

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Telecommunications Relay Services and)	
Speech-to-Speech Services for)	CG Docket No. 03-123
Individuals with Hearing and Speech Disabilities)	
)	
Structure and Practices of the Video Relay)	
Service Program)	CG Docket No. 10-51
)	

APPLICATION FOR REVIEW

IDT Telecom, Inc.
520 Broad Street
Newark, New Jersey 07102
July 27, 2015

TABLE OF CONTENTS

INTRODUCTION4

I. BY COMPELLING THE REIMBURSEMENT OF RELAY SERVICES FROM THE INTERNATIONAL JURISDICTION, THE ORDER CONFLICTS WITH THE COMMUNICATIONS ACT OF 1934, AS AMENDED, AND THE ADMINISTRATIVE PROCEDURE ACT 8

A. The Budget And Contribution Factor Adopted In The Order Violate The Jurisdictional Separations Requirement Of 47 U.S.C. § 225 By Compelling International Providers To Fund Domestic Relay Services 8

1. The FCC does not have the authority to administer or enforce the provision of or recovery for international relay services 8

2. Even if the Commission asserts jurisdiction over international relay services, IDT opposes the existing contribution methodology, which secures the funding of domestic relay services (in part) from the international jurisdiction in violation of 47 U.S.C. § 225(d)(3)(B) as implemented under 47 CFR §64.604(c)(5)(ii) 10

II. BY EXTENDING THE TEMPORARY ALLOWANCE OF RECOVERY FOR IP-BASED RELAY SERVICES, THE ORDER INVOLVES A QUESTION OF POLICY WHICH HAS NOT PREVIOUSLY BEEN RESOLVED BY THE COMMISSION 13

A. The Commission Has Conceded That Its Authority To Authorize The Recovery Of Intrastate Service From The Interstate Jurisdiction Is Limited And Its Actions Exceed Its Limited Authority 13

1. The Commission cannot recover intrastate VRS from the interstate and international jurisdictions 13

2. The Commission cannot recover intrastate IP Relay from the interstate and international jurisdictions 16

3. The Commission cannot recover intrastate IP CTS from the interstate and international jurisdictions 17

III. BY ALLOWING FOR THE RECOVERY OF INTRASTATE IP-BASED RELAY SERVICES FROM THE FUND, THE ORDER INVOLVES THE APPLICATION OF A POLICY WHICH SHOULD BE OVERTURNED 19

A. The Inclusion Of Costs Within The Proposed Budget For Intrastate IP Relay And IP CTS Violates The Jurisdictional Separations Requirement Of 47 U.S.C. § 225 – Such Costs Must Be Recovered From The Intrastate Jurisdiction 19

B. The Inclusion Of Costs Within The Proposed Budget For Intrastate VRS Violates The Jurisdictional Separations Requirement Of 47 U.S.C. § 225 – Such Costs Must Be Recovered From The Intrastate Jurisdiction..... 20

IV. THE ONGOING VIOLATION OF THE JURISDICTIONAL SEPARATIONS MANDATE OF 47 U.S.C. § 225, AS IMPLEMENTED UNDER 47 CFR §64.604(C)(5)(II) HAS CAUSED AND WILL CONTINUE TO CAUSE CONSIDERABLE, IRREPARABLE HARM TO IDT AND COUNTLESS OTHER SERVICE PROVIDERS WHOSE REVENUE IS PRIMARILY AND/OR EXCLUSIVELY INTERNATIONAL..... 21

CONCLUSION..... 23

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Telecommunications Relay Services and)	
Speech-to-Speech Services for)	CG Docket No. 03-123
Individuals with Hearing and Speech Disabilities)	
)	
Structure and Practices of the Video Relay)	
Service Program)	CG Docket No. 10-51
)	

INTRODUCTION

IDT Telecom, Inc. (“IDT”), by its counsel and pursuant to Section 1.115 of the Commission’s Rules, 47 C.F.R. § 1.115, respectfully submits this Application for Review of the Order issued by the Consumer and Governmental Affairs Bureau (“Bureau”) establishing the 2015-16 Telecommunications Relay Service (“TRS”) Fund budget and contribution factor.¹

On April 24, 2015, TRS Fund Administrator Rolka Loube Associates LLC (“RL”) filed an “Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate” with the Commission.² On May 1, 2015, RL filled an “Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate Supplemental Filing,” with the

¹ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, CG Docket No. 03-123, DA 15-774 (Rel. June 30, 2015) (“2015-2016 TRS Fund Order”).

² “Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate,” *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services 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 (April 24, 2015) (“Fund Administrator Proposed Budget for the 2015-2016 Funding Year”).

