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

In the Matter of	)	
	)	
Telecommunications Relay Services and	)	CG Docket 03-123
Speech-to-Speech Services for Individuals	)	
with Hearing and Speech Disabilities	)	
	)	
Truth-in-Billing and Billing Format	)	CG Docket 98-170
	)	
ITTA Petition for Declaratory Ruling	)	
Regarding TRS Line Item Descriptions	)	

REPLY COMMENTS OF THE ENTERPRISE USERS COMMENTERS

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On Behalf of The Enterprise Users Commenters

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SUMMARY

In its opening comments, the Enterprise Users Commenters requested that the Commission deny the *ITTA Petition*[1] as both procedurally and substantively deficient. Procedurally, the Enterprise Users Commenters argued that the *ITTA Petition*, styled as a Petition for Declaratory Ruling, is in reality an untimely Petition for Rulemaking to reverse the Commission's TRS *2005 Report and Order*.[2]

Substantively, the Enterprise Users Commenters noted that the *ITTA Petition* is unconvincing because: (1) the Commission's current rules, by giving effect to both the Truth-in-Billing rules and the TRS rules, harmonizes both rule sections, consistent with well-established canons of statutory interpretation; (2) ITTA's assertion that the current rules require Commission interpretation is at odds with the carrier community's history of acknowledgment of the FCC's prohibition on including descriptions of TRS charges on customers' bills; (3) the FCC's online Consumer Guide—which addresses inter- and intra-state charges does **not** support the proposition that TRS charges may appear on customer bills consistent with the Commission's rules; and (4) the deaf community has long supported the Commission's preserving the dignity of disabled Americans and supporting universal service by prohibiting the placement of TRS line items on phone bills.

None of the commenters in this proceeding have effectively rebutted the Enterprise Users Commenter's contentions or given the Commission a well-reasoned basis to

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1 *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, *Truth-in-Billing and Billing Format ITTA Petition for Declaratory Ruling Regarding TRS Line Item Descriptions*, CG Docket No. 98-170, Petition for Declaratory Ruling of ITTA – The Voice of America's Broadband Providers (filed May 8, 2018) ("*ITTA Petition*").

2 *Truth-in-Billing and Billing Format, National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, CC Docket No. 98-170, CG Docket No. 04-208, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd. 6448 ("*2005 Report and Order*").

overturn its almost thirty-year old prohibition on the use of TRS line items. First, there is no merit to the contention that the Truth-in-Billing rules preserve carriers' ability to advertise the provision of impermissible charges—such as those for TRS—on customer bills. Second, while there is a certain tension between federal jurisdiction over wireless rates and state jurisdiction over wireless terms and conditions under § 332(c)(3) of the Communications Act as it relates to TRS line items, the FCC has definitively resolved this issue by prohibiting the use of TRS line items on customer bills. Third, the carrier community—through its FCC pleadings—has long conceded that the Commission's rules do **not** permit the use of TRS line items. Fourth, because the commercial speech doctrine does not protect unlawful activities—such as the placement of TRS charges on customer bills—the Commission should reject its application to the instant case. Fifth, because permitting "composite" line items that include both TRS and other fees would eviscerate the Commission's prohibition on TRS line items, the FCC should reject this argument. Sixth, because the Commission's prior orders on TRS line items—including TRS I, TRS II, and the 2005 Truth-in-Billing Order—have left no doubt that TRS line items are prohibited, there is no merit to the contention that the Commission's prior pronouncements lacked clarity or merit further elaboration. Seventh, because the VRS Order's of TRS charges is descriptive and not prescriptive, the Commission should reject the argument that this order, in a footnote, countermanded the clear prohibition on TRS line items set forth in the Commission's prior orders. Eighth, there is no merit to the contention that a carrier's TRS fund contribution obligations are so unpredictable that they cannot be recovered through a carrier's service rates, given that carriers recover other variable costs (personnel, energy, health insurance) through such service rates. Ninth,

contrary to the contention that the Truth in Billing rules permit TRS line items, the Commission's orders implementing these rules explicitly state that such billing line items are impermissible.

