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Date: March 23, 2009

Re: **Request for Intervention and Modification** – California Public Utilities Commission  
Request for Proposal 08PS5800 for California Relay Services 3, CPUC Document 368851,  
January 21, 2009 – Section 6.12.4.1 “Disclosure of CA Participation in CTS Conversations”

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## **I. Introduction**

The California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH) consists of community-based nonprofit agencies providing various social services to Californians who are deaf or hard of hearing: Deaf Community Services of San Diego, Inc.; Center on Deafness Inland Empire; Orange County Deaf Equal Access Foundation; Greater Los Angeles Agency on Deafness, Inc.; Tri County-GLAD; Deaf and Hard of Hearing Service Center, Inc.; NorCal Services for Deaf and Hard of Hearing; and Deaf Counseling, Advocacy & Referral Agency. The Hearing Loss Association of California (HLA-CA) and its 29 chapters, is affiliated with the national organization, Hearing Loss Association of America, and represents and supports the interests of people who have a hearing loss and live in California. The National Association of the Deaf (NAD), Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), Association of Late-Deafened Adults (ALDA), and the Hearing Loss Association of America (HLAA) are national organizations that advocate on behalf of people who are deaf, hard of hearing, late-deafened, and deaf-blind, including residents, members, chapters, and affiliates in the great state of California, to ensure equal opportunity and equal access.

This is to notify you that our State of California constituencies informed us about and sought our support to oppose a provision in the California Public Utilities Commission (CPUC) Request for Proposal (RFP) 08PS5800 for California Relay Services 3 (CRS-3), CPUC Document 368851, January 21, 2009 (the RFP). That provision, Section 6.12.4.1 (a copy of which is attached), would require a Captioned Telephone Service (CTS) contractor (Relay Provider) to inform all parties to a CTS call, by text and voice messages, about the “participation” of a CTS Communications Assistant (CA) on that call. For the reasons expressed below, the CCASDHH, HLA-CA, NAD, TDI, ALDA, and HLAA vigorously oppose the requirements of CRS-3 RFP Section 6.12.4.1, and request that Section 6.12.4.1 be deleted in its entirety.

## **II. Executive Summary**

We strongly disagree with the apparent conclusion drawn by CPUC that any California Relay Service constitutes illegal wiretapping, eavesdropping, monitoring, recording, or transcribing unless the Relay Provider informs the telephone user that Relay Services are being provided. Title IV of the Americans with Disabilities Act of 1990 (ADA), codified at 47 U.S.C. § 225, mandated the establishment of nationwide Relay Services to provide access to the nation’s telephone system and to enable two-way communication between hearing and deaf or hard of hearing people, in a manner that is functionally equivalent to telephone users. Under this system of Relay Services, either party may request and engage a Relay Service for that purpose. The ADA mandates strict confidentiality and non-disclosure of the content of all Relay Services provided and prohibits Relay Services from recording any relayed calls. As such, the privacy interests of *all* parties to a relay call are promoted, protected, and ensured by the mandates of Title IV of the ADA. Further, a Relay Service CA is not considered a “third party” to a telephone call by users of these services, the Federal Communications Commission (FCC), or by the federal judiciary. Instead, a CA is intended to be, is considered, and should be treated as a “transparent conduit” to the greatest extent possible to achieve functional equivalency. The purpose and function of a CA is to convert an inaccessible mode of communication to an

accessible mode of communication to enable two-way communication by the parties to a telephone call.

As such, the provision of functionally equivalent telephone service, as mandated by the ADA, should not be construed as illegal wiretapping, eavesdropping, monitoring, recording, or transcribing, given the stringent confidentiality requirements already prescribed by Congress and the FCC. These very federal standards and confidentiality requirements are prescribed by the RFP itself in sections 4.3.1, 6.1.4, and 6.6.2, as well as the ADA compliance certification in section 11. *Requiring a Relay Provider to announce or disclose to a telephone user that Relay Services are being provided also identifies that the other person on the call is deaf or hard of hearing, even when such is not necessary for the provision of the Relay Service, and fails to protect the privacy interests of all of the parties to the call. Instead, the requirements of CRS-3 RFP Section 6.12.4.1 will result in a significant invasion of the privacy of the deaf or hard of hearing person, unnecessary disclosure of the existence of an individual's disability, and the opportunity and potential for discrimination on the basis of disability that the ADA's mandate for Relay Services was intended to eliminate.*

CRS-3 RFP Section 6.12.4.1, which would require a CTS Relay Provider to announce the delivery of services on a call, conflicts with the fundamental objective of Title IV of the ADA – functional equivalency – and negates one of the most important contributions that CTS has made to functional equivalency – enabling the CTS CA to be, in fact, a *transparent conduit of the call*. For these reasons, and as further described below, we request that the requirements specified in CRS-3 RFP Section 6.12.4.1 be eliminated.<sup>1</sup>

### **III. Consumer Input**

At the outset, we note that Section 1.6 of the CRS-3 RFP indicates that the CPUC solicited CRS consumer recommendations: “In 2007 the CPUC asked the [Deaf and Disabled Telecommunications Program] DDTP advisory committees, the Telecommunications Access for the Deaf and Disabled Administrative Committee (TADDAC) and the California Relay Service Advisory Committee (CRSAC), for careful and considered input regarding consumer needs and recommendations for CRS-3. The committees established a CRS-3 Work Group representing all CRS consumer groups. . . . After seven months of collaboration and research, TADDAC released the ‘*Comments on the RFP Process Involving the California Relay System RFP 2008*’ report in April 2008.” At no time during this extensive, comprehensive, and collaborative effort was there any mention or suggestion that CPUC was considering or intended to include the requirements found in Section 6.12.4.1.

