS equipment, we clarify that the incentives prohibition does not apply to the relationship between an IP CTS provider or equipment distributor and an equipment retailer,<sup>86</sup> where the retailer is not a hearing health professional. Where the retailer is not a professional on whom a consumer may rely for objective advice on solutions for hearing loss, we believe that consumers are less likely to be unduly influenced to purchase equipment that they do not need. On the other hand, hearing health professionals tend to be perceived by consumers as reliable sources of neutral, objective advice on assistive technology, and their codes of ethics encourage such reliance by consumers.<sup>87</sup> Therefore, where the retailer is a professional on whom a consumer may rely for objective advice on solutions for hearing loss, we believe that consumers will be less likely to question advice that they need or should use IP CTS. And where provider practices enable a professional to earn greater profits from the sale of IP CTS equipment than from, *e.g.*, enhanced amplification phones, that opportunity to earn greater profits may influence the nature of the advice given to the patient or client (who should otherwise be able to expect objective advice from that professional).<sup>88</sup> In that respect, an enhanced profit offered to a retailing professional is akin to a reward for referral, which is prohibited for all the reasons discussed above.<sup>89</sup>

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<sup>82</sup> *IP CTS Interim Order*, 28 FCC Rcd at 745, Appendix E.

<sup>83</sup> See generally *2005 Financial Incentives Declaratory Ruling*.

<sup>84</sup> The term "hearing health professional" refers to any professional, both medical and non-medical, that advises consumers with regard to hearing disabilities.

<sup>85</sup> See Sorenson, *Ex Parte* Letter, Exhibit A (filed July 18, 2013) (Sorenson July 18, 2013 *Ex Parte*) (proposing modified language for section 64.604(c)(8) of the rules).

<sup>86</sup> Commenters refer to this as an ordinary "wholesaler or dealer" relationship. Sorenson Comments at 14.

<sup>87</sup> See, *e.g.*, American Academy of Audiology, Code of Ethics, Principle 4 (rev. April 2011) (*AAA Code*) ("Members shall provide only services and products that are in the best interest of those served"); *id.*, Rule 4c ("Individuals shall not participate in activities that constitute a conflict of professional interest"), Principle 5 ("Members shall provide accurate information about the nature and management of communicative disorders and about the services and products offered"). The code of ethics is available at <http://www.audiology.org/resources/documentlibrary/Pages/codeofethics.aspx> (last visited Aug. 16, 2013).

<sup>88</sup> For example, a professional with a financial incentive to do so may inadvertently tout the benefits of using IP CTS to a patient or client over other readily available options, even if it is not needed or not the best choice for the patient or client.

<sup>89</sup> As noted above, such practices appear to contravene the *AAA Code*. See *AAA Code*, Rule 2b ("Individuals . . . shall not give or accept benefits or items of value for receiving or making referrals").

27. Sorenson argues further that there is no evidence in the record to support the assumption that hearing health professionals will sell equipment to patients who do not need the equipment in order to make a profit.<sup>90</sup> Sorenson's argument misses the mark. The concern is not whether an individual needs some form of assistive technology; the concern is whether the availability of a profit<sup>91</sup> may result in more advice from professionals to their patients or clients to use IP CTS, even where it would not be the best assistive technology for the individual, which could result in the unnecessary expenditure of funds from a federal program. In other words, offering a free or low-price IP CTS phone to a retailing hearing health professional is not materially different from the other types of professional rewards prohibited by the *IP CTS Interim Order* and by the permanent rules adopted today.<sup>92</sup> We therefore retain our prohibition on referrals for rewards where a provider sells or gives away equipment to a hearing health professional or any other professional on whom a consumer may rely for objective advice on solutions for hearing loss, and the professional makes a profit on the sale of the equipment to his or her patients or clients.

28. Likewise, we remain concerned about joint marketing arrangements between IP CTS providers and hearing health professionals and other professionals upon whom consumers rely for advice to address their hearing health needs. Sorenson urges permission to conduct such "co-operative marketing practices, where an IP CTS provider and audiologist jointly fund marketing campaigns to shared bases of potential customers and patients that are not tied to the number of referrals made."<sup>93</sup> However, such joint marketing arrangements can benefit hearing health professionals in many ways, for example by providing additional patient or client opportunities.<sup>94</sup> Thus, these joint marketing arrangements are also akin to a reward for a referral because they benefit the hearing health professional *e.g.*, through opportunities for cross-referrals, promotional cost sharing, and the like. Moreover, the joint marketing campaigns themselves could be perceived by the consumer as an endorsement of the IP CTS provider by his or her hearing health professional, even if there is no individualized recommendation from

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<sup>90</sup> *Contra* Sorenson *Ex Parte* Letter, August 5, 2013, at 4 (Sorenson August 5, 2013 *Ex Parte*).

<sup>91</sup> For example, professionals could make a significant profit of \$75 or more per phone if a provider (who previously gave away phones to consumers for free) decided to give away phones to professionals, who could then sell the phones for \$75 or more.

<sup>92</sup> *See also* Hamilton August 15, 2013 *Ex Parte* at 3 (arguing that to the extent the Commission adopts a general requirement that IP CTS users must purchase equipment for \$75 or more, then there would no longer be a need to prohibit third party professionals from participating in wholesale/retail arrangements). Although Hamilton is correct that the Commission would no longer be concerned about undue influence on third party certifications if there were no third party certifications, the Commission is still concerned about how the opportunity to make a profit on the sale of IP CTS equipment would influence a hearing health professional to recommend the use of a product that could result in the unnecessary expenditure of funds from a federal program.

<sup>93</sup> Sorenson July 3, 2013 *Ex Parte* at 3.

<sup>94</sup> *See, e.g.*, EarTech Audiology web page promoting CaptionCall, found at <http://www.eartechaudiology.com/caption-call-utah> (last visited August 15, 2013) ("Call our office today on how to get a "Free Caption Call"). Because this advertisement is using the inducement of a free phone to encourage the consumer to come to the audiologist's office, this does not appear to be an objective audiologist attempting to determine what assistive technology best satisfies the consumer's needs. *See also* New England Hearing Instruments, Inc. web page promoting CaptionCall found at <http://www.newenglandhearing.com/captioncall-phone/> (last visited August 15, 2013) ("CaptionCall is the ideal phone for hearing-impaired people – featuring closed-captioning of your conversation!"). Calling the CaptionCall phone the "ideal phone" does not appear to be an objective recommendation of assistive technologies. *See also* Hear Now web page promoting CaptionCall found at <http://hearnowllc.com/caption%20call.htm> (last visited August 15, 2013) ("Trouble Hearing on the Telephone? Then you really want this! And the cost is right. ABSOLUTELY FREE!") Again, this promotion of a free phone does not appear to reflect an objective professional recommendation.

the hearing health professional to the patient or client.<sup>95</sup> In short, a joint marketing arrangement between an IP CTS provider and a hearing health professional rewards the professional for encouraging the consumer to register for or use the IP CTS provider's service, whether or not the consumer needs such service to communicate by telephone. We therefore find that joint marketing arrangements between IP CTS providers and hearing health professionals upon whom consumers potentially rely for advice in regard to their hearing loss violate our prohibition of referrals for rewards and other incentives.

29. Sorenson asks that the prohibition on compensation for violations of our incentives rule be limited to denial of payment for services provided to the specific consumers influenced or affected by such incentives, until such time that the IP CTS provider stops providing such incentives and the consumer obtains third party certification of his or her eligibility to use IP CTS.<sup>96</sup> We decline to make a general determination at this time regarding the scope of withholdings, because we would need to examine the facts of each arrangement on a case-by-case basis to determine the appropriate amount of withholding for each violation. Moreover, we decline to allow third party certification to serve as a means of curing a provider's failure to comply with our prohibition of referrals for rewards and other incentives. We also note that once all *existing* IP CTS users who paid less than \$75 for IP CTS equipment are registered for service, our rules will no longer require third party certifications. The potential for abuse of third party certifications by IP CTS providers was one of the reasons for eliminating third party certification as part of the registration process.<sup>97</sup> There is no public interest reason for allowing IP CTS providers who have not been in compliance with our rules to cure such noncompliance through use of a process that has the potential to be subject to abuse. Finally, we remind IP CTS providers that, in addition to the remedies discussed herein, violations could result in other remedies available by law to address noncompliance, including but not limited to, forfeitures,<sup>98</sup> and revocation of certification to provide IP CTS.<sup>99</sup>

### C. Registration, Certification, Equipment, and Eligibility

30. In the period preceding the promulgation of the *IP CTS Interim Order*, some providers had initiated programs to give away end user IP CTS equipment to IP CTS users who registered for their services.<sup>100</sup> Concern that the recent spike in IP CTS usage may have been the direct result of these equipment giveaways, and that there was no process in place to determine whether such consumers actually needed IP CTS to communicate over the phone, the Commission adopted an interim rule expressly requiring that providers that give away, or sell at a cost of less than \$75, equipment to potential or existing IP CTS users, must require such users to submit to the provider a certification from a professional that the user needs IP CTS in order to achieve functionally equivalent telephone service.<sup>101</sup>

<sup>95</sup> The issue here is the consumer perception caused by a joint marketing arrangement, regardless of whether the professional is in fact endorsing the IP CTS provider, although the advertisements cited in the preceding footnote are all clear endorsements of a particular provider's IP CTS phones.

<sup>96</sup> Sorenson, *Ex Parte* Letter at 4, Exhibit A (filed July 18, 2013).

<sup>97</sup> See section 35, *infra*.

<sup>98</sup> See 47 C.F.R. § 1.80.

<sup>99</sup> *Id.* § 64.606(e)(2).

<sup>100</sup> For example, prior to the *IP CTS Interim Order*, Sorenson had the following ad on its Sorenson website: "Free! Limited time offer! Sign up today and get Sorenson for Free—regularly \$149." <<http://Sorensonphone.com/?gclid=CIXPytHR8rMCFcqY4AodkVwAdQ>> (last viewed Nov. 28, 2012). Apparently, this limited time offer had been in effect for at least several months, with no announced termination date. In addition to the general concerns we raise about the free equipment 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.

<sup>101</sup> *IP CTS Interim Order*, 28 FCC Rcd at 717-18, ¶¶ 21-22.

The Commission further noted that while some state equipment distribution programs provide IP CTS devices to their residents at no charge, these state 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.<sup>102</sup> By contrast, the Commission had no evidence that providers distributing IP CTS equipment were effectively screening users of their service for eligibility prior to giving away the equipment or registering new users for the service.<sup>103</sup>

31. On the other hand, the Commission found that if the consumer has to invest a significant amount in IP CTS equipment, the equipment price will generally screen out individuals who do not need IP CTS.<sup>104</sup> When a consumer is required to make a significant investment in an IP CTS phone, the Commission reasoned, the individual must first consider whether he or she needs the service, *i.e.*, the purchaser is more likely to evaluate whether the benefit from the service is worth the cost of the specialized phone. Concluding that a professional certification of need should not be required if the provider charges an amount that is sufficient to affect most consumers' purchasing decisions, but is not so high as to make the purchase of equipment infeasible, the Commission set the threshold amount for this purpose at \$75 on an interim basis.<sup>105</sup>

32. Despite the adoption of the third-party certification requirement, the Commission continued to be concerned that by giving away devices at no cost, providers were encouraging consumers to obtain and use the free equipment whether or not they had a hearing disability that necessitated the use of IP CTS. Therefore, in addition to seeking comment on the interim rule requiring third party certification when phones are provided for less than \$75,<sup>106</sup> the Commission sought comment on a proposal to simply prohibit all provider programs that give away or loan equipment to potential or existing IP CTS users at no cost or at a *de minimis* cost.<sup>107</sup>

33. The Commission also found good cause to adopt an interim rule requiring each IP CTS provider, in order to be eligible for compensation from the Fund for providing service to new IP CTS users, to register each new IP CTS user.<sup>108</sup> As part of this registration, the Commission directed IP CTS providers to obtain a self-certification of eligibility from each new IP CTS user stating that: (1) 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; (2) the consumer understands that the captioning service is provided by a live CA; and (3) the consumer understands that the cost of the IP CTS calls is funded by the TRS Fund.<sup>109</sup> The Commission explained that these requirements were

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<sup>102</sup> 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 have professional certification that an applicant has "a disability or disabilities that prevents him/her from making or receiving telephone calls independently."

<[http://disabilities.temple.edu/programs/assistive/tddp/docs/TDDP\\_application\\_2012-07.pdf](http://disabilities.temple.edu/programs/assistive/tddp/docs/TDDP_application_2012-07.pdf)> (last visited July 1, 2013).

<sup>103</sup> *IP CTS Interim Order*, 28 FCC Rcd at 718, ¶ 23, n.71.

<sup>104</sup> *Id.* at 717, ¶ 22.

<sup>105</sup> *IP CTS Interim Order*, 28 FCC Rcd at 717, ¶ 22. The Commission noted that 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 providers claim allow for such consumers to assess whether the benefits of purchasing the equipment outweighs its cost. *Id.* at 717-18, ¶ 22.

<sup>106</sup> *Id.* at 726-27, ¶ 42.

<sup>107</sup> *Id.* at 725-26, ¶¶ 40-41.

<sup>108</sup> *Id.* at 717-19, ¶¶ 21-24.

<sup>109</sup> *Id.* at 719, ¶ 25.

intended to highlight important information that may be relevant to the consumer's decision to use the service.<sup>110</sup> In addition, the Commission directed that self-certification be made on a form separate from any other user agreement (such as on a separate page), and required a separate signature specific to the self-certification. This requirement, distinguishable from the method that had been used by some providers of adding a check box to a lengthy service agreement, was found by the Commission to be necessary to ensure that consumers are alerted to the importance of providing a true and accurate certification.<sup>111</sup> The Commission solicited comment on making these interim rules permanent, on whether registration and self-certification should be extended to existing users, and on whether the latter should be required to be made under penalty of perjury.<sup>112</sup>

34. We now adopt on a permanent basis the interim rule requiring IP CTS providers to register each new IP CTS user, and adopt a new rule requiring providers to register all existing IP CTS users within specified timelines. We amend slightly the language needed for self-certification from that in the interim rule, to ensure that IP CTS users fully understand the certification, and to have the consumer certify that he or she will not permit individuals who are not registered to use the service.

35. We also adopt a rule prohibiting TRS providers from receiving compensation from the Fund for any IP CTS minutes of use generated by IP CTS equipment that they distribute, directly or indirectly, for free or for less than \$75 to consumers after the effective date of the rule, except for equipment distributed through an equipment distribution program administered by a state or local government. For existing users who had received their equipment for free or at a price below \$75 from any source other than an equipment distribution program administered by a state or local government, we require that the IP CTS provider obtain from the consumer either a \$75 payment (provided that the consumer received the equipment from the provider) or a certification from an independent, third party professional, made under penalty of perjury. In addition, we require that the providers require their users to obtain from the third party professional the professional's name, title, address, telephone number, and e-mail address. We also make permanent our interim rule requiring each IP CTS provider to maintain the confidentiality of registration and certification information.<sup>113</sup>

### 1. Distribution of Equipment

36. *Background.* Many providers support a prohibition against the provider distribution of free or low-cost equipment. For example, Purple agrees that the distribution of free equipment is problematic, as it can result in the distribution of equipment to non-eligible users.<sup>114</sup> Although in its opening comments, Hamilton asserts that "there is no better indication that a user legitimately needs the service than a user's decision to pay his or her own money for the specialized equipment needed to use the service,"<sup>115</sup> Hamilton adds in a subsequent ex parte letter that the Commission "should be sensitive to the concerns raised in recent consumer group ex parte filings about a blanket requirement that all users

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 727-28, ¶ 43.

<sup>113</sup> As noted in the next subsection, because we now prohibit the distribution of equipment to consumers for free or at a *de minimis* price, we do not need to make permanent the interim requirement for *new* users who receive equipment for free or at a price below \$75 from any source other than a governmental program to obtain a certification from a third party professional. *See id.* at 718-19, ¶ 24.

<sup>114</sup> Purple Comments at 5 ("Growth of IP CTS can also be attributed to irresponsible marketing practices by certain providers. Examples of such practices are offering free phones without any meaningful check on whether the recipient is hard of hearing.") *See also id.* at 6 ("A user who receives free equipment from a provider may not necessarily be eligible for relay service").

<sup>115</sup> Hamilton Comments at 5.

pay at least \$75 for IP CTS equipment.”<sup>116</sup> USTelecom concurs with the Commission’s conclusion that because IP CTS devices are modern, attractive, and offer sound amplification, they are likely to entice consumers with and without hearing loss, and contribute to “heightened usage by the broader public.”<sup>117</sup> Likewise, Miracom opposes the free distribution of equipment usable only on one provider’s service, which practice it claims “has contributed to a host of marketing and competitive abuses which are injurious to consumers’ interest in a competitive marketplace and the Commissions’ interest in ensuring the absence of waste, fraud and abuse in the TRS program.”<sup>118</sup>

37. Sorenson opposes such a prohibition,<sup>119</sup> insisting that there is no evidence that this practice is driving up improper usage, arguing that giving away phones increases “overall usage because some users might not be able to afford phones if they were required to pay full price,” and stating that a proscription on the distribution of free equipment would reduce availability of IP CTS to consumers who need the service.<sup>120</sup> Sorenson argues that imposing an additional \$75 payment for equipment violates the functional equivalence standard and inverts the certification rule as contained in the interim rules, which Sorenson argues was set up as an alternative to third party certification.<sup>121</sup>

38. The Consumer Groups acknowledge that giveaway programs may have the potential to encourage misuse of IP CTS because “consumers without a legitimate need for the service are more likely to use IP CTS if they can obtain the necessary equipment with little or no out-of-pocket cost.”<sup>122</sup> However, they express concern about the impact that the proposed prohibition will have on ensuring the availability of affordable equipment for those in need, explaining that not all states have equipment distribution programs.<sup>123</sup> Consumer Groups recommend that the Commission permit providers to provide IP CTS equipment to consumers at no cost or at *de minimis* cost if they meet certain income eligibility criteria, which the Consumer Groups recommend be set at 400% of the federal poverty guidelines.<sup>124</sup> Similarly, HLAA urges the Commission to ensure a “provision for people of low income or modest means [because] [t]he Commission cannot depend on state programs to deliver the equipment to all consumers who are eligible.”<sup>125</sup> In addition, the Consumer Groups propose that the Commission continue

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<sup>116</sup> Hamilton August 15, 2013 *Ex Parte* at 2.

<sup>117</sup> USTelecom Comments at 7.

<sup>118</sup> Miracom Comments at 11. Although Sprint believes that tying a professional certification to the acceptance of a free phone should obviate the need for the FCC to set a minimum price for these phones, it acknowledges that the “provision of free IP CTS equipment especially when coupled with a rewards program is likely a major reason why there has been a spike in IP CTS usage recently” (Sprint Comments at 5), and opines that such practices “place[] the provision of IP CTS service on a slippery slope that could lead to the same types of questionable and outright fraudulent activities that have plagued the VRS segment of the market for years” (*Id.* at 4).

<sup>119</sup> Sorenson Comments at 16-18; Sorenson Reply Comments at 18-19.

<sup>120</sup> *Id.* at 18.

<sup>121</sup> Sorenson August 5, 2013 *Ex Parte* at 2.

<sup>122</sup> Consumer Groups Comments at 6. The Consumer Groups also note that providers could abuse such programs by reclaiming equipment, not responding to service requests, or penalizing customers who do not generate a certain number of relay minutes. *See also* NASRA Comments at 2 (supporting FCC’s prohibition against providers disseminating IP CTS equipment and software at no cost); HLAA Comments at 7 (distributing phones for a very low cost will have the same impact as giving them away for free).

<sup>123</sup> Consumer Groups Comments at 5-7.

<sup>124</sup> *Id.* at 6-8.

<sup>125</sup> HLAA Comments at 7. HLAA recommends that the Commission create a federal program for free or reduced cost IP CTS phones to income eligible consumers along the lines of the National Deaf-Blind Equipment Distribution (continued....)

to allow providers to provide IP CTS equipment at no or *de minimis* cost to consumers who obtain third party professional certification of their need for the service. In a recent ex parte letter, Consumer Groups argued that an absolute prohibition on the provision of equipment for less than \$75 violates section 225 of the Act, which mandates that “users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communications services.”<sup>126</sup>

39. As to the price threshold for triggering some form of restriction on equipment distribution, the Consumer Groups agree with the Commission’s proposed definition of the threshold price level as an amount that is small enough so as generally not to be a factor in the consumer’s decision to acquire IP CTS equipment.<sup>127</sup> HLAA agrees with the Commission’s tentative conclusion that distributing phones for a very low cost will have the same impact as giving them away for free.<sup>128</sup> Likewise, HLAA approves setting the price threshold at \$75, but raises concerns about the need for further market research to learn, “with certainty at what point the consumer will determine the benefits of purchasing captioned telephone equipment outweigh the cost.”<sup>129</sup>

40. Most commenters believe that any restriction on free or low-cost distribution of equipment should not apply to software, software updates, or applications for mobile users or computer users.<sup>130</sup> HLAA further urges that software for mobile use of IP CTS be modestly priced, and that consumers only be required to self-certify to acquire such software<sup>131</sup> because downloadable applications typically are available to the general public for free or at low cost, and add a variety of needed functions to mobile devices.<sup>132</sup> HLAA further expresses skepticism that individuals who do not need the service would download this software onto their mobile device.<sup>133</sup> Consumer Groups agree, and note that “[b]ecause free software support is currently available for VRS and IP Relay services, such prohibitions should not be imposed on IP CTS software.”<sup>134</sup> Sprint argues that it has offered free mobile applications and software for over a year, and this has not created any unusual growth patterns in its number of usage

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Program (NDBEDP - which distributes free communications equipment to people who are deaf-blind) mandated by the CVAA. *Id.* at 8. *See also* ALOHA *Ex Parte* Letter, August 12, 2013, at 2-3.

<sup>126</sup> Consumer Groups *Ex Parte* Letter, August 9, 2013 at 2 (Consumer Groups August 9, 2013 *Ex Parte*), quoting 47 U.S.C. § 225(d)(1)(D).

<sup>127</sup> Consumer Groups Comments at 6-7, citing *IP CTS Interim Order*, 28 FCC Rcd at 726, ¶ 41.

<sup>128</sup> HLAA Comments at 7. *See also* *IP CTS Interim Order*, 28 FCC Rcd at 726, ¶ 41.

<sup>129</sup> HLAA Comments at 7. Explaining that it conducted its own informal survey of the cost of retail telephones on Amazon.com and other websites, HLAA states that a \$75 threshold would be higher than the average price of specialty phones found on Amazon, but lower than the average price of specialty phones found on other websites. *Id.* at 7. Sorenson, however, suggests that any price threshold should be set at a dollar amount that is comparable to the price of an ordinary telephone (which is considerably less than \$75). Sorenson Reply Comments at 6, 19. NASRA and TEDPA support a minimum price of \$75 for IP CTS equipment. NASRA Comments at 2; TEDPA Comments at 2.

<sup>130</sup> *See, e.g.*, Consumer Groups Comments at 7; Sprint Comments at 6; HLAA Comments at 9, 10; Hamilton Reply Comments at 5 (if users have paid \$75 for equipment, they should be able to download these applications or use the web based portal for free).

<sup>131</sup> HLAA Comments at 9-10.

<sup>132</sup> *Id.* at 9-10.

<sup>133</sup> *Id.* at 10 (noting that they are skeptical that people who do not need IP CTS will download an app to their mobile device that they have purchased on their own, and that brings in a third party to create captions that they do not need in their phone conversations).

<sup>134</sup> Consumer Groups Comments at 9.

minutes.<sup>135</sup> However, NASRA, an association made up of state relay administrations across the country, believes that software should be included in the free or *de minimis* equipment distribution prohibition.<sup>136</sup>

41. *Discussion.* We adopt a rule prohibiting TRS providers from receiving compensation from the Fund for any IP CTS minutes of use generated by IP CTS equipment that they distribute, directly or indirectly, for free or for less than \$75 to consumers after the effective date of the rule.<sup>137</sup> As we discuss below, where consumers must make an investment in an IP CTS equipment purchase, they are far less likely to acquire such equipment if they do not need the service.<sup>138</sup> The record shows some agreement among commenters that setting \$75 as the minimum price threshold is reasonable,<sup>139</sup> and we believe it represents a reasonable balancing of interests. The amount is high enough to deter a consumer from purchasing an item if he or she does not need it for communication, but not so high as to make the purchase of equipment overly burdensome. We apply this prohibition as well to any officer, director, partner, employee, agent, subcontractor, or sponsoring organization or entity (collectively “affiliate”) of any TRS provider. Further, any type of arrangement by an IP CTS provider, directly or indirectly through any third party (other than through a state or local equipment distribution program), to distribute equipment at no charge or for less than \$75 to consumers is likewise prohibited.

42. We take this action due to our concern, based in part on the spike in IP CTS usage that took place during the period after which consumers began receiving free equipment, that the provision of free or minimally priced equipment increases the likelihood that IP CTS will be provided to ineligible users. As the Commission noted in the *IP CTS Interim Order*, many IP CTS 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. In addition, 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.<sup>140</sup> Because of the ease and convenience of using IP CTS devices, which function much the same as a conventional telephone but for the addition of captions, once the device is in a consumer’s possession, consumers may routinely use the device with captions—as might others in the consumer’s household—even if they do not actually need the service for effective communication. 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 of such devices is likely to contribute to IP CTS usage by persons who do not have a sufficient degree of hearing loss to require this service to understand conversation over the phone. Offering such equipment for free or for less than \$75 thus has the potential effect of promoting registration for and use of IP CTS by customers who do not need the service for

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<sup>135</sup> Sprint Comments at 6 (“The FCC should also eschew any attempt to set a purchase price for the software applications that are necessary for users to obtain IP CTS service using their Android-based or iOS-based wireless devices (Wireless IP CTS) and/or using their computers (WebCapTel). Sprint, for one, has offered a downloadable application free of charge to users who have purchased such phones and computers for a little more than a year now and give the fact that Sprint's growth in IP CTS usage has been within historical norms, the offering of such software is not contributing to the concerns that led to the adoption of the *Interim Order* and the issuance of the instant NPRM.”).

<sup>136</sup> NASRA Comments at 2.

<sup>137</sup> We limit this restriction, however, to provider distribution of free or *de minimis* cost equipment to end users; there is no restriction on compensation for minutes of IP CTS use when providers distribute such equipment to state or federal governmental equipment distribution programs.

<sup>138</sup> See Sprint Comments at 5. See also *IP CTS Interim Order*, 28 FCC Rcd at 717, ¶ 22.

<sup>139</sup> See NASRA Comments at 2; TEDPA Comments at 2; Hamilton Comments at 5; HLAA Comments at 7 (\$75 would be acceptable if the FCC sets a *de minimis* amount, but market research is needed).

<sup>140</sup> See *IP CTS Interim Order*, 28 FCC Rcd at 716, ¶ 20.

effective communication, resulting in improper payments from the Fund, contrary to the purpose of the TRS program to provide communication services to persons who have a hearing loss and who have difficulty using conventional telephone services.<sup>141</sup>

43. Paying at least \$75 for IP CTS equipment, by contrast, provides a concrete indication that the consumer has thought the transaction through sufficiently to have concluded that she or he needs IP CTS for effective communication. Thus, we agree with Hamilton that “there is no better indication that a user legitimately needs IP CTS than a user’s decision to pay his or her own money for the specialized equipment needed to use the service.”<sup>142</sup> Stated otherwise, where consumers must make an investment in an IP CTS equipment purchase, they are far less likely to acquire such equipment if they do not need the service.<sup>143</sup> By establishing a threshold price level below which a provider may not directly or indirectly distribute its equipment, we increase the likelihood that individuals who might be equally or better served with other technologies available to persons with hearing loss, such as enhanced amplification telephones, will not choose to sign up for IP CTS solely or primarily because they can obtain telephone equipment that is free or is priced significantly lower than other assistive technologies.

44. In adopting this rule, we also conclude that overall, as a practical matter, consumer self-screening based on having to make a significant investment in equipment, is likely to be a more effective approach to screening than is third-party certification. The Commission’s interim rule, requiring certification by an independent professional when equipment is provided for free or for less than \$75, had been designed to prevent the distribution of IP CTS equipment to individuals who do not actually need IP CTS. Our expectation was that the professional would be able to assist the consumer in selecting among various possible assistive technologies, including non-TRS options such as enhanced-amplification telephones, and would be able to make a certification of eligibility, in appropriate cases, as a neutral party, without being subject to undue influence or bias.<sup>144</sup> However, our experience with this approach suggests that it may not be very effective in achieving adequate screening of such individuals, for a number of reasons.

45. First, as we note in section III.C.6 below, at present, we have not established a specific numeric eligibility threshold for whether a hearing-impaired individual does or does not need IP CTS for functionally equivalent communication. Thus, under the interim rule, determining whether a person qualifies for free or low-cost distribution of IP CTS necessarily involves the exercise of professional judgment by numerous individuals about whom the Commission has little information. It is difficult, at best, for the Commission to effectively oversee the performance of this important gatekeeping function by hundreds or thousands of hearing health and other professionals.

46. Further, we have observed that, where free IP CTS phones have been offered directly or indirectly by a provider under our interim rules, the advertising for such phones continues to focus on the availability of a “free” IP CTS phone, with the need for third-party certification alluded to only vaguely, if at all.<sup>145</sup> Thus, we believe that when consumers are drawn in initially by a provider’s offer of a free

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<sup>141</sup> See *IP CTS Interim Order*, 28 FCC Rcd at 725, ¶ 40. See, e.g., *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, 5148, ¶ 13 (2000).

<sup>142</sup> Hamilton Comments at 5.

<sup>143</sup> See Sprint Comments at 5. See also *IP CTS Interim Order*, 28 FCC Rcd at 717, ¶ 22.

<sup>144</sup> For that reason, we required that certification be provided by an “independent” professional, thereby seeking to ensure that the certifier “does not have any 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.” *IP CTS Interim Order*, 28 FCC Rcd at 718, ¶ 24 n. 72.

<sup>145</sup> See, e.g., New England Hearing Instruments, Inc. web page promoting CaptionCall found at <<http://www.newenglandhearing.com/captioncall-phone/>> (last visited August 19, 2013) (“How to Order your (continued....)”).

phone, and only subsequently seek evaluation and certification by a professional, the professional's role is likely to change from helping the consumer select on their merits from a number of alternative assistive technologies, to accepting or vetoing a choice already made by the consumer, based on exposure to ads promoting the free availability of an IP CTS phone.

47. Moreover, contrary to our clearly stated intent that the screening third party professional be independent of any provider,<sup>146</sup> we are aware of numerous instances in which sessions have been arranged by a provider, to which consumers are invited to obtain a free hearing analysis and a free IP CTS phone at the same time and location.<sup>147</sup> We find that professionals who participate in such sessions, whether for compensation, the prospect of meeting potential new clients, or for other reasons, are linked to the sponsoring provider (or are so perceived by potential customers and clients), and thus are not "independent" as contemplated by the interim rules. Therefore, certification by professionals in such circumstances would not be permissible under those rules.

48. There are additional issues with the professional certification process that have surfaced under our interim rules.<sup>148</sup> Marketing promotions continue to entice consumers by offering the opportunity to acquire IP CTS devices "free" within a limited time period, giving such consumers the impression that if they do not act swiftly, they will miss out on a valuable acquisition.<sup>149</sup> We believe that such promotions can have the effect of encouraging consumers to quickly sign up for service they may not need. Indeed, this focus on offering a free phone<sup>150</sup> may lead many consumers to believe they are

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FREE CaptionCall Phone: New England Hearing Instruments is now an official CaptionCall representative! You can request an appointment at New England Hearing Instruments and our hearing instrument specialists will help you register. **Or** To order your own, go to: <https://www.captioncall.com/CaptionCall/Products/CaptionCall-Phone.aspx> and be sure to use our promo code: **HS1801** and you'll get the CaptionCall phone (regularly \$149) **FREE!** This also includes the **closed-captioning service** for *FREE*, and **in-home setup** by their technician *FREE!*")

<sup>146</sup> See *IP CTS Interim Order*, 28 FCC Rcd at 718, ¶ 24 n. 72.