Commission.³ On May 20, 2015, the FCC issued a Public Notice⁴ of RL's filings, establishing a comment period. On June 4, 2015, IDT submitted Initial Comments⁵ and on June 11, 2015, IDT submitted Reply Comments.⁶

In its Initial and Reply Comments, IDT opposed approval of the proposed budget and contribution factor because both were, in part, based on the funding of intrastate IP Captioned Telephone ("IP CTS"), IP Relay Service ("IP Relay") and Video Relay Service ("VRS"), (collectively "IP-based relay services") from the interstate and international jurisdictions and not from the intrastate jurisdiction. Additionally, IDT opposed approval of the proposed budget and contribution factor because both are, in part, based on the funding of domestic relay services⁷ from the international jurisdiction.

Furthermore, IDT stated that the Bureau's failure to: (1) segregate intrastate IP-based relay services and secure funding from the intrastate jurisdiction; and (2) segregate domestic relay services from international relay services and secure funding from the corresponding domestic jurisdictions violated the jurisdictional separations mandate of 47 U.S.C. § 225, as implemented under 47 CFR §64.604(c)(5)(ii), and caused and would continue to cause

³ "Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate Supplemental Filing," *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services 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 (May 1, 2015).

⁴ "Rolka Loube Associates LLC Submits Payment Formulas and Funding Requirement for the Interstate Telecommunications Relay Services Fund for the 2015-2016 Fund Year," *Public Notice*, CG Docket No. 03-123, CG Docket No. 10-51; DA 15-612 (May 20, 2015).

⁵ "Initial Comments of IDT Telecom, Inc.," *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities* CG 03-123; *Structure and Practices of the Video Relay Service Program* CG 10-51 (June 4, 2015)("IDT Initial Comments").

⁶ "Reply Comments of IDT Telecom, Inc.," *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities* CG 03-123; *Structure and Practices of the Video Relay Service Program* CG 10-51 (June 11, 2015)("IDT Reply Comments").

⁷ E.g., intra- and interstate Internet-based relay services and interstate Traditional TRS, Speech-to-Speech and Captioned Telephone.

irreparable harm to IDT and countless other service providers whose revenue is primarily interstate and/or international and whose contributions would be reduced greatly if the Bureau secured compensation for intrastate IP-based relay services from the intrastate jurisdiction and compensation for interstate relay services from the interstate jurisdiction.

And finally, IDT noted that the Bureau was compelled to remedy these long-standing violations now and in this proceeding and could not extend the violations another year by approving a final budget and contribution factor for the 2015-2016 Interstate TRS Fund Contribution Year. IDT urged the Bureau to issue, concurrent with its Order approving an *interim* 2015-2016 Interstate TRS Fund budget and contribution factor, a Notice of Proposed Rulemaking (“NPRM”) which addresses the appropriate contribution methodology under which the jurisdictional separations requirement of Section 225 can be implemented for IP-based relay services and international services. Upon the issuance of a Declaratory Ruling and/or Report and Order in response to the NPRM, a final budget and contribution factor can be established and the Bureau could true up contributions made pursuant to the interim rates established in this proceeding.

On June 30, 2015, the Bureau issued the 2015-2016 TRS Fund Order, in which it stated, in response to IDT’s Initial and Final Comments, “The determinations of which IDT complains were made by the Commission, and there is no basis for the Bureau to depart in this Order from such prior Commission decisions.”⁸ IDT seeks review of the Bureau’s Order.

⁸ 2015-2016 TRS Fund Order at ¶ 15.

The Commission’s review of the Bureau’s Order is necessary because the Order conflicts with the Communications Act of 1934 (“the Act”), as amended, and the Administrative Procedure Act (“APA”);⁹ involves a question of policy which has not previously been resolved by the Commission;¹⁰ and involves the application of a policy which should be overturned.¹¹ The Commission’s policy of allowing recovery of intrastate IP CTS and IP Relay from the federal TRS Fund violates 47 U.S.C. § 225, as implemented under 47 CFR §64.604(c)(5)(ii). Additionally, the Commission’s policy of allowing recovery of the cost of domestic relay services from international revenue violates 47 U.S.C. § 225, as implemented under 47 CFR §64.604(c)(5)(ii). Moreover, the Commission’s policy of allowing for recovery of intrastate IP CTS and IP Relay from the federal TRS Fund for a “limited” period of time violates 47 U.S.C. § 225, as implemented under 47 CFR §64.604(c)(5)(ii) or, in the alternative, is a policy that must have a limited, Commission-defined period: the current policy has been in effect for 13 and eight years, respectively, which clearly exceeds the period intended when the policy was first articulated. And finally, the Bureau Order allowed for the recovery of intrastate VRS calls from the interstate TRS Fund pursuant to 47 CFR §64.604(c)(5)(ii): 47 CFR §64.604(c)(5)(ii) is in direct contrast to 47 U.S.C. § 225 and must be overturned.

⁹ 47 C.F.R. § 1.115(b)(2)(i).

¹⁰ 47 C.F.R. § 1.115(b)(2)(ii).

¹¹ 47 C.F.R. § 1.115(b)(2)(iii).