Although CPUC apparently values and sought input about consumer needs, CPUC added Section 6.12.4.1 to the RFP after the initial consumer consultations were completed. CPUC failed to return to and consult with consumers or afford consumers an opportunity to consider the need for

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<sup>1</sup> The text of Title IV of the ADA, 47 U.S.C. § 225, is available at <http://www.fcc.gov/cgb/dro/title4.html>. The FCC regulations implementing Title IV of the ADA, 47 C.F.R. § 64.601 - 64.606, is available at <http://www.fcc.gov/cgb/dro/4regs.html>. For purposes of brevity and readability, citations to and excerpts from FCC reports, orders, and other documents referred to in this Request to Delete Section 6.12.4.1 from the CRS-3 RFP, and which are relevant to the provision of Relay Services, are attached.

and impact of the Section 6.12.4.1 requirements before CPUC released the RFP. As a result, the consumer community was unaware of this issue until well after publication of the RFP and could not express its opposition until this time. Further, CRS-3 RFP provides no formal opportunity for consumer input. For these reasons, we submit this request broadly, within and beyond the CPUC.

#### **IV. Relay Services Do Not Violate California State Privacy Law**

Section 6.12.4.1 of the RFP asserts that “California State law prohibits monitoring, recording or transcribing of telephone conversations unless *all* parties to the conversation give their *express prior consent* or have *received notice* that such monitoring, recording or transcribing is occurring.” (Emphasis in the original.) For this proposition, the RFP cites, for example, California State Penal Code Sections 630-632 and California Public Utilities General Order 107-B. Section 6.12.4.1 further states that, “to assure that the privacy and disclosure requirements of the State of California are consistently applied, the CTS contractor must put in place procedures for a formal disclosure [of CA participation in CTS conversations] that will be shared with all parties to the conversation [by text and voice messages], on every call that includes a California-based participant.”

We note that it is likely that California legislators and regulators enacted the cited privacy provisions prior to the establishment of Relay Services, and certainly prior to the relatively recent advancements made in Relay Service technologies, including captioned telephones. As such, it is not likely that Relay Services, developed as a result of Title IV of the ADA, were envisioned when these privacy provisions were enacted. Notably, these privacy provisions make no mention of Relay Services. We also note that the CRS-3 RFP, in Section 6.1.4 (Federal Standards), requires that Relay Providers comply with all applicable federal law. Section 6.1.4.1 further recognizes that, “Where there is a difference between the standard of a FCC regulation and the standard of a requirement in this RFP, the stricter standard of the two shall prevail relative only to that portion of the standard that differs except that notwithstanding any stricter standard in this RFP the standard shall not, in the opinion of the CPUC, conflict with federal law.” Such a conflict exists here.

Nevertheless, conflicts that arise with new technologies, between state law and the mandates and objectives of Congress, or divergent privacy interests may be reconciled through interpretations of the law in light of a variety of factors. Such factors exist in this case, as further described herein, and should be given due weight and consideration to ensure that the rights and protections of state and federal laws are accorded to all Californians.

#### **California State Penal Code Sections 630-632**

The intent of the California Legislature, in enacting Chapter 1.5 (Invasion of Privacy) of the California Penal Code, was to “protect the right of privacy” threatened by the “development of new devices and techniques for the purpose of eavesdropping upon private communications” that “created a serious threat to the free exercise of personal liberties.” California Penal Code § 630. Relay Services were, unequivocally, *not developed for the purpose of eavesdropping* on private communications. Instead of being a “threat” to the free exercise of personal liberties, *Relay*

*Services promote the free exercise of personal liberties* by making the telephone system and services accessible to everyone.

Section 631(a) of the California Penal Code establishes as a crime: any person who “intentionally taps, or makes any unauthorized [telephone] connection,” who “willfully and without the consent of all parties to the communication, or in any unauthorized manner” attempts to learn the contents of any communication in transit, or who “uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained.” CTS Relay Providers and CAs do not, intentionally or otherwise, *tap* (as in wiretap) or make any *unauthorized* telephone connections. They do not try to learn or ascertain the contents of a CTS call, *willfully* and without the consent of all parties or in any other *unauthorized* way. They do not use or try to use any information conveyed in a CTS call for any purpose, including for the purpose of communicating that information to anyone beyond the individuals making the CTS call itself. CAs are prohibited from disclosing the content of any Relay Service call; they are required to maintain strict confidentiality.

Section 632(a) of the California Penal Code establishes as a crime: any person who “intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication,” including communication by means of a telephone or other device. CTS Relay Providers and CAs do not use *electronic amplifying or recording devices*, and they do not *eavesdrop on or record* the confidential communication conveyed by telephones or other devices, intentionally or otherwise, with or without the consent of all the parties to that confidential communication. CAs are prohibited from keeping records of any conversation; they never record any communication.

Section 632.5(a) and Section 632.6(a) of the California Penal Code establish as a crime: any person who “maliciously and without the consent of all parties to the communication, intercepts, receives, or assists in intercepting or receiving a communication” transmitted between cell phones and/or cordless telephones or between any cell phone or cordless telephone and a landline telephone. CTS Relay Providers and CAs do not *maliciously* intercept or receive communication transmitted between phones of any kind, with or without the consent of all parties to the call.

In the ordinary course of business, CTS Relay Providers and CAs do not have the requisite intent, nor do they engage in acts which would constitute an invasion of privacy as proscribed by the California Penal Code. CTS is a form of “telecommunications relay services” (TRS) which is defined in Title IV of the ADA, to mean “telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio.” 47 U.S.C. § 225(a)(3). In other words, the role of the CTS CA is to enable people – with and without a hearing or speech impairment – to communicate with each other in a manner that is *functionally equivalent* to telephone users. Such services include enabling two-way communication when one party uses a telephone and the other party uses a TTY, text messaging system, videophone,

or captioned telephone (a CTS device). In all of these forms of Relay Services, the CA converts one mode of communication that is not accessible into another mode of communication that is accessible, so *all* parties have access to the communication. Under this system of Relay Services, either party may request and engage a Relay Service for that purpose. The ADA mandates strict confidentiality and non-disclosure of the content of all Relay Services provided and prohibits Relay Services from recording any relayed calls. 47 U.S.C. § 225(d)(1)(F). As such, the privacy interests of *all* parties to a relay call are promoted, protected, and ensured by the mandates of Title IV of the ADA.