<sup>147</sup> See, e.g., <<http://www.adhac.com/free-captioncall-phone/>> (last visited July 9, 2013) ("If you do not have a certification of hearing loss; we provide quick no-charge hearing screenings to establish your eligibility for the free CaptionCall service"); <<http://www.allamericanhearing.com/captioncall/>> (last visited July 9, 2013) ("... receive a FREE CaptionCall phone ... our hearing consultations are always free").

<sup>148</sup> For example, we have been informed, off the record, that some of the professionals who have been used for these certifications have specialties, such as pharmacy or podiatry, that do not qualify them to make hearing loss assessments. We note that a certification from a professional practicing in a specialty unrelated to hearing is in violation of the requirement that the third party professional be qualified to evaluate an individual's hearing loss in accordance with applicable professional standards. 47 C.F.R. § 64.604(c)(9)(v)(A); *IP CTS Interim Order*, 28 FCC Rcd at 718-19, ¶ 24.

<sup>149</sup> See e.g., <<https://www.captioncall.com/CaptionCall/Special-Offers.aspx>> (last visited July 1, 2013) (encouraging users to "Get Sorenson FREE! Refer to promo code MS1019 to get Sorenson absolutely free\* (\$149 value). To order a free Sorenson phone now, simply click on the green 'REQUEST INFO' button, complete the form with your contact information and the promo code referenced above, and click 'Submit'. . . This is a limited time offer that includes a free Sorenson phone, free delivery and installation assistance, and ongoing free captioning service funded by the FCC. There are no hidden charges and no out of pocket expenses."). See also <[http://www.hitec.com/productDetail.asp\\_Q\\_catID\\_E\\_130\\_A\\_subCatID\\_E\\_195\\_A\\_productID\\_E\\_433\\_A\\_CaptionCall\\_E\\_CaptionCall](http://www.hitec.com/productDetail.asp_Q_catID_E_130_A_subCatID_E_195_A_productID_E_433_A_CaptionCall_E_CaptionCall)> (last visited Aug. 19, 2013) ("**ORDER TODAY AND ITS FREE . . . Offer expires soon**").

<sup>150</sup> See, e.g., New England Hearing Instruments, Inc. web page promoting CaptionCall found at <<http://www.newenglandhearing.com/captioncall-phone/>> (last visited August 15, 2013) ("CaptionCall is the ideal phone for hearing-impaired people – featuring closed-captioning of your conversation!"); Hear Now web page promoting CaptionCall found at <<http://hearnowllc.com/caption%20call.htm>> (last visited August 15, 2013) ("Trouble Hearing on the Telephone? Then you really want this! And the cost is right. ABSOLUTELY FREE!").

simply getting a free phone with great features, without realizing that they are enrolling in a service using communications assistants whose services are paid for by a federal program.

49. For all these reasons, we conclude that the better course of action is to prohibit compensation from the Fund for IP CTS minutes of use generated from the distribution of IP CTS equipment given out for free or for less than \$75 by all TRS providers.<sup>151</sup>

50. The new requirement prohibiting compensation from the Fund for IP CTS minutes of use generated by consumers who receive equipment for free or for less than \$75 applies to IP CTS provider practices only. We find that state equipment distribution programs (EDPs) or other governmental programs that give out or loan free or reduced cost CTS or IP CTS equipment to their residents<sup>152</sup> do not raise the same concerns as IP CTS provider distributed equipment, because such governmental programs ensure that when equipment is distributed for free or for less than \$75, individuals receiving this equipment will have been screened by a completely objective third party with respect to their need for this service, and that individuals who would be better served by other equipment will have been directed to such equipment.

51. We believe that continuing to set \$75 as the minimum price threshold represents a reasonable balancing of interests.<sup>153</sup> There is record support for this amount,<sup>154</sup> and we believe the amount is high enough to deter a consumer from purchasing an item if he or she does not need it for communication, but not so high as to make the purchase of equipment overly burdensome.<sup>155</sup> As the

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<sup>151</sup> We also reject Sorenson's proposal to require that "all IP CTS users (1) have at least one hearing aid or cochlear implant, and (2) either (i) have an independent third party medical professional certification that, even with a hearing aid or cochlear implant, they need captions to use the telephone in a functionally-equivalent manner to a person without hearing disabilities, or (ii) pay at least \$75 for the necessary equipment." Sorenson *Ex Parte* Letter, August 22, 2013, at 4. We continue to have concerns, as already stated in this section, about the effectiveness of third party certification in assuring that IP CTS usage is limited to those individuals with a legitimate need for the service. While the fact that a consumer has a hearing aid or a cochlear implant certainly makes it more likely that he or she may need IP CTS, it does not ensure that this is the case, and Sorenson's proposal does not assuage our concerns about abuse of the certification process. Sorenson does address some of our concerns by proposing to specify what types of professionals are qualified to provide the certifications, but that does not resolve our concerns about ensuring that the certifier is completely neutral. We note, moreover, that Sorenson's proposal would make IP CTS less available to consumers, by limiting the service to those with hearing aids or cochlear implants, and there may be consumers who do not use either of these technologies, yet would still need IP CTS to communicate by telephone. See Letter from Christian Vogler, Docket 03-123, December 20, 2012, Attachment at 2.

<sup>152</sup> See generally Telecommunications Equipment Distribution Program Association, <<http://www.tedpa.org/StateProgram.aspx>> (last visited Jan. 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.

<sup>153</sup> See Hamilton Comments at 5. See also Miracom Comments at 12 (the distribution of free captioned phones has contributed to a host of marketing and competitive abuses and may encourage persons not needing IP CTS to nonetheless use the service).

<sup>154</sup> See Hamilton Comments at 5 (agreeing that having to pay for a device provides the best indication of whether the user legitimately needs the service and noting that legitimate IP CTS users should be able to purchase a device at retail for no less than \$75); Sprint Comments at 5-6 (noting that "the ability to obtain a free phone, especially when linked [to] a bounty program is likely to be a major, and perhaps sole, reason for the spike in IP CTS usage," and that Sprint's offering of IP CTS phones at prices less than \$99 as part of state or federal government supervised programs is consistent with the \$75 price floor); NASRA Comments at 2 (encouraging the FCC to clearly define the *de minimis* threshold, for example at "a set price point, such as \$75.00" to avoid a loophole for continued misuse that a vague definition would cause; TEDPA Comments at 2 (making the same point as NASRA).

<sup>155</sup> See HLAA Comments at 7. In its comments, Hamilton asks whether combination offers constitute a legitimate marketing practice, so long as the cost of the IP CTS phone is \$75 or more. Hamilton Comments at 4. By way of (continued....)

Commission noted in the *IP CTS Interim Order*, a floor of \$75 is below the listed retail prices for the captioned telephones used with several IP CTS offerings.<sup>156</sup> In addition, \$75 may be roughly comparable to the price of a good-quality “specialty” phone such as an enhanced amplification phone.<sup>157</sup> The \$75 minimum price is also low enough to take into account the different financial circumstances of those who need IP CTS.<sup>158</sup>

52. To ensure that information supporting provider compliance with this requirement is maintained and available for Commission review, we require that providers maintain, with each consumer’s registration records, records describing any IP CTS equipment provided, directly or indirectly, to such consumer and the amount paid for such equipment.<sup>159</sup> Such records shall be maintained for a minimum of five years after the consumer ceases to obtain service from the provider.<sup>160</sup>

53. Sorenson argues that requiring a minimum payment of \$75 for IP CTS equipment is a dramatic, unjustified change from the interim rules, under which the \$75 minimum payment is an alternative to professional certification, stating that it “completely inverts the certification rules as they were contained in the interim rules.”<sup>161</sup> Quoting a statement in the *IP CTS Interim Order* that the Commission “generally believe[s] the most effective means of verifying a user’s need for this service is to

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example, Hamilton states that it offers a package of an IP CTS phone and a router for \$89-\$99, with the price of the phone being \$75 and the router being \$14-\$24, which Hamilton asserts is a reasonable price for a router. Contrasting that to a hypothetical combination of an IP CTS phone and an iPad for a total of \$99, which Hamilton states would clearly be unreasonable, Hamilton asserts that combination offers should be evaluated on a case-by-case basis. We agree that combination offers are acceptable, so long as the IP CTS phone is sold for \$75 or more, the other items sold in the combination package are sold at reasonable market prices, and the total combination price fully reflects the total of each of the elements in the package.

<sup>156</sup> *IP CTS Interim Order*, 28 FCC Rcd at 717-18, ¶ 22, n.67. The Clarity Ensemble telephone used with Purple IP CTS is offered by its manufacturer, Plantronics, for \$149 (*see* <<http://shop.clarityproducts.com/products/clarity/ensemble/?cat=amplified-captioned-phones>> (last visited, July 9, 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?>> (last visited, July 9, 2013)), and the CaptionCall phone used with Sorenson’s IP CTS has a suggested retail price of \$149 (*see* <[https://www.captioncall.com/CaptionCall/CaptionCall\\_Solution/Pricing.aspx](https://www.captioncall.com/CaptionCall/CaptionCall_Solution/Pricing.aspx)> (last visited, July 9, 2013)).

<sup>157</sup> *See* HLAA Comments at 7. Sorenson states that \$75 is more expensive than many amplified phones that are now on the market. *See* Sorenson August 12, 2013 *Ex Parte* at 1 and first attachment. However, many of the amplified phones currently on the market may be inferior to the amplification quality offered by IP CTS phones. *See* Consumer Groups August 13, 2013 *Ex Parte* at 3 (consumers do not benefit from high-gain amplified phones in the same way that they do from IP CTS phones because the amplified phones have no required standard measurement method to assure that they work as advertised). Recent demonstrations of IP CTS phones held at the Commission indicate that their amplification characteristics are impressive (including, for example, on at least one model, a capability to vary amplification by tone frequency). Thus, based on the quality of its amplification features, \$75 does not appear to be an unreasonable price for a consumer to pay for a phone used solely for the purpose of enhanced amplification.

<sup>158</sup> *See IP CTS Interim Order*, 28 FCC Rcd at 718, ¶ 22.

<sup>159</sup> IP CTS providers distributing software-based IP CTS must keep similar records, including whether the user qualifies under the already-registered-and-purchased-equipment exemption or instead paid for the software.

<sup>160</sup> This is consistent with other recordkeeping requirements applicable to iTRS providers. *See, e.g.*, 47 C.F.R. §§ 64.604(c)(5)(D)(7) (requiring that call data supporting claims for payment from the TRS Fund be maintained for a minimum of five years), 64.631(a)(2) (requiring that records of verification of a consumer’s authorization for a change of default provider be maintained for a minimum of five years).

<sup>161</sup> Sorenson August 5, 2013 *Ex Parte* at 2.

have an independent certification for all users,”<sup>162</sup> Sorenson contends that “[i]t stands the logic of the \$75 payment exception on its head to make it the *sine qua non* of a demonstration of need.”<sup>163</sup>

54. Sorenson’s argument fails for several reasons. First, under the rule we adopt today, \$75 is not the “*sine qua non* of a demonstration of need.” As noted above, consumers who register for IP CTS through state or local equipment distribution programs are not required to pay \$75. Thus, the rule we adopt today does not eliminate third-party certification as an alternative; rather, it limits the circumstances under which such certification can be used to establish eligibility, requiring that certification occur in the relatively neutral context of a state or local equipment distribution program.<sup>164</sup> Second, this change is justified because, as explained above, the third party certification process has not been implemented as the Commission expected. In adopting an interim rule providing for third party certification, the Commission did not have the benefit of any experience of how third party certification would actually be implemented. Given that third party certification does not appear to have worked as intended by the Commission, it is entirely appropriate that we adopt a different approach for the final rules.

55. We also disagree with Sprint’s implication that taking this action is beyond the Commission’s jurisdiction.<sup>165</sup> Section 225(d)(1)(A) of the Act directs the Commission to establish guidelines and operations procedures associated with the provision of TRS.<sup>166</sup> In order to achieve the sustainability of this program for persons who do need it, the Commission is well within its authority to establish requirements to ensure that the TRS Fund does not compensate for IP CTS minutes of use generated from equipment that is distributed in a way that may facilitate ineligible users to make use of IP CTS. In this case, we find that prohibiting compensation from the Fund for IP CTS minutes of use generated by the distribution of equipment for free or at a price below \$75 is necessary to achieve this objective.

56. We further reject Sorenson’s and the Consumer Groups’ arguments that the action we take today is counter to principles of functional equivalence,<sup>167</sup> and the statutory goal to achieve full communications access by people with disabilities.<sup>168</sup> First, as the Commission noted in the *VRS Structural Reform Order*, the Commission consistently has distinguished between the provision of relay service, which is explicitly mandated by section 225, and the provision of equipment, which is not.<sup>169</sup>

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<sup>162</sup> *IP CTS Interim Order*, 28 FCC Rcd at 717, ¶ 22.

<sup>163</sup> Sorenson August 5, 2013 *Ex Parte* at 2.

<sup>164</sup> *See, e.g., supra* n. 102.

<sup>165</sup> *See* Sprint Comments at 6 (“[A]ttempting to set a minimum price for IP CTS phones may be beyond the FCC’s jurisdiction since the FCC has long considered the telephone equipment market to be outside the FCC’s Title II regulatory authority.”).

<sup>166</sup> 47 U.S.C. § 225(d)(1)(A).

<sup>167</sup> Sorenson August 5, 2013 *Ex Parte* at 2; Sorenson *Ex Parte* Letter, August 12, 2013 at 1 (Sorenson August 12, 2013 *Ex Parte*). Consumer Groups argue that the prohibition violates the section 225(d)(1)(D) mandate that TRS users pay rates no greater than rates paid for functionally equivalent voice communications services. Consumer Groups August 9, 2013 *Ex Parte* at 9. *See* 47 U.S.C. § 225 (d)(1)(D).

<sup>168</sup> *See* Sorenson Comments at 17-18. Sorenson claims, for example, that the free distribution of equipment “increases usage by making the service available to those who want and need the service, *as the ADA requires.*” *Id.* at 18 (emphasis in original).

<sup>169</sup> *VRS Structural Reform Order*, 28 FCC Rcd at 8696-97, ¶¶ 193-194, *citing* 2011 *VRS Reform FNPRM*, 26 FCC Rcd at 17393, ¶ 49. *See also* 2011 *VRS Reform FNPRM*, 26 FCC Rcd at 17393, ¶ 51 (equipment costs are not “costs caused by interstate telecommunications relay service”); 2006 *MO&O*, 21 FCC Rcd at 8071, ¶ 17; 2007 *TRS Rate Methodology Order*, 22 FCC Rcd at 20170-71, ¶ 82; *Sorenson II*, 659 F.3d at 1044 (“The statute only requires that VRS be made ‘available’ and that users pay no higher rates for calls than others pay for traditional phone services. It does not also require that VRS users receive free equipment and training.”) (citation omitted); *Id.* at 1044-45 (continued....)

Second, we do not read section 225 as requiring the provision of free equipment in order to ensure functional equivalence. Section 225(d)(1)(D), on which the Consumer Groups rely, expressly applies only to telecommunications relay *service*, and there is no comparable provision in the Act that applies to *equipment* used for TRS. Moreover, since users of voice communications services pay for equipment,<sup>170</sup> there is no plausible basis for reading into the statute a restriction against requiring users of TRS to also pay for equipment.

57. Finally, as noted above, we are not prohibiting the free distribution of IP CTS equipment *per se*. Rather, we are prohibiting compensation from the TRS Fund for IP CTS minutes of use generated by equipment that is being given away by providers for free or provided at a price below \$75 to prevent the Fund from paying for IP CTS use that is inconsistent with the goals and purposes of section 225. We place no such restriction on the free distribution of equipment by state or local governmental programs, which are relatively neutral parties that can objectively screen consumers for their eligibility in the program. We believe that the availability of such free or discounted equipment in most states will help to fulfill Congress's and the Commission's goals of "ensuring the widespread availability of IP CTS to individuals who can benefit from the service."<sup>171</sup> Consumer Groups argue that there are a number of states that do not have equipment distribution programs, and for those states that do, they limit distribution to the phones offered by one provider only, thereby depriving low income consumers of the benefits of competition.<sup>172</sup> The Commission is sensitive to the concerns expressed by the consumers, and in the Further Notice we seek comment on whether state equipment distribution programs are meeting the needs of low income consumers, if not, how to meet those needs, and how to meet the needs of low income consumers in states without equipment distribution programs.

58. We also apply this restriction to software and applications (collectively, "software") that allow individuals to use IP CTS without dedicated IP CTS equipment – *e.g.*, via mobile phones or computers. In particular, we prohibit compensation from the TRS Fund for IP CTS minutes of use generated by the software distributed for free or at a price below \$75 unless the user previously obtained IP CTS equipment for \$75 or more or has been deemed eligible for a device from a state EDP. As discussed below, this rule avoids creating a potentially significant loophole that could continue to expose IP CTS to usage by ineligible users. IP CTS is unlike other forms of TRS in that 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.<sup>173</sup> As is the case with hardware, because of the ease and convenience of using IP CTS, persons who do not have a sufficient degree of hearing loss to require this service to understand conversation over the phone (or who do not have any hearing loss at all) could find

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(exclusion of equipment costs does not undermine the section 225 goal of not discouraging or impairing development of improved technology). The limited exception to this is the \$10 million Fund allocation for the distribution of free equipment by state programs certified by the Commission under the NDBEDP, added to the Act by the CVAA. 47 U.S.C. § 620.

<sup>170</sup> Even when wireless providers distribute equipment at no charge, the consumer is still indirectly paying for the equipment on a monthly basis as part of the wireless service contract.

<sup>171</sup> Sorenson Comments at 18. *See also* CTIA Comments at 6 (The Commission should prohibit IP CTS providers from making available equipment for no or *de minimis* cost, but this limitation should not apply if the equipment is made available through government programs that subsidize equipment costs, whether or not the equipment is actually distributed by the government program or provider; <http://www.tedpa.org/StateProgram.aspx> (last visited July 1, 2013), which lists the states that run EDPs. We recognize that at the present time, not all states have EDPs and not all EDPs distribute IP CTS devices. The Commission will continue to monitor the availability of reduced cost equipment to users with limited income, and will explore other avenues of ensuring full access to these services if it finds that consumers are not receiving IP CTS due to an inability to pay for IP CTS equipment.

<sup>172</sup> *See* Consumer Groups August 9, 2013 *Ex Parte* at 2-3. *See also* Hamilton August 15, 2013 *Ex Parte* at 2.

<sup>173</sup> *See IP CTS Interim Order*, 28 FCC Rcd at 716, ¶ 20.

this service desirable for reasons such as creating a transcript or making calls in noisy locations.<sup>174</sup> Given the potential value and ease of use of IP CTS even for users that do not need the service, we predict that, absent our restriction, free or *de minimis* cost IP CTS software would be widely promoted by IP CTS providers in the same way as free IP CTS equipment has been. From the providers' perspective, the more users that sign up to acquire IP CTS software, the more compensation the provider may seek to collect from the Fund, at no cost to the user. Indeed, the elimination of the option for providers to offer free or *de minimis* cost hardware could increase their incentives to turn to promoting free or *de minimis* cost software in this way. We thus are not persuaded by the argument that consumers will not download and use applications and software that they do not need,<sup>175</sup> or that the incentive for a consumer to accept a valuable phone for free generally does not apply to software.<sup>176</sup> Offering IP CTS software for free or for less than \$75 has the potential effect of attracting consumers who might not need to use the service, which is inconsistent with the purpose of the TRS program.<sup>177</sup> Provision of service to such users should not be compensated from the Fund, and this restriction helps guard against that result. We therefore reject the arguments raised by some commenters that the restrictions on compensation from the Fund for IP CTS minutes of use resulting from the distribution of equipment for free or at a low price should not apply to software.<sup>178</sup>

59. We understand that some providers permit consumers who are already registered users of their service to download mobile applications or other software for free.<sup>179</sup> This practice will not violate the proscription against compensation from the TRS Fund for IP CTS minutes of use generated by the distribution of equipment for free or at a price below \$75. Once the user has made the initial investment in an IP CTS device, or has been deemed eligible for the provision of a device by a state EDP, we believe that the risk that such a user is ineligible for IP CTS is substantially reduced. Consequently, providers will be permitted to offer such individuals additional software or applications without charge and still be compensated from the Fund for eligible IP CTS minutes of use. As explained earlier in regard to equipment, the \$75 minimum price threshold represents a balancing of interests. In the context of equipment, we have determined that the amount is high enough to deter a user from purchasing equipment if he or she does not need it for communication, but not so high as to make the one-time purchase of equipment overly burdensome. Based on the current record, we have no basis for concluding that the minimum price for an initial purchase of IP CTS software should be different from the minimum

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<sup>174</sup> See, e.g., *IP CTS Interim Order*, 28 FCC Rcd at 716, ¶ 20.

<sup>175</sup> HLAA Comments at 10; Consumer Groups Comments at 9.

<sup>176</sup> See HLAA Comments at 9-10 (requiring self-certification of eligibility to accept IP CTS software and applications should be enough to prevent ineligible consumers from using the service). See also Sprint Comments at 6 (has offered free mobile applications and software for over a year and that this has not created any unusual growth patterns in its number of usage minutes). We note that HLAA appears to argue that software in general is inexpensive, not that IP CTS software in particular would be inexpensive.

<sup>177</sup> See, e.g., *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, 5148, ¶ 13 (2000).

<sup>178</sup> See, e.g., Consumer Groups Comments at 7; Sprint Comments at 6; HLAA Comments at 9, 10. In response to concerns raised by USTelecom, we clarify, however, that the rules adopted in this order pertaining to IP CTS hardware and software are not intended to encompass all wireless devices or smartphones that are capable of running applications or software providing accessibility features that can enhance the ability of individuals who are hard of hearing to use those devices. Rather, these rules apply only to equipment that is primarily intended to be used for or distributed for the use of IP CTS. See USTelecom Comments at 8-9. We note, however, that our rules otherwise prohibit direct or indirect incentives to register for or use IP CTS. Such rules apply to the distribution of wireless devices, smartphones, or other equipment as an incentive to register for or use IP CTS.

<sup>179</sup> See, e.g., [http://www.hamiltoncapter.com/pc\\_mac/registration.html](http://www.hamiltoncapter.com/pc_mac/registration.html) (last visited July 9, 2013).

price for the purchase of IP CTS equipment. In the Further Notice, however, we seek comment on whether we could accomplish our goal with some different minimum price.

## 2. New Users

60. *Background.* Most commenters to this proceeding agree that universal TRS registration and certification are necessary elements in reducing waste, fraud and abuse, and in improving access to 911 services for new IP CTS users.<sup>180</sup> In fact, it is our understanding that some providers already require self-certification for new users.<sup>181</sup> Parties to this proceeding also are generally supportive of the requirement for the self-certification to be presented on a clearly identified, separate page from all other registration documents.<sup>182</sup>

61. To the extent that the Commission proceeds with a requirement for self-certification, HLAA proposes plainer language, which they say is necessary to ensure that consumers understand the form.<sup>183</sup> Specifically, they offer the following options:

- “the user has a hearing loss and needs captions to be able to fully understand phone conversations,” and
- “the user understands that captioning is provided by a live communications assistant (CA) who listens to the other party on the line and provides the text on the captioned phone.”<sup>184</sup>

62. Similarly, Hamilton proposes simplifying the form language, as follows: “(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.”<sup>185</sup> ALOHA suggests that the self-certification form specifically state that “FCC rules require this Certification remain confidential, except as required by law,” out of concern that older Americans might otherwise be reluctant to sign the form and provide the needed information.<sup>186</sup> Finally, HLAA recommends that family members purchasing IP CTS equipment

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<sup>180</sup> See e.g. Consumer Groups Comments at 7-10; CTIA Comments at 6; Hamilton Comments at 5; Sprint Comments at 7; HLAA Comments at 10-11.

<sup>181</sup> Sorenson Comments at 5-6, n.15; Purple Petition for Limited Waiver, CG Docket No. 03-123, Mar. 1, 2013, at 2 (registration for Purple included a self-certification prior to adoption of the *IP CTS Interim Order*).

<sup>182</sup> See Consumer Groups Comments at 9; HLAA Comments, at 12 (support use of a separate page that is clearly identified as self-identification, which the consumer should sign and date); Sprint Comments at 7-8 (supports requirement, including a separate page on the website).

<sup>183</sup> HLAA claims that the Commission’s proposed language 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” will not be understood by many, if not most, consumers. HLAA Comments at 11.

<sup>184</sup> *Id.* at 11-12.

<sup>185</sup> Hamilton Comments at 5-6. Consumer Groups further request that self-certification forms not state that the user understands IP CTS is provided by a live communications assistant because the FCC’s definition of IP CTS does not require a live communications assistant. Consumer Groups Comments at 9.

<sup>186</sup> ALOHA Comments at 4. Aloha goes on to explain, “[w]e have found many ALOHA members, perhaps because they are elderly and are frequently lectured—often by government—not to share personal information, are very much concerned with personal privacy.” *Id.* It further requests that no additional documents or paperwork be required for self-certification.

for their relatives be permitted to certify the hearing loss of that relative, or provide such certification until that person gets the equipment and signs the self-certification form on his or her own.<sup>187</sup>

63. Commenters have different opinions on the requirement for the self-certification to be signed under penalty of perjury. Consumer Groups agree that the self-certification should be signed under penalty of perjury, noting that “this requirement would . . . help to reduce the risk of fraud.”<sup>188</sup> Sorenson agrees, and notes that “[i]n the Lifeline context, this rule [penalty of perjury] does not appear to have substantially deterred participation by eligible users.”<sup>189</sup> Other commenters, however, express concern about adding a penalty of perjury provision to the self-certification. For example, Sprint opposes the penalty of perjury language, because it claims this language implies that consumers are not to be trusted, and because it raises the possibility of prison, and thus, may reduce functional equivalence, in that some might be fearful of signing such a form.<sup>190</sup> While HLAA also generally opposes this language, it adds that if this requirement is adopted, the consequences of any fraudulent statements should be clearly spelled out on the certification.<sup>191</sup>

64. *Discussion.* The Commission adopts as permanent the interim rule requiring each IP CTS provider to register each new IP CTS user, and to require, as part of the registration process, that providers obtain from each consumer the consumer’s full name, date of birth, last four digits of the consumer’s social security number, address and telephone number and a self-certification as revised below. Specifically, the rule that we adopt today requires that such self-certification state that the consumer: (1) has a hearing loss that necessitates use of captioned telephone service; (2) understands that captions on captioned telephone service are provided by a live communications assistant who listens to the other party on the line and provides the text on the captioned phone; (3) understands that the cost of captioning each Internet protocol captioned telephone call is funded through a federal program; and (4) will not permit, to the best of the consumer’s ability, persons who have not been registered to use Internet protocol captioned telephone service to make captioned telephone calls on the consumer’s registered IP captioned telephone service or device. The Commission further makes permanent the requirements that such self-certification be made on a form separate from any other user agreement (such as on a separate page); that it bear a separate signature<sup>192</sup> specific to the self-certification; and that the signature be made under penalty of perjury.

65. The Commission finds that the registration required in the *IP CTS Interim Order* for new users, together with the mandate that consumers self-certify under penalty of perjury their eligibility to use IP CTS, will help prevent the registration of individuals who do not need captions in order to obtain functionally equivalent telephone service.<sup>193</sup> Such registration is already required of other IP-enabled forms of TRS,<sup>194</sup> and we view it as a logical and useful means to ensure that only those individuals who

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<sup>187</sup> HLAA Comments at 12.

<sup>188</sup> Consumer Groups Comments at 8.

<sup>189</sup> Sorenson Comments at 20.

<sup>190</sup> Sprint Comments at 7-8. Sprint also claims that the requirement is unenforceable. *Id.*

<sup>191</sup> HLAA Comments at 11-13.

<sup>192</sup> As was the case with the interim rule adopted in the *IP CTS Interim Order*, 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. 47 C.F.R. § 64.604(c)(9)(iv); *IP CTS Interim Order*, 28 FCC Rcd at 719, ¶ 25 n.75.

<sup>193</sup> *See id.* at 718-19, ¶ 24.

<sup>194</sup> *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP-Enabled Service Providers*, CG Docket No. 03-123, CC Docket No. 98-67, (continued....)

are truly eligible for different forms of TRS are allowed to use these services.<sup>195</sup> These measures will also ensure that potential users of this service fully understand how IP CTS service works, and that its costs are supported by a federal program. In addition, these measures are consistent with the recent *VRS Structural Reform Order* requiring that each VRS user self-certify that the user has a hearing or speech disability that makes the user eligible to use VRS and that the user understands that the cost of VRS is paid for by contributions from other telecommunications users to the TRS Fund.<sup>196</sup> Although HLAA raised a concern that the requirement for self-certification under penalty of perjury might deter otherwise eligible users,<sup>197</sup> we believe individuals who truly have a need for this service will be willing to attest to such language, and that this language is necessary to prevent abuse of this program.<sup>198</sup> For this same reason, we will not permit family members purchasing IP CTS equipment for their relatives to certify the hearing loss of that relative, as proposed by HLAA.<sup>199</sup> To ensure that IP CTS is not used by ineligible users, it is important that all users themselves certify to their eligibility.<sup>200</sup> To ensure that information supporting the eligibility of users continues to be maintained and available for Commission review, we require that records of consumer registration and self-certification, with all the information required to be included in such certifications, be maintained for a minimum of five years after the consumer ceases to obtain service from the provider.<sup>201</sup>

### 3. Existing Users

66. *Background.* The *IP CTS NPRM* proposed that providers be required to register and obtain self-certification for their existing IP CTS users within 90 days, and sought comment on whether this would be an appropriate amount of time to accomplish these tasks, offering commenters who disagreed with this timeline to submit alternative proposals.<sup>202</sup> The Commission further proposed that IP CTS providers that fail to register existing users within this 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, and sought comment on this proposal. The Commission also sought

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WC Docket No. 05-196, Second Report and Order and Order on Reconsideration, 24 FCC Rcd 791, 808-10, ¶¶ 36-38 (2008) (*Second TRS Numbering Order*) (requiring registration and verification of VRS and IP Relay users).

<sup>195</sup> See *VRS Structural Reform Order*, 28 FCC Rcd at 8654-55, ¶¶ 80-83; *Second TRS Numbering Order*, 24 FCC Rcd at 808-10, ¶¶ 36-38.

<sup>196</sup> See *VRS Structural Reform Order*, 28 FCC Rcd at 8654-55, ¶¶ 80-83.

<sup>197</sup> See HLAA Comments at 11; Sprint Comments at 7-8. *But see* Consumer Groups Comments at 9 (supporting self-certification under penalty of perjury).

<sup>198</sup> See, e.g., *Lifeline & Link Up Reform and Modernization*, WC Docket No. 11-42, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656, 6709-11, ¶¶ 111-14, 6712, ¶ 120 (2012) (*Lifeline/Link Up Reform Order*) (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).

<sup>199</sup> See HLAA Comments at 12. Where the IP CTS user is not competent to sign a legal document, such prohibition would not apply to a spouse. In addition, a family member or other individual who is a legal custodian or has power of attorney allowing the person to sign legal documents for the IP CTS user may sign the certification.

<sup>200</sup> Nevertheless, we understand that family members may need to assist IP CTS users in understanding the meaning of the self-certification form.

<sup>201</sup> This is consistent with other recordkeeping requirements applicable to iTRS providers. See, e.g., 47 C.F.R. §§ 64.604(c)(5)(D)(7) (requiring that call data supporting claims for payment from the TRS Fund be maintained for a minimum of five years), 64.631(a)(2) (requiring that records of verification of a consumer's authorization for a change of default provider be maintained for a minimum of five years).