I. BY COMPELLING THE REIMBURSEMENT OF RELAY SERVICES FROM THE INTERNATIONAL JURISDICTION, THE ORDER CONFLICTS WITH THE COMMUNICATIONS ACT OF 1934, AS AMENDED, AND THE ADMINISTRATIVE PROCEDURE ACT

A. The Budget And Contribution Factor Adopted In The Order Violate The Jurisdictional Separations Requirement Of 47 U.S.C. § 225 By Compelling International Providers To Fund Domestic Relay Services

1. The FCC does not have the authority to administer or enforce the provision of or recovery for international relay services

47 U.S.C. § 225 refers to “intrastate” and “interstate” relay services and does not mention international relay services (or, by extension, recovery of relay services from international revenue.) When initially establishing the contribution methodology to support the Fund, the Commission wrote “For the purpose of calculating TRS contributions, interstate telecommunications service includes ... international.”¹² This interpretation of Congressional intent, memorialized in 47 C.F.R. §64.604(c)(5)(iii)(A) is, quite simply, unsupportable as a matter of law and remains subject to challenge before the Commission in two separate proceedings.¹³ The Commission’s decision appears to rest on its (mistaken) conclusion that Congress authorized the Commission to make available international relay services (and, by extension, authorized the compensation of such services from the corresponding jurisdiction) or that international services are a subset of interstate services.

¹² *In re Telecommunications Relay Services, and the Americans with Disabilities Act of 1990*, Third Report and Order, MM Docket No. 90-571, 8 FCC Rcd. 5300, 5302 (1993)(“TRS III”).

¹³ “Telco Group Application for Review,” *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities* CG 03-123, at pp 5-7 (June 4, 2009)(“Telco Group Application for Review”). See also, Telco Group Declaratory Ruling on Reconsideration at FN 21. Globecomm Systems filed a Petition for Declaratory Ruling that there is no obligation to pay into the Interstate TRS Fund based on revenues arising from traffic that does not originate or terminate in the United States. The Bureau stated that it would “address GSI’s petition in a separate order.” That neither the Bureau nor the Commission can, more than nine years later, deign to address significant issues involving billions of dollars indicates the both the gross negligence and indifference of the Commission as well as the need for judicial review.

47 U.S.C. § 225(B)(2) states that the “the Commission shall have the same authority, power, and functions with respect to common carriers engaged in intrastate communication as the Commission has in administering and enforcing the provisions of this subchapter with respect to any common carrier engaged in interstate communication.” This, and other statutory language, clarifies that the Commission’s authority over intrastate relay service mirrors its authority over interstate relay services. By this language, Congress explicitly did not include the international jurisdiction within the Commission’s authority. In fact, Congress explicitly excluded the international jurisdiction by stating that “The term ‘common carrier’ or ‘carrier’ includes any common carrier engaged in *interstate communication* by wire or radio as defined in section 153[.]” (Emphasis added) Notably, “interstate communication” is defined in 47 U.S.C. § 153(28) as follows:

(28) Interstate communication

The term “interstate communication” or “interstate transmission” means communication or transmission

(A) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia,

(B) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or

(C) between points within the United States but through a foreign country; but shall not, with respect to the provisions of subchapter II of this chapter (other than section 223 of this title), include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

This definition does not include “Foreign Communication,” i.e., “transmission from or to any place in the United States to or from a foreign country.”¹⁴ Congress could very easily have included international or foreign relay services as being available¹⁵ and subject to cost recovery,¹⁶ but Congress did not do so. However much the Commission believes Congress *intended* to extend relay services to the international jurisdiction and however much the Commission believes Congress *should* have extended relay services to the international jurisdiction is immaterial: the plain language of the statute demonstrates that Congress did not intend for the provisions of 47 U.S.C. § 225 to apply to international (or foreign) communications, the providers of such communications and/or the revenue generated from the provision of such communications.

2. Even if the Commission asserts jurisdiction over international relay services, IDT opposes the existing contribution methodology, which secures the funding of domestic relay services (in part) from the international jurisdiction in violation of 47 U.S.C. § 225(d)(3)(B) as implemented under 47 CFR §64.604(c)(5)(ii).

If the Commission is going to read Section 225 as authorizing the provision of international relay services and compensation for relay services from the international jurisdiction, it can and must read Section 225 to extend the jurisdictional separations requirement to international revenue, thus requiring the recovery of costs incurred from the provision of international relay services from the international jurisdiction while prohibiting the

¹⁴ 47 U.S.C. § 153(21).

¹⁵ For example Congress could have stated in 47 U.S.C. §225(b)(1) “the Commission shall ensure that interstate, intrastate and international [or foreign] telecommunications relay services are available” but the Commission did not do so: it explicitly did not include international or foreign telecommunications relay services.