The CPUC recognizes the authority and mandates of Title IV of the ADA and the FCC. See, e.g., CPUC CRS-3 RFP Sections 3.1 (Telecommunications Relay Service); 4.3.6 (New and Innovative Relay Services); 6.1.4 (Federal Standards); and 6.1.4.1 (FCC Standards). Specifically, Section 4.3.1 of the RFP states, “Relay Providers must continuously comply with all applicable FCC and CPUC performance and operational orders, rules and standards relative to TRS including those that would otherwise apply to common carriers providing TRS.”

In Section 3.3.6 of the CRS-3 RFP, CPUC acknowledges that CTS is an “FCC approved voice-carry-over relay service.” CPUC reimburses Relay Providers only for intrastate (California-to-California) CRS calls. CPUC does not pay for Relay Services provided on interstate or international CRS calls (calls originating in or terminating outside of California). Instead, Relay Providers are responsible for obtaining reimbursement for interstate and international CRS calls from the FCC’s Interstate TRS Fund which is administered by the National Exchange Carrier Association (NECA) under the authority of the FCC. CPUC CRS-3 RFP Section 4.3.2.

The CPUC also recognizes the importance of and requires absolute confidentiality. See, e.g., CPUC CRS-3 RFP Sections 6.6.2 (Confidentiality); 6.6.2.1 (Total Confidentiality); 6.6.2.2 (Pledge of Confidentiality) (required for all Relay Provider staff); 6.6.2.3 (Discussion of Calls); 6.6.2.4 (Emergencies); 6.6.2.5 (Monitoring of Calls); 6.6.2.6 (Confidentiality Policy); 6.6.2.7 (Termination for Violation of Confidentiality); 6.6.2.8 (Restriction of Information); 6.6.4.10 (Customer Profile Data Confidentiality); and 32 (Confidentiality of Data).

Given the requirements of Title IV of the ADA, the FCC’s implementing regulations, the CPUC CRS-3 RFP contractual requirements, and the provisions of the California Penal Code addressing confidentiality, *a CTS Relay Provider or CA would, by necessity, have to be acting outside the scope of employment in order to violate the California Penal Code’s privacy provisions.*

This conclusion is supported by the *exceptions* provided in the California Penal Code itself. Section 631(b)(1) provides that Section 631 does not apply “to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited herein are for the purpose of construction, maintenance, conduct or operation of the services and facilities of the public utility.” Section 631(b)(2) also provides that Section 631 does not apply “to the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of a public utility.” Sections 632, 632.5, and Section 632.6 each contain exceptions that are virtually identical to Sections 631(b)(1) and (2), described above. See California Penal Code Sections 632(e), 632.5(b), and 632.6(b).

The *conduct* and *operation* of Relay Services, including CTS, is part of the *business of providing communications services* and fall within the exceptions provided in the California Penal Code in Sections 631(b), 632(e), 632.5(b), and 632.6(b). CRS contractors are operating as agents of public utilities engaged in that business. Relay Services, including CTS, are authorized and mandated by law to make telephone services accessible. CAs, as employees of the contractors, do not intercept or receive communication unless requested and authorized by at least one party, and they are provided access to the communication for the sole purpose of converting inaccessible modes of communication to accessible modes of communication, which benefit *all* parties to a telephone conversation. Furthermore, they are required to maintain strict confidentiality and are prohibited from recording or disclosing the content of any call. Thus, the provision of Relay Services, including CTS, by employees of contractors serving as agents of public utilities acting within the scope of their employment to provide communications services, falls within the exceptions of and does not violate the proscriptions of the California Penal Code against eavesdropping.

This conclusion is further supported by Section 632(f) of the California Penal Code which provides that Section 632 “does not apply to the use of hearing aids and similar devices, by persons afflicted with impaired hearing, for the purpose of overcoming the impairment to permit the hearing of sounds ordinarily audible to the human ear.” The provision of Relay Services, including CTS, is akin to the use of hearing aids and similar devices that enable access to communication conveyed by the hearing of sounds ordinarily audible to the human ear. The purpose of Section 632(f) is well served by including Relay Services under its umbrella.

### **California Public Utilities General Order 107-B**

California Public Utilities General Order 107-B establishes requirements of telephone companies operating in California to ensure the privacy of telephone communications. For example, General Order 107-B, Section I, requires telephone companies to “maintain complete records of all instances in which employees discover any devices installed for the purpose of overhearing communications over the lines of such corporation”; maintain a file “of all instructions to employees, regulations, rules and forms designed to ensure the privacy and/or maintain the secrecy of communications over the lines of the corporation together with a record of the steps taken to ensure the privacy of and /or secrecy of communications”; and to report to the CPUC on these provisions annually.