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REPLY COMMENTS OF THE ENTERPRISE USERS COMMENTERS

The companies listed below[3] (collectively, the "Enterprise Users Commenters" or "Commenters") respectfully submit their Reply to the Comments filed in response to the Federal Communications Commission's ("FCC" or "Commission") Public Notice concerning a petition for declaratory ruling filed by ITTA – The Voice of America's Broadband Providers ("ITTA").[4]

INTRODUCTION

In its Petition, ITTA asked the Commission to rule that, under its Truth-in-Billing rules and § 225 of the Communications Act of 1934, as amended ("Act"), "it is and always has been permissible for a carrier recovering Telecommunications Relay Services (TRS)

[3] The following enterprise users join in these reply comments: 3M Company, Cabela's Incorporated, Coca-Cola Company, Clearwater Paper Corporation, Covenant Care California, LLC, Mastercard Technologies, LLC, MediaNews Group, Inc., OceanX LLC, Office Depot, Inc., O'Neal Steel, Inc., O'Reilly Automotive, Inc., Ratner Companies, L.C., Reynolds Services, Inc., Sears Holdings Management Corporation, Terex Corporation, Universal Data Consultants, Young's Holdings, Inc.

[4] *Consumer and Governmental Affairs Bureau Seeks Comment on ITTA Petition for Declaratory Ruling*, CG Docket Nos. 03-123, 98-170, Public Notice, DA 18-516 (rel. May 18, 2018).

Fund contributions via an end user cost recovery fee line item (or the like) on customers' bills to include TRS, among other references, in the line item description."[5]

In its opening comments, the Enterprise Users Commenters urged that the Commission reject the ITTA Petition because: (1) by giving effect to both the Truth-in-Billing rules and the TRS rules, the Commission's current rules give effect to these rule sections, consistent with traditional canons of statutory interpretation; (2) because the carrier community has long acknowledged that the FCC prohibits TRS line items there is no merit to the contention that these rules are unclear; (3) there is no support in the FCC's online Consumer Guide (addressing both inter- and intra-state charges) that TRS charges may appear on customer bills consistent with the Commission's rules; and (4) because the Commission's prohibition on the placement of TRS line items on phone bills preserves the dignity of disabled Americans and supports universal service the deaf community has long supported this ban.

As described in greater detail below, no commenter has offered the Commission a sound legal or policy basis to overturn its well-settled prohibition on TRS line items. The Enterprise Users Commenters reiterates that the Commission should deny the *ITTA Petition* because the Commission has previously and unequivocally ruled that the recovery of TRS Fund contributions should not appear as a specific line item or part of a specifically identified charge on customers' bills and neither Commission's orders, nor the

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[5] *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, *Truth-in-Billing and Billing Format ITTA Petition for Declaratory Ruling Regarding TRS Line Item Descriptions*, CG Docket No. 98-170, Petition for Declaratory Ruling of ITTA – The Voice of America's Broadband Providers (filed May 8, 2018), p.1 ("*ITTA Petition*").

record in this proceeding, has done anything to disturb this nearly thirty year old determination.

I. CENTURYLINK DISTORTS THE TRUTH-IN-BILLING RULES IN URGING THE COMMISSION TO CHANGE THE TRS RECOVERY RULES

CenturyLink correctly asserts that "charges contained on telephone bills must be accompanied by a 'brief, clear, non-misleading, plain language description of the service or services rendered,'"[6] as set forth in the Commission's Truth-in-Billing rules. However, CenturyLink then protests that "Despite this general policy towards disclosure and transparency in consumer billing–which includes line item charges on consumer bills–the Commission has continued to prohibit carriers from 'specifically identifying charges' on consumers' bills for contributions paid to the TRS Fund."[7] This protest is without merit. While CenturyLink has distorted the Commission's Truth-in-Billing rules by attempting to use them to justify describing an "illegal" charge on customers' bills, the Commission's Truth-in-Billing rules do **not** apply to "illegal" charges–they only apply to "legal" charges on customers' bills. Since the Commission prohibits the recovery of TRS Fund contributions via a specific line item or part of a specifically identified charge on customers' bills, TRS recovery charges should not "appear" much less be "described" on customers' bills.

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6 *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, *Truth-in-Billing and Billing Format ITTA Petition for Declaratory Ruling Regarding TRS Line Item Descriptions*, CG Docket No. 98-170, CenturyLink Comments, p. 3 (filed June 18, 2018) (citing 47 C.F.R. § 64.2401(b)) ("CenturyLink Comments").

