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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

WILLIAM D. FERGUSON and	)	
ELIZABETH T. FERGUSON,	)	
husband and wife,	)	NOS. CIV 95-0260-PHX-RCB
	)	CIV 95-2742-PHX-RCB
Plaintiffs,	)	CIV 96-305-PHX-EHC
	)	(Consolidated)
v.	)	
CITY OF PHOENIX,	)	UNITED STATES'
a municipality,	)	SUPPLEMENTAL BRIEF AS
	)	<u>AMICUS CURIAE</u> IN
Defendant.	)	OPPOSITION TO DEFENDANT'S
	)	MOTION FOR SUMMARY
	)	JUDGMENT
	)	
	)	
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The United States hereby responds to a number of new points raised in the City's reply in support of its motion for summary judgment.

1. The City argues that the Department of Justice's interpretation that title II prohibits public entities from imposing any additional or space bar requirements upon callers

who use TDDs for access to 9-1-1 emergency services<sup>1</sup> is "unreasonable, arbitrary and capricious" (Reply at 17-20). The City explains that the Department of Justice:

"completely fails to account for the fact that there is NO technology available whereby a [9-1-1] system can automatically detect every call from every TDD unit or computer, without the caller hitting the space bar to emit a tone the system can understand."

Reply at 17-18. We agree that there is no technology that can automatically detect TDD calls where there is no emission of electronic tones. Contrary to what the City would like the Court to believe, however, that fact does not govern whether the City's 9-1-1 system complies ADA. TDD calls can be "handled" without the use of a diverter system, simply by providing the appropriate equipment and training to enable call takers to query silent calls via TDD. The City refuses to do so, even though, as we have pointed out (see U.S. Brf. at 6-7), not all TDD's emit electronic tones when the space bar is pressed. For these individuals, the City offers NO access whatsoever to its 9-1-1 emergency service.

Furthermore, as we have also explained (U.S. Brf. at 6), depressing the space bar or other keys while waiting for a call to be answered is a foreign procedure for TDD users. Voice

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<sup>1</sup> This position is stated in the Department of Justice's Technical Assistance Manual, issued pursuant to statutory mandate, 42 U.S.C. § 12206(c)(3). See THE AMERICANS WITH DISABILITIES ACT Title II Technical Assistance Manual, Covering State and Local Government Programs and Services, (1993 & Supp. 1994), II-7.3000 (Emergency telephone services) A copy of this manual is attached to the United States' Brief as Amicus Curiae in Opposition to Defendant's Motion for Summary Judgment, Exhibit C.

callers are not required to learn a foreign procedure in order to access its 9-1-1 service. In light of this difference, it is difficult to understand how the City can claim it is providing equal access to the hearing impaired.

In sum, the Department of Justice's interpretation of its regulation is grounded firmly in the obvious inadequacy of a 9-1-1 system that requires TDD users to press a space bar to gain access to its services. The interpretation, therefore, is not "arbitrary and capricious," and is entitled to deference. See U.S. Brf. n.10.

2. The City argues that it has resolved any perceived inadequacies in its 9-1-1 system by adopting a new procedure in September 1995, for handling silent open line calls. Call takers are to press the "5" key and then the "#" key. This sends a pre-programmed TDD message to the caller advising him or her to press the space bar. If the caller has a TDD that emits tones when the space bar is pressed, and takes this action, the diverter will supposedly "seize" the call and re-route it to the trunk dedicated for TDD access.

For two reasons, this new procedure does not provide for effective handling of TDD 9-1-1 calls. First, again the procedure assumes, incorrectly, that all TDD's have the capacity to emit tones when the space bar is pressed. If a tone is not emitted, then the individual is denied ANY access to the 9-1-1 service.