General Order 107-B, Section II, sets out the “Regulations Governing Monitoring and Recording.” Generally, the California telephone network cannot be used “for the purpose of transmitting any telephone conversation which is being monitored or recorded” *except* when “[a]ll the parties to the conversation give their express prior consent to the monitoring or recording” or when “notice that such monitoring or recording is taking place is given to the parties to the conversation” in accordance with General Order 107-B. “Monitoring” is defined as “the use of monitoring equipment to allow a third person to overhear the telephone conversation of two or more persons.” “Monitoring equipment” is “any method or apparatus by which a public utility telephone corporation or a telephone subscriber . . . may listen to or record telephone conversations” without “any audible indication to the parties conversing that their

conversation is being overheard” or without “connection of a device to provide two-way conversation between the listener and the parties conversing so that the listener’s voice may be heard throughout any period of monitoring” or without “any indication to the parties conversing that their conversation is being recorded.” Notice of monitoring must be given by providing an automatic and repeated “beep” tone warning that is audible to all parties, or by “verbal announcement by the operator of monitoring equipment to the parties to a communication that their communication is being monitored.” “Recording” is defined as “the recording or transcribing of any telephone conversation by means of any electronic device” and notice is generally given by providing an automatic and repeated “beep tone” warning audible to all parties. We note, here, that the terms “recording” and “transcribing” in the context of telephone privacy provisions mean to preserve in a manner that can be copied, such as a tape recording or a writing; not the conversion of one mode of communication to another mode of communication, each of which is conveyed in real time and not preserved by a CTS Relay Provider.

Like the goal of the California Penal Code, the goal of these public utilities regulations is to reduce or eliminate activities that are designed to invade the privacy of telephone communications. General Order 107-B prohibits the monitoring or recording of telephone communications, except where all parties to a conversation give their express prior consent or when notice of such monitoring or recording is given to the parties to the conversation. Monitoring does not include the “[a]ccidental or unintentional interception of telephone conversations by telephone utility personnel engaged in normal operation, maintenance, or construction.” Like the telephone utility personnel, a Relay Service CA is engaged in the normal operation of the telephone utility. As the FCC has explained, repeatedly, *CAs are transparent conduits* – conduits that relay conversations *without* censorship or *monitoring functions*.

More importantly, Relay Providers and CAs, including CTS, do not *overhear, listen to, or record* any telephone conversations. Rather, the CTS CA function is to *hear* the telephone user and convert the telephone user’s mode of communication from speech to text – by re-voicing and using speech recognition technology – to enable two-way communication between that telephone user and CTS device user who is deaf or hard of hearing. Without the CTS CA, a person who cannot hear or who does not hear well cannot be a party to the telephone conversation. In other words, like the telephone device and the lines that convey the signals, a CTS CA makes a telephone conversation possible. The function of the CTS CA is to deliver telephone service in a manner that is functionally equivalent to telephone users, in compliance with Title IV of the ADA. Furthermore, the CTS CA is prohibited from intentionally altering a relayed conversation and must transmit conversations verbatim and in real time. 47 C.F.R. §§ 64.604(a)(1) and (2)(ii). The intent, design, and goal of providing Relay Services is *not* to invade the privacy of telephone communications. On the contrary, the intent, design and goal of providing Relay Services is to make telephone communications possible for and to promote, protect, and ensure the privacy of all parties.

Because Relay Providers and CAs, including CTS, are not monitoring, listening in on, overhearing, or recording telephone conversations, there is no need to provide audible “beep” tones, verbal announcements, or other forms of notification. Express prior consent of *all* parties to the call for the provision and delivery of Relay Services to make that call accessible to all

parties cannot be required under General Order 107-B because a CA is not monitoring or recording the call.

### **Privacy and Title IV of the ADA**

The laudable intent of California State law is to protect the privacy of telephone conversations. In the case of Relay Services, the ADA mandates strict confidentiality and non-disclosure of the content of any and all Relay Services provided and prohibits Relay Services from keeping records of or recording the content of any relayed calls. 47 C.F.R. § 64.604(a)(2). Only Section 705 of the Communications Act authorizes CAs to divulge the existence and content of conversations “in response to a subpoena issued by a court of competent jurisdiction” or “on demand of other lawful authority.” 47 U.S.C. §§ 605(a)(5) and (6). The FCC has interpreted these exceptions to apply only to authorized requests by government officials in connection with specific incidents of possible law violations and to be extremely rare. CAs who violate these confidentiality requirements are subject to criminal penalties and civil damages. 47 U.S.C. § 605(e). Further, Title IV of the ADA requires and the FCC regulations provide a mechanism for filing complaints against Relay Providers who do not comply with the statute and regulations, including their confidentiality requirements. 47 U.S.C. §§ 225(e) and (g); 47 C.F.R. § 64.604(c)(6). As such, the privacy interests of *all* parties to a relay call are promoted, protected, and ensured by the mandates of Title IV of the ADA.

In its very first rulemaking implementing the ADA’s mandate for Relay Services, the FCC addressed these privacy interests specifically with respect to state laws requiring disclosure of telephone conversations involving obscene or illegal calls, calls involving child or spousal abuse, and calls containing verbal sexual assaults. The FCC concluded that Relay Providers could not disclose such telephone conversations because such disclosure conflicted with the ADA Title IV mandate for functional equivalency. As a result, the FCC issued rules preempting all state statutes that affirmatively required Relay Providers with knowledge of child, spousal or elderly abuse to disclose that information to law enforcement authorities. Such affirmative disclosure requirements, like the one sought to be imposed in section 6.12.4.1 of this RFP, conflict with the ADA Title IV mandate for functional equivalency. In fact, the disclosure requirement conflicts with section 6.1.4.1 of the RFP which mandates compliance with the FCC ADA requirements.

### **V. Communications Assistants as Transparent Conduits**

Section 6.12.4.1 of the RFP asserts, “In the CTS calling process there is a CA participating in the call” and that “the CA is on the call.” Such assertions give a misleading impression of the actions and role of the CTS CA. The role of the CTS CA is to enable people – with and without a hearing or speech impairment – to communicate with each other in a manner that is *functionally equivalent* to telephone users. In all of these forms of Relay Services, the CA converts one mode of communication that is not accessible into another mode of communication that is accessible, so *all* parties have access to the communication.