¹⁶ Likewise, Congress could have stated in 47 U.S.C. §225(d)(3)(b) “Such regulations shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction and costs caused by international [or foreign] telecommunications relay services shall be recovered from the international [or foreign] jurisdiction” but the Commission did not do so: it explicitly did not include international or foreign telecommunications relay services.

international jurisdiction from being tapped to recover costs from the domestic jurisdictions. As the Commission has cited, “[A]mbiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in a reasonable fashion.”¹⁷ So, to the degree the failure to explicitly reference international relay services within Section 225 is “ambiguous,” the ambiguity can be resolved reasonably, *i.e.*, by concluding that if Congress intended to allow for relay service users to make international calls Congress also intended to apply the jurisdictional separations mandate to the recovery of international relay services as well. If the Commission fails to extend the interpretation of Section 225 to jurisdictional separations, the resolution of the ambiguity is unreasonable, as it leads to inconsistent, contrary outcomes within the same statute.

As noted repeatedly in this filing and long-acknowledged by the Commission, the intent of Congress was unambiguous on the issue of jurisdictional separations: relay service costs are to be recovered from the corresponding jurisdiction. Thus, the only question can be whether Congress intended to impose a different recovery mechanism for the international jurisdiction. The answer is, quite simply, that there is no evidence to indicate this to be the case.

Additionally, it is unreasonable to conclude that international relay services are jurisdictionally the same as interstate relay services and are meant to be recovered from a joint interstate/international revenue base, which is presently the case. International calls are not a subset of interstate calls¹⁸: international calls are jurisdictionally different from intrastate or

¹⁷ Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).

¹⁸ This appears to be what the Commission assumed when it noted that “[T]hese commenters propose that the Commission require TRS Fund contributions from providers of every interstate service including...international.” TRS III at ¶9.

interstate. International calls originate in a state, territory or possession of the United States (the “US”) and terminate outside the US (or vice versa) whereas interstate calls originate in one state, territory or possession and terminate within another. The Commission has acknowledged that international calls are separate and apart from interstate calls (“[W]e agree ... that by definition ... international telecommunications are not ‘interstate’ because they are not carried between states, territories or possessions of the United States”¹⁹ and “international services are supported by the Interstate TRS Fund.”)²⁰ Moreover, the revenue generated from international calls is reported separately from intrastate and interstate revenue on the Form 499-A²¹ and is treated differently as well.²² The Commission has even explicitly addressed the provision of and recovery for certain international relay services by prohibiting the compensation for certain internationally-originated VRS calls²³ and international IP Relay calls in their entirety.²⁴ In sum, international relay service calls are a specific jurisdiction – neither intrastate nor interstate - and any attempt to treat the international jurisdiction as anything less than its own separate jurisdiction for the purpose of complying with the jurisdictional separations requirement must fail.

¹⁹ *In re: Federal-State Joint Board Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 22493 at ¶1779 (May 8, 1997).

²⁰ *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities* CG 03-123, Declaratory Ruling and Reconsideration, DA 06-1100 at ¶ 10 (May 25, 2006) (“Telco Group Declaratory Ruling”).

²¹ “Columns (b), (c), (d), and (e) are provided to identify the part of gross revenues that arise from interstate and international services for each entry on Lines 303 through 314 and Lines 403 through 417,” 2015 Telecommunications Reporting Worksheet Instructions (FCC Form 499-A) at 26, located at http://www.usac.org/_res/documents/cont/pdf/forms/2015/2015-FCC-Form-499A-Form-Instructions.pdf last viewed June 3, 2015.

²² See, 2015 Telecommunications Reporting Worksheet Instructions (FCC Form 499-A) at Appendix A.

²³ 47 C.F.R. § 64.604(a)(7).

²⁴ Even in 2005, when IP Relay represented 76% of recoverable relay minutes for the entire TRS Fund, none of these minutes were international because the FCC, as a matter of policy, did not compensate international IP Relay calls.

II. BY EXTENDING THE TEMPORARY ALLOWANCE OF RECOVERY FOR IP-BASED RELAY SERVICES, THE ORDER INVOLVES A QUESTION OF POLICY WHICH HAS NOT PREVIOUSLY BEEN RESOLVED BY THE COMMISSION

A. The Commission Has Conceded That Its Authority To Authorize The Recovery Of Intrastate Service From The Interstate Jurisdiction Is Limited And Its Actions Exceed Its Limited Authority

1. The Commission cannot recover intrastate VRS from the interstate and international jurisdictions

The Commission has conceded that its authority to authorize the recovery of intrastate services from the Fund is limited in scope and time. Yet the Commission has knowingly and willfully exceeded this very limited exception it established for itself.

In 2000, the Commission issued an Order approving the compensation of all (including intrastate) VRS calls from the Interstate TRS Fund.²⁵ In doing so, the Commission noted:

*During the development of this new relay service, we will permit recovery of costs associated with both intrastate and interstate calls from the interstate TRS Fund.*²⁶

The statute permits this action. Section 225(d)(3) states that the Commission's regulations "shall *generally provide* that costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction (emphasis added)." We believe the word "generally" gives to the Commission *some* discretion to fund intrastate service from the interstate jurisdiction. We believe that our action, *intended as an interim arrangement*, is an appropriate exercise of this discretion.