7 *Id.* at 3.

II. CENTURYLINK MISSTATES COMMISSION'S "TENSION" BETWEEN TRS RECOVERY RULES AND TRUTH-IN-BILLING RULES

In addition, CenturyLink misstates the FCC's precedent as somehow having created "tension" between: (1) its policy against identifying TRS Fund recovery charges as a specific line item; and (2) its Truth-in-Billing rules. Specifically, CenturyLink notes that "In 2005, the FCC acknowledged some 'tension' between this policy against identifying TRS Fund recovery charges as a specific line item and the Truth-in-Billing rules..."[8] This is a misrepresentation of the FCC's precedent—the FCC never stated that there was "tension" between its TRS recovery policy and its Truth-in-Billing rules. CenturyLink then attempts to leverage this fabricated "tension" by urging the Commission to change its position on the recovery of TRS, as a means to alleviate this alleged "tension" with the Truth-in-Billing rules.

Specifically, when the Commission made reference to "tension" in its 2005 Truth-in-Billing Order,[9] it was voicing concern that its TRS recovery policy might be in "tension" with State jurisdiction over the "terms and conditions" (as opposed to the "rates") of CMRS, as described in § 332(c)(3) of the Communications Act: § 332(c)(3) prohibits the States from regulating CMRS "rates," but reserves State jurisdiction over the "terms and conditions" pursuant to which CMRS providers offer their services.

Of course, this seemingly clear dichotomy becomes murkier when applied to the regulation of taxes and fees, which definitely affect rates, but the presentation of which smacks more of terms and conditions. The Commission cleanly resolved this "tension" by

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8 *Id.* at 3-4.

9 *Truth-in-Billing and Billing Format; National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd. 6448 (2005) ("*2005 Truth-in-Billing Order*").

ruling that "state regulation prohibiting or requiring CMRS line items constitutes preempted rate regulation … [but] … this preemption does not affect other areas within the states' regulatory authority. For example, our ruling does nothing to disturb the states' ability to require CMRS carriers to contribute to state universal service support mechanisms or to impose other regulatory fees and taxes."[10]

Applying § 332(c)(3)'s allocation of jurisdiction between the FCC (rates) and the States (terms and conditions) to billing line items, such as those for TRS, the Commission held that a "state rule requiring CMRS carriers to segregate particular costs into line items … would limit a carrier's ability to set and structure its rates."[11] Against this background, the FCC pointed to the aforementioned "tension" between state and federal jurisdiction: "We recognize that precluding states from prohibiting carriers from using line items on an end user's bill may be in tension with our prior conclusion in the TRS context that carriers may not recover interstate TRS costs as a specifically identified line item."[12]

Therefore, while the "tension" referred to by CenturyLink in the FCC's orders is real, the tension is between federal and state jurisdiction over CMRS billing practices, not between the ability of carriers to use TRS line items or not. Contrary to CenturyLink's allegations, the latter issue is well-settled—TRS line items are forbidden.

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10 *Id.*, ¶ 32.

11 *Id.*, ¶ 31.

12 *Id.*, ¶ 31, n.86.

III. CENTURYLINK FALSELY ARGUES THAT THE TELECOM INDUSTRY GENERALLY RECOGNIZES THAT A NON-SPECIFIC LINE ITEM CHARGE THAT INCLUDES INTERSTATE TRS COST RECOVERY IS AND ALWAYS HAS BEEN PERMISSIBLE

CenturyLink argues that "it seems generally recognized that a non-specific line item charge that includes interstate TRS cost recovery is and has always been permissible. While this seems to be recognized in the industry, others less steeped in telecommunications law and practice do not have the same understanding."[13] Contrary to CenturyLink's assertion, the record indicates that the telecom industry has not historically shared this viewpoint.

As the Enterprise Users Commenters described in its previous comments, the record illustrates that the telecom industry does not share CenturyLink's opinion on this matter. COMPTEL, INCOMPAS's predecessor, is a trade association that represents over 200 communications and technology companies including Level3 (which was acquired by CenturyLink) and AT&T, which also commented on the *ITTA Petition*.