In the case of CTS, the action of the CA is to re-voice what the CA hears so the CA’s speech recognition system can convert the CA’s speech into text for display on the CTS device. Although speech recognition systems that can automatically convert a telephone user’s speech to text are in development, they still have not achieved a sufficient level of accuracy for use with

Relay Services. As such, for the foreseeable future, a CA must first acquaint the speech recognition system with his or her voice and speech patterns. Once the system is “trained” in this manner, the CA is needed to re-voice a telephone user’s communication so the speech recognition system can convert what the CA says into text with the requisite rate of accuracy.

A Relay Service CA is prohibited from intentionally altering a relayed conversation and must transmit conversations verbatim and in real time. 47 C.F.R. §§ 64.604(a)(1) and (2)(ii). The FCC has consistently held that a Relay Service CA is a *transparent conduit* of telephone services – a conduit that relays conversations *without* censorship or *monitoring functions* – and not a “third party” to a telephone call. The FCC equates reaching a Relay Service CA ready to place the call as equivalent to a telephone user getting a “dial tone” when picking up the phone.

For example, the FCC has explained that a CA is to be treated solely as a *transparent conduit* with respect to the Health Insurance Portability Access Act of 1996 (HIPAA). Pub. L. No. 104-191, 110 Stat. 1936. Generally, HIPAA prohibits the disclosure of protected health information without the patient’s consent. 45 C.F.R. § 164.508. The FCC noted the concern of some health professionals that communicating with a patient through a Relay Service might violate the HIPAA privacy rule if the CA is considered a “third party” who hears the information being discussed as the call is relayed. The FCC emphasized that all forms of Relay Service can be used to facilitate calls between health care professionals and patients without violating the HIPAA privacy rule.

In addition to the FCC, the federal judiciary recently held that a CA is not a “third party” for hearsay purposes. *Germano v. International Profit Association*, 544 F.3d 798 (7th Cir. 2008). The U.S. Court of Appeals for the Seventh Circuit explained that a CA is “no more than a language conduit.” *Id.* at 803. The court also explained that various characteristics of Relay Services contribute to the transparency of the CA: (1) instead of selecting the CA, the deaf job applicant had been randomly connected to the CA; (2) the CA had no motive to mislead, to distort or to transmit statements inaccurately because she had no prior relationship with either of the parties to the call; and (3) CAs in general were assured to be reliable because their qualifications and language skills were prescribed by federal regulations. *Id.*

Like the FCC, the *Germano* court recognized that, by their very definition, CAs do not *participate* in any way *in or on* the call. CAs simply relay the conversation between the parties on those calls.

## **VI. Achieving Functional Equivalency**

Section 6.12.4.1 notes that many CTS device users consider the transparency of the CTS CA “a significant benefit because of the natural flow of the conversation.”

Functional equivalency, the standard articulated in Title IV of the ADA, has served as the reference point in determining how Relay Services must be provided to consumers. The goal is to have the features, functions, and capabilities of Relay Services mirror telephone services as closely as possible. In its efforts to achieve functional equivalency, over the past 18 years, the FCC has established a set of intricate rules, including functional requirements, guidelines, and

operational procedures which govern the manner in which Relay Services must be provided. These rules direct Relay Services to operate 24 hours per day; prohibit CAs from refusing calls or limiting the length of any relayed calls; define the skills that a CA must have; prohibit the imposition of charges beyond those applied to functionally equivalent telephone calls; specifically require CAs to transmit conversations verbatim and in real time; and prohibit CAs from intentionally altering a relayed conversation. See 47 C.F.R. § 64.604.

When Title IV of the ADA was enacted, the only form of Relay Service technology available was that which enabled a TTY user and a telephone user to converse with one another by having the CA read the typed TTY communication to the telephone user and type the telephone user's spoken communication to the TTY user. Over the years, advancements in technology have provided other Relay Service options that offer far greater functional equivalency. One such advancement is CTS, which permits the CA to be transparent during the set up and transmission of each call.

In 2003, the FCC approved CTS and praised the new technology's ability to achieve functional equivalency through its transparency, noting its ability to connect automatically with the CTS Relay Provider and to the called party by direct dialing of the called party's number, without interaction with the CA by either party to the call. *The FCC praised the fact that CTS eliminated any need for the CA to speak or interact with either party, a feature that brought significant advantages and greater functional equivalence.* In addition, precisely because the CA is transparent, the FCC was able to waive a number of FCC regulations that apply to traditional TTY Relay Service calls. These included the requirement for the call to be voiced by a CA of the same gender. Similarly, the FCC agreed that a proposal that would have allowed CTS CAs to interrupt the conversation would interfere with the natural flow of the conversation and defeat one of the central features of CTS – *the transparency of the CTS CA*. A few years later, the FCC approved an Internet-based form of CTS and reiterated its expectation that the service would be provided in a way that is automated and invisible to both parties to the call. The FCC recognized that CTS operates more like conventional telephone service, is less intrusive, and more natural for the call participants. As such, the FCC further noted that people who lose their hearing later in life, a segment of the population that has not been well served by existing Relay Service options, may find it easier to adjust to CTS devices and CTS than to TTYs and traditional TTY Relay Services. In fact, the FCC's prediction has borne out, and CTS is filling that void, enabling thousands of older Americans to remain independent, active, and productive. CTS consumers in California want to use the telephone in virtually the same way they always have – without any announcement by a CA.