This funding scheme is a *temporary arrangement*. When VR[S] develops to the point where it can be required, as we expect it will, *we intend to revert to the traditional cost*

²⁵ *Telecommunications Relay Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, ¶¶ 21-27 (Mar. 6, 2000) ("VRS Order").

²⁶ *Id.* at ¶ 24 (Italics added.)

recovery mechanism. We will not establish a particular date for that transition. Instead, we will continue to assess the availability of the service and its technological development and determine at some point in the future when it best can be funded in the traditional manner.²⁷

Fifteen years later, VRS is not a “new” service and maintaining the existing contribution methodology cannot be justified to support the need to “speed the development of VRS.”²⁸ With over 112 million minutes projected for the 2015-2016 Funding Year²⁹ and compensation for VRS representing over 59% of the Fund’s usage budget, it is fair to say that VRS development does not need to be sped up.³⁰ Casting aside IDT’s disagreement that the inclusion of the word “generally”³¹ authorized the Commission’s decision to allow for interim recovery in the first place, the FCC acknowledged that the license granted by the inclusion of “generally” extended only to allow for an “interim arrangement.” And while, from a “History of the Universe”³² perspective, fifteen years may seem interim, IDT asserts that any arrangement that exists long enough to celebrate its *quinceanera* is no longer “interim.” Thus, the FCC’s continued, fifteen-year inclusion of costs for intrastate VRS calls violates its own dubious interpretation of the jurisdictional separations requirement of 47 U.S.C. § 225(d)(3)(B).

Additionally, any claim that the jurisdiction of VRS calls cannot be established, thus compelling that all calls be compensated from the intrastate jurisdiction, must fail. The

²⁷ Id at ¶¶ 26-27 (internal footnotes omitted)(Italics added except where so noted.)

²⁸ *Telecommunication Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Second Report and Order, Order on Reconsideration, and Notice of Proposed Rulemaking, CC Docket No. 98-67, CG Docket No. 03-123, FCC 03-112, 18 FCC Rcd 12379 (June 17, 2003) at ¶¶26-27 (“*Second Improved TRS Order & NPRM*”).

²⁹ Supplemental Fund Administrator Proposed Budget for the 2015-2016 Funding Year at Exhibit 2.

³⁰ *Id.*

³¹ It is worth noting that the Commission’s own rules do not include the word “generally,” *See generally*, 47 CFR §64.604(c)(5)(ii).

³² *A Brief History of Time*, Directed by Errol Morris 1992 (Film).
<https://www.youtube.com/watch?v=ySUYAKWzoVQ> (last viewed May 21, 2015).

Commission has previously stated “Because the leg of the call between the person with a hearing disability and the CA uses the Internet, and not the PSTN, VRS providers cannot automatically determine the geographic location of that party to the call.”³³ IDT disagrees that any alleged inability to automatically determine the geographic location of the parties using the relay service allows the Commission to establish a methodology contrary to explicit direction from Congress. Arguably, if the relay service provider cannot demonstrate that a call is interstate or international, the call should *not* be compensated from the Fund. Regardless, the issue of automatically-determined geographic location should be moot, as the information required by service providers in order to receive compensation per 47 CFR 64.604(c)(ii)(D)(2)(i)-(x) provides sufficient information to allow the relay service provider and Fund Administrator to determine the jurisdiction of VRS calls.³⁴ And even if the data obtained pursuant to 47 CFR 64.604(c)(ii)(D)(2)(i)-(x) is somehow insufficient to determine the jurisdiction of VRS calls, the Commission has failed to implement reporting requirements or proxies or *any* sort of mechanism that would prevent the recovery of intrastate VRS from the intrastate jurisdiction.³⁵

³³ *Telecommunications Relay Services for Individuals with Hearing and Speech Disabilities; Internet-based Captioned Telephone Service*, CG Docket No. 03-123, Declaratory Ruling, FCC 06-182 (January 11, 2007) at ¶ 5 (“TRS Declaratory Ruling”).

³⁴ For example, 47 CFR 64.604(c)(ii)(D)(2)(v)-(vi) require the incoming telephone and IP address (if call originates with an IP-based device) and the outbound telephone and IP address (if call originates with an IP-based device). This information alone should be sufficient to determine the jurisdiction of a call. To the degree the Commission believes that the physical location of the calling or called party can vary from the location associated with the phone number or IP address, the Commission can address this issue. However, since there is no benefit to the calling or called party (or the service provider) to manipulate the jurisdiction of the call, IDT does not believe that any uncertainty (which exists in all aspects of the telecommunications business) presents cause for meaningful concern.