<sup>202</sup> *IP CTS Interim Order*, 28 FCC Rcd at 730, ¶ 49.

comment on whether to require, as part of the registration and certification process for existing users that had accepted IP CTS equipment for no charge or less than \$75 from any source other than a governmental program, that the provider obtain from the consumer a certification from an independent, third party professional attesting that (1) the consumer has a hearing loss that necessitates captioned telephone, and (2) the third party professional understands that IP CTS captioning is performed by a live CA and is funded through a federal program.<sup>203</sup>

67. Commenters are divided in their support for a registration requirement for existing users.<sup>204</sup> Hamilton, for example, states that it “does not object to extending these requirements to existing users, provided that existing users may self-certify. . . .”<sup>205</sup> and that “to the extent that the new registration and certification requirements that currently apply only to new users are extended to existing users, such requirements use the same criteria that are applied to new users . . . .”<sup>206</sup> Sprint “agrees that IP CTS providers be required ‘to obtain registration and certification from their existing users.’”<sup>207</sup> However, Sorenson urges the Commission to impose certification requirements only prospectively because, it contends, extending the self-certification requirement to existing users would be an enormous burden on providers and consumers.<sup>208</sup> To the extent that the Commission moves forward with a certification requirement for existing users, Sorenson urges the Commission to compensate providers for all minutes up to the deadline for providing existing users’ registrations, and permit providers to stop service for those who have not provided certification.<sup>209</sup> Similarly, HLAA urges that “unless the Commission finds overwhelming evidence that a vast number of consumers have actively engaged in fraud, the burden would far outweigh any benefit of turning away the few who may have unintentionally signed up for a program that they do not need.”<sup>210</sup> Consumer Groups similarly oppose extending the self-certification requirement to existing users because doing so would “unfairly burden consumers who have come to rely on IP CTS.”<sup>211</sup>

68. In addition, commenters have differing views on the amount of time needed to register existing users. Sprint “believes that a 90-day window should be enough time to obtain registration and certification, with the caveat that providers should be able to obtain a limited extension of the deadline if they can demonstrate that such extension is in the public interest.”<sup>212</sup> Hamilton and Sorenson request that providers be afforded up to 180 days after any effective date to effectuate registration of existing users.<sup>213</sup> While, as noted above, Consumer Groups generally oppose requiring existing users to register, if the Commission moves ahead with this mandate, they propose a phase-in of such registration, by which providers would be required to register 50 percent of customers within 90 days; 75 percent within 180

<sup>203</sup> *Id.* at 727, ¶ 42.

<sup>204</sup> *See, e.g.*, Miracom Comments at 10; USTelecom Comments at 4 (supports registration/certification for new and existing users); Hamilton Comments at 1, 5 (supports at least self-certification, and perhaps more, for existing users).

<sup>205</sup> Hamilton Comments at 5.

<sup>206</sup> *Id.* at 1.

<sup>207</sup> Sprint Comments at 8, n.10 (*quoting IP CTS Interim Order*, 28 FCC Rcd at 730, ¶ 49).

<sup>208</sup> Sorenson Comments at 20-21.

<sup>209</sup> *Id.* at 22.

<sup>210</sup> HLAA Comments at 10. *See also* CCAC Comments at 1; ALOHA Comments at 5.

<sup>211</sup> Consumer Groups Comments at 12.

<sup>212</sup> Sprint Comments at 8, n.10. *See also* Miracom Comments at 10 (supporting requirement that all existing users register within 90 days).

<sup>213</sup> Hamilton Comments at 6; Sorenson Comments at 21 (“providers should be given at least six months”).

days, and 100 percent within 270 days. To ensure that people who are elderly or who have mobility disabilities have enough time to discuss the registration and certification with their family members or professionals, Consumer Groups also propose allowing consumers a 60 day grace period to complete their certification in the event that they receive a service termination notice.<sup>214</sup> Finally, Consumer Groups urge that individuals whose service is disconnected be permitted to re-certify at a later time.<sup>215</sup>

69. *Discussion.* The Commission adopts a rule requiring each IP CTS provider to register and obtain certification from all of its existing IP CTS users.<sup>216</sup> We believe that taking such action will help to ensure that IP CTS is as immune as possible from waste, fraud and abuse that could otherwise threaten the long-term viability of this program. As the Commission has previously noted, provider practices that result in waste, fraud, and abuse threaten the sustainability of the TRS Fund, and unlawfully shift improper costs to consumers of other communications services, including local and long distance voice telephone subscribers and interconnected VoIP subscribers.<sup>217</sup> While much of our concern has been focused on the unprecedented growth in IP CTS demand in recent years, we are committed to ensuring that all IP CTS users, including those who began using this service prior to the period of substantial growth, are eligible to use these services and that these individuals fully understand the nature of this federal program. Without a self-certification requirement, there are no guarantees that these existing IP CTS users ever acquired information about the way that IP CTS works – for example, that a third person is on every call to re-voice the conversation and that every minute of usage is compensated through a federal program.

70. Although the Commission proposed in the *IP CTS Interim Order* that all existing IP CTS users must be registered within a 90-day period,<sup>218</sup> in response to comments received, we now adopt a rule requiring providers to register and obtain certification from their existing users within 180 days of the rule's effective date.<sup>219</sup> We believe that adopting a 180-day deadline will strike the appropriate balance between removing ineligible individuals from this service and allowing eligible individuals to continue using it. We understand that the majority of individuals who have grown accustomed to using IP CTS are senior citizens who may require the assistance of friends and relatives to understand the new self-certification and submit it to their provider. The longer registration period of 180 days will allow providers the time necessary to complete the registration process and prevent the loss of eligible users because of an inability to register on time.<sup>220</sup> Additionally, this requirement is consistent with the Commission's reform of the Lifeline program, in which the Commission required carriers to recertify the

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<sup>214</sup> Consumer Groups Comments at 12. *But see* Sorenson Comments at 22 (opposing Consumer Group's phase-in proposal as too complex and burdensome).

<sup>215</sup> Consumer Groups Comments at 12.

<sup>216</sup> By "existing IP CTS users," we mean all users who are enrolled in a provider's IP CTS as of the effective date of the amended registration and certification rule (Appendix B, § 64.604(c)(9)) and who have not previously undergone registration and certification by that provider in compliance with the interim registration and certification rule (*see IP CTS Interim Order*, 28 FCC Rcd at 743-44, Appendix D, § 64.604(c)(9)).

<sup>217</sup> *VRS Structural Reform Order*, 28 FCC Rcd at 8648, ¶ 64.

<sup>218</sup> *IP CTS Interim Order*, 28 FCC Rcd at 730, ¶ 49.

<sup>219</sup> Hamilton Comments at 6; Sorenson Comments at 20-21 (opposing registration of existing users, but asking for a six month period if registration of existing users is required); Consumer Groups Comments at 12 (opposing registration of existing users, but supporting a 180-day period if registration of existing users is required).

<sup>220</sup> *See, e.g., id.* at 12 (urging longer periods for registration "[t]o ensure that elderly customers and people with [mobility] disabilities have sufficient time . . .").

eligibility of all existing Lifeline subscribers within seven months after the effective date of the certification requirement.<sup>221</sup>

71. IP CTS providers that fail to register existing users within this period will not be compensated for service to any unregistered users, or to any users who fail to provide the required self-certification, immediately upon expiration of this period. Given the length of time that we are allowing for registration of existing users, we do not see a need to provide consumers with an additional 60-day grace period as proposed by the Consumer Groups,<sup>222</sup> because providers will have ample time to send multiple notices and reminder notices to consumers informing them of the registration and certification requirements and deadline. In the event there are existing users who do not meet this deadline, providers will not receive compensation for service to these users and may discontinue service to such users. However, the users may register at a later date,<sup>223</sup> at which time their provider will once again be compensated for service to these users, effective on the date of their completion of registration and certification.

72. We also adopt as part of the registration requirements for existing users who received equipment for free or at a price below \$75, directly or indirectly from an IP CTS provider (or from any other source other than an equipment distribution program administered by a state or local government), prior to the effective date of the interim rules, a mandate for providers to obtain from each user either a payment of \$75 (this option is available if the equipment was obtained directly from the IP CTS provider) or a certification from an independent, third party professional that (1) the consumer has a hearing loss that necessitates use of captioned telephone service, and (2) the third party professional understands that the captions on captioned telephone service are provided by a live communications assistant and is funded through a federal program. In addition, we require that the providers require their users to obtain from the third party professional the professional's name, title, address, telephone number, and e-mail address. We adopt this rule because we are concerned that prior to the effective date of the interim rules, consumers who may not have had a hearing loss necessitating the use of IP CTS may have been induced to sign up for service by the enticement of equipment provided for free or at a price substantially below the actual cost of the equipment.<sup>224</sup> We acknowledge that we found the third party certification process under the interim rules less effective than expected,<sup>225</sup> and that, accordingly, we do not retain this approach for new users. However, existing users of IP CTS that received equipment for less than \$75 prior to the effective date of the interim rule did so at a time when the rules permitted providers to do so and still receive compensation from the Fund. Thus, as an equitable matter, we find those users more similarly situated to users registered under the framework of the interim rules.<sup>226</sup> Accordingly, we will allow an IP CTS provider to continue to collect compensation from the Fund for those existing users who received the equipment for free or for less than \$75 directly from the IP CTS provider and subsequently pay \$75 to the

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<sup>221</sup> *IP CTS Interim Order*, 28 FCC Rcd at 730, ¶ 49, n.130 (citing *Lifeline/Link-Up Order*, 27 FCC Rcd at 6717, ¶ 130). The number of IP CTS users is smaller than the number of Lifeline subscribers, and so a slightly shorter timeline is appropriate for registration of IP CTS users.

<sup>222</sup> See Consumer Groups Comments at 12.

<sup>223</sup> See *id.* at 12.

<sup>224</sup> See *IP CTS Interim Order*, 28 FCC Rcd at 716-18, ¶¶ 19-22.

<sup>225</sup> See section III.B.1, *supra*.

<sup>226</sup> Further, where existing users did not obtain their equipment directly from the IP CTS provider, a retroactive payment of \$75 would be cumbersome to implement. In addition, in cases where the equipment was originally obtained, *e.g.*, from a spouse or other close relative of the consumer, payment of \$75 to the spouse or other relative would not necessarily be effective in signaling the consumer's willingness to make a significant investment in the equipment.

IP CTS provider.<sup>227</sup> In addition, for those existing users who did not receive their equipment directly from the provider or who do not wish to pay \$75 for the equipment, we believe an alternative method of establishing eligibility is appropriate, consistent with the protections we adopt for IP CTS more generally. To that end, we find that requiring such users to obtain certification from an independent third party professional is likely to provide at least some incremental benefit—even if not ideal—to help ensure that only those individuals needing this service to receive functionally equivalent telephone service are able to use it. As the Commission found in the *IP CTS Interim Order*, we continue to set the threshold for this purpose at \$75 because we believe, and the record reflects, that a consumer who pays \$75 or more for IP CTS equipment is not likely to do so if the consumer does not need IP CTS to understand telephone conversations.<sup>228</sup>

73. To achieve compliance with this mandate, we emphasize that the third-party professional must be qualified to evaluate an individual’s hearing loss in accordance with applicable professional standards.<sup>229</sup> Such professionals may include physicians, audiologists and other hearing related professionals,<sup>230</sup> and may not include a professional with a specialty that would not ordinarily be capable of evaluating hearing loss.<sup>231</sup> Additionally, we believe that a professional’s certification of a consumer could be directly or indirectly influenced by IP CTS providers through compensation, opportunities for meeting potential clients, or otherwise, if IP CTS providers are permitted to refer certifying professionals to consumers, arrange seminars or meetings where professionals are available to provide certifications for consumers, or otherwise facilitate such certification or enter business relationships with certifying professionals. Specifically, we believe that the relationships established by such activities may result in professionals being more likely to provide certification that a consumer needs IP CTS for effective communication, even in situations where another technology, such as an enhanced amplification telephone, may serve the consumer better than IP CTS. Therefore, the rule we adopt provides that the third party professional making such certification may not have been referred to the IP CTS user, either directly or indirectly, by any provider of TRS or any officer, director, partner, employee, agent, subcontractor, or sponsoring organization or entity (collectively “affiliate”) of any TRS provider. Nor may the third party professional making such certification have any business, family or social relationship with the TRS provider or any affiliate of the TRS provider from which the consumer is receiving service. Moreover, we prohibit any provider from facilitating or otherwise playing a role, in any way, in the acquisition of such third party professional certifications through seminars, conferences, meetings or other gatherings in community centers, nursing homes, apartment buildings, or any other location. Prohibited arrangements include any program or activity in which a provider, its affiliates, or its affiliates of

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<sup>227</sup> Consistent with our rules, such payment shall be documented by the IP CTS provider, and the IP CTS provider shall retain records of such payment for at least five years after the consumer stops using the IP CTS provider’s service.

<sup>228</sup> See section 35, *supra*. See also *IP CTS Interim Order*, 28 FCC Rcd at 717-18, ¶ 22; NASRA Comments at 2; TEDPA Comments at 2; Hamilton Comments at 5; HLAA comments at 7 (\$75 would be acceptable if the FCC sets a *de minimis* amount, but market research is needed).

<sup>229</sup> 47 C.F.R. § 64.604(c)(9)(v)(A); *IP CTS Interim Order*, 28 FCC Rcd at 718-19, ¶ 24.

<sup>230</sup> To ensure that third party professionals who are generally not qualified to evaluate hearing loss do not provide these required certifications in violation of the Commission’s rules, we are narrowing the list of professionals from those listed in the *IP CTS Interim Order*. See *IP CTS Interim Order*, 28 FCC Rcd at 718-19, ¶ 24.

<sup>231</sup> For example, since professionals who specialize in ophthalmology, dermatology, urology, radiology, podiatry, or pharmacy generally would not be expected to have the familiarity needed to attest to the individual’s hearing loss or need for IP CTS, a certification from a professional practicing in one of these specialties is likely to be in violation of the requirement that the third party professional must be qualified to evaluate an individual’s hearing loss in accordance with applicable professional standards. 47 C.F.R. § 64.604(c)(9)(v)(A); *IP CTS Interim Order*, 28 FCC Rcd at 718-19, ¶ 24.

affiliates play a role in arranging, scheduling, sponsoring, hosting, conducting or promoting for the purpose of acquiring such certifications. To ensure the reliability of the third party certification, we will further require that it be made under penalty of perjury. To ensure that information supporting the eligibility of users continues to be maintained and available for Commission review, we require that records of user registration and self-certification, with all the information required to be included in such certifications, be maintained for a minimum of five years after the consumer ceases to obtain service from the provider.<sup>232</sup>

#### 4. Confidentiality of Registration and Certification

74. In the NPRM, the Commission asked whether it should make permanent its interim rule requiring each IP CTS provider to maintain the confidentiality of 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.<sup>233</sup> All providers and consumer stakeholders commenting on this issue agree on the need for a permanent rule requiring confidentiality and nondisclosure.<sup>234</sup>

75. The Commission acknowledges that data obtained for the purposes of IP CTS registration may include sensitive personal information.<sup>235</sup> In light of the general consensus that such information is private, the Commission makes permanent its interim rule requiring each IP CTS provider to maintain the confidentiality of registration and certification information that it acquires, and to not disclose such registration and certification information except as required by law. We note that in the event that the Commission adopts a rule requiring registration to take place in a centralized registry, as proposed in the Notice accompanying this Report and Order,<sup>236</sup> these confidentiality protections will likely be supplemented with strict security safeguards protecting against the unauthorized disclosure of information housed in that database.<sup>237</sup> For TRS (including IP CTS) to be functionally equivalent to voice telephone services, consumers with disabilities who use TRS are entitled to have the same assurances of privacy as do consumers without disabilities for voice telephone services.<sup>238</sup>

#### 5. Provider Compliance with Eligibility Requirements

76. In the *IP CTS Interim Order*, the Commission sought comment on a proposed requirement that 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 the proposed requirement, submit to the Commission a description of how they will ensure that they do

<sup>232</sup> This is consistent with other recordkeeping requirements applicable to iTRS providers. *See, e.g.*, 47 C.F.R. §§ 64.604(c)(5)(D)(7) (requiring that call data supporting claims for payment from the TRS Fund be maintained for a minimum of five years), 64.631(a)(2) (requiring that records of verification of a consumer's authorization for a change of default provider be maintained for a minimum of five years).

<sup>233</sup> *IP CTS Interim Order*, 28 FCC Rcd at 730, ¶ 48.

<sup>234</sup> *See e.g.* TDI Group Comments at 8, n.16; Sprint Comments at 8, n.9; Purple Comments at 2, 9-10 ("IP CTS providers should be required to maintain the confidentiality of user information and the FCC should apply CPNI-like requirements.").

<sup>235</sup> *Cf. VRS Structural Reform Order*, 28 FCC Rcd at 8652, ¶ 75.

<sup>236</sup> *See* section IV.B, *infra*. The Commission mandated use of a centralized database for VRS registration and verification in the *VRS Structural Reform Order*. *VRS Structural Reform Order*, 28 FCC Rcd at 8647-56, ¶¶ 62-86.

<sup>237</sup> *See VRS Structural Reform Order*, 28 FCC Rcd at 8652-53, ¶¶ 75-76 (noting the need for sufficient safeguards to maintain the personal nature of the information in the database and restricting access to the database to authorized entities and only for authorized purposes).

<sup>238</sup> *See id.* at 8683-84, ¶ 164 (applying the Customer Proprietary Network Information protections to TRS users).

not request or collect payment from the TRS Fund for service to consumers who do not satisfy the registration and certification requirements contained in the rules proposed therein, and an explanation of how those measures provide such assurance.<sup>239</sup> The Commission also sought comment on a proposal that 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 who satisfy the registration and certification requirements will be denied IP CTS certification.<sup>240</sup> We did not receive any comments specifically opposed to this proposal.

77. We adopt the Commission's proposed rule that applicants seeking certification as IP CTS providers, including any applicants with pending applications, must 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 consumers who do not satisfy the registration and certification requirements, and an explanation of how those measures provide such assurance. Further, pursuant to section 64.606(b)(2)(ii),<sup>241</sup> we will deny certification to any applicant for certification to provide IP CTS that does not establish as part of its compliance plan that it has adequate measures and procedures in place to ensure that it will seek payment for serving only eligible users who satisfy the registration and certification requirements. Although we appreciate the Consumer Groups' interest in IP CTS competition and concern that any new rules not delay action on certification applications, we believe that to prevent waste, fraud and abuse of the TRS Fund, it is critical that applicants seeking certification to be IP CTS providers demonstrate to the Commission that they will provide service only to consumers who have established their eligibility through compliance with the registration and certification processes established by the Commission. Noncompliant provider practices not only allow some providers to obtain a competitive advantage over providers that operate in compliance with the Act and our rules, but, by resulting in payments from the TRS Fund for unauthorized service, threaten to undermine the key goal of section 225 to ensure the provision of TRS to eligible users.<sup>242</sup>

## 6. Eligibility Thresholds

78. *Background.* In the NPRM, the Commission sought comment on whether to adopt a specific quantitative threshold to determine eligibility to use IP CTS.<sup>243</sup> The Commission explained that 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) that are necessary for the individual to detect sound: mild (26-40 dB HL); moderate (41-54 dB HL); moderately severe (55-70 dB HL); severe (71-90 dB HL); profound (91+ dB HL); and totally deaf (no hearing at all).<sup>244</sup> The Commission asked which of these thresholds, if any, are appropriate,<sup>245</sup> and for commenters who oppose quantitative requirements to propose alternative eligibility requirements and to weigh the potential benefits of establishing quantitative

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<sup>239</sup> *IP CTS Interim Order*, 28 FCC Rcd at 730, ¶ 50.

<sup>240</sup> *Id.* at 730, ¶ 50.

<sup>241</sup> 47 C.F.R. § 64.606(b)(2)(ii).

<sup>242</sup> *See VRS Structural Reform Order*, 28 FCC Rcd at 8648, ¶ 64.

<sup>243</sup> *IP CTS Interim Order* 28 FCC Rcd at 728-30, ¶¶ 44-48.

<sup>244</sup> *Id.* at 728, ¶ 44, *citing, 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](http://www.nap.edu/openbook.php?record_id=11099&page=59) (last visited, Jan. 17, 2013); Hear-it.org, "Definition of Hearing Loss," found at <http://www.hear-it.org/Defining-hearing-loss> (last visited, Jan. 17, 2013).

<sup>245</sup> The Commission explained that it was aware of only three states that had established mandatory or recommended criteria requiring that an individual's hearing loss be severe to profound in order to receive a CTS device. *IP CTS Interim Order*, 28 FCC Rcd at 728, ¶ 45 (describing requirements established by programs in North Dakota, Washington, and Wisconsin).

and other threshold eligibility criteria against the potential costs.<sup>246</sup> Finally, the Commission asked whether states that have their own eligibility threshold requirements should be allowed to use such criteria for IP CTS calls made by their residents to the extent that these requirements exceed federal standards, and so long as such state requirements do not conflict with federal law.<sup>247</sup>

79. The majority of commenters, including providers, consumers, and telecommunications carriers contributing to the Fund, express opposition to quantitative threshold eligibility requirements based on decibel levels to determine IP CTS eligibility.<sup>248</sup> The RERC-TA offers a comprehensive explanation for why it believes this approach would be inappropriate:

Predicting the need for [IP CTS] with a single value derived from an audiogram belies the complex nature of speech understanding for individuals with hearing loss. . . . While the audibility of speech is a significant factor in explaining the deficits individuals with hearing loss experience in understanding speech, other factors, such as auditory distortions and susceptibility to background noise, can be responsible for further reductions in speech understanding capabilities. . . . [S]imply providing additional sound level through amplification . . . does not fully ameliorate the speech understanding difficulties[,] especially in noisy situations.<sup>249</sup>

The RERC-TA adds that the range and types of listening demands that individuals may confront in different situations, as well as age, can also affect speech understanding. For example, they report that the ability to understand speech has been found to decline in difficult listening situations as one's age increases.<sup>250</sup>

80. Similarly, both the Consumer Groups and HLAA maintain that any specified dB level of hearing loss criteria would be arbitrary and consequently exclude from the program many persons with a legitimate need for IP CTS.<sup>251</sup> Citing earlier comments filed with the Commission, the Consumer Groups

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<sup>246</sup> *IP CTS Interim Order*, 28 FCC Rcd at 729, ¶ 47.

<sup>247</sup> *Id.* at 729-30, ¶ 47.

<sup>248</sup> See, e.g., Consumer Groups Comments at 10-12; RERC-TA Comments at 10-13; Hamilton Comments at 6; CTIA Comments at 6; ALOHA Comments at 5; TEDPA Comments at 2; NASRA Comments at 2. *But see*, Miracom Comments at 9 (supporting professional certification for all users and suggesting a hearing loss eligibility requirement of at least 40 dB in the good ear). See also Consumer Groups, *Ex Parte* Letter, CG Docket No. 03-123 (filed Dec. 27, 2012); Consumer Groups, *Ex Parte* Letter, CG Docket No. 03-123 (filed Jan. 7, 2013) (Consumer Groups First January 7, 2013 *Ex Parte*); Consumer Groups, *Ex Parte* Letter, CG Docket No. 03-123 (filed Jan. 7, 2013) (Consumer Groups Second January 7, 2013 *Ex Parte*) (arguing that any dB criteria would be arbitrary and that there is no evidence that self-certification is not working or that users are engaged in fraud); TDI, *Ex Parte* Letter, CG Docket No. 03-123 (Dec. 19, 2012); HLAA, *Ex Parte* Letter, CG Docket No. 03-123 (filed Dec. 20, 2012); Ultratec, Inc., *Ex Parte* Filing entitled *IP Captioned Telephone Best Practices Policy*, CG Docket No. 03-123, at 3-5 (filed Sept. 21, 2012) (*Ultratec Best Practices*); Hamilton, Comments of Hamilton Relay, Inc. in Support of IP CTS "Best Practices" Policy at 2 (Nov. 1, 2012); Sprint, *Ex Parte* Letter, CG Docket No. 03-123 (Dec. 21, 2012). Miracom was the only commenter who filed in support of a threshold eligibility requirement. Miracom Comments at 9.

<sup>249</sup> RERC-TA Comments at 10. RERC-TA supports its position with a discussion of recent research on speech understanding. RERC-TA Comments at 11-13. See also Linda Kozma-Spytek and Dr. Christian Vogler, *Ex Parte* Letter, CG Docket No. 03-123 (Dec. 20, 2012) (explaining 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*).

<sup>250</sup> RERC-TA Comments at 11.

<sup>251</sup> Consumer Groups Comments at 10; HLAA Comments at 13 (noting that it "firmly, adamantly and vehemently oppose[s] any move to set a decibel level threshold requirement to be eligible to use IP CTS"). Among other things, HLAA expresses concern that "setting a dB level certification would set a terrible precedent for people with (continued....)

explain that “[a]udiograms are notoriously poor predictors of speech recognition performance by people with hearing loss,”<sup>252</sup> and that “in addition to the dB level of hearing loss, audibility is affected by the shape of the hearing loss in terms of the frequency spectrum, device noise and distortion, and other variables that medical tests are unable to capture.”<sup>253</sup> Finally, Consumer Groups oppose allowing the states to impose any requirements that exceed those adopted by the Commission because IP CTS is a service provided nationwide, and “eligibility should not depend on one’s state of residence.”<sup>254</sup>

81. TRS providers also generally oppose determining IP CTS eligibility based on a specified dB hearing loss threshold.<sup>255</sup> For example, Sorenson claims that numerical thresholds are not effective in determining need,<sup>256</sup> points to the burdens associated with getting an audiology examination,<sup>257</sup> and suggests that nearly all Sorenson customers have either a hearing aid or cochlear implant, indicating their need for assistive devices that generally are not prescribed for individuals who have a mild hearing loss.<sup>258</sup> Likewise, Hamilton rejects a minimum decibel hearing loss because, it claims, hearing comprehension plays an “equally important part of the analysis” and a dB threshold, because it is arbitrary, would exclude legitimate consumers of the service.<sup>259</sup> CTIA concurs that, in addition to requiring persons with hearing disabilities to undergo testing, testing an individual’s ability to discriminate speech is not flawless and a quantitative standard would impede the ability of individuals who truly require IP CTS from obtaining this service.<sup>260</sup>

82. *Discussion.* Based on the information provided by commenters to this proceeding, we are persuaded that we should not adopt eligibility criteria for IP CTS based on a specified decibel (dB) level of hearing loss at this time. As discussed above, with the exception of Miracom,<sup>261</sup> all commenters (Continued from previous page) \_\_\_\_\_ disabilities who have access to services and products that are protected by the Americans with Disabilities Act [ADA].” *Id.* See also HCAA Reply Comments at 2.

<sup>252</sup> Consumer Groups Comments at 10, *citing* Spyttek/Vogler *Ex Parte*.

<sup>253</sup> Consumer Groups Comments at 10 (citations omitted). Consumer Groups add that quantitative criteria could also exclude people with hearing loss that varies over time, such as those with Meniere’s disease, as well as persons who have central auditory processing disorders, or who only are able to hear well in quiet settings. For all of these reasons, the Consumer Groups specifically reject Dr. McBride’s proposal, presented in the NPRM, for IP CTS eligibility to be determined using a threshold of 40 dB hearing loss in the better ear. Consumer Groups Comments at 11, *citing* Ingrid K. McBride, Ph.D., Director of Audiology for the Department of Speech and Hearing Science of Arizona State University, *Ex Parte* Declaration, CG Docket No. 03-123 (filed Jan. 9, 2013) (McBride Declaration) (recommending the threshold standard for defining a moderate hearing loss of 40 dB HL in the better ear, supplemented with the alternative of the reasonable opinion of a hearing professional that the individual is not capable of using the telephone in a manner that is functionally equivalent to telephone users without hearing loss).

<sup>254</sup> Consumer Groups Comments at 11. Consumer Groups further urge the Commission to “preempt states from imposing any quantitative dB hearing loss threshold requirements or other state-specific requirements” on IP CTS users. *Id.*

<sup>255</sup> See, e.g., Hamilton Comments at 6; CTIA Comments at 6; Sorenson Comments at 24-27.

<sup>256</sup> Sorenson Comments at 25 (noting that there are “too many factors unrelated to a person’s ‘decibels of gain’ score that impact his or her ability to use the telephone without captioning.”).

<sup>257</sup> *Id.* at 27 (claiming that requiring elderly, hard of hearing consumers to travel to an audiologist would present a “significant and unreasonable burden”).

<sup>258</sup> *Id.* at 26. Nonetheless, if the Commission chooses to adopt a dB hearing loss threshold, Sorenson supports a 40dB threshold requirement. *Id.* at 27.

<sup>259</sup> Hamilton Comments at 6. Hamilton adds that hearing comprehension cannot be easily measured using objective criteria and is best left to audiologists and other professionals.

<sup>260</sup> CTIA Comments at 6.

<sup>261</sup> See Miracom Comments at 9 (supports a 40 dB hearing loss eligibility threshold).

oppose the use of a specified decibel level of hearing loss on the grounds that it does not take into account all other factors that may contribute to an individual's difficulty in understanding speech on a telephone. Thus, at this time, and on this record, we are not persuaded that we can readily identify bright-line eligibility thresholds for which the benefits in protecting the Fund outweigh the costs, including the potential for excluding consumers for whom use of IP CTS otherwise would be consistent with section 225 of the Act and Commission policy. Nevertheless, the Commission will continue to monitor IP CTS provider practices and usage. If the reforms we adopt today and any additional reforms that we adopt in response to the Notice are not effective in preventing ineligible users from using IP CTS, the Commission may revisit this issue at a future time.

#### **D. Notification Label**

83. For the reasons discussed below, we adopt a notification labeling requirement for IP CTS equipment informing both new and existing users that IP CTS may be used only by registered IP CTS users. We will not require, at this time, that a similar notice appear on the IP CTS device's screen.

84. *Background.* To further prevent casual or inadvertent use of IP CTS, the Commission sought comment on whether it 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.<sup>262</sup> The Commission also sought comment on whether it should require, for equipment that is already in the hands of consumers, that IP CTS providers send such labels to their registered users of this service, with specific instructions directing consumers to affix such labels on the front of their IP CTS equipment in a conspicuous location.<sup>263</sup> In addition, the Commission asked whether it 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 consumer pushes the "captions on" button (or takes some other similar action to initiate captioning) and before captioning commences.<sup>264</sup> The Commission asked commenters to weigh the costs of these labeling and display requirements against the benefits of such requirements.<sup>265</sup>

85. While commenters generally support a notice requirement to alert consumers on the need for only eligible user(s) to use an IP CTS device,<sup>266</sup> they differ as to the form that this notice should take, and the manner in which the notice can be most effective and least intrusive. Several providers seek flexibility on how the notice is provided – that is, either via a printed label that adheres to the exterior of the IP CTS device or an electronic message that appears on the device's screen,<sup>267</sup> as well as on the sizing of a label so that it has a font that is large enough for people to read, but small enough to fit on the

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<sup>262</sup> *IP CTS Interim Order*, 28 FCC Rcd at 731, ¶ 55, 747, Appendix E (containing proposed rule).

<sup>263</sup> *IP CTS Interim Order*, 28 FCC Rcd at 731, ¶ 55.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> See e.g., Purple Comments at 9 (no objection to label on the device as long as provider is not held liable for ensuring that label remain on after delivery to user); CTIA Comments at 8 (support label requirement); Miracom Comments at 12-13 (support the label, but not the notice on the caption screen); TEDPA Comments at 3; NASRA Comments at 3.