It is this attribute – that the CA is a *transparent* conduit – that Relay Service users and the FCC have recognized as being crucial to achieving functional equivalency. It is not always possible for a CA to be transparent with traditional TTY Relay Services because all of the communication must be typed, typing speeds are substantially slower than speaking or signing, and the parties must adhere to turn-taking rules. Fortunately, the ability for a CA to be transparent has significantly increased with newer Relay Service technologies that have brought about Internet-based text (in which turn-taking is less restricted), voice carry over (VCO), hearing carry over (HCO), video relay services (VRS) (for signed communication), and CTS. In fact, when offered, deaf and hard of hearing users of these Relay Services frequently choose the option that the CA

*not* announce to the called party that the call is a Relay Service call, because they want the call to function as similar as possible to a telephone call and because such announcement is simply unnecessary for the delivery of those Relay Services.

Even the CPUC has recognized the importance of giving Relay Service users the option of not announcing that a call is a Relay Service call. Section 6.9.7 of the RFP explicitly gives deaf, hard of hearing, and speech disabled users of TTY Relay Services a choice of having the CA announce to the called party that the call is a Relay Service call or to reject that announcement. (Presumably the announcement may also provide an opportunity for the called party to learn from the CA about the provision of and how to use the Relay Service, which some users may find expedient.) (“Upon request by the user, the CA shall not announce a call as a relay call, permitting the caller to provide explanation, if any.”). However, this very right – given to all other Relay Service users – seems to be taken away from CTS users. In Section 6.12.2 of the RFP, CPUC waives compliance with Section 6.9.7 *specifically for CTS* and, instead, appears to take a diametrically opposed position in 6.12.4.1 by requiring Relay Providers to announce CTS calls, even when such announcement is unnecessary for the delivery of those Relay Services.

CTS consumers in California feel strongly that giving relay users the choice to announce or not is completely valid and necessary, not only to achieve functional equivalency, but because, since the inception of Relay Services, businesses and other telephone users have frequently refused to accept calls that were announced by a CA as being made through a Relay Service, believing these calls to be marketing attempts or other similar calls in which they had no interest. The rate of refusal to accept calls announced by a CA has increased dramatically in recent years, due to the increased incidence of misuse of Internet-based text Relay Services by people posing as deaf or hard of hearing individuals who use these services to perpetrate fraudulent commercial transactions or for other inappropriate activities. This increased incidence of nefarious activities perpetrated through Internet-based text Relay Services has been publicized nationwide by the media and on the Internet. As a result, recipients of a call announced by a CA of *any* Relay Service – not only Internet-based text Relay Services – more frequently refuse to accept the call than ever before. When an ADA-covered entity does not accept a relay call, the individual who is deaf or hard of hearing is denied the ability to perform his or her job, or make an appointment, or engage in one of a plethora of activities needed to maintain that individual’s independence, privacy, and productivity. The FCC has issued public notices directing businesses to accept Relay Service calls in accordance with their ADA obligations so as not to discriminate against people with disabilities. But these notices have had only limited impact. The FCC, along with other federal government entities, Relay Providers, and consumer groups will continue to implement measures to curtail the incidence of Internet-based text Relay Service misuse and to restore the confidence of businesses and the general public in Relay Services, generally. In the meantime, the choice to have a CA announce a call as a Relay Service call has become even more necessary, not only to achieve functional equivalency, but to increase the chance that the call will be accepted and completed.

CTS achieves *functionally equivalent* telephone service, as mandated by Title IV of the ADA. CTS also provides an opportunity for a person who is deaf or hard of hearing to be treated just like everyone else who uses a telephone. CTS offers a means by which Relay Service users no longer have to worry about whether their calls will be accepted or not. Not only is Section

6.12.4.1 unnecessary for the purpose of processing the CTS call, it is antithetical to one of the basic premises of the ADA – “to address the major areas of discrimination [including communication] faced day-to-day by people with disabilities.” 42 U.S.C. § 12101(b)(4). Removing the choice of whether to announce or not a CTS call reduces substantially the functional equivalency of this service, in direct conflict with Title IV of the ADA. Simply put, *a CA cannot be a transparent conduit when the Relay Provider is required to disclose that the call is being facilitated by a Relay Service!*

## **VII. Violating the Privacy of Individuals who are Deaf or Hard of Hearing**

Section 6.12.4.1 of the RFP requires the CTS Relay Provider to “put in place procedures for a formal disclosure [of CA ‘participation’] that will be shared [by text and voice messages] with all parties to the conversation, on every call that includes a California-based participant.”

Section 6.12.4.1 suggests further that a CTS device user may be unaware that a CTS CA has been engaged to convert the telephone user’s speech to text. This circumstance is virtually impossible because the CTS device user cannot receive the service of a CTS CA without requesting the service. Further, the performance of the service is evident as text displayed on the user’s CTS device.

Section 6.12.4.1 seeks, then, to ensure that the telephone user knows that a CTS “CA is on the call” by requiring the Relay Provider to “put in place procedures for a formal disclosure that will be shared with all parties to the conversation”; a “CA participation disclosure.” Such a disclosure misconstrues the actions and role of the CTS CA. CTS CAs do not *participate* in any way *in or on* the call. These CAs simply relay the conversation between the parties on those calls, converting an inaccessible mode of communication to an accessible mode of communication to enable two-way communication by the parties to a telephone call. The CA is intended to be, is considered, and should be treated as a transparent conduit to the greatest extent possible, given the Relay Service technology in use, in order to achieve the functional equivalency mandated by Title IV of the ADA.

Section 6.12.4.1 also notes that many CTS device users “may not have informed their callers that they have a hearing disability.” When the CA is a transparent conduit and functional equivalency has been achieved through the delivery of Relay Services, there is absolutely no need for CTS device users (or users of any other form of Relay Service) to inform the telephone user that they have a hearing disability. In such cases, the choice of whether to disclose or not to disclose the existence of a disability rests with the CTS device user, as it should.