³⁵ *In the Matter of 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 Docket No. 90-571; CC Docket No. 98-67; CG Docket No. 03-123, FCC 04-137 (June 30, 2004) at ¶ 242 (“TRS Order, Order on Reconsideration and FNPRM”).

This “head in the sand” approach cannot survive – not when IDT and other carriers are forced to pay hundreds of millions of dollars – as a result of the FCC’s willful blindness.

2. The Commission cannot recover intrastate IP Relay from the interstate and international jurisdictions

The arguments in support of IDT’s position regarding VRS are equally applicable to IP Relay. In 2002, the Commission issued a Declaratory Ruling approving the compensation of all (including intrastate) IP Relay calls from the TRS Fund.”³⁶ In doing so, the Commission noted that “Because there is currently no automatic means for determining whether a call made via IP Relay is intrastate or interstate, we authorize, on an *interim* basis, recovery of all costs of providing IP Relay from the Interstate TRS Fund.”³⁷ Again, the Commission’s requirement that an automatic means for determining jurisdiction is a condition precedent to lawful jurisdictional recovery is unsupported by the statute and/or rule. Additionally, it has been thirteen years since the Commission conceded that its authorization was on an “interim” basis. Thus, to the degree the FCC has relied on the inclusion of the word “generally” to allow for interim recovery, that reliance, after 13 years, can no longer be justified. The Commission must complete the work it initiated in 2004: it must determine whether a technological mechanism exists that can provide for the jurisdictional identification of the IP Relay caller or it must look to other

³⁶ *In the Matter of Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Petition for Clarification of WorldCom, Inc.*, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, CG Docket No. 98-67, FCC 02-121 (April 22, 2002) at ¶ 20 (“IP Relay Order”).

³⁷ *Id.* at ¶ 1 (Italics added.)

methods by which the Commission might determine which IP Relay calls are intrastate and which calls are interstate.³⁸

3. The Commission cannot recover intrastate IP CTS from the interstate and international jurisdictions

For the past eight years, the Commission has violated Congressional intent, its own rules and even the guidelines it established for itself by allowing for recovery of intrastate IP CTS from the interstate and international jurisdiction. The fact that the contribution methodology for IP CTS has violated for “only” eight years does not temper the egregiousness of the violation, particularly given the exploding costs associated with IP CTS in recent years.³⁹ In 2007, the Commission issued a Declaratory Ruling approving the compensation of all (including intrastate) IP CTS calls from the interstate TRS Fund “*until such time as the Commission adopts jurisdictional separation of costs for this service.*”⁴⁰ This time was not intended to be as open-ended (or never-ended, as the case as so far been): Chairman Martin wrote in his Statement accompanying the Order: “[A]lthough we permit this service to be compensable from the Interstate TRS Fund, it is important to emphasize that this is an interim measure. This past summer, we initiated a proceeding to consider the appropriate cost recovery methodology for relay services, including jurisdictional separation of costs. The Commission is committed to taking all necessary actions to ensure that the TRS program is operated as efficiently and effectively as possible. It is only by doing so that we can continue to ensure that individuals with

³⁸ TRS Order, Order on Reconsideration and FNPRM at ¶ 222.

³⁹ In the 2008-2009 Contribution Year, \$409,585 was budgeted for IP CTS; for the 2015-2016 Contribution Year, \$424,366,944 has been budgeted for IP CTS. To understand the enormity of this increase, consider this: You could take the entire annual 2008-2009 budget and spend it nearly three times a day every day a year before you would exceed the 2015-2016 annual budget

⁴⁰ TRS Declaratory Ruling at ¶ 1 (Italics added.)

disabilities have the same access to communication technologies as all other Americans.”⁴¹ Commissioner McDowell likewise noted the temporary nature of the cost recovery: “I look forward to resolution of the remaining IP CTS issues regarding cost recovery, the mandatory nature of the service, and certification. We should take all necessary steps, as soon as possible, to encourage the development and implementation of new technologies that make communications easier and more transparent for the hearing impaired public.”⁴² So, once again, the Commission recognized its limited authority to allow for intrastate recovery from the Fund, established a condition precedent (one that was solely within its control) to implement jurisdictional separations for a relay service and then failed to take the steps to address the condition. Considering that the Commission arguably had no authority to override the jurisdictional separations mandated by Congress and implemented in its own rules to allow recovery for the intrastate jurisdiction in the first place, the Commission’s subsequent failure to address the condition is all the more offensive and demonstrative of the reason why the Commission cannot be allowed to extend its policies further.

Ultimately, the Commission’s failure to segregate intrastate Internet-based relay services and secure funding from the intrastate jurisdiction violates the jurisdictional separations mandate of 47 U.S.C. § 225, as implemented under 47 CFR §64.604(c)(5)(ii), and has caused considerable, irreparable harm to IDT and countless other service providers whose revenue is primarily interstate and international. The Commission is compelled to remedy the violation within the 2015-2016 Funding Year.