<sup>267</sup> See, e.g., Ultratec Reply Comments at 14 (if labels are required, requests "flexibility either to print such labels for new and existing users to affix to their CPE or to display a notice on-screen"); Purple Comments at 9; Sprint Comments at 9-10 (supports some form of notice, but IP CTS providers should have flexibility to print labels or have the notice on the caption screen); Sorenson Comments at 30 (if required, label options could include stickers, permanent labeling, or a notice on the screen). Sorenson also suggests that providing notice on the screen can be achieved at a modest cost through a software update, which can be changed with further software updates, as needed. Sorenson Comments at 30.

device.<sup>268</sup> Other commenters express concern about requiring notices to appear on the caption display screen because these can annoy consumers, cause confusion, and result in negative consumer response.<sup>269</sup> For example, Purple maintains that an on-screen notice is burdensome and could cause confusion.<sup>270</sup> If a notice on the screen is required, Sorenson seeks flexibility to develop a message that is effective within the limited screen size.<sup>271</sup>

86. Consumer Groups believe that an added notification in the form of a label on IP CTS devices is not necessary because adoption of the interim rules on a permanent basis will reduce the use of IP CTS by individuals who do not need the service.<sup>272</sup> However, if any notice is required, Consumer Groups recommend that the notice appear on the screen at the beginning of a call.<sup>273</sup> HLAA does not object to using a label or a notice on the screen as one part of a larger educational effort to alert existing and new users about the proper use of the phone, but expresses doubt about whether a notice or label alone would be effective.<sup>274</sup>

87. *Discussion.* After a careful review of the comments, we conclude that a printed label to be adhered to the IP CTS device itself will be the best approach for supplementing other information made available to IP CTS users on the need to limit use of the device only to users who have registered for IP CTS. We are persuaded by commenters that a notice appearing on the device's screen before each call might be an intrusive annoyance, delay calls, and cause confusion as to whether the notice is part of the captioned message, especially on incoming calls.<sup>275</sup> By contrast, for software-based IP CTS on mobile phones, laptops, tablets, computers or other similar devices, we conclude that a printed label is impractical. Instead, we require IP CTS providers to ensure that, each time the consumer logs into the application, the notification language shown above appears in a conspicuous location on the device screen immediately after log-in.

88. Additionally, although the *IP CTS Interim Order* proposed a notification that “FCC regulations permit the use of captions only by people with hearing loss who require captions to communicate effectively using the telephone,”<sup>276</sup> we now conclude that a shorter notice would be preferable. Specifically, we conclude that a notice simply prohibiting persons other than registered users with hearing loss from using the phone with captions on will best effect the purposes of the label. Pursuant to our rules, “registered users” will have gone through the certification process. Such shorter notice is also more likely to fit on the device in a conspicuous location. Implicit in this requirement, as well as implicit in the requirement that IP CTS providers, in order to be eligible to receive compensation from the Fund for providing IP CTS, must first register the user,<sup>277</sup> is the underlying requirement that only

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<sup>268</sup> Ultratec Reply Comments at 14. *See also* Sorenson Comments at 30 (urging flexibility with respect to the wording to ensure that the message fits within the space available on the equipment or on the screen).

<sup>269</sup> Ultratec Reply Comments at 14-15.

<sup>270</sup> Purple Comments at 9.

<sup>271</sup> Sorenson Comments at 31.

<sup>272</sup> Consumer Groups Comments at 13. *See also* Sorenson Comments at 31 (a label or notification is not needed if the “default off” interim rule is retained).

<sup>273</sup> Consumer Groups Comments at 13.

<sup>274</sup> HLAA Comments at 15-16. *See also* Ultratec Reply Comments at 13-14 (a label will not discourage misuse and that continued consumer education efforts would be more effective).

<sup>275</sup> *See, e.g.*, Purple Comments at 9; Ultratec Comments at 14, 15.

<sup>276</sup> *See IP CTS Interim Order*, 28 FCC Rcd at 747, Appendix E.

<sup>277</sup> *See* section III.C, *supra*. *See also* Appendix B, § 64.604(c)(9).

registered users may use IP CTS phones with the captions turned on. We codify this requirement to make it explicit in section 64.604(c)(11) of our rules.<sup>278</sup>

89. Accordingly, we require that each IP CTS provider ensure that its IP CTS equipment has affixed to its face and in a conspicuous location, a label that contains the following brief statement in a clearly legible font:

FEDERAL LAW PROHIBITS ANYONE BUT REGISTERED USERS WITH  
HEARING LOSS FROM USING THIS DEVICE WITH THE CAPTIONS ON.<sup>279</sup>

Each IP CTS provider shall maintain, with each consumer's registration records, records stating whether the required label was affixed to such equipment prior to its provision to the consumer. Such records shall be maintained for a minimum period of five years after the consumer ceases to obtain service from the provider.

90. We also require any IP CTS provider that already has distributed IP CTS equipment to consumers as of the effective date of the final rule, to distribute the above equipment labels to such consumers, along with clear and specific instructions directing the consumer to place such labels on the face of their IP CTS equipment in a conspicuous location.<sup>280</sup> We direct that such labels and instructions be provided to consumers within thirty (30) days after the effective date of the final rule. To ensure that information supporting provider compliance with this requirement continues to be maintained and available for Commission review, we require that records of the provision to consumers of required labels, as well as instructions for existing equipment, be maintained for a minimum of five years after the consumer ceases to obtain service from the provider.<sup>281</sup>

#### **E. Default Captions Off**

91. *Background.* In the *IP CTS Interim Order*, the Commission expressed concern that having IP CTS devices default to "captions on" would lead to casual or inadvertent use of IP CTS by individuals either living with, or visiting a household or office of, an eligible IP CTS user.<sup>282</sup> Because most IP CTS equipment at the time was programmed to a setting that defaulted captions to "on," these devices automatically displayed captions, unless the person making the call took an affirmative step to turn the captions off.<sup>283</sup> That IP CTS is provided without interruption in the normal conversational flow and in a manner that is invisible to both parties to the call, the Commission explained, increased the likelihood that individuals who did not need IP CTS would casually or inadvertently use this service, resulting in improper billing of the TRS Fund.<sup>284</sup> To avoid such misuse and ensure that the Fund is used only to support calls made by people with hearing loss who need IP CTS to communicate by phone, the Commission required, 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, and that each time a

<sup>278</sup> Appendix B, § 64.604(c)(11)(iii).

<sup>279</sup> Appendix B, § 64.604(c)(11)(iii).

<sup>280</sup> Appendix B, § 64.604(c)(11)(iii). The final rule on equipment labels, 47 C.F.R. § 64.604(c)(11)(iii), 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 1995 and an effective date of the rule.

<sup>281</sup> This is consistent with other recordkeeping requirements applicable to iTRS providers. *See, e.g.*, 47 C.F.R. §§ 64.604(c)(5)(D)(7) (requiring that call data supporting claims for payment from the TRS Fund be maintained for a minimum of five years), 64.631(a)(2) (requiring that records of verification of a consumer's authorization for a change of default provider be maintained for a minimum of five years).

<sup>282</sup> *IP CTS Interim Order*, 28 FCC Rcd at 720, ¶ 27.

<sup>283</sup> The Commission noted that some equipment required a two-step process to turn the captions off. *Id.*

<sup>284</sup> *Id.* at 722, ¶ 33.

consumer initiates or answers an IP CTS call, the consumer be required to affirmatively turn on the captions.<sup>285</sup> The Commission found that any burden imposed on consumers by requiring them to take one or more additional steps, such as pushing a button, to receive captions, was outweighed by the substantial public interest in preventing the misuse of this service.<sup>286</sup> The Commission nevertheless suggested that this burden could be minimized by prominently displaying the captioning on-off button on the IP CTS device.<sup>287</sup> The Commission sought comment on whether it should make this interim rule permanent, and if so, whether it should be changed in any way.

92. Some commenters support the adoption of a default captions-off rule on a permanent basis.<sup>288</sup> Miracom, an applicant for certification to provide IP CTS service, asserts that the distribution of phones that defaulted to “captions on” was “a substantial cause of the explosion in IP CTS minutes.”<sup>289</sup> USTelecom indicates that several states have already adopted a default captions-off rule for CTS, and comments that such a rule is a “narrowly tailored and reasonable solution” for addressing misuse of IP CTS.<sup>290</sup> Both USTelecom and CTIA assert that any burden on IP CTS users would be outweighed by the significant public benefit of protecting the TRS Fund.<sup>291</sup>

93. Current TRS providers, however, generally raise concerns about the impact of the default-off rule on consumers or offer qualified support,<sup>292</sup> and consumer organizations oppose continuation of the interim rule.<sup>293</sup> The Consumer Groups argue that “the interim default captioning-off

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<sup>285</sup> *Id.* Accordingly, the interim rule disallowed giving consumers the option of changing the default setting from captions-off to captions-on.

<sup>286</sup> *Id.* at 722, ¶ 33 & n. 92.

<sup>287</sup> *Id.* (referencing the CapTel 840i How-to-Guide at 26, which explained that a red light is lit around the captions button when it is on).

<sup>288</sup> *See, e.g.*, USTelecom Comments at 5, 6; CTIA Comments at 7 (with no different rule for work or residential); Sprint Comments at 8-10 (although it sees no evidence that it will limit the use of IP CTS service, Sprint supports this, but not for wireless or web users). *See also* Miracom Comments at 11.

<sup>289</sup> Miracom Comments at 11.

<sup>290</sup> USTelecom Comments at 5.

<sup>291</sup> *Id.* at 5-6; CTIA Comments at 7.

<sup>292</sup> *See, e.g.*, Hamilton, *Ex Parte* Letter at 2 (Jan. 10, 2013); Hamilton Reply Comments at 6-7 (requirement is too much of a burden, particularly on elderly consumers); Purple Comments at 5-8 (while supporting the default-off requirement with exceptions for waivers, cites to tests it ran that shows “[a] default-off setting delays the delivery of the call to a CA by as much as two times the delay if configured with default-on”); Sorenson Comments at 28-30 (although not opposed to equipment being shipped with a default-off setting, Sorenson wants consumers to have the option to change the setting to default-on, and argues that the default-off setting does not take into account the demographic that uses the service, and that there is no evidence that a default-on setting increases ineligible use, rather it increases eligible use); Sorenson Reply Comments at 7, 8, 23, 24 (75 percent of its customers prefer a default-on setting for captions, and users miss the first part of a call while turning on the captions, which is not functionally equivalent service). *See also* ALOHA Comments at 6 (objects to the requirement, but finds that it is better than an alternative of requiring certifications by third parties).

<sup>293</sup> *See* HLAA Reply Comments at 2-3 (a default-off setting flies in the face of functional equivalency); Consumer Groups Reply Comments at 2-5 (interim rule is unduly burdensome and in possible conflict with various provisions of the Communications Act, including 47 U.S.C. §§ 225, 255, 617). Although some of these commenters offered qualified support for a captions-off default setting in their opening comments, *see, e.g.*, HLAA Comments at 14-15; Consumer Groups Comments at 12-13, they objected to any such requirement in their reply comments, after receiving input from consumers on the new default-off setting. *See also* Consumer Groups, *Ex Parte* Letter at 3, 2d Attachment (Apr. 26, 2013) (Consumer Groups April 26, 2013 *Ex Parte*); Consumer Groups, *Ex Parte* Letter at 1-2, Attachment 2 (June 20, 2013) (Consumer Groups June 20, 2013 *Ex Parte*); Consumer Groups, *Ex Parte* Letter at 1-2, Attachment (June 26, 2013) (Consumer Groups June 26, 2013 *Ex Parte*).

rule has proven highly disruptive to many IP CTS consumers[,] . . . [and] would also contravene Section 225 of the ADA because forcing IP CTS consumers to turn captions on for every call is not functionally equivalent to a hearing user's ability to pick up a telephone and place a call.<sup>294</sup> They add that “[t]he default captioning –off rule is especially problematic to IP CTS users who live alone or live in a household where everyone is hard of hearing. . . . [N]o record evidence exists that a sufficient quantity of misuse supports the default-off rule in these circumstances.”<sup>295</sup> Ultratec reports receiving hundreds of complaints from consumers about the new feature, and asserts that rather than being a “small burden,” the default-off setting appears to be a “major disruption to many users,”<sup>296</sup> including “less technologically adept individuals for whom this extra step has proven to be very challenging.”<sup>297</sup> Hamilton reports that consumers complain that they are missing “the initial portions of incoming and outgoing calls because of the delay in receiving captions once the captions on feature is selected. This can be particularly problematic, for example, when accessing an interactive voice response (‘IVR’) menu, where key information can be missed in the initial moments.”<sup>298</sup>

94. Various commenters urge further study before a final rule is adopted requiring a default-off setting for captions, arguing in part that the Commission needs more information to understand the effect that this rule has on functional equivalency.<sup>299</sup> Ultratec insists that there is no evidence that the default-on setting significantly contributed to IP CTS misuse, and that absent such evidence, the Commission should not adopt a permanent default-off requirement.<sup>300</sup> Some commenters also urge the Commission to grant exceptions to the captions default-off rule for answering machines,<sup>301</sup> 911 calls,<sup>302</sup>

<sup>294</sup> Consumer Groups August 9, 2013 *Ex Parte* at 4.

<sup>295</sup> Consumer Groups August 9, 2013 *Ex Parte* at 4. *See also* Sorenson August 5, 2013 *Ex Parte* at 3; Consumer Groups August 13, 2013 *Ex Parte* at 2-3. Sorenson also suggests that the default off rule is not justified where the IP CTS phone has a warning label and is sitting adjacent to a non-CTS phone. Sorenson August 5, 2013 *Ex Parte* at 3.

<sup>296</sup> Ultratec Reply Comments at 5.

<sup>297</sup> *Id.* at 7. Ultratec attached an appendix to its comments containing testimonies from various individuals who describe the difficulties they or their relatives have had with using IP CTS since the captions default-off rule went into effect. *See id.*, Appendix A.

<sup>298</sup> Hamilton August 15, 2013 *Ex Parte* at 2-3. *See also* Sorenson August 5, 2013 *Ex Parte* at 3-4 (captions default off results in the consumer missing the “initial, critical few seconds of a call in which the context is established”). Hamilton also suggests that if the Commission requires consumers to purchase equipment for at least \$75, “doing so may have obviated the need for any captions off requirement, because casual or inadvertent use would essentially be eliminated through the purchase of equipment.” Hamilton August 15, 2013 *Ex Parte* at 3.

<sup>299</sup> *See, e.g.*, RERC-TA Comments at 2-5; Consumer Groups Comments at 2-5, 12-13 (opposes the requirement unless the Commission shows, through usability studies, that the requirement would not unduly burden consumers). Hamilton Comments at 6-7 (“Hamilton urges the Commission to carefully analyze consumers’ needs before making this requirement permanent”).

<sup>300</sup> Ultratec Reply Comments at 8-9. According to Ultratec the average usage per CTS phone in six states that require these phones to be shipped with the captions defaulted off is no different than the use of this service in states that permit phones to have the captions defaulted on. Ultratec Reply Comments at 9, n.17. However, Ultratec acknowledges that all six states with the default off requirement allow users to adjust the default setting to “default on” to avoid the inconvenience of switching the caption setting every time they use their phone. To the extent that users take advantage of this permanent override feature, they have changed the phone to a default on setting, enabling captions to automatically appear every time the phone is used by anyone in their households. In this case, there is no real difference between the way the phones function in each of these states and so the data fails to prove Ultratec’s point.

<sup>301</sup> *See e.g., id.* at 11 (answering machine and auto answer features should continue to be allowed to be in a default on setting); Consumer Groups Comments at 13 (if default off is adopted, it should not apply to answering machine use); HLAA Comments at 15 (use of answering machines should work as equivalent to turning on captions for an incoming call); Hamilton August 15, 2013 *Ex Parte* at 3.

and specific circumstances, such as housing arrangements where the IP CTS user lives on his or her own,<sup>303</sup> or has a designated phone in a work setting.<sup>304</sup> Finally, HLAA expresses the concern that the ability to manipulate volume or to preset the volume so that it is loud enough for the consumer to hear other parties should not be linked to the setting for captions, so that the consumer need not turn on both features for every call.<sup>305</sup>

95. In addition to comments from providers and consumer organizations, numerous individuals submitted comments to the Commission expressing their opposition to the caption-off default setting. Many of these commenters raise concerns about the ability of older persons who are cognitively impaired to remember to turn captions on for both incoming and outgoing calls.<sup>306</sup> Others point to the difficulties they have experienced when they answer incoming calls with the captions-off default feature because of delays in when the captions appear after they press the “captions on” button. They state that because it is during this initial period of a telephone call that key information, such as the identity of the caller, is obtained and the purpose and tone of the conversation is established, such delays deny them functionally equivalent telephone service.<sup>307</sup> Consumers also report that in some instances the delays at the start of incoming calls result in callers hanging up on them rather than waiting for the called party (*i.e.*, the individual utilizing the captioning) to be ready.<sup>308</sup>

96. *Discussion.* We continue to believe that, given the unusual characteristics of IP CTS relative to other relay services,<sup>309</sup> it is reasonable and prudent to require that equipment, software, and mobile applications 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. Although we have limited information about the interim rules’ impact on IP CTS minutes, in part because of the largest provider’s failure to come into compliance when

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<sup>302</sup> See *e.g.*, Ultratec Reply Comments at 12; Sprint Comments at 9, n.11.

<sup>303</sup> See *e.g.* Purple Comments at 7; Purple Reply Comments at 1-2; Ultratec Reply Comments at 11.

<sup>304</sup> See *e.g.* Miracom Comments at 11; Purple Comments at 7; Purple Reply Comments at 1-2.

<sup>305</sup> See HLAA Comments at 15.

<sup>306</sup> See, *e.g.*, Comments of Carolyn Brown (Mar. 14, 2013) (“[F]or people like my elderly mother, or people with mild dementia, steps including reading small text, pressing buttons on equipment, etc. will mean they will not use the device. It will be too intimidating; they will forget the procedure.”); Comments of Timothy Geran (Mar. 22, 2013) (“My wife is disabled physically, has trouble learning new things and . . . doesn’t remember that she has to turn captioning on.”); Comments of Janella Carpenter (Mar. 20, 2013) (“I am beginning to be forgetful, and your requirements that change the way to use the captioning confuses me.”); Comments of Raymond Wilcenski (Mar. 22, 2013) (“My dementia will prevent me often from being able to use the phone.”); Comments of Denise Heinrich (Mar. 8, 2013) (“[T]o a 92 year old, this is disastrous. It absolutely needs to be automatic for them! Their decline in cognitive skills demands that everything be as simple as possible with no changes. This is crucial to their safety and well-being.”); Comments of John Strehlau (Mar. 22, 2013) (audiologist whose patients “have become confused” by the default-off rule).

<sup>307</sup> See, *e.g.*, Comments of Melissa Ruth (Mar. 4, 2013); Comments of Christopher Haggerty (Mar. 21, 2013); Comments of Thomas Wylie (Mar. 22, 2013); Comments of Dana Mulvany (Mar. 12, 2013) (suggesting a compromise whereby incoming calls have captioning for the first two minutes, after which the user would have to opt-in to continue the captioning). See also Purple Comments at 8 and n.7 (“A default off setting delays the delivery of the call to a CA by as much as two times the delay if configured with default-on.”).

<sup>308</sup> See *e.g.* Comments of Jean Christensen (Mar. 22, 2013) (“With the caption turned off I have to fumble to get it on and with the short delay most people hang up.”); Comments of Pearl Spodick (Mar. 22, 2013) (“I already have to adjust the volume to the highest level one button at a time (at least 3 buttons) before calling or receiving a call. . . . Each additional step slows and handicaps the flow of conversation.”).

<sup>309</sup> See *supra* section III.C.1.

the interim captions-off rule took effect, call data submitted by providers to RLSA for the three months immediately following the effective date of the rule indicate that usage of IP CTS, which had been growing rapidly, is no longer climbing. Specifically, although prior to the release of the interim rules in February 2013, the IP CTS program was experiencing an average growth of 7.5 percent per month over the previous 13 months, for a total growth of 97 percent, since publication of the interim rules, the program has seen an average of 3.7% decline per month.<sup>310</sup>

97. While we are unable to quantify the amount of IP CTS usage attributable to casual or inadvertent use of captions, it stands to reason that an unregistered individual who makes casual use of an IP CTS telephone is likely to ignore the presence of captions, or to forget, or be unable or unmotivated – or unaware of the option – to turn them off.<sup>311</sup> In addition, especially in light of the history of this service prior to the adoption of the interim rules, it may be that some currently registered IP CTS users do not actually need IP CTS for effective communication.<sup>312</sup> Others may need captions in some circumstances, but not others.<sup>313</sup> Accordingly, and because IP CTS is provided without interruption in the normal conversational flow and the captions do not interfere in any way with the consumer’s ability to conduct a telephone call by voice in the ordinary manner, defaulting captions to “on” would mean that IP CTS may be provided to individuals who do not need it and the TRS Fund is inappropriately billed for the cost. Accordingly, we continue to believe that a default captions-off requirement is necessary to reduce misuse of the service, and help protect the viability of the Fund in the face of the recent dramatic upsurge in IP CTS usage.<sup>314</sup>

98. To the extent that consumers have initially found the switch to be confusing, disruptive, or to have caused delays in the start of captioning, we anticipate that most concerns will subside over time

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<sup>310</sup> Information is based on data provided to RLSA by providers over the past several months.

<sup>311</sup> We note the results of a study by the Rehabilitation Engineering Research Center on Telecommunications Access (RERC-TA), which surveyed over 2,000 CTS and IP CTS users who use standalone telephones to access the service. *See* Initial IP-CTS Survey Analysis by the Rehabilitation Engineering Research Center on Telecommunications Access, CG Docket Nos. 13-24 and 03-123 at 5 (filed Apr. 12, 2013) (RERC Survey). Of those users who acknowledged sharing their telephones with persons without hearing loss, about 50 percent reported that those with whom the phone is shared never turn off captions, while another 25 percent said that the sharers only sometimes turn off captions. RERC Survey at 17-18. This finding appears to support the need for a default-off rule. On the other hand, the study also found that those who acknowledged sharing their telephones with others comprised only a small minority (about 15 percent) of the total surveyed, but it is possible that not all users who share their phones are willing to acknowledge such sharing. We further note that the users surveyed are not necessarily representative of the overall population of IP CTS users. The participants in the study were recruited solely via the Internet (RERC Survey at 4), and their median age was 69 (RERC Survey at 10), which is younger than the median age reported by providers.

<sup>312</sup> In addition, some consumers who needed IP CTS when they registered for it may cease to need it – for example, if they obtain an improved hearing aid. Others who could see IP CTS captions when they registered for IP CTS may experience a deterioration of eyesight to the degree that the captions are no longer helpful.

<sup>313</sup> For example, a consumer may be unable to have effective telephone communication only when there is too much ambient noise, may have particular trouble hearing and understanding callers with soft voices, but not those with loud voices, or may be able to hear and understand low-pitched voices more easily than high-pitched.

<sup>314</sup> We intend to continue to monitor the impact of this rule, however, including evaluating the extent to which it is causing delays at the start of incoming calls (*see, e.g.*, Comments of Melissa Ruth (Mar. 4, 2013); Comments of Christopher Haggerty (Mar. 21, 2013); Comments of Thomas Wylie (Mar. 22, 2013); Comments of Dana Mulvany (Mar. 3, 2012); Comments of Dan Schwartz (Mar. 20, 2013); Purple Comments at 8 & n.7), and will gather additional feedback on this issue in the accompanying Notice.

as default off becomes familiar.<sup>315</sup> We continue to believe that a requirement to push one additional button when dialing or when receiving a call will become habit to do so promptly and will not interfere with the functional equivalence of the IP CTS experience for most consumers.<sup>316</sup> We further believe that permitting IP CTS users to permanently override the default-off setting and change it to captions-on, as suggested by some commenters,<sup>317</sup> is not an effective solution, as it will not address the concerns we have that persons who are ineligible to use the service will casually or inadvertently use this service when in someone else's home or office.

99. At the same time, we recognize that some individuals may have particular difficulty with accessing captions when they are defaulted to off.<sup>318</sup> To address this circumstance, adopt a process for this unique group of consumers to obtain an exemption from the default-off requirement if the consumer has a cognitive or physical disability that significantly impairs the ability of the consumer to turn on captioning at the start of each call.<sup>319</sup> To prevent abuse of this exemption, we will require applicants seeking this exception to submit to their provider (1) a self-certification, dated and made under penalty of perjury, that the requirement to activate captioning at the start of each call significantly impedes the consumer's ability to make use of the captioned telephone service;<sup>320</sup> and (2) a certification from an independent, third party, licensed physician in good standing,<sup>321</sup> dated and made under penalty of perjury, that the consumer has a physical or mental disability or functional limitation that significantly impedes the consumer's ability to activate captioning at the start of each call, including a brief description of the basis for such statement.<sup>322</sup> In the event that the consumer is not competent to provide the required self-

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<sup>315</sup> In this regard, it is important to note that the increased delay experienced by many consumers in the delivery of captions on incoming calls only occurs if the consumer forgets or omits to press the captions-on button simultaneously with or prior to picking up the receiver.

<sup>316</sup> For those users who find pushing even one additional button to be overly-burdensome, however, we provide an opportunity for accommodation, as discussed below.

<sup>317</sup> See, e.g., Sorenson Comments at 28-30.

<sup>318</sup> See, e.g., Comments of Carolyn Brown (Mar. 14, 2013); Comments of Timothy Geran (Mar. 22, 2013); Comments of Janella Carpenter (Mar. 20, 2013); Comments of Raymond Wilcenski (Mar. 22, 2013); Comments of Denise Heinrich (Mar. 8, 2013); Comments of Vicki Boltz (Mar. 22, 2013); Comments of John Leap (Mar. 22, 2013) ("technology needs to be simple for us"); Comments of John Strehlau (Mar. 22, 2013).

<sup>319</sup> See Ultratec Reply Comments at 10-12; Hamilton Reply comments at 3-4; Purple Comments at 5-8; Purple Reply Comments at 1-2 (all commenting in favor of an exemption to the general rule). We believe that the availability of this hardship exception responds to consumer concerns that these devices be capable of providing "at least one mode that minimizes the cognitive, memory, language, and learning skills required of the user" in compliance with the accessibility requirements of sections 255 and 716 of the Communications Act. Consumer Groups Comments at 3 (*citing* 47 C.F.R. §§ 6.3(a)(1)(x), 7.3(a)(1)(x), 14.21(b)(1)(x)).

<sup>320</sup> This elevated self-certification is in addition to the self-certification already required of all IP CTS users. See section III.C, *supra*.

<sup>321</sup> The physician, who may be represented by a qualified, licensed health care professional in his or her medical practice (such as a nurse practitioner), must be either the user's primary care physician or a physician whose specialty is such that the physician is qualified to attest to cognitive or mobility disabilities of the type that would make it difficult to remember to push or to physically push a button to turn on captions, for example, a gerontologist, neurologist, or psychiatrist. A certification from a physician with a specialty that would not ordinarily be capable of evaluating cognitive or mobility disabilities of the type that would make it difficult to remember to push or to push a button to turn on captions shall not qualify for the submission of this exemption request, unless such specialist is the user's primary care physician. For example, physicians who specialize in ophthalmology, dermatology, urology, radiology or podiatry generally would not be expected to have the familiarity needed to attest to the individual's functional limitations needed for this exemption.

<sup>322</sup> These rules 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 1995 and an (continued....)

certification, such certification shall be made by the consumer's spouse or legal guardian or a person with power of attorney. A third-party, independent physician certification must include the physician's name, title, area of specialty or expertise, address, telephone number, and e-mail address. In addition, we prohibit providers from accepting a certification from any physician who is not "independent"; that is, who has been referred to the IP CTS user, either directly or indirectly, by any provider of TRS or any officer, director, partner, employee, agent, subcontractor, or sponsoring organization or entity (collectively "affiliate") of any TRS provider. In addition, the physician making such certification shall not have any business, family, or social relationship with and shall not have received any payment, referral, or other thing of value from the TRS provider or any affiliate of the TRS provider, with whom the individual seeking the exemption is requesting service. Additionally, we prohibit any provider from facilitating or otherwise playing a role, in any way, in the acquisition of such physician certifications through seminars, conferences, meetings or other gatherings in community centers, nursing homes, apartment buildings, or any other location. Prohibited arrangements include any program or activity in which a provider, its affiliates, or affiliates of affiliates play a role in arranging, scheduling, sponsoring, hosting, conducting or promoting for the purpose of acquiring such certifications. If any IP CTS provider facilitates certification by a third party physician, such IP CTS provider shall be subject to the potential array of consequences that arise from violations of TRS rules, including revocation of its certification to provide IP CTS or other enforcement action.

100. IP CTS providers must maintain detailed records of all consumers who have submitted such individual and physician certifications, including copies of these certifications, for a period of five years after the consumer ceases to use the provider's service.<sup>323</sup> IP CTS providers must further report to the Commission on a monthly basis,<sup>324</sup> subject to confidentiality requirements, and such records shall include a list of all newly exempted consumers (with names redacted), the dates on which each consumer registered for IP CTS with the provider and was provided with IP CTS equipment with a default setting of captions on, the area of specialty or expertise of the certifying physician accompanying each hardship certification, and the basis for granting each hardship exception. We require each IP CTS provider to maintain the confidentiality of such certification information, and to not disclose such certification information or the content of such information, except as provided herein or as otherwise required by law. The Commission shall also maintain the confidentiality of such information, and shall carefully review it to ensure that this exception to the rule is not abused.

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effective date of the rule. We note that in section 35, *supra*, we found that a professional certification procedure was not sufficient to eliminate the risk that users who do not need IP CTS would begin using this service if they receive this equipment for free. By contrast, here, the professional certification is only needed to allow users who have already registered, provided certification on their eligibility to use IP CTS, and attested to their understanding about how this service works to be able to effectively use the service. Having to go through the additional step to obtain the professional certification to be able to have the captions defaulted on (when such individuals do not need this added attestation to merely use the phones with the captions defaulted off), we believe, will screen out individuals who do not truly need the hardship exemption. Consumer Groups argue that obtaining such third party physician certification will be burdensome. Consumer Groups August 9, 2013 *Ex Parte* at 5. However, because individuals who would qualify for this exemption are likely to already have established relationships with primary care or other physicians who are qualified to provide a certification, and it is likely that such physicians would already be familiar with the individual's cognitive or physical disability, we do not find this requirement to be unduly burdensome.

<sup>323</sup> This is consistent with other recordkeeping requirements applicable to iTRS providers. *See, e.g.*, 47 C.F.R. §§ 64.604(c)(5)(D)(7) (requiring that call data supporting claims for payment from the TRS Fund be maintained for a minimum of five years), 64.631(a)(2) (requiring that records of verification of a consumer's authorization for a change of default provider be maintained for a minimum of five years).

<sup>324</sup> We delegate to the Chief, Consumer and Governmental Affairs Bureau the authority to modify the frequency of this reporting requirement if it appears that this exemption is not being abused.

101. Finally, we agree with commenters who stress the need for a simple procedure to turn the captions on,<sup>325</sup> and note our understanding that most, if not all current providers, have strived to make this process as easy as possible for consumers. Therefore, for the purpose of limiting as much as possible the delay between when a consumer answers an incoming call and pushes the button to initiate captioning, we require providers to ensure that each IP CTS telephone they distribute includes a button, icon, or other comparable feature that is easily operable and requires only one step for the consumer to turn on captioning.<sup>326</sup> In the Notice, we also seek comment on whether we should prohibit providers from linking the ability to manipulate or preset the volume to the selection for captions, so that IP CTS users can adjust or keep the volume defaulted to their preferred level without having to turn both features on for every call.

102. *Web and Mobile Devices.* In a waiver petition submitted in response to the Commission's *IP CTS Interim Order*,<sup>327</sup> and its comments to this proceeding, Sprint argues that a default captions-off requirement should not be required for Wireless CapTel and WebCapTel users because, in order to access CapTel services on a mobile device or through a computer or tablet, the eligible user must have opened the application and entered his or her user ID and passcode.<sup>328</sup> Sprint acknowledges that once a consumer enables the application, the captioning stays on for each subsequent call until the application is closed,<sup>329</sup> and that it is unaware of any technological fix to require that the captions must be turned on each time another call is made subsequent to the application being enabled.<sup>330</sup> Purple also argues that the default captions-off requirement should not be applied to exclusive users of software based

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<sup>325</sup> See, e.g., TEDPA Comments at 2 (“A single, clearly marked button should be required rather than a multi-step menu option.”); Comments of Nancy Garthwait (Mar. 22, 2013) (“work with hardware providers to make this as easy and trouble free as possible”).

<sup>326</sup> Section 225(d)(1)(A) of the Act directs the Commission to “establish functional requirements, guidelines, and operations procedures” for TRS. 47 U.S.C. § 225(d)(1)(A). Because a critical component of a rule requiring captions to be defaulted to off is the ability to turn them on when needed, the Commission is adopting a regulation to ensure that is the case. We believe that this new rule, requiring providers to ensure that IP CTS devices have a button, icon, or other comparable feature that is easily operable and requires only one step for the user to turn on captioning, responds to consumer concerns that manufacturers of such devices provide “at least one mode that is operable with user limited reach and strength.” See Consumer Groups Comments at 3 (*citing* 47 C.F.R. §§ 6.3(a)(1)(vi), 7.3(a)(1)(vi), 14.21(b)(1)(vi)).