In its 2013 Petition for Forbearance, COMPTEL conceded that the Commission's rule is very clear–if carriers wish to recover their TRS Fund contributions from their customers, they must do so by incorporating the cost of TRS Fund contributions into the price of their telecommunications services; otherwise, carriers must absorb the cost themselves: "Each provider contributes to the [Telecommunications Relay Service] Fund based on its prior year revenues. As a result, providers cannot anticipate the magnitude of annual increases in the TRS contribution factor when setting their rates. They must either pass through increases in the contribution amount via a general rate hike, or they

[13] CenturyLink Comments at 5.

must absorb the increases where contracts or other billing arrangements with customers restrict their ability to raise their rates."[14] As such, COMPTEL requested "that that the Commission forbear [under § 10 of the Act, 47 U.S.C. § 160] from enforcing its uncodified "rule" or requirement that prohibits interstate telecommunications providers from passing through contributions to the Telecommunications Relay Service ("TRS") Fund to their end users as separately identified line items."[15]

Similarly, in its 2015 comments on the proposed TRS contribution factor, COMPTEL acknowledged that the Commission has ruled, many times, that carriers are prohibited from using line items on customers' bills to recover TRS Fund contributions but, instead, must incorporate the recovery of TRS Fund contributions into the price of their services, if they wish to recover this cost from their customers: "[T]he Commission has stated on several occasions that providers are not permitted to identify TRS contributions as separate line items on subscriber bills but instead are required to incorporate TRS contributions into the prices of their interstate telecommunications services."[16]

In addition to COMPTEL, four other common carriers (IDT Telecom, Inc., Intermedia.net, Vocalcity, Inc., and Vonage Holdings Corp), provided comments on the 2013 TRS contribution factor, reiterating their understanding of the Commission's rules

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[14] *Petition for Forbearance Pursuant to 47 U.S.C. § 160 From Enforcement of The TRS Line Item Prohibition*, WC Docket No. 13-, Petition for Forbearance of COMPTEL, p. 5-6 (filed Dec. 12, 2013) (this petition was pulled from Commission's physical archives) (emphasis added).

[15] *Id.* at 1.

[16] *Telecommunications Relay Services and Speech-to-Speech for Individuals With Hearing and Speech Disabilities, Structure and Practices of the Video Relay Service Program*, CG Docket Nos. 03-123, 10-51, COMPTEL's Comments on the Proposed Contribution Factor, p. 4-5 (filed June 4, 2015) (emphasis added).

regarding the recovery of TRS Fund contributions by carriers: "Carriers contribute to the TRS Fund based on their previous year revenues and are not allowed to seek reimbursement of this fee through a separate line item charge to customers, but instead must integrate the additional cost into their rates."[17]

Against this background, there is no merit to CenturyLink's contention that communications carriers generally recognize that a "non-specific line item charge that includes interstate TRS cost recovery is and has always been permissible."[18]

IV. AT&T MISINTERPRETS THE COMMERCIAL SPEECH DOCTRINE AS APPLIED TO FCC REGULATION OF TRS LINE ITEMS

AT&T asserts that "Interpreting Commission orders in a manner which prohibits an explanation that a composite line item surcharge includes interstate TRS costs would violate carriers' First Amendment rights,"[19] citing *BellSouth Telecommunications, Inc. v. Farris*,[20] for the proposition that "a Kentucky statute that prohibited telecommunications companies from separately stating on bills to customers a new gross revenue tax violated the companies' First Amendment rights."[21]

This argument misapplies the commercial speech doctrine and the holding of *Farris* to the instant case. Specifically, in *Farris*, "[K]entucky imposed a 1.3% tax on the

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17 *Telecommunications Relay Services and Speech-to-Speech for Individuals With Hearing and Speech Disabilities,* CG Docket No. 03-123, *Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51, Comments of IDT Telecom, Inc., Intermedia.net, Vocalcity, Inc., and Vonage Holdings Corp., p. 8 (filed May 31, 2013) (emphasis added).

18 CenturyLink Comments at 5.

19 *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, *Truth-in-Billing and Billing Format, ITTA Petition for Declaratory Ruling Regarding TRS Line Item Descriptions*, CG Docket No. 98-170, AT&T Comments, p. 10 (filed June 18, 2018) ("AT&T Comments").