⁴¹ “Statement of Chairman Kevin J. Martin,” TRS Declaratory Ruling at 1.

⁴² “Statement of Commissioner Robert M. McDowell,” TRS Declaratory Ruling at 1.

III. BY ALLOWING FOR THE RECOVERY OF INTRASTATE IP-BASED RELAY SERVICES FROM THE FUND, THE ORDER INVOLVES THE APPLICATION OF A POLICY WHICH SHOULD BE OVERTURNED

- A. The Inclusion Of Costs Within The Proposed Budget For Intrastate IP Relay And IP CTS Violates The Jurisdictional Separations Requirement Of 47 U.S.C. § 225 – Such Costs Must Be Recovered From The Intrastate Jurisdiction

The budget and contribution factor approved in the 2015-2016 TRS Fund Order violate the jurisdictional separations requirement of 47 U.S.C. § 225 because both are calculated, in part, based on funding intrastate IP Relay and IP CTS from interstate and international revenue and not from intrastate revenue. 47 U.S.C. § 225(d)(3)(B) unambiguously states, regarding regulations for cost recovery of relay services “Such regulations shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction.” This mandate was equally and unambiguously implemented by the Commission in its rules (“Costs caused by interstate TRS shall be recovered from all subscribers for every interstate service ... costs caused by intrastate TRS shall be recovered from the intrastate jurisdiction.”)⁴³ Thus, any final budget (and corresponding contribution factor) whose calculation is based solely on revenue from the interstate and international jurisdictions and which compensates costs incurred from the provision of intrastate IP CTS and IP Relay is, on its face, in violation of 47 U.S.C. § 225(d)(3)(B) as implemented under 47 CFR §64.604(c)(5)(ii) because the costs caused by intrastate Internet-based relay services are recovered from the interstate and international jurisdictions.

⁴³ 47 CFR §64.604(c)(5)(ii).

B. The Inclusion Of Costs Within The Proposed Budget For Intrastate VRS Violates The Jurisdictional Separations Requirement Of 47 U.S.C. § 225 – Such Costs Must Be Recovered From The Intrastate Jurisdiction

The budget and contribution factor approved in the 2015-2016 TRS Fund Order violate the jurisdictional separations requirement of 47 U.S.C. § 225 because both are calculated, in part, based on funding intrastate VRS from the interstate and international jurisdictions and not from the intrastate jurisdiction. While IDT's opposition to the Commission's approach toward VRS mirrors its opposition to IP CTS and IP Relay, it is necessary to address one additional point regarding VRS that is inapplicable to IP Relay and IP CTS. Unlike these two services, whose violation of the jurisdictional separations requirement is based solely on prior Commission Orders, the FCC's violation of the jurisdictional separations requirement for VRS is based on the Commission's rules. 47 CFR §64.604(c)(5)(ii) states that "Costs caused by the provision of interstate and intrastate VRS shall be recovered from all subscribers for every interstate service." However, the Commission cannot hide behind the rule and continue to recover intrastate VRS from the interstate and international jurisdictions and be insulated from a violation of 47 U.S.C. § 225 for VRS because 47 CFR §64.604(c)(5)(ii) itself violates 47 U.S.C. § 225(d)(3)(B). The Commission's authority to implement rules is constrained in that it cannot replace the clear, unambiguous intent of Congress with rules that directly contradict Congressional intent.⁴⁴ And there can be no doubt that 47 U.S.C. § 225(d)(3)(B) ("costs caused by intrastate telecommunications relay services shall be recovered from the intrastate

⁴⁴See, e.g., *In re Old Fashioned Enterprises, Inc.*, 236 F.3d 422, 425(8th Cir. 2001)("Although substantial deference is due an agency's interpretation of its regulations, no deference is due if the interpretation is contrary to the regulation's plain meaning."); *Delaware Division of Health and Social Services v. United States Department of Health and Human Services*, 664 F.Supp. 1104 (D. Del. 1987)(Where "the regulations unreasonably supersede" the plain meaning of the statute, the "attempted revision of the statutory language is not only unreasonable; it is arbitrary and capricious" and "must be overturned.")

jurisdiction”) directly contradicts 47 CFR §64.604(c)(5)(ii) (“Costs caused by the provision of ... intrastate VRS shall be recovered from all subscribers for every interstate service”) because the intent (and result) of the statute is that intrastate relay service costs are recovered from the intrastate jurisdiction whereas the intent (and result) of the Commission’s rule is that intrastate VRS costs are recovered from the interstate and international jurisdictions.