Section 6.9.7 of the RFP states, “The CA shall not have the option to inform the called party that the caller is deaf or speech disabled unless the caller asks the CA to do so.” This is appropriate, but also misleading. Relay Services are used when one of the parties to a call is deaf or hard of hearing or has a speech disability. *Common sense dictates that an announcement or disclosure that a telephone call is a “Relay Service call” also and simultaneously announces and discloses the existence of a disability.* This is an unavoidable consequence of such announcements and disclosures. As such, Section 6.12.4.1 conflicts with Section 6.9.7, which appropriately recognizes that the choice to disclose the existence of a disability belongs to the individual.

The issue of identification as a person with a disability in the context of Relay Services has significant consequences because these services enable access to the entire universe of telephone users. Generally, under the ADA, when a person with a disability needs or wants a reasonable accommodation from an ADA-covered entity, that person must “self-identify” as a person with a disability. If there is no need to request a reasonable accommodation, however, self-identification as a person with a disability is not required at all. Sadly, identification as a person with a disability opens the door to discrimination on the basis of disability, a form of discrimination which, today, is still pervasive, sometimes overt, and often subtle or attitudinal. By requiring a CTS Relay Provider to announce or disclose that a call is a Relay Service call, *Section 6.12.4.1 results in the indirect disclosure of the existence of a disability and creates the opportunity to discriminate on the basis of disability in violation of the basic principles upon which the ADA is predicated.*

Section 6.12.4.1 of the RFP, which requires a CTS Relay Provider to announce or disclose the fact that the call is a Relay Service call, is equivalent to requiring the CTS CA to identify one of the parties as being deaf or hard of hearing. The choice of the CTS device user to self-identify or not self-identify (to the other party to the call) as a person who is deaf or hard of hearing is totally obliterated. That is the impact, effect, and result of Section 6.12.4.1. Mandating a CTS Relay Provider to take this action is also particularly and extremely offensive to the dignity, self-determination, independence, and privacy of the person who is deaf or hard of hearing.

In summary, Section 6.12.4.1 inappropriately and unnecessarily places the alleged privacy interests, if any, of the telephone user above the personal privacy interests of the deaf or hard of hearing CTS device user. Such a result cannot stand.

## **VIII. Conclusion**

For the reasons described above, we vigorously oppose the requirements of Section 6.12.4.1 of the CRS-3 RFP, and request that the CPUC support the constituents of the California Deaf and Disabled Telecommunications Program by deleting Section 6.12.4.1 in its entirety.

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**California Public Utilities Commission  
Request for Proposal 08PS5800 for California Relay Services 3,  
CPUC Document 368851  
January 21, 2009**

...

**6.12.4 Additional Captioned Telephone Service Requirements**

6.12.4.1 Disclosure of CA Participation in CTS Conversations

California State law prohibits monitoring, recording or transcribing of telephone conversations unless *all* parties to the conversation give their *express prior consent* or have *received notice* that such monitoring, recording or transcribing is occurring. In the CTS calling process there is a CA participating in the call, potentially without the Voice user's knowledge and possibly without the CTS device user's awareness. While many CTS consumers consider this transparency a significant benefit because of the natural flow of the conversation and some may not have informed their callers that they have a hearing disability, there are nevertheless California laws and regulations that require all parties to be fully informed that the CA is on the call.<sup>12</sup>

In order to assure that the privacy and disclosure requirements of the State of California are consistently applied, the CTS contractor must put in place procedures for a formal disclosure that will be shared with all parties to the conversation, on every call that includes a California-based participant. The disclosure communications for the CTS device user must include a text message transmitted at a speed that may be easily read and understood. The exact final text for these disclosures must be approved by the CPUC prior to commencement of the contract.

Bidders are required to confirm that they understand the above privacy requirements and describe how they propose to satisfy the CA participation disclosure requirement to each of the parties engaged in a CTS conversation. The description shall include:

1. The methodology of delivering the disclosures,
2. A flow chart depicting the insertion and delivery of appropriate text and voice messages to be provided by the CTS Relay Provider, as well as
3. A proposed example of the disclosure messages.

...

<sup>12</sup> Relevant laws include but are not limited to California State Penal Code Sections 630-632 and California Public Utilities General Order (GO) 107-B.

**Citations to FCC reports, orders, and other documents referred to in this Request to Delete Section 6.12.4.1 from the CRS-3 RFP and which are relevant to the provision of Relay Services:**

Relay Services “utilize human CAs who see and hear private conversations while acting as transparent conduits relaying conversations without censorship or monitoring functions.”

*Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, Report and Order and Request for Comments, CC Dkt. No. 90-571, FCC 91-213 (July 26, 1991) ¶13 (*First TRS Report and Order*).

The FCC interpreted the exception to the rule that CAs never disclose the content of any relayed conversation under Section 705 of the Communications Act, to apply only to “authorized requests by government officials in connection with specific incidents of possible law violations,” and to be “extremely rare.”

*Id.* at ¶14, n.14.

Since the inception of relay services, businesses and other telephone users have frequently turned away relay calls, believing these calls to be marketing attempts or other calls in which they had no interest.

*Telecommunications Relay Services, the Americans with Disabilities Act of 1990, and the Telecommunications Act of 1996*, 12 F.C.C.R. 1152, 1169 (Jan. 14, 1997).

“If people with hearing or speech disabilities cannot communicate by telephone, their ability to compete and succeed in today’s job market is threatened. Being able to place a phone call to a prospective employer, to answer an advertisement for a job, to receive training, and to advance one’s career through formal and informal networks depends largely on one’s ability to communicate with many different individuals and entities.”

*Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, CC Dkt. 98-67, FCC 00-56, 15 FCC Rcd 5140 (March 6, 2000) at ¶7.

The FCC explained that “reaching a CA ready to place the relay call is equivalent to getting a dial tone when picking up the phone. Thus, this portion of the call is the first crucial step to making the TRS calling experience functionally equivalent to placing a voice call . . .”