20 542 F.3d 499 (6th Cir. 2008) ("*Farris*").

21 AT&T Comments at 10.

gross revenues of telecommunications providers. In connection with the new tax, the legislature banned providers from 'collecting the tax directly' from consumers and from 'separately stating the tax on the bill.'"[22].

The Sixth Circuit held that it was **not** a violation of BellSouth's commercial speech rights to prohibit a charge from appearing on customers' bills. In particular, the prohibition on "collecting the tax directly from consumers" was not a violation of BellSouth's First Amendment rights because "[t]he terms of the clause [prohibiting carriers from collecting the tax directly from consumers] refer to non-expressive conduct, not speech, and as a result lie beyond the protection of the First Amendment."[23] Thus, the *Farris* court's decision stands for the proposition that just as the State of Kentucky can regulate commercial conduct (as opposed to commercial speech) by prohibiting carriers from collecting a state tax directly from their customers, the FCC can regulate commercial conduct by allowing carriers to recover TRS contributions in their service rates but prohibiting them from recovering TRS contributions as a specifically identified charge or line item on customers' bills.

AT&T also misrepresented the court's decision as it applies to the description of TRS charges on customers' bills. In *Farris*, Kentucky disallowed carriers from stating that the 1.3% tax was embedded in the carriers' service rates. Since carriers' service rates are a "legal" charge on customers' bills, the Court deemed it a violation of First Amendment rights when Kentucky disallowed carriers from stating the tax was incorporated into the carriers' service rates. Similarly, as it relates to the recovery of TRS,

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22 *Farris* at 500.

23 *Id.* at 510.

if carriers were prevented from stating that there is a TRS charge incorporated into their service rates, this would be a violation of their commercial speech rights.

However, as it relates to the recovery of TRS, ITTA is not asking the Commission permission for carriers to reference TRS in the description of a "service rate" (i.e. a legal charge). Rather, ITTA is asking the commission permission for carriers to reference TRS in the description of a "line item" (i.e. an illegal charge). Therefore, unlike in *Farris*, there is no First Amendment violation by the Commission. AT&T is in effect arguing that it is a violation of a carrier's commercial speech rights to disallow the description of an "illegal" charge on customers' bills (i.e. a TRS line item). However, because it is well-settled that "the First Amendment does not protect commercial speech about unlawful activities,"[24] the Commission should reject AT&T's argument.

V. THE COMMISSION HAS PROHIBITED THE USE OF LINE ITEMS, INCLUDING COMPOSITE LINE ITEMS, TO RECOVER TRS FUND CONTRIBUTIONS

The Commission could not have stated its position on the use of line items more clearly than when it held: "In sum, we reiterate that carriers are not prohibited per se under our existing Truth-in-Billing rules or the Act from including non-misleading line items on telephone bills. We note that this finding does not alter the role of any other specific prohibition or restriction on the use of line items. For example, this Commission has prohibited line items for Interstate Telephone Relay Service (TRS) costs."[25] Thus, in this Order, the FCC categorically prohibited carriers from using line-items to recover TRS Fund contributions on customers' bills.

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[24] 44 Liquormart Inc. v. Rhode Island, 517 U.S. 484, 497 n.7 (1996) (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973)).

[25] *2005 Truth-in-Billing Order*, ¶ 23, n.64 (emphasis added).

To avoid the consequences of its violations of the Commission's rules (charging TRS as a line item against the backdrop of this decisive Commission Order), AT&T offers two alternative arguments. First, AT&T acts as if the *2005 Truth-in-Billing Order* were never promulgated and decrees that in *TRS I* and *TRS II*, the Commission "did not ban TRS line items."[26] This argument fails on its face, since the 2005 Truth-in-Billing Order plainly said "this Commission has prohibited line-items for Interstate Telephone Relay Services costs."[27]

Second, AT&T suggests there are actually two types of line items–*single* and *composite* line items–and that because TRS is charged within a composite line item, it really is not a line item, and escapes the TRS line item prohibition set forth in the *2005 Truth-in-Billing Order*. This argument also fails in light of the Commission's course of use of the term "line item." Specifically, in its orders, the Commission does not differentiate between "single" and "composite" line items–they are both considered line items. If this were not the case, many of the Commission's rules addressing line items could simply be bypassed by combining charges into a composite line item. The following examples illustrate this point:

Example 1: "Consistent with the Commission's prior findings, we reiterate that it is a misleading practice for carriers to state or imply that a charge is required by the government when it is the carriers' business decision as to whether and how much of such costs they choose to recover directly from consumers through a *separate line item*

[26] AT&T Comments at 6.