<sup>327</sup> Emergency Petition of Sprint Nextel for Limited Waiver and Clarification at 3-5 (filed Feb. 26, 2013) (Sprint Waiver Petition).

<sup>328</sup> Sprint Comments at 9-10. Sprint explains that a user must engage in multiple steps to enable these software applications each time the user longs onto the service. Sprint Waiver Petition at 4-5. A WebCapTel user who wants to make a captioned call through a computer must (1) open the browser and type the URL of the website, (2) enter the user name and passcode, (3) type the number the user is calling, and (4) click on the “Place Call” button. *Id.* To receive a captioned call on a computer, the user must (1) ensure that the computer is on and running and opened to the CapTel provider’s access page, (2) enter the user name and passcode, (3) enter the phone number attached to the computer, (4) instruct the calling party to dial a toll-free number and enter the phone number of the phone attached to the computer, and (5) answer the phone when it rings. *Id.* A user who has downloaded the Wireless CapTel application to the user’s mobile phone and wants to make a captioned call must (1) open up and log onto the application by entering the user name and passcode, (2) wait until the application ensures that the mobile broadband connection is fast enough for a captioned call, (3) enter the number the user is calling, and (4) tap the “Call” button to dial the phone number and enable the captions. *Id.* To receive a captioned call on a mobile phone, the user must (1) ensure that the application has been opened and that the user name and passcode have been entered, (2) wait until the application ensures that the broadband connection is fast enough for a captioned call, and (3) upon receiving a call, the user must tap the “Answer with Captions” button in order to receive captioning. *Id.*

<sup>329</sup> Sprint Waiver Petition at 5.

<sup>330</sup> Sprint Comments at 10; Sprint Waiver Petition at 5.

IP CTS, given the nature and typical use of such services.<sup>331</sup> In reply, Hamilton notes that mobile and web-based IP CTS may already be compliant because a consumer must affirmatively open the application or visit the web portal and log in before they can begin to use IP CTS.<sup>332</sup> In response to the Sprint Waiver Petition, the Consumer and Governmental Affairs Bureau (CGB) waived the interim default captions-off requirement as applied to Wireless CapTel and WebCapTel on mobile phones, laptops, tablets, and computers until the Commission issues an order addressing whether the interim rule requiring captions to be defaulted off should be made permanent.<sup>333</sup>

103. To the extent that a consumer must take an affirmative step each time he or she wants to enable IP CTS on a web-enabled or mobile device in order to access IP CTS, we agree that the purpose of the captions-off default rule is served. Moreover, as noted in the *IP CTS Waiver Order*, such devices, which are typically personalized, are likely to be used only by the individual who needs captions, and are not as likely to result in the same type of misuse as can occur with an IP CTS device that looks like a home phone and that may be available for use by family members or visitors.<sup>334</sup> Finally, as noted in the *IP CTS Waiver Order*, we believe that it is unlikely that a hearing individual would attempt to make an IP CTS call on one of these web or mobile devices, even if the person has access to the computer or mobile device with the downloaded applications and knows the log-in information, because it would be easier and more efficient to simply use the regular telephone feature of the device to make or receive calls.<sup>335</sup> Because the underlying purpose of the captions off rule will continue to be served by the way these software products operate and how they are likely to be used, we believe that the captions off requirement is being met by the software applications when used on mobile phones, laptops, tablets, and computers, provided that the following two conditions are satisfied: (1) consumers must actively set up the IP CTS software feature by individually logging in with a unique ID and password that is provided only to the registered user,<sup>336</sup> and (2) the default setting switches to “captions on” only for the limited session during which the consumer is logged on, rather than remaining on indefinitely.<sup>337</sup> We understand that, at present,

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<sup>331</sup> Purple Comments at 6. Purple adds that “the proper measure [of whether to apply the default-off requirement] should be an evaluation of the effectiveness of the service itself measured against the likelihood of misuse of a given device,” and explains that software based IP CTS is not likely to be used by others. *Id.* at 7.

<sup>332</sup> Hamilton Reply Comments at 4-5.

<sup>333</sup> *IP CTS Waiver Order*, 28 FCC Rcd at 6462, ¶ 18.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> As discussed *supra*, section III.C, we are adopting an express rule stating that only registered users are permitted to use IP CTS. Moreover, as with all forms of IP CTS, in the case of web-enabled or mobile devices, a provider may not submit for compensation minutes of use by consumers who are not registered to use IP CTS, except for minutes of use generated by existing consumers prior to the registration deadline. In an *ex parte* letter, Sprint explained that both the WebCapTel and Wireless CapTel log-in sites have a “Remember Me” box, which if checked will automatically enter the user’s log-in information and enable the user to access the page that enables the user to make or receive captioned calls. Sprint, *Ex Parte* Letter at 1, n.1 (filed Mar. 13, 2013) (Sprint March 13, 2013 *Ex Parte*). In the *IP CTS Waiver Order*, we found that the “Remember Me” application qualified for the limited waiver, provided that, each time the user turns on the computer or mobile phone, the user must still go to the WebCapTel or Wireless CapTel web page or application and follow the other steps of the multi-step procedures described by Sprint before the consumer can make use of IP CTS. *IP CTS Waiver Order*, 28 FCC Rcd at 6462, ¶ 18. This ruling applies here as well.

<sup>337</sup> In other words, a consumer must log in each time he or she uses a software-based form of IP CTS to qualify under this exemption. If IP CTS software can be configured to load automatically upon a device’s start up without the user logging in, it would not qualify for this exemption. In the Sprint March 13, 2013 *Ex Parte*, Sprint confirmed that users of WebCapTel and Wireless CapTel who have shut down their computers or mobile devices must follow the multi-step procedures described in the Sprint Petition once they turn on their computers or mobile (continued....)

the number of IP CTS calls made via these types of web-enabled or mobile devices is small. In the event that the pattern in the usage of IP CTS over these devices changes in a way that raises concerns about the manner in which they are being used, we reserve the right to reconsider the manner in which we will apply the captions off requirement to these devices.

104. *911 Calling.* Several commenters raise concerns that in an emergency situation, individuals may not remember to activate the caption functionality when calling 911 services.<sup>338</sup> For example, Ultratec states that IP CTS users may forget to take the extra step of manually enabling captions “under the stress and panic of [an] emergency, thereby rendering them unable to communicate with first responders.”<sup>339</sup> While we recognize that some consumers may forget to turn captions on while making a 911 call, the record does not provide sufficient data to enable us to evaluate the extent of this hazard. Further, although one provider has told us that it can turn captions on for 911 calls while maintaining a general setting for captions default off,<sup>340</sup> the record is insufficient to determine the technical feasibility of configuring equipment so that captions are defaulted to “on” solely for 911 calls. In the absence of such data, we cannot conclude that the risks of persons being unable to communicate on 911 calls are so high as to justify requiring providers to have their equipment default to captions-off on all calls. We believe that the availability of an exception for those who have significant difficulty turning on captions, combined with the requirement that IP CTS providers implement a “one touch” method of turning captions on if technically feasible,<sup>341</sup> addresses the concerns regarding 911 calling while we develop a complete record.

105. We nevertheless agree that it would be desirable if captions defaulted to “on” solely for 911 calls. We therefore clarify that IP CTS providers may automatically turn captions on solely for 911 calls and 911 call-backs to the extent it is technically feasible. We will continue to monitor this issue, and in the accompanying Notice we seek comment on the feasibility of configuring IP CTS equipment so that captions are automatically turned on only for 911 calls and on whether doing so should be required.

106. *Answering Machines.* Several commenters also express concern about the consequences of applying the captions default-off setting to answering machines and similar devices.<sup>342</sup> From the information received to date, we cannot conclude that, on balance, these concerns are significant enough

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phones. As explained by Sprint, the WebCapTel and Wireless CapTel applications close when the user turns off the device containing the application. *Id.* at 1.

<sup>338</sup> See, e.g., Sprint Comments at 9, n.11 (a person “who is in an emergency situation such that he/she may not be acting in [a] rational manner should not be required to remember that he/she must also . . . activate the captions functionality when calling 911 services”); Clifford Cleary Comments (Mar. 7, 2013) (“captions were turned off every time I stopped talking to check on my partner”); Leslie McQuilkin Comments (Mar. 7, 2013) (“I was forced to wait and I was hung up by emergency services”); Renee Mallinson Comments (Mar. 25, 2013) (“in an emergency, people can get flustered, especially at my age, and an added step could impair me in an emergency”); Lin Kogan Comments (Mar. 22, 2013); Timothy Geran Comments (Mar. 22, 2013).

<sup>339</sup> Ultratec Reply Comments at 12.

<sup>340</sup> Hamilton, *Ex Parte* Letter at 1 (filed August 22, 2013).

<sup>341</sup> We believe that providing a one-touch method is technically feasible, as the record indicates that some providers have already implemented such a method. See Captel, Hamilton, and Sprint, *Ex Parte* Letter, Attachment at 20 (Feb. 28, 2013).

<sup>342</sup> See, e.g., Consumer Groups Comments at 13; HLAA Comments at 15; Ultratec Reply Comments at 11 (explaining that Ultratec’s phones previously were able to caption an incoming answering machine message and store the information on the phone, but that under the “default off” requirement, the user has to press the captions-on button – sometimes multiple times - to “re-caption” the incoming voice message when he or she wants to get the message).

to outweigh the need to control potential misuse through a default-off rule. However, we remain open to considering ways to ease these concerns and seek comment on this issue in the Notice.

107. *IP CTS Phones Available Only to Registered Users.* Consumer Groups and some providers have suggested that there is no need to require a default setting of captions off when an IP CTS user is living alone, living only with other individuals who are hard of hearing, or is in an office setting where no one else has access to that person's IP CTS phone.<sup>343</sup> They posit that the chance of inadvertent use under such circumstances is "remote."<sup>344</sup> We remain concerned that even a consumer living alone or working in a setting where others do not have access to the IP CTS phone may not need captioning for every call, and that a default off setting may be needed to prevent unneeded use of the captioning. Thus, we are not persuaded at this time that there should be a different rule for such users. At the same time, however, we are open to revisiting this conclusion in the future, should experience show that such a limited exception would not undermine our efforts to ensure that IP CTS is used only when truly needed. For this reason we ask in the Further Notice whether an exemption should be provided for consumers with IP CTS phones that are available only to registered IP CTS users. We also ask whether there should be any other exemptions to the captions default off requirement.

108. We reject the Consumer Groups argument that the default captions-off requirement violates section 225 and 255 of the Act.<sup>345</sup> We do not interpret section 225 as requiring that a relay service with the characteristics of IP CTS must be always "on" unless consciously turned off, or as providing that a requirement that a consumer turn on a relay service before using it deprives the consumer of functionally equivalent service. Nor do we interpret such a requirement as rendering a relay service, or its equipment, less "usable" under section 255. To the extent that consumers with cognitive or physical disabilities have difficulty turning on captioning at the start of a call, we find that the exception we adopt herein addresses any section 255 concerns.

#### **F. Extension of Interim Rules**

109. The interim rules adopted in the *IP CTS Interim Order* are set to expire on September 3, 2013.<sup>346</sup> However, the final rules that we adopt today will not become effective until after that date. We therefore extend the effectiveness of each interim rule until the final rule replacing it becomes effective. Specifically, interim rule section 64.604(c)(8), the rule on referrals for rewards,<sup>347</sup> will remain in effect until 30 days after publication of a summary in the Federal Register<sup>348</sup> of final rule section 64.604(c)(8); interim rule section 64.604(c)(9); the rule on user registration and certification<sup>349</sup> will remain in effect until publication in the Federal Register of a notice announcing the approval of final rule section

<sup>343</sup> See Consumer Groups August 9, 2013 *Ex Parte* at 4; Consumer Groups August 13, 2013 *Ex Parte* at 2-3 and Attachment 2; Sorenson August 5, 2013 *Ex Parte* at 3; Hamilton August 15, 2013 *Ex Parte* at 3; Purple Comments at 7; Purple Reply Comments at 1-2; Ultratec Reply Comments at 11; Purple, *Ex Parte* Letter at 1-2 (August 23, 2013).

<sup>344</sup> Consumer Groups August 9, 2013 *Ex Parte* at 4.

<sup>345</sup> See *id.* at 4. See also Sorenson August 5 *Ex Parte* at 2-4 (arguing that default-off unlawfully interferes with rights created under section 225).

<sup>346</sup> See *IP CTS Interim Order*, 28 FCC Rcd at 710, ¶ 25 (setting a sunset date of 180 days after the effective date of the interim rules on registration and certification become effective); 78 FR 14701, 14702 (2013) (announcing an effective date of March 7, 2013 and an expiration date of September 3, 2013 for section 64.604(c)(9), the rule on registration and certification).

<sup>347</sup> 47 C.F.R. § 64.604(c)(8).

<sup>348</sup> See 5 U.S.C. § 553(d); 47 C.F.R. § 1.427(a).

<sup>349</sup> 47 C.F.R. § 64.604(c)(9).

64.604(c)(9) by the Office of Management and Budget under the Paperwork Reduction Act of 1995,<sup>350</sup> and interim rule section 64.604(c)(10), the rule on default captions off,<sup>351</sup> will remain in effect until 30 days after publication of a summary in the Federal Register<sup>352</sup> of final rule section 64.604(c)(10)(i).

110. The Administrative Procedure Act (APA) provides that a substantive rule cannot become effective earlier than 30 days after the required publication or service of the rule, except “for good cause found and published with the rule.”<sup>353</sup> We take action to extend the effectiveness of the interim rules before the final rules replacing them take effect in order to prevent a gap in these rules, and, consequently, opening the door to practices that we have already determined could permit consumers who do not need IP CTS to use this service. Such result, for the various reasons discussed in this Report and Order and the *Interim IP CTS Order*, would be contrary to the purposes of section 225 of the Act,<sup>354</sup> wasteful of the TRS Fund, and thus contrary to the public interest. Further, we have no reason to believe that IP CTS providers cannot comply with the extension of the interim rules because they have already been required to comply with these rules since at least March 7, 2013.<sup>355</sup> Accordingly, such providers do not need to make any changes to their operating procedures to comply with the extension of the effectiveness of the interim rules. We therefore find good cause to extend the effectiveness of each interim rule until the final rule replacing it takes effect.

#### IV. FURTHER NOTICE OF PROPOSED RULEMAKING

##### A. Rate Methodology Used for IP CTS

111. *Background.* Section 225 of the Communications Act of 1934, as amended (Act),<sup>356</sup> directs the Commission to implement regulations for TRS cost recovery that provide for the “jurisdictional separation” of TRS costs; *i.e.*, the costs caused by *interstate* TRS are to be recovered from all subscribers for interstate services, and the costs caused by the provision of *intrastate* TRS are to be recovered from each intrastate jurisdiction.<sup>357</sup> Interstate relay calls and all calls made via Internet-based forms of TRS are funded through mandatory contributions made to the Interstate Telecommunications Relay Service Fund (TRS Fund or Fund) by interstate telecommunications and VoIP service providers, based on certain of their end user revenues.<sup>358</sup> Eligible providers of interstate TRS that comply with the

<sup>350</sup> Pub. L. No. 104-13, 109 Stat. 163 (May 22, 1995), *codified at* 44 U.S.C. § 3501 *et seq.*

<sup>351</sup> 47 C.F.R. § 64.604(c)(10).

<sup>352</sup> *See* 5 U.S.C. § 553(d); 47 C.F.R. § 1.427(a).

<sup>353</sup> 5 U.S.C. § 553(d). *See also* 47 C.F.R. § 1.427(a).

<sup>354</sup> 47 U.S.C. § 225.

<sup>355</sup> Sections 64.604(c)(9) and (10) became effective on March 7, 2013. *See* 78 FR 8032 (2013); 78 FR 14701, 14702 (2013). Section 64.604(c)(8) became effective on February 5, 2013. *See* 78 FR 8032 (2013).

<sup>356</sup> 47 U.S.C. § 225.

<sup>357</sup> 47 U.S.C. § 225(d)(3)(B); *see also* 47 C.F.R. § 64.604(c)(5)(ii). The Communications Act does not require a specific funding method for *intrastate* TRS or state TRS programs and states generally recover the costs of intrastate TRS either through rate adjustments or surcharges assessed on all intrastate end users, after which the states reimburse TRS providers directly for their intrastate TRS costs. 47 U.S.C. § 225(d)(3)(B) (certified state TRS programs “shall permit a common carrier to recover the costs incurred in providing intrastate telecommunications relay services by a method consistent with the requirements of [section 225]”). *See also* 47 U.S.C. § 225(f).

<sup>358</sup> *See* 47 C.F.R. § 64.604(c)(5)(iii)(A), (B). *See also Contributions to the Telecommunications Relay Services Fund*, CG Docket No. 11-47, Report and Order, 26 FCC Rcd 14532 (2011) (*VoIP Contribution Order*).

Commission's rules are entitled to seek recovery from the Fund for their "reasonable" costs of providing such service.<sup>359</sup>

112. The Commission uses various rate methodologies to compensate providers for the provision of interstate and IP-based TRS. For example, the Commission determines how compensation rates for video relay service (VRS)<sup>360</sup> and Internet Protocol Relay Service (IP Relay) are calculated.<sup>361</sup> Commission rules require TRS providers to submit to the Fund administrator projected cost and minutes of use data, total TRS minutes of use, total interstate TRS minutes of use, total TRS operating expenses, and total TRS investment, and "other historical or projected information reasonably requested by the administrator for purposes of computing payments and revenue requirements."<sup>362</sup> The Commission has used these factors, including trends in historical costs, to determine rates.<sup>363</sup> After the IP Relay rate is initially set, however, it is adjusted over a three-year period using a price cap methodology.<sup>364</sup> During this period, the rate is increased annually by an inflation factor and adjusted downward by a factor that takes into account increased efficiencies. The price cap IP Relay rate is also subject to adjustments based on exogenous costs beyond the control of providers.<sup>365</sup>

113. In contrast, rates for the interstate portion of traditional text-based TRS calls,<sup>366</sup> speech-to-speech relay services,<sup>367</sup> PSTN-based CTS, and for all IP CTS are determined using the Multi-state Average Rate Structure Plan (MARS Plan).<sup>368</sup> Under the MARS Plan, the Fund administrator calculates the compensation rates for TRS using a weighted average of competitively bid state rates. For IP CTS, the Fund administrator uses a weighted average of competitively bid state rates for intrastate PSTN-based

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<sup>359</sup> See 47 C.F.R. § 64.604(c)(5)(iii)(E).

<sup>360</sup> VRS is a form of TRS that allows people with hearing or speech disabilities who use sign language to communicate with others through video equipment and a broadband Internet connection. See 47 C.F.R. § 64.601(27).

<sup>361</sup> IP Relay is a form of TRS in which an individual with a hearing and/or speech disability or who is deaf-blind connects to a CA using an IP-enabled device via the Internet. See 47 C.F.R. § 64.601(17).

<sup>362</sup> 47 C.F.R. § 64.604(c)(5)(iii)(D)(1). The Fund administrator reviews the submitted data, determines the average per-minute compensation rate for the various forms of TRS, and submits the rates to the Commission by May 1<sup>st</sup> of each year for approval. The Commission issues a rate order each year by June 30, either approving or modifying these rates for the next Fund year, which runs from July 1 to June 30. 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).

<sup>363</sup> See, e.g., *VRS Structural Reform Order*, 28 FCC Rcd at 8694-8706, ¶¶ 188-216; *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Order, 25 FCC Rcd 8689, 8692-98, ¶¶ 6-20 (2010) (2010 TRS Rate Order) (using historical costs and demand as a point of departure in revising VRS compensation rates previously set based on projected costs and demand), *aff'd Sorenson Communications, Inc. v. FCC*, 659 F.3d 1035 (10th Cir. 2011) (*Sorenson II*).

<sup>364</sup> See 2007 TRS Rate Methodology Order, 22 FCC Rcd at 20161-64, ¶¶ 39-46.

<sup>365</sup> 2007 TRS Rate Methodology Order, 22 FCC Rcd at 20163, ¶ 44.

<sup>366</sup> Traditional text-based TRS is a form of TRS wherein an individual with a hearing and/or speech disability or who is deaf-blind uses a text telephone, or TTY over the PSTN, to communicate by telephone through a CA with other individuals. See generally 47 U.S.C. § 225; Pub. L. No. 111-260, § 103; 47 C.F.R. § 64.601(22).

<sup>367</sup> Speech-to-speech relay service is a form of TRS that allows individuals with speech disabilities to communicate with other telephone users through the use of specially trained CAs who understand the speech patterns of persons with speech disabilities and can repeat the words spoken by that person. See 47 C.F.R. § 64.601(20).

<sup>368</sup> See 2007 TRS Rate Methodology Order, 22 FCC Rcd at 20151, ¶ 16, 20155-61, ¶¶ 26-38.

CTS for the prior calendar year,<sup>369</sup> and files this rate with the Commission by May 1<sup>st</sup> of each year.<sup>370</sup> In addition, because some states compensate a much larger number of minutes than others, the calculation is based on a weighted average rate by dividing total state dollars paid by total conversation minutes. In calculating total state dollars (the numerator), the Commission makes adjustments to take into account that some state rates are based on session minutes while others are based on conversation minutes.<sup>371</sup> Additionally, on some occasions, the Commission has allowed the Fund administrator to exclude from the MARS calculation rates and data from states that utilize certain compensation methodologies.<sup>372</sup>

114. The Commission's reasons for adopting the MARS Plan methodology, laid out in the *2007 TRS Methodology Order*, were largely based on the prediction that using an average of state rates in the MARS Plan would "simplify the rate setting process and result in more predictable, fair, and reasonable rates" for IP CTS.<sup>373</sup> The Commission expressed concern that reliance on a weighted average of the providers' projected minutes and costs might produce rates that were only as accurate as the providers' projected minutes of use and costs. Specifically, the Commission explained that providers had incentives to both overestimate costs and underestimate minutes, to ensure that the compensation rate would be as high as possible, presumably to make a profit—all of which put into question the reliability of a cost-based recovery mechanism.<sup>374</sup> Likewise, the Commission rejected use of a price cap regime out of concern that this would require the Commission's determination of an initial rate that accurately reflected providers' historical, actual, reasonable costs.<sup>375</sup> The *2007 TRS Methodology Order* concluded that the MARS plan's reliance on competitively bid state rates instead would produce a rate that better approximated providers' reasonable costs because it was "the compensation rates by states for the same,

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<sup>369</sup> See *id.* at 20151, ¶ 16.

<sup>370</sup> See *id.* at 20153, ¶ 26. Under the MARS methodology, the determination of the IP CTS rate by the Fund administrator has included the following steps: (1) the collection of intrastate PSTN-based CTS compensation rate data from the states and the providers for the prior calendar year, and the determination of whether any state's data will be excluded from the calculation; (2) the calculation of each state's total dollars paid for intrastate PSTN-based CTS services during the applicable period; and (3) the calculation of the final rate by dividing the total dollars paid by all states by the total conversation minutes of all states. The proposed MARS rate is then placed on public notice, and finalized by June 30<sup>th</sup> of each year for the following July 1<sup>st</sup> to June 30<sup>th</sup> Fund year, after taking into consideration public comments received. For a complete discussion of the calculation of the MARS rate. See *id.* at 20155-61, ¶¶ 26-38. As noted above, the MARS rate is similarly used to determine interstate rates for traditional TRS and STS. *Id.* at 20159, ¶ 34.

<sup>371</sup> *Id.* at 20158, ¶ 32.

<sup>372</sup> *Id.* at 20157, ¶ 29 (state's intrastate rate will be excluded from MARS calculation where it is based on the interstate rate because of the circularity in such rates); *id.* at 20170, ¶ 58 (excluding the one state that used a flat rate methodology at the time, *i.e.*, Michigan); *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, 26 FCC Rcd 9972, 9977, ¶¶ 13-14 (2011) (excluding data from three states that reimbursed providers at a flat (versus a per-minute) rate and partially excluding data from one state that tied its intrastate CTS rate to the interstate CTS rate for part of the year).

<sup>373</sup> *Id.* at 20151, ¶ 16.

<sup>374</sup> *Id.* at 20151, ¶ 17 (recognizing that the resulting rates under a cost-based methodology did not always correlate precisely to the providers' actual costs).

<sup>375</sup> The Commission explained that "the compensation rate is not a 'price' that is charged to, and paid by, a service user, but rather is a settlement mechanism to ensure that providers are compensated from the Fund for their actual reasonable costs of providing service." *Id.* at 20155, ¶ 25.

*albeit* intrastate, service.”<sup>376</sup> In addition, it was expected that the MARS Plan would eliminate the costs, burdens, and uncertainties associated with evaluating, correcting, and re-evaluating provider data.<sup>377</sup>

115. *The Sorenson Petition.* On February 20, 2013, Sorenson Communications, Inc. (Sorenson) and its wholly-owned subsidiary, CaptionCall, LLC, filed a petition for rulemaking requesting that the Commission initiate a proceeding to replace the current MARS rate methodology used for determining the IP CTS rate with a price cap regulatory approach.<sup>378</sup> Sorenson advises using the same approach that we apply to IP Relay because, they argue, a price cap regime would exert downward pressure to lower the IP CTS rate and give providers greater rate stability, incentivizing providers to offer service more efficiently and engage in greater innovation through investments in new technologies.<sup>379</sup>

116. On March 25, 2013, the Commission released a Public Notice seeking comment on the Sorenson Petition.<sup>380</sup> Only two providers commented, both of whom object to the price cap regulatory approach in determining rates for the provision of IP CTS.<sup>381</sup> Hamilton Telephone (Hamilton), the original proponent of the MARS methodology,<sup>382</sup> continues to maintain that this rate methodology is superior to a price cap approach because a “price cap methodology for IP CTS would create a significant risk of systematically undercompensating providers.”<sup>383</sup> Likewise, Sprint criticizes the Sorenson proposal as one that would lead to waste in resources, requiring extensive FCC regulation and cost examination.<sup>384</sup> Sprint also objects to Sorenson’s proposal to set the initial rate for IP CTS using an average of the MARS PSTN-based CTS rates for 2008, 2009, and 2010 because it claims that these years did not reflect more recent rate increases.<sup>385</sup> Finally, Sprint raises concerns about the proposal’s “efficiency factor” rate reduction to account for productivity gains,<sup>386</sup> and the possible lack of predictability that this methodology would present for both providers and the Commission, due to annual exogenous adjustments.<sup>387</sup> Neither

<sup>376</sup> *Id.* at 20151, ¶ 17, 20155, ¶ 25.

<sup>377</sup> *Id.* at 20151, ¶ 18. *See also id.* at 20159, ¶ 35 (the MARS Plan “avoids the necessity of detailed analysis (and possible disallowance) of the projected cost and demand data for each provider, as such data will no longer be required to be filed by the providers of these services”).

<sup>378</sup> *See* Petition for Rulemaking of Sorenson Communications, Inc. and CaptionCall, LLC, CG Docket No. 03-123 (filed Feb. 20, 2013) (Sorenson Petition).

<sup>379</sup> Sorenson Petition at 1-2.

<sup>380</sup> *See Request for Comment on the Petition for Rulemaking Filed by Sorenson Communications, Inc. Regarding Coast Recovery Methodology for Internet Protocol Captioned Telephone Service*, CG Docket Nos. 13-24 and 03-123, Public Notice, 28 FCC Rcd 2256 (CGB 2013).

<sup>381</sup> *See* Comments of Sprint Nextel Corporation, CG Docket No. 13-24 and 03-123 (filed Mar. 25, 2013) (Sprint Rate Methodology Comments); Comments of Hamilton Relay Inc., CG Docket No. 13-24 and 03-123 (filed Mar. 25, 2013) (Hamilton Rate Methodology Comments).

<sup>382</sup> *2007 TRS Rate Methodology Order*, 22 FCC Rcd at 20142 n.5.

<sup>383</sup> Hamilton Rate Methodology Comments at 6.

<sup>384</sup> Sprint Rate Methodology Comments at 3-4.

<sup>385</sup> *See* Sprint Rate Methodology Comments at 2 (“The fact that MARS rates may have recently increased does not make them any less valid than the MARS in effect for the years that Sorenson recommends serve as the ‘baseline.’”).

<sup>386</sup> *See id.* at 3 (proposal would mirror the provision for IP Relay rate setting by reducing the IP CTS rate by an “efficiency factor equal to GDP-PI (the inflation factor less .5 percent (.005) to account for productivity gains)” (citing Sorenson Petition at 7)). Sprint claims that “there is no reason to assume that the use of the IP Relay ‘efficiency factor’ is valid for IP CTS.” Sprint Rate Methodology Comments at 3.

<sup>387</sup> *See* Hamilton Rate Methodology Comments at 5.

commenter proposed an alternative to the MARS Plan or to Sorenson's proposed price cap approach for determination of the IP CTS rates.

117. *Discussion.* As the Commission has previously pointed out, our “mandate in determining rates is to ensure that the rates correlate to actual reasonable costs and that the *process* of determining the rates is fair, efficient, and predictable.”<sup>388</sup> To this end, when the Commission adopted the MARS Plan for various forms of TRS in 2007, it stated that “[t]o the extent future or unforeseen circumstances suggest that the MARS rate is not fair and reasonable, we can make adjustments as appropriate. Our objective is to ensure that services are provided efficiently and that providers are compensated for their reasonable actual costs of doing so.”<sup>389</sup>

118. When the Commission adopted the MARS Plan, IP CTS was a nascent service that had been approved as eligible for compensation from the Fund only nine months earlier,<sup>390</sup> and was provided by only a single entity that offered service through two subcontracting companies. As such, call volume for this service was small, with costs that necessarily reflected this low usage. During the intervening years, and especially in the last year, the provision of this service has changed dramatically. Since December 2011, IP CTS has been experiencing unprecedented and unusually rapid growth<sup>391</sup> that has signaled a sharp departure from the trend of declining rates of growth in usage of this service over three prior years.<sup>392</sup> According to the Fund administrator's *2013 TRS Rate Filing*, this growth is expected to continue and even accelerate.<sup>393</sup> At the same time, provider projections for IP CTS growth have been called into question, as minutes of use have far exceeded their projections in recent months,<sup>394</sup> and PSTN-based CTS minutes of use, upon which the MARS rate is largely based, have steadily fallen. Additionally, the Fund administrator has questioned the extent to which the MARS rate takes into account declining IP CTS costs.<sup>395</sup> Moreover, since the MARS methodology was adopted, various new entrants

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<sup>388</sup> *2007 TRS Rate Methodology Order*, 22 FCC Rcd at 20153, ¶ 21 (emphasis in original).

<sup>389</sup> *Id.* at 20160, ¶ 35.

<sup>390</sup> *2007 IP CTS Order*, 22 FCC Rcd 379.

<sup>391</sup> We note that growth for this service is likely to continue, given the potentially untapped market of consumers with hearing loss who may need this service to obtain functionally equivalent communication service. For a detailed summary of this growth from January to October 2012, see *IP CTS Interim Order*, 28 FCC Rcd at 706-07, ¶¶ 96-97. In that Order, the Commission took immediate, interim steps to address certain practices related to the provision and marketing of IP CTS that appeared to be contributing to this dramatic spike in reimbursement requests to the TRS Fund. In the *IP CTS Interim Order*, the Commission did not address the rate for IP CTS, but it did clarify that the Fund administrator shall not be obligated to pay any request for compensation until it has been established as compensable. *Id.* at 725-26, ¶¶ 36-37 (amending 47 C.F.R. § 64.604(c)(5)(iii)(E)).

<sup>392</sup> 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.

<sup>393</sup> Rolka Loube Saltzer Associates, *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 and 10-51, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate (filed May 1, 2013) (*2013 TRS Rate Filing*).

<sup>394</sup> See *2013 TRS Rate Filing* at Exhibit 1-4 (showing the difference in IP CTS projections vs. actual minute submissions).