IV. THE ONGOING VIOLATION OF THE JURISDICTIONAL SEPARATIONS MANDATE OF 47 U.S.C. § 225, AS IMPLEMENTED UNDER 47 CFR §64.604(C)(5)(II) HAS CAUSED AND WILL CONTINUE TO CAUSE CONSIDERABLE, IRREPARABLE HARM TO IDT AND COUNTLESS OTHER SERVICE PROVIDERS WHOSE REVENUE IS PRIMARILY AND/OR EXCLUSIVELY INTERNATIONAL

The need to separate relay service calls (and compensation for such calls) into the international jurisdiction is compelling. On information and belief, approximately 99% of lawful, compensable relay services are domestic. Telco Group, in a filing in this docket,⁴⁵ has indicated that international relay service usage/compensation represents less than one percent of the annual Fund budget.⁴⁶ Also on information and belief, contributions based on international revenue represent approximately 10% of the Interstate Fund’s budget.⁴⁷ Should these numbers be accurate (or even remotely close to accurate), what they would indicate is that the Fund secures compensation from the international jurisdiction in order to support not only international relay services, but also intrastate and interstate relay services. Such a finding, which IDT believes is virtually certain since IDT alone (based on its own international

⁴⁵ “Application for Review,” *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*,” CG Docket No. 03-123 (June 4, 2009) at pp 9-12 (“Telco Group Application for Review”).

⁴⁶ While this data is several years old, the Commission has access to data that could confirm or refute the claim using more recent data.

⁴⁷ See, Table 1.6 (Revenues from Telecommunications and Interconnected VoIP Service Provided to End Users: 2009), “Universal Service Monitoring Report, 2011, CC Docket No. 98-202,” CC Docket No. 96-45. Again, while this data is several years old, the Commission has access to data that could confirm or refute the claim using more recent data.

revenue and corresponding Fund contributions), may very well support all compensated international relay services would demonstrate that the current compensation methodology violates 47 U.S.C. § 225, as implemented under 47 CFR §64.604(c)(5)(ii), because the methodology does not limit the imposition of a contribution factor upon international revenue to recover only international relay service costs. In fact, given the *de minimis* use of international relay services (and their corresponding *de minimis* portion of the overall Fund budget), many carriers whose revenue is primarily international would see their contributions reduced to a fraction of current costs if the Commission secured compensation for intrastate, interstate and international relay services from the corresponding jurisdiction.

Ultimately, the Commission's failure to segregate domestic relay services and secure funding from the domestic jurisdictions violates the jurisdictional separations mandate of 47 U.S.C. § 225, as implemented under 47 CFR §64.604(c)(5)(ii), and has caused considerable, irreparable harm to IDT and countless other service providers whose revenue is primarily interstate and international. The Commission is compelled to remedy the violation within the 2015-2016 Funding Year.

CONCLUSION

IDT seeks Commission Review of the Bureau Order because the approved budget and contribution factor include costs for intrastate IP Relay, IP CTS and VRS whereas the Fund is supported only by interstate and international revenue: the inclusion of intrastate costs violates the jurisdictional separations requirement of 47 U.S.C. § 225 and must be recovered from the intrastate jurisdiction. The Commission has conceded that its authority to authorize the recovery of intrastate service from the interstate jurisdiction is limited and its actions exceed its limited authority. The Commission cannot recover intrastate IP Relay, IP CTS and VRS from the interstate and international jurisdiction.

IDT also seeks Commission Review of the Bureau Order because it violates the jurisdictional separations requirement of 47 U.S.C. § 225 by compelling international providers to fund domestic relay services. 47 U.S.C. § 225, as implemented under 47 C.F.R. §64.604(c)(5)(ii), compels that relay service costs be recovered from the corresponding jurisdiction. The ongoing violation of the jurisdictional separations mandate of 47 U.S.C. § 225, as implemented under 47 C.F.R. §64.604(c)(5)(ii) has caused and will continue to cause considerable, irreparable harm to IDT and countless other service providers whose revenue is primarily and/or exclusively international.

As stated in our prior filings, the Commission should issue a NPRM to begin the process whereby the Fund contribution methodology conforms to the jurisdictional separations requirement of 47 U.S.C. § 225. This is the appropriate proceeding in which to issue a NPRM. If the Commission is going to continue to support intrastate relay services from the Fund, the

Commission should extend the Fund contribution base to include intrastate revenue. The Commission must ensure that relay service providers are capable of determining the jurisdiction of relay service calls and reporting them, per jurisdiction, to the Fund Administrator. The Commission must also establish rules and provide sufficient information to allow the Fund Administrator to develop a contribution factor for each jurisdiction and apply that factor to the corresponding jurisdictions' reported revenue. The Commission should establish separate jurisdictional contribution factors for the 2015-2016 Fund Contribution Year, thereby allowing for a true up of an interim contribution factor determined in this proceeding.

Respectfully submitted,

IDT Telecom, Inc.

/s/ Carl Wolf Billek

Carl Wolf Billek
Senior Regulatory Counsel
IDT Telecom, Inc.
520 Broad Street
Newark, NJ 07102
(973) 438-4854 (Telephone)
(973) 438-1215 (Facsimile)
Carl.Billek@idt.net (Email)