*Id.* at ¶170.

One of the most important contributions that CTS has made to the ADA promise of functional equivalency is the complete transparency of the CA throughout the call.

*Telecommunications Relay Services, and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling, CC Docket No. 98-67, FCC 03-190, 18 FCC Rcd 16121 at ¶33 (August 1, 2003) (*Captioned Telephone Declaratory Ruling*).

“The captioned telephone user does not need to dial an 800 or 711 exchange to reach the TRS facility and set up the call, nor is there any interaction with the CA (by either party to the call). . . . Throughout the call the CA is completely transparent and does not participate in the call by voicing any part of the conversation.”

*Id.* at ¶4.

“Captioned telephone VCO service offers consumers the benefit of operating more like conventional voice telephone service, with direct dialing of the called party’s number and the nearly simultaneous delivery of the actual voice of the called party and written text of what the called party has said as generated by the CA re-voicing the message. The record reflects that it is less intrusive and more natural for the call participants, and that users who become hearing impaired later in life may find it easier to adjust to captioned telephone VCO service than to traditional TRS services. Therefore, captioned telephone VCO service will reach a segment of the population that has traditionally not been well serviced by current TRS options.”

*Id.* at ¶16.

“Finally, just as VRS [video relay service] has allowed greater functional equivalence in telecommunications for callers who use sign language, we believe that captioned telephone VCO [voice carryover] service will provide greater functional equivalence for those people who prefer VCO TRS and use this technology.”

*Id.* at ¶16.

Because the CTS CA is transparent, the FCC was able to waive a number of regulations that apply to traditional TTY relay calls, including the requirement for CTS calls to be voiced by a CA of the same gender.

*Id.* at ¶47.

The FCC explained that CTS is designed so that the user directly calls the other party, with the CA transparent to the call and that “this functionality would be defeated if gender preference had to be accommodated.”

*Id.* at ¶48.

The FCC agreed with consumers that a proposal that would have allowed CTS CAs to interrupt a telephone conversation would “interfere with the natural flow of the

conversation and largely defeat one of the central features of the captioned telephone VCO service, *i.e.*, that the CA is transparent during the set-up and throughout the call.”

*Id.* at ¶50.

“Some health professionals have been concerned that contacting patients and discussing health related information via TRS poses a possible violation of the Privacy Rule because a ‘third party,’ the TRS CA, hears the information being discussed as the call is relayed. Some state TRS facilities have informed the FCC that health professionals are requiring all of the facility’s CAs to sign disclosure forms before they will use TRS to contact patients with hearing or speech disabilities. We therefore emphasize that all forms of TRS, including ‘traditional’ TTY based relay, Internet Protocol (IP) Relay, Video Relay Service (VRS), and Speech-to-Speech (STS), can be used to facilitate calls between health care professionals and patients without violating HIP[A]A’s Privacy Rule.”

*Clarification of the Use of Telecommunications Relay Services and HIPAA*, FCC Public Notice, DA 04-1716, 19 F.C.C.R. 10677, 10,677-78 (June 14, 2004).

The FCC explained that the “guidepost for the provision of TRS – that the relay service should be ‘functionally equivalent’ to voice telephone service – means, as we have stated, that the CA ‘serves as a *transparent conduit* between two people communicating through disparate modes.’ In other words, the CA’s role is simply to convert typed (or signed) messages into voice messages, and vice versa, so that the parties to the call can communicate back and forth, as any parties to a telephone call would do. It is because of this limited, transparent role of the CA that we have frequently stated that completion of the initial call to the TRS facility, and connecting to a CA, is equivalent to receiving a dial tone.”

*Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, CC Dkts. 90-571, 98-67; CG Dkt. 03-123, FCC 04-137, 19 FCC Rcd 12475 (June 30, 2004) at ¶154 (internal citations omitted).

FCC confirmed that CAs are not third parties that can make independent judgments on relayed calls. The FCC explained that the first step for the TRS user, the completion of the outbound call to the TRS provider, is the equivalent to reaching a “dial tone.”

*Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Order on Reconsideration, CG Dkt. No. 03-123, FCC 05-203 (December 12, 2005) at ¶3, n.12.

FCC confirmed that CAs are not third parties that can make independent judgments on relayed calls. The FCC explained that the first step for the TRS user, the completion of the outbound call to the TRS provider, is the equivalent to reaching a “dial tone.”

*Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling and Further Notice of Proposed Rulemaking, CG Dkt. No. 03-123, FCC 06-57 (May 9, 2006) at ¶10).

“Voice telephone users reach a dial tone almost instantaneously every time they pick up the telephone. For TRS users, the Commission has recognized that reaching a CA ready to handle the call is essentially the same as reaching a dial tone.”

*Id.* at ¶30.

When the FCC approved an Internet-based form of CTS, it reiterated that “the new service will be provided in a way that is automated and invisible to both parties to the call. For example, presently with captioned telephone service the consumer does not communicate directly with a CA to set up the call; similarly, we expect that IP captioned telephone service should permit the consumer to directly dial the called party and then automatically connect the CA to the calling party to deliver the captions.”

*Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities, Internet-based Captioned Telephone Service*, Declaratory Ruling, CG Dkt No. 03-123, FCC 06-182 (January 11, 2007) at ¶23.

FCC confirmed that CAs are not third parties that can make independent judgments on relayed calls. The FCC again spoke of the obligation placed on TRS providers to “handle calls consumers choose to make, when they choose to make them, *i.e.*, to be the ‘dial tone’ for a consumer that uses relay to call to a voice telephone user. . . .”

*Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities, E911 Requirements for IP-Enabled Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, CG Dkt. No. 03-123, WC Dkt. No. 05-196, FCC 08-151 (2008) at ¶145.