<sup>395</sup> Based on its analysis of the IP CTS providers' submitted cost data, the TRS Fund administrator reported an average of projected costs for the 2013-14 Fund year to be \$1.4816, which is \$0.3061 below the MARS CTS rate for the coming year or approximately 17% less than the MARS rate level of \$1.7877. *2013 TRS Rate Filing* at 13-14.

have joined the IP CTS market, significantly altering the competitive landscape for this service.<sup>396</sup> Finally, unlike traditional VRS services, which envelop a more readily definable market, IP CTS services could be useful to a vastly larger market—virtually anyone who has hearing loss necessitating these services to have functionally equivalent telephone communication.<sup>397</sup>

119. All of these factors—the continued sharp growth in the use of IP CTS, the declining use of PSTN-based CTS, concerns that not all providers are accurately forecasting demand, and the potential for a vastly larger market and thus even larger call volumes—call into question the appropriateness of continuing to rely on a rate methodology that relies on PSTN-based CTS rates in determining a rate for the Internet form of this service. We are particularly determined to ensure, given the sudden and unexpected growth in IP CTS, that the rate methodology selected for this service be one that can sustain this service for those who need it by avoiding the payment of compensation that exceeds the reasonable costs of providing this service. Finally, the burgeoning IP CTS market and the proliferation of new prospective provider entrants<sup>398</sup> may necessitate the adoption of additional mandatory minimum IP CTS standards,<sup>399</sup> which in turn may increase the cost of providing the service. All of these factors make it both necessary and appropriate to revisit the rate methodology for IP CTS at this time.

120. For these reasons, we seek comment on whether modifications should be made to the current methodology for IP CTS, including whether an entirely different methodology would be more appropriate. In particular, we seek to adopt a methodology that is consistent with the principle that the process should be designed to fairly compensate providers for their “reasonable” actual costs of providing service, and that will result in predictability for the providers.<sup>400</sup> As an initial matter, given the rapidly increasing demand for the IP version of this service, while demand for the PSTN version is declining, per-minute costs for the two versions may also be diverging; therefore, we seek comment on whether the original premise underlying the adoption of the MARS rate—that the reasonable costs of IP CTS would be reflected in an average of the PSTN version of this service competitively bid throughout the states—still supports use of this methodology for IP CTS. We believe that there are currently significant differences in demand levels for PSTN-based CTS and IP CTS, such that tying rates for IP CTS to the rates set at the state level for PSTN-based CTS may no longer be appropriate. We seek comment on this point. Further, has the sharp increase in demand for this service resulted in a decline in costs per minute? That is, have economies of scale reduced the costs of IP CTS? In this regard, we note that although the TRS Fund administrator has calculated a proposed rate of \$1.7877 for the 2013-14 Fund year based on the CTS MARS calculation, aggregated provider submitted cost data results in an actual cost per minute calculation of \$1.4826 for IP CTS.<sup>401</sup>

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<sup>396</sup> At the time of its adoption, Ultratec was the sole provider of this service, offering it to the public through Sprint and Hamilton. Since that time, Sprint and Hamilton have opened their own IP CTS call centers, and Purple and Sorenson have entered the IP CTS market.

<sup>397</sup> See 47 C.F.R. §§ 64.604(c)(9)(iii)(A), (v)(B) (setting forth eligibility criteria for IP CTS).

<sup>398</sup> In addition to Purple and Sorenson, both of whom entered in recent years, the Commission has received a petition to enter the market from Miracom USA, Inc. See Application of Miracom USA, Inc. for Certification to Provide IP Captioned Telephone Service, CG Docket No. 03-123 (filed Nov. 23, 2011).

<sup>399</sup> See, e.g., *IP CTS Interim Order*, 28 FCC Rcd 703.

<sup>400</sup> *2006 TRS Cost Recovery FNPRM*, 21 FCC Rcd at 8391, ¶ 28.

<sup>401</sup> See *2013 TRS Rate Filing* at 13. Although IP CTS providers are not required to file annual projected cost and demand data with the Fund administrator (because the MARS Plan does not rely on projected or annual costs), this past year, IP CTS providers voluntarily submitted their data for the 2013-14 Fund year. The Fund administrator used these data to determine that the average reported cost for IP CTS is \$1.48 per minute, as compared to the MARS-calculated rate of \$1.78 per minute.

121. We seek comment on, and proposals for, alternative cost recovery methodologies for IP CTS. For example, should the Commission adopt a rate methodology similar to that for VRS and IP Relay, *i.e.*, based on a weighted average of actual and/or projected costs for each provider? Alternatively, should the Commission adopt a rate methodology for IP CTS that calculates rates based on each individual provider's costs?

122. In this regard, we question whether the cost elements that go into a determination of the IP Relay rate, now set at \$1.0391 per minute for the 2013–14 Fund year,<sup>402</sup> are demonstrably different from the elements that go into an IP CTS minute.<sup>403</sup> Prior to the adoption of the MARS rate for IP CTS, this service was compensated at the same rate as IP Relay.<sup>404</sup> We seek comment on whether the labor and technological costs of providing IP CTS are similar to the costs of providing IP Relay, and if so, whether the Commission should return to the original method of reimbursing for IP CTS at the same rate as IP Relay. Should IP CTS costs be lower than IP Relay costs, given that an IP Relay CA must be trained to read aloud the words of the IP Relay user and transcribe the words of the hearing caller, whereas an IP CTS CA need only transcribe the words of the hearing caller? To what extent are the cost differences due to marketing and outreach expenses? In the *VRS Structural Reform Order*,<sup>405</sup> the Commission removed outreach costs from the rate base for VRS and IP Relay. Should we consider doing the same for IP CTS? Commenters that maintain that the costs associated with providing these two forms of relay are not comparable should be specific in describing the differences that result in disparate costs for each service.

123. If we adopt a methodology based on providers' submission of actual and/or projected costs, we anticipate that the Commission will specify which expenses may be included as part of the "reasonable" costs necessary for the provision of IP CTS. We therefore seek comment on what such allowable costs should be. Should the cost categories be different than those used in calculating rates for IP Relay and VRS? We note that the Commission recently removed outreach costs as an allowable expense in setting rates for VRS providers, creating instead a national outreach plan for that service.<sup>406</sup> Should such expenses be excluded from rate calculations for IP CTS rates? Should other expenses currently included in the rate calculations for VRS and IP Relay be excluded from rate calculations for IP CTS? Conversely, should any expense categories currently excluded from the rate calculations for VRS and IP Relay be included in rate calculations for IP CTS? We specifically seek input on the extent to which the rate should include an allowance for working capital.<sup>407</sup>

124. Additionally, if the Commission adopts a methodology based on analysis of providers' actual and projected costs, we seek comment on whether the Commission should require the same filings of cost and demand data by IP CTS providers as are currently required of VRS and IP Relay providers and on the degree of any administrative burden such filings would impose on the Commission and the providers. Would any burden be outweighed by the benefit of having a rate for IP CTS that more accurately reflects the true costs of providing the service?

125. To the extent that we adopt a new rate methodology, we further seek comment on the period that the IP CTS rate determined under this regime should remain in effect. What should the rate

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<sup>402</sup> *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 and 10-51, Order, 28 FCC Rcd 9219, ¶ 2 (2013).

<sup>403</sup> See 2013 TRS Rate Filing at 16.

<sup>404</sup> *IP CTS Order*, 22 FCC Rcd at 390, ¶ 26.

<sup>405</sup> *VRS Structural Reform Order*, 28 FCC Rcd at 8634-39, ¶¶ 31–39.

<sup>406</sup> *Id.* at 8696, ¶ 192.

<sup>407</sup> We note that under the MARS Plan, this was unnecessary because working capital already was built into the various state rates that determined the MARS rate. Hamilton *Ex Parte* Letter at 1 (Feb. 12, 2007).

period be? Should the Commission establish the IP CTS rate for periods longer than one year to ensure predictability? Alternatively, should the rate be established for periods shorter than one year, in order to provide an opportunity to adjust the rate to account for significant changes in costs or demand?<sup>408</sup> If the rate period is one year or longer, how should rates be adjusted during such longer period? We seek comment on the advantages and disadvantages of using either a one-year rate period or some shorter or longer period of time for this service category.

126. We also seek comment on other alternatives to the current rate methodology. For example, should the Commission seek competitive bids for the provision of IP CTS, limiting the opportunity to provide this service in the future to one or more winning bidders?<sup>409</sup> If we were to transition to such a structure, in the interim, how should we set rates in order to ensure the continued viability of the service to those who need it most? Are there ways to utilize competitive bidding or auction-type processes to set rates for IP CTS without unduly limiting the number of ultimate providers?

127. We also seek comment on whether, under any rate methodology for IP CTS, there should be a “true-up” at the end of each Fund year based on actual reasonable costs of either individual providers or, to encourage providers to seek greater efficiencies, either a weighted average or the lowest cost among providers of the service. Under a true-up, providers would be required to reimburse the Fund for any amount by which their payments exceed actual reasonable costs, as determined by the Administrator in consultation with the Commission, based on filings by the providers. With such a true-up, providers’ ultimate compensation need not be contingent on estimates of costs or minutes of use.<sup>410</sup> Providers would receive periodic payments of estimated reasonable costs based on a particular cost methodology, and at the end of the Fund year, or other period as determined by the Commission, the true-up would reconcile the providers’ actual reasonable costs for providing service in compliance with the Commission’s rules and the payments received. We seek comment generally on any issues relating to the use of a true-up, including how a true-up could be implemented, what record keeping requirements might be required, and when and how often the true-up should occur.

## **B. Centralized Registration and Verification of IP CTS Users**

128. In the Report and Order, we establish registration and verification requirements for all IP CTS users.<sup>411</sup> In this Notice, we go a step further, to ask whether the centralized registration and verification processes that we recently adopted for VRS should also apply to IP CTS. Specifically, in the Commission’s *VRS Structural Reform Order*, the Commission directed the creation of a user registration database (TRS-URD) and implementation of centralized eligibility verification requirements to ensure that VRS registration is limited to those who have a hearing or speech disability.<sup>412</sup> The Commission

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<sup>408</sup> As noted above, IP CTS has experienced dramatic increases in demand during recent years.

<sup>409</sup> We note that many states award contracts for the provision of intrastate TRS to a single provider through a competitive bidding process. *See, e.g.*, State of Arizona, Application for Renewal of Current Certification, CG Docket No. 03-123 (filed Sept. 26, 2012); State of Ohio, FCC Certification Renewal and Supporting Document, CG Docket No. 03-123 (filed Oct. 22, 2012), each containing a copy of the Request for Proposals that was used to competitively select a vendor for the provision of PSTN-based TRS service in these states.

<sup>410</sup> The Commission previously asked about the use of a true up in the context of establishing the mechanism for VRS rates. At that time, it noted that the providers’ demand forecasts for VRS had generally been significantly lower than actual demand, and when demand is underestimated, the compensation rate will be higher, resulting in potential overcompensation for actual minutes. *2006 TRS Cost Recovery FNPRM*, 21 FCC Rcd at 8393, ¶ 29. *See also 2004 TRS Report & Order*, 19 FCC Rcd at 12565-66, ¶ 236 (seeking comment on whether VRS might be compensated by “a lump sum payment or periodic payments of estimated actual costs with a ‘true-up’ at the end of the fund year.”).

<sup>411</sup> *See* section III.C, *supra*.

<sup>412</sup> *VRS Structural Reform Order*, 28 FCC Rcd at 8647-56, ¶¶ 62-86.

indicated that such database should have capabilities to allow the Fund administrator and the Commission to: (a) receive and process registration information provided by VRS providers sufficient to identify unique VRS users and ensure each has a single default provider; (b) assign each VRS user a unique identifier; (c) allow VRS providers and other authorized entities to query the database to determine if a prospective user already has a default provider; (d) allow VRS providers to indicate that a VRS user has used the service; and (e) maintain the confidentiality of proprietary data housed in the database by protecting it from theft, loss, or disclosure to unauthorized persons.<sup>413</sup> The Commission concluded that a centralized process by which users are registered and their identity is verified will help to prevent registration and use of the service by fraudulent users, ensure that all users meet the verification standards established by the Commission, and increase the efficiency of the VRS program.<sup>414</sup>

129. We similarly believe that a centralized registration and verification process will reduce fraud, waste and abuse and ensure greater efficiency in the IP CTS program. In the *VRS Structural Reform Order*, we sought comment on extending use of the TRS-URD to other forms of TRS, including IP CTS. We specifically asked whether to require each IP CTS provider to give users the capability to register with that provider as the user's "default provider," (citing 47 C.F.R. §64.611(a)), to populate the TRS-URD with information about each user, and to query the database to ensure each user's eligibility for each call.<sup>415</sup> We now invite interested parties to submit comments on these matters in this proceeding as well, and to generally comment on application of the centralized processes for registration and verification that we adopted for VRS to IP CTS.<sup>416</sup> Among other things, we ask commenters to point out any differences between these types of services that might necessitate adjustment in the way that information is entered into the database, the database is utilized, and the confidentiality protections that will be needed to protect against the unauthorized disclosure of information housed in that database.<sup>417</sup>

130. We propose to direct the Managing Director to ensure that the centralized user registration database has the capability of performing an identification verification check when an IP CTS provider or other party submits a query to the database about an existing or potential user.<sup>418</sup> We further propose that the criteria for identification verification for IP CTS (*e.g.*, information to be submitted, acceptable level of risk, etc.) be established by the Managing Director in consultation with the Commission's Chief Technology Officer and the Chief of the Office of Engineering and Technology. Finally, we propose that IP CTS providers not be permitted to register individuals who do not pass the identification verification check conducted through the user registration database, and not be permitted to seek compensation for calls placed by such individuals. We seek comment on each of these proposals.

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<sup>413</sup> *Id.* at 8650, ¶ 69, noting that the Commission recently established a National Lifeline Accountability Database as part of its efforts to reform and modernize the Universal Service Fund's Lifeline program, and was relying on the Commission's experience in that proceeding to establish this centralized process for VRS. *See Lifeline and Link Up Reform and Modernization Order*, 27 FCC Rcd at 6734-54, ¶¶ 179-225.

<sup>414</sup> *VRS Structural Reform Order*, 28 FCC Rcd at 8655, ¶ 84.

<sup>415</sup> *Id.* at 8714-15, ¶ 251

<sup>416</sup> *See id.* at 8650-56, ¶¶ 69-86.

<sup>417</sup> *See id.* at 8654-55, ¶¶ 75-76 (noting the need for sufficient safeguards to maintain the personal nature of the information in the database and restricting access to the database to authorized entities and only for authorized purposes).

<sup>418</sup> *Id.* at 8656, ¶ 86 (noting that the National Lifeline Accountability Database has the same functionality and citing *Lifeline/Link Up Order*, 27 FCC Rcd at 6743, ¶ 201).

### C. Migration to State TRS Programs

131. Currently, state TRS programs administer and oversee the provision of CTS,<sup>419</sup> and the Commission oversees the provision of IP CTS. The Commission seeks comment on whether it should transfer the responsibilities for administering and overseeing IP CTS to state TRS programs. Among other things, this would transfer the responsibility for registering and certifying the eligibility of new IP CTS users from providers to the state relay programs. Taking this action may leverage the oversight abilities of the fifty states (plus covered territories) to ensure that TRS funds are appropriately used to serve customers in need.<sup>420</sup> We note that there appears to be at least some initial support for this transition. For example, NASRA, an association of state relay administrators, notes that its members “look forward to the opportunity to partner with the FCC and RSLA to be able to analyze and monitor the provision of all forms of TRS . . .”<sup>421</sup> NASRA also expresses support for requiring all CTS users to be screened or assessed, for example through a state’s equipment distribution procedures or eligibility requirements.<sup>422</sup> Along these same lines, TEDPA, the national association of state equipment distribution programs (EDPs), explains that most EDPs have “thorough eligibility and certification processes already in place to ensure that IP CTS equipment is appropriately distributed to end users.”<sup>423</sup>

132. We see advantages in having the state TRS programs, which are physically closer to the residents using this service and which, in large part, have already been undertaking the role of certifying consumers for the distribution of CTS equipment, to take on the role of ensuring the provision of IP CTS only to individuals who are eligible to use it, as well administering this service’s operations. We seek comment on this approach. If the state programs do become obligated to manage IP CTS, and the centralized TRS-URD is used to register and verify all IP CTS users, we would, thus, expect the state programs to conduct eligibility assessments of potential IP CTS users within their states. The state TRS programs (as compared to the providers, as is the case for VRS), would then populate the TRS-URD with the necessary data. We seek comment on this arrangement.

133. If the states take on the responsibility of registering users, we propose that the registration and self-certification requirements that we adopt today apply to all state IP CTS programs, understanding that these will be amended by the final rules addressing the application of the TRS-URD for IP CTS. Should the Commission prescribe other steps that states must take to ensure that IP CTS providers are not seeking compensation from the Fund for calls made by ineligible individuals? For example, we note that both NASRA and TEDPA do not support use of a minimum hearing threshold as a way of determining IP CTS eligibility.<sup>424</sup> To what extent should each state program be permitted to define its own eligibility

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<sup>419</sup> CTS is offered in every state and the District of Columbia. Many states also offer specialized CPE used for CTS for free or at reduced rates for qualifying consumers. See <http://www.captel.com/states> (viewed July 1, 2013).

<sup>420</sup> The Commission has not seen, for example, the same fraud and waste in the state-administered programs as it has with Internet-based TRS such as VRS, and IP Relay. See, e.g., Twenty-Six Charged in Nationwide Scheme to Defraud the FCC’s Video Relay Service Program, Press Release (Nov. 19, 2009), available at <http://www.justice.gov/opa/pr/2009/November/09-crm-1258.html>. See also *Misuse of Internet Protocol (IP) Relay Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 12-38 and 03-123, First Report and Order, 27 FCC Rcd 7866 (2012).

<sup>421</sup> NASRA Comments at 1. See also TEDPA Comments at 2 (making a nearly identical statement).

<sup>422</sup> NASRA Comments at 2; TEDPA Comments at 2.

<sup>423</sup> TEDPA Comments at 2.

<sup>424</sup> NASRA Comments at 2 (Users with audiograms outside the thresholds may still have auditory discrimination issues that can be assisted with captioning, because there are often factors – including additional disabilities, auditory processing, learning, acceptance of technology – other than strictly hearing loss that impact whether CTS is the best option for obtaining telecommunications access); TEDPA at 2 (does not support a minimum hearing threshold because of the varying degrees of hearing loss and auditory discrimination).

criteria for IP CTS use? In other words, should the Commission establish a mandatory minimum standard on eligibility by which all states must comply, or should states be permitted to establish their own eligibility criteria?<sup>425</sup> As a third alternative, should the Commission set minimum and maximum standards and allow the states to set their own standards within that range? If each state conducts an individual assessment to determine the eligibility of every IP CTS user, will the captions default off rule still be necessary? Will these assessments provide enough of a safeguard against misuse of the service by persons who do not need it?

134. States currently perform many registration and verification functions when providing CTS or giving out CTS or IP CTS equipment in their states. If IP CTS is added as a service that the states must manage and oversee, could these functions as they pertain to IP CTS be easily integrated into the states' current operations? We acknowledge comments by NASRA and TEDPA that not all states have EDPs that distribute IP-based equipment due to statutory limitations or restrictions.<sup>426</sup> However, we wish to clarify that were we to transfer responsibility for IP CTS to the state programs, the distribution of IP CTS equipment would remain at the states' option. How is the provision of CTS currently handled by states that do not have an EDP? Do such states nevertheless conduct assessments for participation in their CTS programs that could be used for determining IP CTS eligibility? What new or other responsibilities, in addition to conducting assessments of a greater number of potential users, would the states have to take on if this transfer of responsibility is made? Generally, what are the costs and benefits of requiring the state TRS programs to take on these responsibilities? What effect, if any, would such a shift have on the functional equivalence of the consumer's experience? Finally, we ask states to provide recommendations for the time period necessary for this transfer to take place, and to identify specific factors and constraints that support their recommendations.

135. *Funding IP CTS.* Section 225 of the Act directs the Commission to implement regulations for TRS cost recovery that provide for the "jurisdictional separation" of TRS costs; *i.e.*, the costs caused by *interstate* TRS generally are to be recovered from all subscribers for interstate services, and the costs caused by the provision of *intrastate* TRS are to be recovered from each intrastate jurisdiction.<sup>427</sup> As a result, state TRS programs arrange provider reimbursement for intrastate CTS calls through their individual funding mechanisms.<sup>428</sup> Notwithstanding this arrangement, in the *2007 IP CTS Declaratory Ruling*, the Commission concluded, on an interim basis, that all IP CTS calls would be compensated from the Fund.<sup>429</sup> The Commission explained that this approach was consistent with the treatment of VRS and IP Relay calls, and would provide an incentive for competition among multiple providers to offer this service on a nationwide basis in a manner that would "enhance consumer choice,

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<sup>425</sup> Section 225(f)(2) of the Act requires that states be in compliance with the Commission's mandatory minimum standards and other regulatory requirements. 47 U.S.C. § 225(f)(2). *See also* 47 U.S.C. § 225(d)(1) (directing the Commission to, among other things, establish functional requirements, guidelines and operations procedures and minimum standards).

<sup>426</sup> NASRA Comments at 2; TEDPA Comments at 2.

<sup>427</sup> 47 U.S.C. § 225(d)(3)(B). *See also* 47 C.F.R. § 64.604(c)(5)(ii). Interstate relay calls and all calls made via Internet-based forms of TRS, including IP CTS currently are funded through mandatory contributions made to the Fund by interstate telecommunications and VoIP service providers, based on certain of their end user revenues. *See* 47 C.F.R. § 64.604(c)(5)(iii)(A), (B). *See also VoIP Contribution Order*.

<sup>428</sup> The Communications Act does not require a specific funding method for *intrastate* TRS or state TRS programs, and states generally recover the costs of intrastate TRS either through rate adjustments or surcharges assessed on all intrastate end users, after which the states reimburse TRS providers directly for their intrastate TRS costs. 47 U.S.C. § 225(d)(3)(B) (certified state TRS programs "shall permit a common carrier to recover the costs incurred in providing intrastate telecommunications relay services by a method consistent with the requirements of [section 225])." *See also* 47 U.S.C. § 225(f). Interstate CTS calls are billed to and compensated by the Fund.

<sup>429</sup> *2007 IP CTS Declaratory Ruling*, 22 FCC Rcd at 390, ¶ 25.

service quality and available features.”<sup>430</sup> However, the Commission explained that this was an interim measure only and that it intended to revisit the cost recovery methodology for this service, including the matter of jurisdictional separation of costs, in the future.

136. As noted in section IV.A above, since 2007, the Commission has compensated IP CTS providers using the MARS rate methodology, by which the Fund administrator calculates the compensation rates for TRS using a weighted average of competitively bid state rates, and is revisiting the use of this methodology.<sup>431</sup> We also revisit whether the Fund should continue to support the costs of all IP CTS calls. In particular, we question whether the original incentives for having all financial support come from the Fund still exist. For example, as compared to when this service began in 2007 – when there were only two providers under the control of a single vendor<sup>432</sup> – there are now four IP CTS providers, with an application pending by a fifth provider that has expressed interest in offering this service.<sup>433</sup> In addition, a primary underlying reason for the Commission’s decision to have the Fund reimburse providers for the costs of VRS and IP Relay calls – upon which part of the rationale for doing the same for IP CTS calls is based – was the difficulty in ascertaining the location of calls made using IP transmissions. Insofar as calls associated with IP CTS are often made using the PSTN, we believe that IP CTS providers are able to ascertain the origination and destination of IP CTS calls in a manner that would allow for compensation for these calls to be billed to the states or the Fund, and seek comment on whether this assumption is accurate.

137. Given that the original reasons for having the Fund provide compensation for these calls may no longer exist, we believe that the Commission should reconsider its prior decision to treat IP CTS as an entirely interstate service and propose instead that this service be treated like traditional CTS, wherein state relay programs would be required to compensate providers for intrastate IP CTS calls. As stated earlier, the Act envisions that the funding support for TRS should be separated between the states and the federal government, with states paying for intrastate calls and the TRS Fund covering interstate calls. If we are incorrect in our assumption that IP CTS providers are able to discern the points of origination and destination of IP CTS calls in a manner that would allow them to determine which calls are intrastate versus interstate, we seek input on other ways that we can allocate IP CTS compensation for intrastate and interstate calls between the states and the TRS Fund. For example, can we establish a default proxy allocation between interstate and intrastate call jurisdiction that can be used if actual measurements are not possible? What should that allocation be? We also seek comment on the proposed jurisdictional separation, and ask below about the time period that would be needed by the states to effectuate this change. Finally, we ask how the Commission make such a transition in a way to best benefit consumers?

138. *Mandating CTS and IP CTS.* While every state voluntarily offers CTS, the Commission currently does not mandate the provision of either CTS or IP CTS. Given that we are now proposing to shift some of the financial obligations associated with IP CTS to the state programs, we seek comment on whether a mandate is needed to ensure that all states will participate in the provision of these services. Additionally, we seek comment on whether a mandate for CTS is necessary. We note that in October 2005, the Commission received a petition for rulemaking to mandate CTS, filed by thirteen organizations

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<sup>430</sup> *Id.*

<sup>431</sup> See section IV.A, *supra*.

<sup>432</sup> *2007 IP CTS Declaratory Ruling*, 22 FCC Rcd at 390, ¶ 24.

<sup>433</sup> See *Miracom Application*. In addition, AT&T previously filed an application to provide IP CTS. Although AT&T has since withdrawn its application, it is possible that the company may develop a renewed interest in this service in the event it is restructured with greater state participation.

generally representing people with hearing and speech disabilities.<sup>434</sup> Petitioners stated that, at the time, eighteen states did not offer any CTS and those that did offer the service imposed restrictions on the number of residents who could sign up for it, resulting in lengthy waiting lists<sup>435</sup> and limitations on the physical locations where residents were permitted to use CTS.<sup>436</sup> In June of 2009, most of the same petitioners filed a supplement with the Commission, detailing the ongoing state restrictions that they said were continuing to deny full access to the service, including limits on the number of entrants, jurisdictional boundaries for participants who crossed state lines, and restrictions on the operations of this service.<sup>437</sup>

139. Given the initial reluctance of the states to provide CTS, is a mandate of this service necessary to ensure the ongoing provision of this service, especially if state programs will now be required to assume the administration of intrastate IP CTS? We assume that many consumers have become regular users of state-supported services, as well as IP CTS. What would be the consequences to consumers were states to discontinue service or decline to participate in an IP CTS program if we were not to make IP CTS a mandatory service?

140. If a mandate for IP CTS were adopted, how quickly would state programs be capable of taking on the responsibilities associated with managing IP CTS operations and funding IP CTS? We ask commenters to provide feedback on the length of time needed to implement these changes, and the reasons such time is needed. For example, are there states where legislation or rulemaking would be required in order to assume these roles and, if so, how will this affect the time needed for a migration of such obligations to the states?

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<sup>434</sup> See Self Help for Hard of Hearing People, Inc., Alexander Graham Bell Association for the Deaf and Hard of Hearing, American Academy of Audiology, American Association of People with Disabilities, American Speech-Language-Hearing Association, Association of Late-Deafened Adults, Deaf and Hard of Hearing Consumer Advocacy Network, League for the Hard of Hearing, National Association of the Deaf, National Cued Speech Association, Telecommunications for the Deaf and Hard of Hearing, Inc., California Association of the Deaf, and California Coalition of Agencies Serving the Deaf and Hard of Hearing, Petition for Rulemaking to Mandate Captioned Telephone and Approve IP Captioned Telephone Relay Service, CG Docket No. 03-123, filed Oct. 31, 2005. The Commission sought public comment on the petition on November 14, 2005. *Petition for Rulemaking Filed Concerning Mandating Captioned Telephone Relay Service and Authorizing Internet Protocol (IP) Captioned Telephone Relay Service*, CG Docket No. 03-123, Public Notice, 20 FCC Rcd 18028 (CGB 2005) (2005 CTS Petition).

<sup>435</sup> For example, the petition alleged that Wisconsin, Vermont and South Carolina allowed only five persons to join the CTS program each month, and Connecticut, Kentucky, Indiana, Mississippi, Nevada and Utah limited monthly entry to 10 individuals. *2005 CTS Petition* at 17.

<sup>436</sup> For example, California allowed participants of its program to use its services only when physically present in its state. Petitioners reported that other states required that at least one leg of CTS calls had to be in their states, creating a policy that was “haphazardly applied from state to state, [that] denie[d] users the portability they need[ed] while traveling.” *2005 CTS Petition* at 18.

<sup>437</sup> Hearing Loss Association of America (HLAA), Alexander Graham Bell Association for the Deaf and Hard of Hearing, American Academy of Audiology, American Association of People with Disabilities, American Speech-Language-Hearing Association, Association of Late-Deafened Adults, Deaf and Hard of Hearing Consumer Advocacy Network, National Association of the Deaf, Telecommunications for the Deaf and Hard of Hearing, Inc., California Association of the Deaf, California Coalition of Agencies Serving the Deaf and Hard of Hearing, and Alliance for Public Technology, Supplement to Petition to Mandate Captioned Telephone Relay Service, CG Docket No. 03-123 (filed June 10, 2009). See also Ultratec, Supplement to Comments on Petition for Rulemaking for a Mandate for Captioned Telephone Relay Service (July 27, 2009). On June 26, 2009, the Commission released a new Public Notice to refresh the record in response to this supplement. *Consumer & Governmental Affairs Bureau Seeks to Refresh the Record on Petition to Mandate Captioned Telephone Relay Service*, CG Docket No. 03-123, Public Notice, 24 FCC Rcd 8570 (CGB 2009).

#### D. Mandatory Minimum Requirements

141. The Commission seeks comment on the need for and propriety of imposing certain mandatory minimum requirements for IP CTS. For example, should mandatory minimum requirements be established for the speed of captioning? If so, what would be an appropriate minimum speed and how should it be measured? If we adopt a specified speed, should we couple this with a specified error rate, and if so, what should this be? How would such requirements be enforced? Should we institute recordkeeping and/or reporting requirements for effective Commission oversight?

142. Should providers be permitted to compromise speed in favor of greater accuracy or *vice versa*? For example, should a provider be given the option of having a shorter lag time between the time that the other party to the call speaks and the captions appear, even if there is an increased error rate as a result of maintaining such speed? Or should providers be permitted to opt for a longer lag time in favor of greater accuracy?<sup>438</sup> Should consumers be given these options? We ask commenters to discuss the costs of imposing and enforcing these or other mandatory minimum requirements for IP CTS and the benefits of such requirements.

143. Are there other mandatory minimum standards that are needed to ensure that IP CTS providers are offering services to the public that are functionally equivalent to voice telephone services? For example, the Consumer Groups claim that currently, the browsers on CTS devices use Java Script, which is not compatible with the external large print display screens or Braille readers often used by people who have severe vision loss along with their hearing loss.<sup>439</sup> We seek comment on the need to address this issue, as well as any other matters necessary to ensure that consumer needs are being met by IP CTS.

#### E. Low Income Consumers

144. In the Report and Order, we conclude that the availability of free or discounted equipment through state and local governmental equipment distribution programs would help to fulfill Congress's and the Commission's goals of ensuring the widespread availability of IP CTS to individuals who can benefit from the service.<sup>440</sup> Consumer Groups argue that not all states have equipment distribution programs and that those states that do have such programs limit distribution to the phones offered by one provider only, thereby depriving low income consumers of the benefits of competition.<sup>441</sup> We are sensitive to the concerns expressed by the consumers and seek comment on whether state equipment distribution programs are meeting the needs of low income consumers. If state equipment distribution programs are not meeting those needs, what should the Commission do to address the needs of low income consumers in states without equipment distribution programs as well as in states that are not fully meeting the needs of low income consumers? Should the Commission allow for a low-income exception to the prohibition of providing compensation for IP CTS minutes of use generated by equipment that is distributed for less than \$75? If so, who should be permitted to distribute equipment for less than \$75? For example, should charitable organizations be permitted to distribute such equipment? If so, should we permit or prohibit charitable organizations that receive funding from IP CTS providers? If we are to permit distribution of equipment for less than \$75, how do we ensure that individuals receiving such equipment qualify as low income? What types of thresholds should we set for low

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<sup>438</sup> We are concerned that a practice may be emerging wherein providers summarize the conversation content of IP CTS calls. We remind providers that our rules require that all conversational content must be relayed verbatim, unless summarization is requested by the user. Noncompliance with this rule may result in denial of compensation.