[27] *2005 Truth-in-Billing Or*der, ¶ 23, n.64.

charge."[28] Absurdly, if a "separate line item" were defined solely as a "single" line item and not a "composite" line item, carriers could simply combine charges into a composite line item, portray them as required by the government, and bypass this Commission rule.

Example 2: "[w]e tentatively conclude that where carriers choose to list charges in separate line items on their customers' bills, government mandated charges must be placed in a section of the bill separate from all other charges."[29] Again, if a "separate line item" were defined solely as a "single" line item and not a "composite" line item, carriers could simply combine charges into a composite line item, and bypass the Commission's tentative mandate restricting non-government charges from appearing in the same section of the bill as government mandated charges.

In these examples, the term "separate line item" plainly refers to both "single" and "composite" line items. It would defy logic to suggest that a "separate line item" does not include composite line items. If this were the case, carriers could avoid all of the Commission's rules that apply to line item charges by simply combining charges into a composite line item. In fact, this is precisely AT&T's argument. AT&T is suggesting that the Commission's TRS rules that prohibit the recovery of TRS via a line item do not apply because TRS charges are billed within a composite line item and, therefore, fall outside of the Commissions definition of a line item. The Commission should reject this argument.

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[28] *Id.*, ¶ 27 (emphasis added).

[29] *Id.*, ¶ 39 (emphasis added).

VI. AT&T MISREADS THE HOLDINGS OF TRS I AND TRS II IN CONTENDING THAT TRS LINE ITEMS ARE NOT CLEAR VIOLATIONS OF THE COMMISSIONS RULES

AT&T's contention that the *TRS I* and *TRS II* Orders "did ***not*** ban TRS line items"[30] is belied by the plain language of these orders. Specifically, in *TRS I*, the Commission stated, "Moreover, in order to provide universal telephone service to TRS users as mandated by the ADA, carriers are required to recover interstate TRS costs as part of the cost of interstate telephone services *and not as a specifically identified charge on subscribers' lines*."[31] And, in *TRS II*, the Commission explicitly rejected MCI's "propos[al] [to allow] a specifically identified charge on end users,"[32] holding that, "[i]n order to provide universal telephone service to TRS users as mandated by the ADA, carriers are required to recover interstate TRS costs as part of the cost of interstate telephone services *and not as a specifically identified charge on end user's lines*. Thus, MCI's proposal to assess such a charge is not feasible."[33]

Against this clear, almost three-decade old Commission language that TRS line items are prohibited, the FCC should reject AT&T's tortured interpretation to the contrary. In particular, while it is certainly possible that, in promulgating *TRS I* and *TRS II*, the Commission intended to "stat[e] only that carriers cannot recover the costs of interstate TRS through charges imposed on a limited subset of their consumers, rather than 'all

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30 AT&T Comments at 6.

31 *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, 6 FCC Rcd 4657, ¶ 34 (1991) ("*TRS I").*

32 Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, 8 FCC Rcd 1802, ¶ 19 (1993) ("*TRS II"*).

33 *TRS II*, ¶ 22.

subscribers for every interstate service,'"[34] there is no language in the Commission's pertinent orders to indicate that this is the case. Therefore, unless and until the Commission opens a new rulemaking to modify the prohibition on TRS billing line items set forth in *TRS I* and *TRS II*, and affirmed in various Truth-in-Billing Orders,[35] the FCC should continue to enforce its existing prohibition on TRS line items.

VII. THE VRS 2011 ORDER DOES NOT PERMIT CARRIERS TO UTILIZE TRS LINE ITEMS

AT&T's suggestion that the *VRS 2011 Order*'s statement that the costs of Video Relay Service ("VRS," a form of TRS), "are passed on to all consumers of telecommunications service by intrastate and interstate common carriers, either as a surcharge on their monthly service bills or as part of the rate base for the state's intrastate telephone services,"[36] somehow "puts the issue [of the permissibility of TRS line items] to rest" represents a misreading of the *VRS 2011 Order*. Rather, a more detailed review of the Order in question reveals that the FCC's discussion of the permissibility of a TRS line item is **descriptive**, not **prescriptive**.