Second, even if a TDD user can transmit tones by pressing the space bar in response to the "5#" message, the caller can be

trapped in a "loop." For example, if both TDD-equipped positions are busy with other calls (voice or TDD), the TDD call proceeds to a non-TDD-equipped position. The call taker at the non-equipped position has no choice but to press the "5#" keys to instruct the caller to take the same action again in order to re-route it back to the trunk dedicated for TDD access. The caller becomes trapped in the loop, without being able to communicate his or her emergency needs.

3. The City asserts that it is simply not feasible for it to do more than it has done. The experience of other cities defeats that claim. The United States' settlement agreements with other cities demonstrate that equipping every one or two consoles/positions with a TDD and establishing operating procedures for recognizing TDD tones and for treating silent open lines as potential TDD calls is not only feasible but necessary to ensure effective handling of TDD calls. See Settlement Agreement Between the United States of America and City of Fort Lauderdale, Florida, No. 204-18-18, February 24, 1995, Exhibit A, ¶¶ 4a (installing a minimum of one TDD per two consoles), and 7a (recognizing TDD tones and considering silent open lines possible TDD calls); Settlement Agreement Between the United States of America and the City of Berkeley, California, No. 204-11-21, May 17, 1994, Exhibit B, ¶¶ 4a (installing a minimum of one TDD at each console pod, and at all other answering points) and 6 (recognizing TDD tones and considering silent open lines possible TDD calls); Settlement Agreement Between the United States of America and The City of Chicago, Illinois, Nos. 204-23-2, -7, and

47, May 22, 1995, Exhibit C, ¶¶ 4a (installing two TDD's at each zone console; at the overflow positions on each floor of the Communications Center; and in the telephone Auxiliary/Response Program ("Call-back Unit")); and 6 (recognizing TDD tones and considering silent open lines possible TDD calls). See also Settlement Agreement Between the United States of America and the City of Los Angeles, California, No. 204-12C-17, July 12, 1994, Exhibit D, ¶¶ 6 (installing a minimum of one TDD at each operator 9-1-1 console) and 11 (recognizing TDD tones and considering silent open lines possible TDD calls).<sup>2</sup>

It is noteworthy that the City claims to have discussed the adequacy of its system with representatives of the City of Los Angeles, yet failed to increase the number of TDDs when changing to its "new system", as Los Angeles agreed to do in its settlement with the Department of Justice.

4. The City claims that requiring that it add more TDD equipment and that it query silent calls would be unduly burdensome. The City, however, has provided no specific facts to support the conclusory statements made by its employees that equipping all its call-taking positions with TDD equipment would cost \$1.3 million.

Moreover, even assuming that equipping each 9-1-1 position with TDD equipment would cost \$1.3 million, that fact alone does not mean that having to do so would be an "undue burden." Whether such action would constitute an "undue burden" must be

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<sup>2</sup>The foregoing settlement agreements are also attached as an exhibit to Plaintiff's Supplemental Statement of Newly Discovered Facts.

determined on a case-by-case basis and depends, in part, on the financial condition of the City. In other words, spending \$1.3 million on the 9-1-1 system may not be a burden whatsoever. For example, Commander Rodabaugh, the head of the City's 9-1-1 system, testified that the lack of funding is not a hinderance in the City's ability to change the 9-1-1 system:

I was looking at building the best system I could. I was not looking at cost, I will find the money to do what needs to be done to deliver the service.

Commander Rodabough's Deposition, November 21, 1995, page 47, lines 4-6.<sup>3</sup> Hence, the City is not entitled to summary judgement based on its defense of "undue burden."

#### CONCLUSION

For the foregoing reasons, and for the reasons expressed in the United States's opening brief, this Court should deny the City's motion for summary judgment on the issues of liability,

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<sup>3</sup>This portion of Commander Rodabaugh's deposition is also included as an exhibit to Plaintiff's Supplemental Statement of Newly Discovered Facts.

and the availability of injunctive relief, and compensatory damages.

Submitted this 1st day of March, 1996.

Respectfully submitted,

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