<sup>439</sup> Consumer Groups Comments at 14.

<sup>440</sup> See Section III.C.1, *supra*. See also Sorenson Comments at 18; CTIA Comments at 6.

<sup>441</sup> See Consumer Groups August 9, 2013 *Ex Parte* at 2-3. See also Hamilton August 15, 2013 *Ex Parte* at 2. See generally <<http://www.tedpa.org/StateProgram.aspx>> (last visited July 1, 2013) (listing states that run EDPs).

income? Should it be four times the poverty level, as suggested by the Consumer Groups<sup>442</sup> and applied to the distribution of equipment under our National Deaf-Blind Equipment Distribution Program,<sup>443</sup> or should it be some other amount, such as 135% of federal poverty guidelines or participation in a specified government assistance program, as in the Lifeline program?<sup>444</sup> What type of documentation should we require to demonstrate eligibility as a low income consumer? Should we require certification under penalty of perjury? For consumers who qualify for the low income exemption, should we also require that they submit third party certification under penalty of perjury of hearing loss necessitating the use of IP CTS? To whom should the consumers submit all such documentation and certifications? Should the documentation and certifications be submitted to the newly created TRS-URD for processing and review? What other measures should the Commission adopt to ensure that individuals receiving such equipment qualify as low income and require the use of IP CTS? What are the costs and benefits of adopting a low income exception, as well as the costs and benefits of adopting measures to ensure that consumers qualify for the low income exception and require the use of IP CTS?

#### **F. IP CTS Software and Applications**

145. In the Report and Order, we prohibited compensation from the TRS Fund for IP CTS minutes of use generated by IP CTS equipment provided free of charge or at a price below \$75, other than through a state or local government equipment distribution program. We applied the same restriction to the provision of IP CTS software and applications to IP CTS users who had not already paid \$75 for IP CTS equipment, software, or applications. With respect to software and applications, we set the minimum price at \$75 to be consistent with the minimum price for equipment. We now seek comment on whether the purchase of IP CTS software and applications raises considerations that make it appropriate to set a different price threshold for software and applications. We ask commenters who believe that the \$75 price threshold should not be applicable to the context of software and applications to explain why it should not be applicable, to propose an appropriate alternative price threshold, and to explain why such an alternative would be sufficient to deter individuals who do not need IP CTS from using the service. We ask commenters to also address the costs and benefits of any minimum price they propose.

#### **G. Default Caption Off Requirement**

146. *911 Calls and Callbacks.* We believe that the rules adopted today adequately address concerns about emergency calls. Nevertheless, it might be possible to make further improvements in the handling of IP CTS during calls to 911, as well as callbacks from emergency call centers. The Commission, therefore, seeks comment whether it is technically feasible for all IP CTS equipment to be defaulted to “captions turned on” for 911 emergency calls, and if so, whether we should require IP CTS providers to so configure their equipment. If such a requirement is adopted, should individual consumers be permitted to override such setting? Would a different default setting for captions on 911 calls hinder or confuse consumers experiencing an emergency, if they have become accustomed to pressing captions on only when they need them? Should a captions on default for 911 calls be able to simply override attempts to turn the captions off? Similarly, would it be technically feasible to program an override for incoming call backs from 911 call centers? We understand that one manufacturer of IP CTS phones is capable of programming its devices to automatically provide captions on for incoming calls.<sup>445</sup> Would all IP CTS device manufacturers be capable of defaulting their devices to captions on solely for the purpose of receiving calls from 911 call centers? Could this also be done to receive specified emergency alerts from official authorities such as local, state and federal governmental entities? Should consumers be able to override an automatic default-on setting for incoming emergency calls, and if so, would such override

<sup>442</sup> See Consumer Groups Comments at 8; Consumer Groups August 9, 2013 *Ex Parte* at 3 n.6.

<sup>443</sup> 47 C.F.R. § 64.610(d)(2).

<sup>444</sup> 47 C.F.R. § 64.409.

<sup>445</sup> Pamela Y. Holmes, Ultratec, Notice of Ex Parte Communication in CG Docket No. 03-123 (July 5, 2013).

be technologically possible? Ultratec notes that having the captions defaulted to “on” for incoming calls and to “off” for outgoing calls “could be very confusing to consumers.”<sup>446</sup> Would this be the case if this arrangement applied only to emergency calls? We ask commenters to discuss the costs and benefits of their recommendations for a “captions on” override for both outgoing and incoming 911 or emergency calls.

147. *Volume Control.* Some commenters also express concern that, with a default caption-off setting, consumers miss critical information at the beginning of the call because of the time required to adjust the volume of the device along with turning the captions on.<sup>447</sup> They claim that certain IP CTS equipment links the ability to manipulate or preset the amplification setting to the setting for the captions, so that if the captions are set to default off, both features go off when a call ends, and the consumer must turn both features on for every call.<sup>448</sup> The Commission seeks further information on the features of currently available IP CTS equipment to better understand this problem. On IP CTS phones or software applications, do the volume control and captions functions act independently of each other? If not, what is the rationale for making these functions dependent? Should these functions be capable of independent activation? If the latter, the consumer would be able to adjust the volume up or down, or keep a volume setting defaulted to a certain level, without having to first turn on the captions for the call. In this case, we assume that the consumer might find that she or he does not need captions for the call. If we are correct in our assumption, should IP CTS providers be prohibited from linking volume control to the captions-on function? What are the costs and benefits of having the volume control and captions functions act independently of one another?

148. *Answering Machines and Other Incoming Calls.* Commenters also raise concerns about the impact of the default caption-off requirement on retrieving messages from their answering machines. For example, HLAA asks the Commission to consider the affirmative act of turning on an answering machine as equivalent to turning the captions on for an incoming call.<sup>449</sup> Ultratec explains that prior to the default off rule, its IP CTS devices captured and stored captions on voice messages left on an answering machine. Since the rule went into effect, however, it claims that users must press the captions “on” button and “re-caption the incoming voice message each time the user wants to play (or replay) a voice recorded message.”<sup>450</sup> As a result, Ultratec maintains, the default off setting creates inefficiencies, in that it incurs extra costs to the Fund each time the user replays the incoming message. We seek comment on how answering machines or other IP CTS devices capture captions, and whether we should amend our rules to address the retrieval of messages from such machines. Are all IP CTS devices equipped with built-in answering machines? If so, can such IP CTS devices be programmed to a captions default on setting for their answering machine functions? How would this work for the retrieval of voice mail that is captured in a telephone service provider’s network or an off-the-shelf answering machine that is not integrated into the IP CTS device? Are there other incoming call situations that the Commission needs to consider? For example, some commenters claim that a captions off default requirement can

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<sup>446</sup> *Id.*

<sup>447</sup> See e.g. Comments of Pearl Spodick (Mar. 22, 2013) (“I already have to adjust the volume to the highest level one button at a time (at least 3 buttons) before calling or receiving a call. . . Each additional step slows and handicaps the flow of conversation.”)

<sup>448</sup> HLAA Comments at 15.

<sup>449</sup> HLAA Comments at 15; See also Consumer Groups Comments at 13 (if default off is adopted, it should not apply to answering machine use).

<sup>450</sup> Ultratec Comments at 11.

result in a delay of captioning.<sup>451</sup> How does the captions off default requirement affect the ability of a consumer to communicate on incoming calls 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?<sup>452</sup> Ultratec notes that having the captions defaulted to “on” for incoming calls and to “off” for outgoing calls “could be very confusing to consumers.”<sup>453</sup> Does this mean that the Commission should either require captions default off for all calls, both incoming and outgoing (other than calls that fit within one of the exceptions), or permit captions to default on for all calls? We also seek comment on whether we should require that all IP CTS phones that are defaulted to captions on enable consumers to turn off the captioning with a single step. What are the costs and benefits of such a requirement?

149. *IP CTS Phones Available Only to Registered Users.* As noted in the Report and Order,<sup>454</sup> Consumer Groups and some providers have suggested that there is no need to require a default setting of captions off when an IP CTS user is living alone, living only with other individuals who are hard of hearing, or is in an office setting where no one else has access to that person’s IP CTS phone.<sup>455</sup> They posit that the chance of inadvertent use under such circumstances is “remote.”<sup>456</sup> We remain concerned about the unintentional user of IP CTS phones in any setting where others are present, such as a household that includes individuals who are not registered IP CTS users or a workplace station that is available to more than one employee, as well as a consumer living alone or with a private phone in a workplace who may not need captioning for every call. We are also concerned that consumers who live alone or have a private phone in a workplace receive functionally equivalent service.<sup>457</sup> We therefore seek comment on whether an exception could be implemented, above and beyond the hardship exception already granted, and consistent with our goal of eliminating unnecessary usage, for individuals who live alone (or only with other registered IP CTS users) or work in a situation, such as a private office, where no one else can use the individual’s phone. We ask commenters to provide information on the type of documentation that should be required to authenticate their living or working situation, and how we could prevent abuses were this exception adopted. In particular, we seek comment on how to ensure that those consumers who do not need captioning for every call will not use the captioning when it is not needed. We also ask commenters to address the costs and benefits of adopting such an exception. In addition, we ask whether we could safely adopt any other exceptions to the captions default off requirement, and if so, what are the costs and benefits of adopting such exceptions. We also seek comment on whether we should require that all IP CTS phones that are defaulted to captions on enable consumers to turn off the captioning with a single step. What are the costs and benefits of such a requirement?

150. *State Commission Authority.* In the previous section we discuss the alternative of transferring some responsibilities for administering and overseeing IP CTS to state TRS programs. If such a transfer of administrative responsibilities occurs, how would such a transfer affect the default-off rule? Should state programs be authorized to decide whether and under what circumstances to allow

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<sup>451</sup> See, e.g., Comments of Melissa Ruth (Mar. 4, 2013); Comments of Christopher Haggerty (Mar. 21, 2013); Comments of Thomas Wylie (Mar. 22, 2013); Comments of Dana Mulvany (Mar. 3, 2012); Comments of Dan Schwartz (Mar. 20, 2013); Purple Comments at 8 & n. 7.

<sup>452</sup> See 47 U.S.C. § 225(a)(3).

<sup>453</sup> Pamela Y. Holmes, Ultratec, Notice of Ex Parte Communication in CG Docket No. 03-123 (July 5, 2013).

<sup>454</sup> See Section III.E, *supra*.

<sup>455</sup> See Consumer Groups August 9, 2013 *Ex Parte* at 4; Consumer Groups August 13, 2013 *Ex Parte* at 2-3 and Attachment 2; Sorenson August 5, 2013 *Ex Parte* at 3; Hamilton August 15, 2013 *Ex Parte* at 3; Purple Comments at 7; Purple Reply Comments at 1-2; Ultratec Reply Comments at 11.

<sup>456</sup> Consumer Groups August 9, 2013 *Ex Parte* at 4.

<sup>457</sup> See *id.* at 4.

captions to be defaulted to on, or should that decision be made by the Commission? Would a transfer of responsibilities render the default-off rule unnecessary?

#### **H. Website, Advertising, and Educational Information Notifications**

151. In the Report and Order, we adopt requirements for notification labels to be affixed to all IP CTS telephones informing the consumer that: “FEDERAL LAW PROHIBITS ANYONE BUT REGISTERED USERS WITH HEARING LOSS FROM USING THIS DEVICE WITH THE CAPTIONS TURNED ON.”<sup>458</sup> HLAA states in its comments that although it is skeptical that an equipment label requirement alone “will discourage use by people who are entitled to use the phone[,] . . . consumers must be educated by multiple and repeated sources of information, such as provider’s websites, the self-identification statement, the contract, if there is one, brochures about the service, manuals for the equipment, and advertisements for the phone and the service.”<sup>459</sup>

152. To ensure that consumers receive multiple and repeated sources of information regarding legitimate use of IP CTS as proposed by HLAA, we propose that the following language be prominently displayed on all IP CTS provider web sites, advertising brochures and other advertising and consumer education and informational materials, including provider-supplied literature and user manuals: “FEDERAL LAW PROHIBITS ANYONE BUT REGISTERED USERS WITH HEARING LOSS FROM USING IP CAPTIONED TELEPHONES WITH THE CAPTIONS TURNED ON.” In the case of IP CTS provider websites, we propose that the language be prominently displayed on the home page, each page that provides consumer information about IP CTS, and each page that provides information on how to order IP CTS or IP CTS equipment. In addition, we propose that all IP CTS provider websites, advertising brochures and other advertising and consumer education and informational materials, including provider-supplied literature and user manuals, contain clear and prominently located statements and information (1) that the captions on captioned telephone service are provided by a live communications assistant who listens to the other party on the line and provides the text on the captioned phone, and (2) that the cost of captioning each Internet protocol captioned telephone call is funded through a federal program. We seek comment on these proposals and any alternative proposals to inform consumers about the way that it works and how it is funded. We also ask commenters to address the costs and benefits of any proposed requirements.

#### **I. General Prohibition of Providing Service to Users Who Do Not Need the Service**

153. In the *VRS Structural Reform Order*, to ensure that TRS is available “in the most efficient manner”<sup>460</sup> and achieves the goals underlying the provision and regulation of TRS, the Commission adopted a general prohibition on VRS providers engaging in fraudulent, abusive, and wasteful practices.<sup>461</sup> We seek comment on whether the Commission should adopt a general prohibition on IP CTS providers from providing service to consumers who do not genuinely need the service, that is, consumers who do not need an assistive technology to understand a telephone conversation or consumers who can understand a telephone conversation utilizing an assistive technology, such as an amplified phone, that does not entail the expenditure of money from the Interstate TRS Fund. Are there any other general prohibitions that should be adopted by the Commission? How else should the Commission ensure that only those who need IP CTS actually use the service? We seek comment on the costs and benefits of adopting general prohibitions on IP CTS providers from providing service to consumers who do not genuinely need the service.

<sup>458</sup> See section 35D, *supra*.

<sup>459</sup> HLAA Comments at 15-16. See also Ultratec Reply Comments at 13-14.

<sup>460</sup> 47 U.S.C. § 225(b)(1).

<sup>461</sup> *VRS Structural Reform Order*, 28 FCC Red at 8668-69, ¶ 131.

## V. PROCEDURAL MATTERS

### A. Comment Filing Procedures

154. Pursuant to sections 1.415 and 1.419 of the Commission's rules,<sup>462</sup> 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).<sup>463</sup>

- *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 12<sup>th</sup> 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 12<sup>th</sup> Street, SW, Washington DC 20554.

155. 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 12<sup>th</sup> Street SW, 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](mailto:fcc@bcpiweb.com).

### B. Ex Parte Presentations

156. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.<sup>464</sup> 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 *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

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<sup>462</sup> 47 C.F.R. §§ 1.415, 1.419.

<sup>463</sup> See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

<sup>464</sup> 47 C.F.R. §§ 1.1200–1.1216.

deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b).<sup>465</sup> In proceedings governed by rule 1.49(f)<sup>466</sup> 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.

### C. Regulatory Flexibility Act

157. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>467</sup> the Commission has prepared a Final Regulatory Flexibility Certification in which it concludes that, under the terms of RFA, there is no significant economic impact on small entities of the policies and rules addressed in this document. The Certification is set forth in Appendix D.

158. As required by the RFA, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this item. The IRFA is set forth in Appendix E. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided on or before the dates indicated on the first page of this Report and Order and Notice. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.<sup>468</sup> In addition, the Report and Order and Notice and IRFA (or summaries thereof) will be published in the Federal Register.<sup>469</sup>

### D. Paperwork Reduction Act Analysis

159. *Paperwork Reduction Act of 1995 Analysis.* This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA).<sup>470</sup> It will be submitted to the Office of Management and Budget (OMB) for review under section 3507 of the PRA.<sup>471</sup> Prior to submission to OMB, the Commission will publish a notice in the Federal Register seeking public comment on the information collection requirement. In addition, that notice will also seek comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees" pursuant to the Small Business Paperwork Relief Act of 2002.<sup>472</sup> The information collection contained in this Report and Order will not go into effect until OMB approves the collection and the Commission has published a notice in the Federal Register announcing the effective date of the information collection.

160. The Notice seeks comment on proposed new information collection requirements. If the Commission adopts any new information collection requirement, the Commission will publish another notice in the *Federal Register* inviting the public to comment on the requirements, as required by the

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<sup>465</sup> *Id.* § 1.1206(b).

<sup>466</sup> *Id.* § 1.49(f).

<sup>467</sup> 5 U.S.C. §§ 601 *et. seq.* The RFA 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).

<sup>468</sup> *See id.* § 603(a).

<sup>469</sup> *Id.*

<sup>470</sup> Pub. L. No. 104-13.

<sup>471</sup> 44 U.S.C. § 3507.

<sup>472</sup> Pub. L. No. 107-198. *See* 44 U.S.C. § 3506(c)(4).

PRA.<sup>473</sup> In addition, pursuant to the Small Business Paperwork Relief Act of 2002,<sup>474</sup> the Commission will seek specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees.

**E. Congressional Review Act**

161. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.<sup>475</sup>

**F. Materials in Accessible Formats**

162. To request materials in accessible formats (such as Braille, large print, electronic files, or audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY). This Report and Order and Further Notice of Proposed Rulemaking can also be downloaded in Word and Portable Document Formats (PDF) at <http://www.fcc.gov/cgb/dro/trs.html>.

**VI. ORDERING CLAUSES**

163. 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 Report and Order and Further Notice of Proposed Rulemaking is hereby ADOPTED, effective thirty (30) days after publication of the text or summary thereof in the Federal Register, except for those rules and requirements involving Paperwork Reduction Act burdens, which shall become effective upon announcement in the Federal Register of OMB approval and an effective date of the rules, and except for the extension of the rules adopted in the *IP CTS Interim Order*, which shall be effective immediately publication in the Federal Register.

164. IT IS FURTHER ORDERED that the final rules on referrals for rewards, 47 C.F.R. § 64.604(c)(8), 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).

165. IT IS FURTHER ORDERED that the interim rules on referrals for rewards, 47 C.F.R. § 64.604(c)(8), adopted in the *IP CTS Interim Order*,<sup>476</sup> SHALL CONTINUE TO BE EFFECTIVE until the final rules on referrals for rewards adopted herein become effective.<sup>477</sup>

166. IT IS FURTHER ORDERED that the final rules on 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 1995<sup>478</sup> and an effective date of the rules.

167. IT IS FURTHER ORDERED that the interim rules on new user registration and certification, 47 C.F.R. § 64.604(c)(9), adopted in the *IP CTS Interim Order*,<sup>479</sup> SHALL CONTINUE TO

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<sup>473</sup> Pub. L. No. 104-13. See 44 U.S.C. §§ 3501-3520.

<sup>474</sup> Pub. L. No. 107-198. See 44 U.S.C. § 3506(c)(4).

<sup>475</sup> 5 U.S.C. § 801(a)(1)(A).

<sup>476</sup> *IP CTS Interim Order*, 28 FCC Rcd at 735, 743, ¶¶ 66, 68, Appendix D.

<sup>477</sup> The effectiveness of the interim rules on referrals for rewards is being extended to avoid a gap in this requirement.

<sup>478</sup> Pub. L. No. 104-13, 109 Stat. 163 (May 22, 1995), codified at 44 U.S.C. § 3501 *et seq.*

<sup>479</sup> *IP CTS Interim Order*, 28 FCC Rcd at 735, 743-44, ¶¶ 66, 70, Appendix D.

BE EFFECTIVE until the final rules on user registration and certification adopted herein become effective.<sup>480</sup>

168. IT IS FURTHER ORDERED that the final rules requiring a default setting of captions off, 47 C.F.R. § 64.604(c)(10)(i), (ii), (iii) and (v), 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).

169. IT IS FURTHER ORDERED that the interim rules requiring a default setting of captions off, 47 C.F.R. § 64.604(c)(10), adopted in the *IP CTS Interim Order*,<sup>481</sup> SHALL CONTINUE TO BE EFFECTIVE until the final rules requiring a default setting of captions off adopted herein become effective.<sup>482</sup>

170. IT IS FURTHER ORDERED that the final rules providing a hardship exemption to the requirement of a default setting of captions off, 47 C.F.R. § 64.604(c)(10)(iv), 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 1995<sup>483</sup> and an effective date of the rules.

171. IT IS FURTHER ORDERED that the final rules regarding compensation of IP CTS providers in regard to minutes of use generated by consumers receiving certain IP CTS equipment and the final rules prohibiting persons who have not registered for IP CTS from using IP CTS equipment with captions turned on, 47 C.F.R. § 64.604(c)(11)(i) and (ii), 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).

172. IT IS FURTHER ORDERED that the final rules on labeling and recordkeeping of IP CTS equipment, 47 C.F.R. § 64.604(c)(11)(iii) and (iv), 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 1995<sup>484</sup> and an effective date of the rules.

173. IT IS FURTHER ORDERED that the final rules regarding registration and certification compliance requirements for applicants for certification to be IP CTS providers, 47 C.F.R. § 64.606(a)(2)(ii)(F), 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 1995<sup>485</sup> and an effective date of the rules.

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<sup>480</sup> The effectiveness of the interim rules on new user registration and certification is being extended to avoid a gap in the requirement.

<sup>481</sup> *IP CTS Interim Order*, 28 FCC Rcd at 735, 744, ¶¶ 66, 69, Appendix D.

<sup>482</sup> The effectiveness of the interim rules on default captions off is being extended to avoid a gap in this requirement.

<sup>483</sup> Pub. L. No. 104-13, 109 Stat. 163 (May 22, 1995), *codified at* 44 U.S.C. § 3501 *et seq.*

<sup>484</sup> Pub. L. No. 104-13, 109 Stat. 163 (May 22, 1995), *codified at* 44 U.S.C. § 3501 *et seq.*

<sup>485</sup> Pub. L. No. 104-13, 109 Stat. 163 (May 22, 1995), *codified at* 44 U.S.C. § 3501 *et seq.*

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## List of Commenters

COMMENTERS	COMMENTS SUBMITTED
Adult Loss of Hearing Association (ALOHA)	February 26, 2013
L. Storck, President of Collaborative for Communication Access via Captioning (CCAC)	February 20, 2013
CTIA-The Wireless Association (CTIA)	February 26, 2013
Hamilton Relay (Hamilton)	February 26, 2013
Hearing Loss Association of America (HLAA)	February 26, 2013
Miracom USA, Inc. (Miracom)	February 26, 2013
Purple Communications Inc. (Purple)	February 26, 2013
Rehabilitation Engineering Research Center on Telecommunications Access (RERC-TA)	February 26, 2013
Sorenson Communications Inc. and CaptionCall LLC (Sorenson)	February 26, 2013
Sprint Nextel (Sprint)	February 26, 2013
United States Telecom Association (USTelecom)	February 26, 2013
<b>Consumer Groups consisting of:</b> Telecommunications for the Deaf and Hard of Hearing, Inc., Association of Late-Deafened Adults, Inc., National Association of the Deaf, Deaf and Hard of Hearing Consumer Advocacy Network, Cerebral Palsy and Deaf Organization, California Coalition of Agencies Serving the Deaf and Hard of Hearing, and American Association of the Deaf-Blind	February 26, 2013
<b>PAPERWORK REDUCTION COMMENTS</b>	
Sorenson and CaptionCall LLC (Sorenson Paperwork Reduction Comments)	February 19, 2013
<b>REPLY COMMENTS</b>	
Consumer Groups	March 12, 2013
HLAA	March 12, 2013
Hamilton	March 12, 2013
Purple	March 12, 2013
RERC-TA	March 12, 2013
Sorenson	March 12, 2013
Ultratec	March 12, 2013

## APPENDIX B

## Final Rules

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 paragraphs (c)(8), (9), and (10), and by adding paragraph (c)(11) as follows:

**§ 64.604 Mandatory minimum standards.**

\* \* \* \* \*

(c) \* \* \*

(8) Incentives for Use of IP CTS.

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

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

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

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

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

(9) IP CTS Registration and Certification Requirements.

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

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

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

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

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

(iii) Self-Certification On or After [insert effective date of this rule amendment]. IP CTS providers must also first obtain from each consumer prior to requesting compensation from the TRS Fund for the consumer, a written certification from the consumer, and if obtained on or after [INSERT EFFECTIVE DATE OF THIS RULE AMENDMENT], such certification shall state that:

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

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

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

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

(iv) The certification required by paragraphs (c)(9)(ii) and (iii) of this section must be made on a form separate from any other agreement or form, and must include a separate consumer signature specific to the certification. Beginning [insert effective date of this rule amendment], such certification shall be made under penalty of perjury. 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) Third-Party Certification Prior to [insert effective date of this rule amendment]. Where IP CTS equipment is or has been obtained by a consumer from an IP CTS provider, directly or indirectly, at no charge or for less than \$75 and the consumer was registered in accordance with the requirements of paragraph (c)(9) of this section prior to [insert effective date of this rule amendment], the IP CTS provider must also obtain from each consumer prior to requesting compensation from the TRS Fund for the consumer, written certification provided and signed by an independent third-party professional, except as provided in paragraph (c)(9)(xi) of this section.

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

(A) Be qualified to evaluate an individual's hearing loss in accordance with applicable professional standards, and may include, but are not limited to, community-based social service providers, hearing related professionals, vocational rehabilitation counselors, occupational therapists, social workers, educators, audiologists, speech pathologists, hearing instrument specialists, and doctors, nurses and other medical or health professionals;

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

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

(vii) Third-Party Certification On or After [insert effective date of this rule amendment]. Where IP CTS equipment is or has been obtained by a consumer from an IP CTS provider, directly or indirectly, at no charge or for less than \$75, the consumer (in cases where the equipment was obtained directly from the IP CTS provider) has not subsequently paid \$75 to the IP CTS provider for the equipment prior to the

date the consumer is registered to use IP CTS, and the consumer is registered in accordance with the requirements of paragraph (c)(9) of this section on or after [**insert effective date of this rule amendment**], the IP CTS provider must also, prior to requesting compensation from the TRS Fund for service to the consumer, obtain from each consumer written certification provided and signed by an independent third-party professional, except as provided in paragraph (c)(9)(xi) of this section.

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

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

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

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

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

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

(xi) IP CTS providers must obtain registration information and certification of hearing loss from all IP CTS users who began receiving service prior to March 7, 2013, within 180 days following [**insert effective date of this rule amendment**] (registration deadline). Notwithstanding any other provision of paragraph (c)(9) of this section, IP CTS providers shall be compensated for compensable minutes of use generated prior to the registration deadline by any such users, but shall not receive compensation for minutes of IP CTS use generated on or after the registration deadline by any IP CTS user who has not been registered.

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

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

(iii) For software applications on mobile phones, laptops, tablets, computers or other similar devices, the requirements of this paragraph (c)(10) of this section are satisfied so long as (A) consumers must log in to access the IP CTS software feature with a unique ID and password, and (B) the default setting switches to captions on only while the consumer is logged in, and does not remain on indefinitely.

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

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

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

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

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

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

(11) IP CTS Equipment.

(i) Any IP CTS provider, including its officers, directors, partners, employees, agents, subcontractors, and sponsoring organizations and entities, that provides equipment, software or applications to consumers, directly or indirectly, at no charge or for less than \$75, whether through giveaway, sale, loan, or otherwise, on or after **[insert effective date of this rule]** shall be ineligible to receive compensation for minutes of IP CTS use generated by consumers using such equipment. An IP CTS provider may provide software or applications at no charge or for less than \$75 to a consumer who has already paid a minimum of \$75 for equipment, software, or applications to that IP CTS provider without affecting the IP CTS provider's eligibility to receive compensation for minutes of IP CTS use generated by that consumer.

This paragraph (c)(11)(i) shall not apply in instances where the consumer has obtained IP CTS equipment from a local, state, or federal governmental program.

(ii) No person shall use IP CTS equipment or software with the captioning on, unless (1) such person is registered to use IP CTS pursuant to paragraph (c)(9) of this section; or (2) such person was an existing IP CTS user as of March 7, 2013, and either (a) paragraph (c)(9)(xi) of this section is not yet in effect or (b) the registration deadline in paragraph (c)(9)(xi) of this section has not yet passed.

(iii) IP CTS providers shall ensure that any newly distributed IP CTS equipment has a label on its face in a conspicuous location with the following language in a clearly legible font: “FEDERAL LAW PROHIBITS ANYONE BUT REGISTERED USERS WITH HEARING LOSS FROM USING THIS DEVICE WITH THE CAPTIONS ON.” For IP CTS equipment already distributed to consumers by any IP CTS provider as of the effective date of this paragraph, such provider shall, within 30 days of the effective date of this paragraph, distribute to consumers equipment labels with the same language as mandated by this paragraph for newly distributed equipment, along with clear and specific instructions directing the consumer to attach such labels to the face of their IP CTS equipment in a conspicuous location. For software applications on mobile phones, laptops, tablets, computers or other similar devices, IP CTS providers shall ensure that, each time the consumer logs into the application, the notification language required by this paragraph appears in a conspicuous location on the device screen immediately after log-in.

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

3. 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.

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## APPENDIX C

## Final Regulatory Flexibility Certification

1. The Regulatory Flexibility Act of 1980, as amended (RFA)<sup>1</sup> requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that “the rule will not have a significant economic impact on a substantial number of small entities.”<sup>2</sup> The RFA generally defines “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>3</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>4</sup> 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).<sup>5</sup>

2. Internet protocol captioned telephone relay service (IP CTS) is a form of telecommunications relay service (TRS) that permits people who can speak, but who have a hearing loss and 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.<sup>6</sup> During the spring and fall of 2012, the Commission witnessed an unusually steep increase in the growth of IP CTS minutes.<sup>7</sup> This sudden and unprecedented escalation raised serious concerns for the Interstate TRS Fund (Fund) that, if not immediately addressed, threatened to overwhelm and, therefore, jeopardize the Fund for all forms of TRS. In order to protect the Fund, on January 25, 2013, the Commission took swift and immediate action, in the *IP CTS Interim Order*, to terminate, on an interim basis, provider practices that appeared to be resulting in the use of IP CTS by individuals who did not need this service to communicate in a functionally equivalent manner.<sup>8</sup>

3. In this Report and Order, the Commission modifies and makes permanent certain of those interim rules. The Commission therefore permanently prohibits all referrals for rewards programs and any other form of direct or indirect incentives, financial or otherwise, to register for or use IP CTS or for

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<sup>1</sup> 5 U.S.C. §§ 601 *et. seq.* The RFA 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).

<sup>2</sup> 5 U.S.C. § 605(b).

<sup>3</sup> 5 U.S.C. § 601(6).

<sup>4</sup> 5 U.S.C. § 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.”

<sup>5</sup> Small Business Act, § 15 U.S.C. § 632.

<sup>6</sup> See 47 C.F.R. § 64.601(16); *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*). IP CTS was approved as a compensable TRS program in 2007. *Id.*

<sup>7</sup> For example, 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. Additionally, in October 2012 alone, minutes reported by providers exceeded the minutes that the Fund administrator budgeted for this service by 38%. As a result, the total requested payout also exceeded the budgeted amount by 38%, almost \$4 million. See *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 13-24 and 03-123, Order and Notice of Proposed Rulemaking, 28 FCC Rcd 703, 706, ¶ 6 (2013) (*IP CTS Interim Order*).

<sup>8</sup> *IP CTS Interim Order*.

referral of IP CTS customers. The Commission also adopts as a final rule its interim requirement that each IP CTS provider, in order to be eligible for compensation from the Fund for providing service to *new* IP CTS users, (a) to register each new IP CTS user, and, (b) as part of the registration process, to obtain from each consumer a self-certification that the consumer (i) has a hearing loss that necessitates use of captioned telephone service, (ii) understands that the captions on captioned telephone service are provided by a live communications assistant who listens to the other party on the line and provides the text on the captioned phone, (iii) understands that the cost of captioning each Internet protocol captioned telephone call is funded through a federal program, and (iv) will not permit, to the best of the consumer's ability, persons who have not been registered to use Internet protocol captioned telephone service to make captioned telephone calls on the consumer's registered IP captioned telephone service or device. The Commission further adopts permanent rules 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, while allowing IP CTS users to apply for an exemption from this provision upon a showing of hardship.<sup>9</sup> The Commission also extends the effectiveness of each interim rule adopted in the *IP CTS Interim Order* until the final rule replacing it becomes effective.