Specifically, n.209, quoted by AT&T, states that "VRS users are not charged for use of the service. Rather, these costs are passed on to all consumers of telecommunications service by intrastate and interstate common carriers, either as a

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[34] AT&T Comments at 3-4.

[35] *See, e.g., Truth-in-Billing and Billing Format, National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing,* 20 FCC Rcd 6448, ¶ 23, n.64 (2005) ("For example, this Commission has prohibited line items for interstate Telephone Relay Service (TRS) costs.").

[36] AT&T Comments at 7 (quoting *Further Notice of Proposed Rulemaking, Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 26 FCC Rcd 17367 (2011) ("*VRS 2011 Order"*).

surcharge on their monthly service bills or as part of the rate base for the state's intrastate telephone services. When a VRS provider engages in fraudulent practices, the costs are unlawfully passed on to the public."[37] A fair reading of this passage is that the FCC is not overturning its prohibition on TRS line items (which had been in effect for eighteen years at the time), but was describing carrier billing practices, some of which built their TRS contributions into their per minute rates and some of which used a surcharge to recover their state and federal fund contribution obligations. AT&T's contention that this footnote is prescriptive is belied by both the text of the footnote itself, which lends itself to an alternative, descriptive explanation, and the unlikelihood of the FCC overturning an eighteen year-old policy in a footnote.

Moreover, the *2005 Financial Incentives Declaratory Ruling*, cited in n.209, does not stand for the proposition that TRS line items are consistent with the Commission's rules. Rather, the Declaratory Ruling merely states—in the context of explaining why using provider rebates to encourage VRS use violates § 225 of the Communications Act—that end-users do not pay for their TRS/VRS service:

> Because the provision of TRS is an accommodation for persons with certain disabilities, the cost of the TRS service is not paid by the TRS user. The statute and regulations provide that eligible TRS providers offering interstate services and certain intrastate services will be compensated for their just and "reasonable" costs of doing so from the Interstate TRS Fund, currently administered by NECA. "Congress chose to adopt a mechanism for compensation of TRS providers that allows them to be paid by all subscribers for interstate services" through contributions paid into the Fund. Under this mechanism, TRS providers that provide TRS services that are eligible for compensation from the Interstate TRS Fund submit to NECA on a monthly basis the number of minutes of service they provided of the various forms of TRS, and NECA compensates them based on per-minute compensation rates calculated on an annual basis. In addition, VRS

[37] *Id.*, ¶ 103, n.209 (citing *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Declaratory Ruling*, 20 FCC Rcd 1466, ¶ 6 (2005) ("*2005 Financial Incentives Declaratory Ruling"*).

> consumers presently do not pay any long distance charges in connection with a VRS call. Therefore, there is no cost of any kind to the consumer for placing a VRS call.[38]

Against this background, AT&T's reliance on a tangentially related footnote in an FCC Order as support for overturning a well-settled FCC policy against TRS line items is unavailing. As such, the Commission should reject AT&T's argument.

VIII. THERE ARE ONLY TWO CATEGORIES OF TELECOMMUNICATIONS CHARGES "LINE ITEMS" AND "SERVICE RATES" AND THERE IS NO MERIT TO THE CONTENTION THAT CARRIERS CANNOT RECOVER THEIR TRS CONTRIBUTIONS THROUGH THEIR SERVICE RATES

There are only two categories of telecommunications charges on customers' bills: (1) line items; and (2) service rates (i.e. undifferentiated charge for service). These two categories of charges were pointed out by the Commission when it noted "State regulations that prohibit a CRMS carrier from recovering certain costs through a separate line item, thereby permitting cost recovery only through an undifferentiated charge for service…"[39] The Commission plainly points out that there are only two options from which to recover costs: (1) through a "separate line item" or (2) through an "undifferentiated charge for service" (i.e. service rate).

In an attempt to justify the legality of using a "line item" instead of "service rates" to recover TRS costs, CenturyLink argues that the recovery of TRS through "service rates" is unsustainable. Specifically, CenturyLink notes "The notion that interstate TRS contributions can only be recovered via a service rate is not sustainable in today's marketplace especially with the significant increases to the interstate TRS contribution

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38 *Id.*, ¶ 6 (footnotes and citations omitted).

39 2005 Truth-in-Billing Order, ¶ 31 (emphasis added).

factor over the last several years."[40] CenturyLink then contends "To effectively recover interstate TRS contributions via static competitive service rates would be challenging at best, and virtually impossible with the varied and significant annual increases in the interstate TRS contribution factor over the last several years."[41]

CenturyLink's argument is inconsistent with the operational realities of a modern business. In particular, every company contends with unpredictable, variable operating expenses when setting the prices of its goods or services and these companies have to use their best judgement to forecast increases in operating costs and set their prices accordingly. CenturyLink certainly sets its service rates to take into account other unpredictable operating expenses (e.g. personnel, energy, health insurance, and other variable costs of doing business). Likewise, CenturyLink should set its service rates with sufficient margins to make its TRS contributions, which also vary from year to year. And, of course, CenturyLink will not be at any competitive disadvantage in building its TRS obligations into its rates, as the prohibition on TRS line items applies to all carriers.[42]

The recovery of TRS Fund contributions from customers is collected at the discretion of carriers (i.e. carriers' recovery of TRS from customers is not federally mandated). If carriers choose to recover TRS costs, the Commission allows these cost to be recovered through their service rates, however, the Commission prohibits the recovery of TRS as a line item.

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40 CenturyLink Comments at 5.

41 Id. at 5-6.

42 In fact, many wireless carriers, including Boost Mobile, https://www.boostmobile.com/why-boost.html?intnav=TopNav:WhyBoost:WhyChooseBoost, and T-Mobile, https://www.t-mobile.com/news/t-mobile-one-now-available, have successfully built all taxes and fees, including their universal service contributions, which far exceed their TRS contributions, into their service rates.

IX. USTELECOM MISAPPLIES TRUTH-IN-BILLING RULES TO CONCLUDE THE COMMISSION APPROVED THE USE OF LINE ITEMS TO RECOVER TRS COSTS

USTelecom misapplies truth-in-billing rules to conclude that the Commission has "implicitly approved carriers' use of line item descriptions that reference TRS…"[43] Specifically, USTelecom notes "by adopting broad, binding principles rather than mandating specific language and formats to govern descriptions on carrier bills, the Commission prioritized substance (consumer protection) over form,"[44] and concludes: "Thus, carriers have long had flexibility to include TRS cost recovery on customer bills as part of their rates, or in a line item listing TRS, among other items, in the description."[45]

USTelecom has correctly quoted part of the Commission's rules. In fact, if the Commission's words, quoted by USTelecom, were read in a vacuum, it would appear as though the Commission had given its permission for carriers to use and describe line item charges as they deem appropriate. However, the Commission's words were not stated in a vacuum. The Commission goes on to conclude "In sum, we reiterate that carriers are not prohibited per se under existing Truth-in-Billing rules or the Act from including non-misleading line items on telephone bills. We note that this finding does not alter the role of any other specific prohibition or restriction on the use of line items. For example, this Commission has prohibited line items for interstate Telephone Relay Service (TRS) costs."[46]

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43 USTelecom Comments at 3.

44 *Id.*

45 *Id.*

46 2005 Truth-in-Billing Order, ¶ 23, n.64 (emphasis added).

USTelecom conveniently left out one very key element from its argument–in light of the Commission's Truth-in-Billing rules, the Commission went out of its way to state "this Commission has prohibited line items for interstate Telephone Relay Service (TRS) costs."[47] The Commission could not have stated its position more clearly–in plain view of the Commission's Truth-in-Billing rules, the Commission has prohibited the use of line items to recover TRS costs.

CONCLUSION

As described above, because neither ITTA nor the record in this proceeding provide any sound legal or policy justifications to overturn the Commission's well-settled determination that TRS line items are prohibited, the Commission should reject ITTA's Petition.

Respectfully submitted,

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[47] 2005 Truth-in-Billing Order, n.64.