4. The Report and Order also adopts rules: (1) requiring 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, (b) as part of the registration process, to obtain from each user the same self-certification that is required of new IP CTS users, and (c) for those existing users who had obtained equipment at no cost or below \$75, to pay \$75 for the equipment or to obtain certification from an independent third party professional that the user has a hearing loss that necessitates the use of captioned telephone service and that the third party professional understands that the captioned telephone service is provided by a live communications assistant and is funded through a federal program; (2) requiring IP CTS equipment to have labels informing consumers that consumers who have not registered to use IP CTS are prohibited from using the equipment with captions turned on; (3) prohibiting all providers from receiving compensation from the Fund for minutes of use generated from IP CTS users receiving IP CTS equipment, software, or applications at no cost or below \$75 on or after the effective date of this rule;<sup>10</sup> and (4) making provider certification contingent on demonstrated compliance that the provider will provide service only to eligible users. The Commission believes that none of these requirements would impose a significant economic impact on providers, including small businesses. Moreover, each requirement is necessary to help to ensure that IP CTS is as immune as possible from waste, fraud and abuse that could otherwise threaten the long-term viability of this program.

5. In analyzing whether a substantial number of small entities will be affected by the requirements adopted in the Report and Order, the Commission notes that the SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such firms having 1,500 or fewer employees.<sup>11</sup> Four providers currently receive compensation from the Interstate TRS Fund

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<sup>9</sup> The Commission also provides an exemption for mobile and web applications, provided that consumers must log into such applications and the default switches to captions on only for the limited session while the consumer is logged on.

<sup>10</sup> This prohibition does not apply to software or applications provided to consumers who already paid \$75 to the provider for equipment, software, or applications.

<sup>11</sup> 13 C.F.R. § 121.201, NAICS code 517110. According to Census Bureau data for 2007, there were 31,996 firms in the Wired Telecommunications Carrier category which operated for the entire year. U.S. Census Bureau, 2007 Economic Census, Sector 51: EC0751SSSZ2: Information: Subject Series - Estab & Firm Size: Employment Size of Establishments for the United States: 2007 (Release Date: 11/19/2010). [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-skip=700&-ds\\_name=EC0751SSSZ2&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ2&-lang=en). Of this total, 30,178 firms had employment of 99 or fewer employees, and an additional 1,818 firms had employment of 100 employees or more. Thus, under this size standard, the vast majority (continued....)

for providing IP CTS: Hamilton Relay, Inc.; Purple Communications, Inc.; Sorenson Communications, Inc. and its wholly-owned subsidiary CaptionCall; and Sprint Nextel Corporation. In addition, Miracom USA, Inc. has applied to the Commission for certification to be authorized to receive compensation from the Interstate TRS Fund (Fund) to provide IP CTS. We conclude that two of the five IP CTS providers and applicants that would be affected by the proposed rules are deemed to be small entities under the SBA's small business size standard. Because each of the new requirements adopted in the Report and Order will have no, or minimal, economic impact upon small entities, the Commission concludes that there will be no significant economic impact on the small entities affected by the changes adopted in this Report and Order, and adopts these rules as necessary to help to ensure that IP CTS is as immune as possible from waste, fraud and abuse that could otherwise threaten the long-term viability of this program.

6. Specifically, certain of the Commission's rules adopted in the Report and Order do not require any affirmative action or investment on the part of providers, including small entities, in that they are solely proscriptive, merely forbidding certain marketing behaviors. For example, the Commission's permanent prohibition on all referrals for rewards programs and any other form of direct or indirect incentives will not require any financial outlay, nor cause any significant economic impact, on providers which are small entities.

7. Similarly, the rule adopted in this Report and Order prohibiting all providers from receiving compensation from the Fund for minutes of use generated from IP CTS users receiving IP CTS equipment, software, or applications at no cost or below \$75 on or after the effective date of this rule, is proscriptive in nature and will not have a significant economic impact on providers which are small entities. In fact, small entity providers may be assisted by this rule, as it will ease competitive pressure on them to distribute hardware and software at no cost to consumers.

8. The Commission adopts, as a final rule, its interim requirement that each provider, in order to be eligible for compensation for service to *new* IP CTS users, register each new user and obtain from each user a self-certification that the user (i) has a hearing loss that necessitates use of captioned telephone service, (ii) understands that the captions on captioned telephone service are provided by a live communications assistant who listens to the other party on the line and provides the text on the captioned phone, (iii) understands that the cost of captioning each Internet protocol captioned telephone call is funded through a federal program, and (iv) will not permit, to the best of the user's ability, persons who have not been registered to use Internet protocol captioned telephone service to make captioned telephone calls on the user's registered IP captioned telephone service or device.

9. In addition, the Report and Order adopts rules requiring 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, (b) as part of the registration process, to obtain from each user a self-certification that the user (i) has a hearing loss that necessitates use of captioned telephone service, (ii) understands that the captions on captioned telephone service are provided by a live communications assistant who listens to the other party on the line and provides the text on the captioned phone, (iii) understands that the cost of captioning each Internet protocol captioned telephone call is funded through a federal program, and (iv) will not permit, to the best of the user's ability, persons who have not been registered to use Internet protocol captioned telephone service to make captioned telephone calls on the user's registered IP captioned telephone service or device, and (c) for those existing users

(Continued from previous page) \_\_\_\_\_

of firms can be considered small. (The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 100 employees or more.") *Id.*

who had obtained equipment at no cost or below \$75, to pay \$75 for the equipment<sup>12</sup> or obtain certification from an independent third party professional the user has a hearing loss that necessitates the use of captioned telephone service and that the third party professional understands that the captioned telephone service is provided by a live communications assistant and is funded through a federal program.

10. User registration is already required of other forms of TRS<sup>13</sup> and is a necessary and useful means to ensure that only those individuals who are truly eligible for TRS are allowed to use these services.<sup>14</sup> These measures will also ensure that users of IP CTS fully understand how the service works, and that its costs are supported by a federal program. The new rules, which require the registration and certification of *new* users prior to the commencement of service and give the providers 180 days to register all *existing* users who began service prior to January 1, 2012,<sup>15</sup> afford providers an adequate time to comply, and extending the registration requirements to *existing* users is a one-time effort that, once completed, is not ongoing. The Commission finds that the ongoing impact on providers, including small entities of registering *new* users and the one-time impact of upon providers, including small entities, of registering *existing* users is justified in order to protect the TRS Fund from misuse by ineligible users, and thereby safeguard the future of IP CTS and other TRS programs. Because the requirements to register and obtain certifications from users have an administrative-only impact on IP CTS providers, including small entities, and the Commission has mitigated the impact of such requirements by affording providers an adequate amount of time to register *existing* users, the Commission finds that these requirements will not cause any significant economic impact on providers, including those which are small entities. The Commission rejects the alternative of imposing the requirement for new users only, because such alternative does not address the fact that ineligible users may have enrolled in the program at an earlier time, especially during the period in which usage spiked.

11. The Commission has also adopted a rule making provider certification contingent on demonstrated compliance that the provider will provide service only to eligible users. This requirement is essential to prevent waste, fraud and abuse by ensuring that the Commission does not certify IP CTS providers that do not have a plan in place to prevent ineligible users from using IP CTS. Because applicants for certification to provide IP CTS already must submit detailed applications demonstrating their ability to comply with all Commission requirements, the additional showing required by this rule imposes little or no additional burden upon the providers, including small entities. The Commission thus finds that this requirement will not cause any significant economic impact on providers, including those which are small entities.

12. The Commission also adopts a requirement that IP CTS equipment feature labels informing both new and existing users that consumers who have not registered to use IP CTS are prohibited from using the equipment with captions turned on. Providers will be required to affix such labels to new equipment before it is distributed to consumers, and to distribute the labels to existing users along with instructions to attach the label to the equipment that the consumer is already using. The

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<sup>12</sup> The option to make a subsequent payment of \$75 is available only if the consumer initially obtained the equipment for free or for less than \$75 from the IP CTS provider and the subsequent payment is made to the provider.

<sup>13</sup> See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP-Enabled Service Providers*, CG Docket No. 03-123, CC Docket No. 98-67, WC Docket No. 05-196, Second Report and Order and Order on Reconsideration, 24 FCC Rcd 791, 808-810, ¶¶ 36-38 (2008) (*Second TRS Numbering Order*) (requiring registration and verification of VRS and IP Relay users).

<sup>14</sup> See *Structure and Practices of the Video Relay Services 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, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 8618, 8654-55, ¶¶ 80-83 (2013) (*VRS Structural Reform Order*); *Second TRS Numbering Order*, 24 FCC Rcd at 808-810, ¶¶ 36-38.

<sup>15</sup> Users who began service on or after March 7, 2013 will already have been registered under the interim rule.

obligations imposed by this labeling requirement are minimal for new equipment, and are similarly minimal, and a one-time expense, for existing users' equipment. The Commission finds that the small impact upon providers, including small entities, is warranted to ensure that ineligible users are cautioned that they may not utilize IP CTS. The Commission thus finds that this requirement will not cause any significant economic impact on providers, including those which are small entities. Based upon the comments filed in this proceeding, the Commission rejected the alternative of requiring this information to be displayed on the IP CTS screen at the beginning of each call, because such alternative may have had more of an economic impact upon providers and was likely to be potentially confusing to consumers.

13. The Commission also makes permanent its interim rule requiring IP CTS providers to ensure that equipment and software used in conjunction with their service have a default setting of captions off at the beginning of each call, so that the consumer must take an affirmative step to turn on the captions each time the consumer wishes to use IP CTS. The Report and Order adds, for the first time, a hardship exception whereby a provider need not have a setting of default captions off for those consumers who submit to the IP CTS provider a self-certification and an independent third party physician certification that the requirement to activate captioning at the start of each call significantly impedes the consumer's ability to make use of the captioned telephone service. The Commission also permits each provider to turn captions on for 911 emergency calls so long as the provider still complies with the general captions default off requirement.

14. The requirement for 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 necessitated a one-time software change on the part of providers, including small entities. The implementation of this requirement, however, is outweighed by the public interest need to prevent misuse of IP CTS resulting from consumers sharing their IP CTS equipment with individuals who do not qualify to use IP CTS. Such misuse results in greater expenses incurred by the TRS Fund, which is funded by contributions provided by telecommunications and VoIP providers, including small entities. The hardship exemption adopted in this Report and Order will impose new reporting and recordkeeping obligations on all IP CTS providers, including small entities. However, the reporting and recordkeeping requirements will not be substantial, because each IP CTS provider will have a one-time requirement for each consumer who qualifies for the hardship exemption. Moreover, the hardship exemption was supported by all commenters, including all IP CTS providers, who commented on the issue as a means of ensuring functionally equivalent service for those consumers who have significant difficulty turning on captions. Because the hardship exemption will allow those consumers who are unable to turn on captions to have a default setting of captions on, and thereby be able to make use of the service, the hardship exemption should result in additional legitimate compensable minutes for IP CTS providers, and thereby benefit such providers, including small entities. The Commission also permits each provider to turn captions on for 911 emergency calls so long as the provider still complies with the general captions default off requirement. Therefore, the Commission finds that these requirements will not cause any significant economic impact on providers, including those which are small entities. The Commission rejected the alternative of returning to a system permitting default-on settings for all consumers, as it deemed making the captions default off rule permanent to be necessary to ensure that IP CTS is utilized only by eligible users, thereby protecting the program and the Fund. The Commission also rejected the alternative of no hardship exception, because without the exception, certain consumers would be unable to make use of IP CTS that is functionally equivalent to the ability of a hearing individual who does not have a speech disability to communicate using voice communication services.<sup>16</sup>

15. The Report and Order also extends the effectiveness of each interim rule adopted in the *IP CTS Interim Order* until the final rule replacing it becomes effective. Because all IP CTS providers are already supposed to be in compliance with each of the interim rules, the extension of the effectiveness

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<sup>16</sup> See 47 U.S.C. § 225(a)(3).

of the interim rules will impose no new requirements on any IP CTS provider, including small entities. The Commission thus finds that these rule extensions will not cause any significant economic impact on providers, including those which are small entities. The Commission rejected the alternative of not extending the effectiveness of the interim rules to prevent a gap in these rules, which would open the door to practices that the Commission has already determined could permit consumers who do not need IP CTS to use the service.

16. Therefore, for all of the reasons stated above, we find that the requirements of this Report and Order will not have a significant economic impact on a substantial number of small entities.

17. The Commission will send a copy of the Report and Order, including a copy of this Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the SBA.<sup>17</sup> This final certification will also be published in the Federal Register.<sup>18</sup>

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<sup>17</sup> See 5 U.S.C. § 605(b).

<sup>18</sup> See *id.*

## APPENDIX D

## Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act (RFA),<sup>1</sup> the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Further Notice of Proposed Rulemaking (Notice). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments in the Notice. The Commission will send a copy of this Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>2</sup> In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

**A. Need for, and Objectives of, the Proposed Rules**

2. Internet protocol captioned telephone relay service (IP CTS) is a form of telecommunications relay service (TRS) that permits people who can speak, but who have a hearing loss and 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.<sup>4</sup> In the Notice, the Commission seeks comment on nine main issues. First, the Commission seeks comment on whether to change the methodology for calculating the compensation rate paid to IP CTS providers. Second, the Commission seeks comment on whether the centralized registration and verification processes that we recently adopted for video relay service (VRS) should also apply to IP CTS.<sup>5</sup> Third, the Notice asks whether the Commission should transfer the responsibilities for funding, administering and overseeing IP CTS to state TRS programs. Fourth, the Commission asks whether there is need for mandatory minimum standards specific to IP CTS, including standards on accuracy, speed, communications assistant (CA) connection time, volume pre-sets, and access to 911, and if so, how such standards should be measured and enforced. Fifth, the Commission seeks comment on whether to adopt a low income exception to the requirement that consumers must pay a minimum of \$75 for IP CTS phones. Sixth, the Commission asks whether the \$75 minimum price for IP CTS software and applications should be retained or modified. Seventh, the Commission seeks comment on application of the default captions off requirement<sup>6</sup> with regard to certain situations raised in

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<sup>1</sup> 5 U.S.C. § 601 *et seq.* The RFA has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See 5 U.S.C. § 603(a).

<sup>4</sup> See 47 C.F.R. § 64.601(16); *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*).

<sup>5</sup> In the Commission's *VRS Structural Reform Order*, the Commission directed the creation of a user registration database (TRS-URD) and implementation of centralized eligibility verification requirements to ensure that VRS registration is limited to those who have a hearing or speech disability. *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 Nos. 10-51 and 03-123, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 8618, 8647-8656, ¶¶ 62-86 (2013) (*VRS Structural Reform Order*).

<sup>6</sup> In the months prior to January, 2013, IP CTS had been experiencing unusually rapid growth. The Commission was concerned that usage of this service by ineligible persons using IP CTS equipment was contributing substantially to this increase in IP CTS minutes of use. See *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 13-24 and 03-123, Order and Notice of Proposed Rulemaking, 28 FCC Rcd 703, 720, ¶ 27 (2013) (*IP CTS Interim Order*). On January 25, 2013, the Commission issued interim rules which (continued....)

the comments to this proceeding. Eighth, the Commission seeks comment on a proposal that language be prominently displayed on all IP CTS provider websites, advertising brochures and other advertising and consumer education and informational materials, including provider-supplied literature and user manuals, notifying consumers that federal law prohibits anyone other than registered IP CTS users from using IP CTS equipment with captioning turned on. Finally, the Commission asks whether it should adopt a general prohibition on providing service to consumers who do not need IP CTS.

**B. Legal Basis**

3. The legal basis for any action that may be taken pursuant to the *Notice* is contained in sections 1, 2, 4(i), 4(j), and 225 of the Communications Act of 1934, as amended.<sup>7</sup>

**C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules May Apply**

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules.<sup>8</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>9</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>10</sup> 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 SBA.<sup>11</sup>

5. We believe that the entities that may be affected by the proposed rules are IP CTS providers. Neither the Commission nor the SBA has developed a definition of “small entity” specifically directed toward IP CTS providers. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers, which consists of all such firms having 1,500 or fewer employees.<sup>12</sup> Four providers currently receive compensation from the Interstate TRS Fund for providing IP CTS: Hamilton Relay, Inc.; Purple Communications, Inc.; Sorenson Communications, Inc. and its wholly-owned subsidiary CaptionCall; and Sprint Nextel Corporation. In addition, Miracom USA, Inc. has applied to the Commission for certification to be authorized to receive compensation from the Interstate TRS Fund (Continued from previous page)

\_\_\_\_\_ included a requirement that providers set equipment to a default captions-off setting. *Id.* at 722, ¶ 33. The accompanying Report and Order makes this interim rule permanent.

<sup>7</sup> 47 U.S.C. §§ 151, 152, 154(i), 154(j), and 225.

<sup>8</sup> 5 U.S.C. § 604(a)(3).

<sup>9</sup> 5 U.S.C. § 601(6).

<sup>10</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the 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.”

<sup>11</sup> 15 U.S.C. § 632.

<sup>12</sup> 13 C.F.R. § 121.201, NAICS code 517110. According to Census Bureau data for 2007, there were 31,996 firms in the Wired Telecommunications Carrier category which operated for the entire year. U.S. Census Bureau, 2007 Economic Census, Sector 51: EC0751SSSZ2: Information: Subject Series - Estab & Firm Size: Employment Size of Establishments for the United States: 2007 (Release Date: 11/19/2010). [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-fds\\_name=EC0700A1&-skip=700&-ds\\_name=EC0751SSSZ2&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-skip=700&-ds_name=EC0751SSSZ2&-lang=en). Of this total, 30,178 firms had employment of 99 or fewer employees, and an additional 1,818 firms had employment of 100 employees or more. Thus, under this size standard, the vast majority of firms can be considered small. (The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 100 employees or more”). *Id.*

(Fund) to provide IP CTS. We conclude that two of the five IP CTS providers and applicants that would be affected by the proposed rules are deemed to be small entities under the SBA's small business size standard.

**D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

6. Certain rule changes, if adopted by the Commission, would modify rules or add requirements governing reporting, recordkeeping and other compliance obligations.

7. If the Commission were to adopt the changes to the methodology for calculating the compensation rate paid to IP CTS providers<sup>13</sup> as proposed in the Notice, the compensation rate may be lower than it is now,<sup>14</sup> and IP CTS providers may be required to submit to the Fund administrator cost data<sup>15</sup> that they are not now required to provide. However, interstate TRS, including IP CTS, is funded through a federal program in which interstate telecommunications and voice over Internet protocol (VoIP) providers, including small entities contribute to the Fund, and the monies contributed to the Fund are used to compensate TRS providers, including IP CTS providers. Section 225(b)(1) of the Communications Act of 1934, as amended (Act), requires that TRS is made available "in the most efficient manner" to individuals with hearing and speech disabilities.<sup>16</sup> The Commission therefore has a statutory obligation to ensure that TRS providers, including IP CTS providers, are compensated fairly and are not overcompensated. The purpose of any change in rate methodology, if adopted by the Commission, would be to satisfy this statutory obligation.

8. If the Commission were to adopt centralized registration and verification processes as we recently did for VRS, and thereby extend the use of the TRS user registration database (TRS-URD)<sup>17</sup> to IP CTS, providers of these services, including small entities, would be required to collect certain information from consumers and enter that information in the TRS-URD. However, the TRS-URD would actually reduce the regulatory and recordkeeping burden on IP CTS providers, including small entities, because (1) the providers would no longer be required to verify user information, which would be accomplished centrally by a single entity contracted by the Commission, and (2) the providers would have reduced burdens when collecting information from consumers who switch providers, because the user information of those consumers would already be in the database.

9. If the Commission were to adopt the proposal to transfer the responsibilities for funding, administering and overseeing IP CTS to state TRS programs, IP CTS providers, including small entities, would need to submit compensation requests to each state and comply with the regulatory obligations, including recordkeeping and reporting, of each state. However, the Commission is concerned about misuse of IP CTS that may be costly to the interstate telecommunications and VoIP providers, including small entities, that contribute to the Fund. One of the reasons for shifting regulatory oversight of IP CTS to the states would be to provide for greater regulatory oversight to prevent such misuse. The Notice seeks comment on the costs and benefits of shifting regulatory responsibility to the states.

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<sup>13</sup> Currently, IP CTS rates are determined using the Multi-state Average Rate Structure Plan (MARS Plan). Under the MARS Plan, the Fund administrator calculates the compensation rates for IP CTS using a weighted average of competitively bid state rates for intrastate captioned telephone service (CTS). See *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, 20151, ¶ 16 (2007) (*2007 TRS Rate Methodology Order*).

<sup>14</sup> Some of the methodologies under consideration may result in lower compensation rates.

<sup>15</sup> The notice proposes, as one of the possible scenarios, that the rate for IP CTS be calculated based on cost data.

<sup>16</sup> 47 U.S.C. § 225(b)(1).

<sup>17</sup> See *VRS Structural Reform Order*, 28 FCC Rcd at 8649-53, ¶¶ 68-77.

10. If the Commission were to adopt changes to the mandatory minimum standards specific to IP CTS, IP CTS providers, including small entities, would be required to comply with the changed standards. The Commission initially believes that the costs associated with these standards would be reasonable for the IP CTS providers, because in many cases the providers support the changes, and have indicated that they meet some of the new standards already. The Notice seeks comment on the recordkeeping that would be required to demonstrate compliance with the proposed standards, and initially believes that the recordkeeping cost to providers, including small entities, would be reasonable and in line with what is required of providers for the other forms of TRS, including many of the same providers who offer IP CTS. The Notice seeks comment on the costs and benefits of modifying the proposed mandatory minimum standards for IP CTS.

11. If the Commission were to adopt a low income exception to the requirement that providers may not receive compensation from the Fund generated by equipment provided to new consumers for less than \$75, it is proposed that the TRS-URD administrator would be required to obtain from IP CTS users documentation and certifications demonstrating that the consumer qualifies for the low income exemption and need IP CTS to understand telephone conversations. Because the TRS-URD administrator, and not the IP CTS providers, would be responsible for obtaining such documentation, this proposal is not likely to place a regulatory burden on IP CTS providers, including small entities. The notice seeks comment on the costs and benefits of the proposal.

12. If the Commission were to modify the minimum amount of \$75 that consumers must pay for software and applications in order for providers to be eligible to receive compensation from the Fund for minutes of use generated by those consumers, the administrative and other burdens on IP CTS providers, including small entities, would remain the same. The Notice seeks comment on the costs and benefits of modifying the minimum amount.

13. If the Commission were to change the application of the default captions off requirement with regard to certain situations raised in the comments to this proceeding, such as whether to require the disassociation of volume control from the use of captions, whether to permit that captions be defaulted on for answering machines, and whether to permit captions to be defaulted on for IP CTS phones that are available only to registered users, there may be one-time costs to IP CTS providers, including small providers, in implementing any such changes. The Commission initially believes that such costs would be reasonable, and the public interest in ensuring functionally equivalent service by addressing these situations would outweigh this minimal burden. The Notice seeks comment on the costs and benefits of these various modifications proposed in the Notice.

14. If the Commission were to adopt a requirement to provide a notification on all IP CTS provider websites, advertising brochures and other advertising and consumer education and informational materials, including provider-supplied literature and user manuals, that federal law forbids anyone but registered IP CTS users from using IP CTS equipment with captioning turned on, IP CTS providers, including small entities, would be required to provide such information on their websites, advertising brochures and other advertising and consumer education and informational materials. The Commission initially believes that this requirement would impose only minimal burden on providers, including small entities, because the changes required by this rule would simply be to add wording to web pages that already exist and to advertising brochures and other advertising and consumer education and informational materials that the IP CTS providers print and would not require the creation of new web pages or new printed materials solely for the purpose of compliance with the requirement. The notice also seeks comment on the costs and benefits of the proposal.

15. Finally, if the Commission were to adopt a general prohibition on IP CTS providers from providing service to consumers who do not genuinely need the service, IP CTS providers, including small entities would be required to take steps to ensure that they are not providing service to consumers who do not genuinely need the service. Such measures would be necessary to prevent waste of the TRS Fund and would save contributors to the TRS Fund, including small entities from contributing unnecessary amounts to the Fund. The notice seeks comment on the costs and benefits of the proposal.

**E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered**

16. The RFA requires an agency to describe any significant alternatives, specific to small entities, that it has considered in developing its approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”<sup>18</sup>

17. In general, alternatives to proposed rules are discussed only when those rules pose a significant adverse economic impact on small entities. In this context, however, one of the proposed rules would confer benefits as explained below, and the others do not impose significant adverse economic impact.

18. If the Commission were to adopt the changes to the methodology for calculating the compensation rate paid to IP CTS providers as proposed in the Notice, the compensation rate may be lower than it is now, and IP CTS providers may be required to submit to the Fund administrator cost data that they are not now required to provide. However, interstate TRS, including IP CTS, is funded through a federal program in which interstate telecommunications and voice over Internet protocol (VoIP) providers, including small entities contribute to the Fund, and the monies contributed to the Fund are used to compensate TRS providers, including IP CTS providers. Section 225(b)(1) of the Act requires that TRS is made available “in the most efficient manner” to individuals with hearing and speech disabilities.<sup>19</sup> The Commission therefore has a statutory obligation to ensure that TRS providers, including IP CTS providers, are compensated fairly and are not overcompensated. Because the purpose of any change in rate methodology, if adopted by the Commission, would be to satisfy this statutory obligation, the Commission is not proposing other alternatives for small entities.

19. If the Commission were to adopt centralized registration and verification processes, and require IP CTS providers to transfer information to the TRS URD, IP CTS providers would transfer information which they are already obliged to collect to the central database manager, and the TRS Fund would compensate the database manager. Providers, including small entities, would thereby be relieved of the obligation to maintain registration information, and would not be responsible for the cost of maintenance of a registration database. There would be no additional reporting or recordkeeping obligations associated with the proposed rule change, and the effect of the rule would be to reduce recordkeeping obligations on providers, including small entities. The Commission is not proposing other alternatives for small entities because these requirements may be needed to limit waste, fraud and abuse, and an ineligible user can potentially defraud the TRS Fund by obtaining service from large and small entities alike. Therefore, if the Commission were to adopt centralized registration and verification procedures, the same requirements would need to apply to users of small entities as well as large entities.

20. If the Commission were to adopt the proposal to transfer the responsibilities for funding, administering and overseeing IP CTS to state TRS programs, some current IP CTS providers, including possible small entities, would need to submit compensation requests to each state and comply with the regulatory obligations, including recordkeeping and reporting, of each state. However, the Commission is concerned about misuse of IP CTS that may be costly to the interstate telecommunications and VoIP providers, including small entities, that contribute to the Fund. One of the reasons for shifting regulatory oversight of IP CTS to the states would be to provide for greater regulatory oversight to prevent such misuse. The Notice seeks comment on the costs and benefits of shifting regulatory responsibility to the

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<sup>18</sup> 5 U.S.C. § 603(c)(1)-(c)(4).

<sup>19</sup> 47 U.S.C. § 225(b)(1).

states. If regulatory responsibility were shifted to the states, it would be up to the states to consider whether to adopt significant regulatory alternatives specific to small entities.

21. If the Commission were to adopt changes to the mandatory minimum standards specific to IP CTS, IP CTS providers, including small entities, would be required to comply with the changed standards. The Commission initially believes that the costs associated with these standards would be reasonable for the IP CTS providers, because in many cases the providers support the changes, and have indicated that they meet some of the new standards already. The Notice seeks comment on the recordkeeping that would be required to demonstrate compliance with the proposed standards, and initially believes that the recordkeeping cost to providers, including small entities, would be reasonable and in line with what is required of providers for the other forms of TRS, including many of the same providers who offer IP CTS. The Notice seeks comment on the costs and benefits of modifying the proposed mandatory minimum standards for IP CTS. Moreover, the Commission is not proposing other alternatives for small entities because this proposal applies to the mandatory minimum standards for the entire IP CTS program. Section 225(d)(1)(B) of the Act requires that the Commission establish mandatory minimum standards,<sup>20</sup> and section 225 (a)(3) of the Act requires that TRS be provided “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. . . .”<sup>21</sup> In order to ensure functional equivalency, the same mandatory minimum standards need to apply to small entities as well as large entities.

22. If the Commission were to adopt a low income exception to the requirement that providers may not receive compensation from the Fund generated by equipment provided to new consumers for less than \$75, it is proposed that the TRS-URD administrator would be required to obtain from IP CTS users documentation and certifications demonstrating that the consumer qualifies for the low income exemption and need IP CTS to understand telephone conversations. Because the TRS-URD administrator, and not the IP CTS providers, would be responsible for obtaining such documentation, this proposal is not likely to place a regulatory burden on IP CTS providers, including small entities. The notice seeks comment on the costs and benefits of the proposal.

23. If the Commission were to modify the minimum amount of \$75 that consumers must pay for software and applications in order for providers to be eligible to receive compensation from the Fund for minutes of use generated by those consumers, the administrative and other burdens on IP CTS providers, including small entities, would remain the same. The Notice seeks comment on the costs and benefits of modifying the minimum amount.

24. If the Commission were to change the application of the default captions off requirement with regard to other situations raised in the comments to this proceeding, such as whether to require the disassociation of volume control from the use of captions, whether to permit that captions be defaulted on for answering machines, and whether to permit captions to be defaulted on for IP CTS phones that are available only to registered users, there may be one-time costs to IP CTS providers, including small providers, in implementing such changes. As noted above, the Commission initially believes that such costs would be reasonable, and the public interest in ensuring functionally equivalent service by addressing these situations outweigh this minimal burden, and therefore no alternatives are proposed for small entities. The Notice seeks comment on the costs and benefits of these various modifications proposed in the Notice. The Commission will consider any comments received that propose alternatives that would reduce the burden of any regulation on IP CTS providers, including specific proposals to reduce the regulatory burden on small entities.

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<sup>20</sup> 47 U.S.C. § 225(d)(1)(B).

<sup>21</sup> 47 U.S.C. § 225(a)(3).

25. If the Commission were to adopt a requirement to provide a notification on all IP CTS provider websites, advertising brochures and other advertising and consumer education and informational materials, including provider-supplied literature and user manuals, that federal law forbids anyone but registered IP CTS users from using IP CTS equipment with captioning turned on, IP CTS providers, including small entities, would be required to provide such information on their websites, advertising brochures and other advertising and consumer education and informational materials. The Commission initially believes that this requirement would impose only minimal burden on providers, including small entities, because the changes required by this rule would simply be to add wording to web pages that already exist and to advertising brochures and other advertising and consumer education and informational materials that the IP CTS providers print and would not require the creation of new web pages or new printed materials solely for the purpose of compliance with the requirement. The Commission initially rejects the alternative of not adopting the proposed requirement on the grounds that the requirement is needed to prevent consumers who are not eligible to use IP CTS from using IP CTS equipment with the captions turned on. This is needed to avoid unnecessary Fund expenditures, which in turn, would be paid for by telecommunications and VoIP companies that contribute to the Fund. Some of these contributors are small entities. The Commission will consider any comments received that propose alternatives that would reduce the burden on small entities.

26. Finally, if the Commission were to adopt a general prohibition on IP CTS providers from providing service to consumers who do not genuinely need the service, IP CTS providers, including small entities would be required to take steps to ensure that they are not providing service to consumers who do not genuinely need the service. Such measures would be necessary to prevent waste of the TRS Fund. Since large and small entities alike are in a position to waste Fund resources by providing service to consumers who do not genuinely need the service, the Commission initially rejects relieving small entities of this obligation. Moreover, the requirement would save contributors to the TRS Fund, including small entities from contributing unnecessary amounts to the Fund. The notice seeks comment on the costs and benefits of the proposal.

**F. Federal Rules that May Duplicate, Overlap, or Conflict with Proposed Rules**

27. None.