Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of: Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities	CG Docket No. 03-123

JOINT COMMENTS OF SORENSON COMMUNICATIONS, INC. AND CAPTIONCALL, LLC ON IDT PETITION FOR RULEMAKING REGARDING INTERSTATE TELECOMMUNICATIONS RELAY SERVICE FUND CONTRIBUTION

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Sorenson Communications, Inc., and CaptionCall LLC file these comments in response to the Commission's request for comments on the petition for rulemaking filed by IDT Telecom, Inc. ("IDT").[1]

INTRODUCTION AND SUMMARY

As requested by IDT, the Commission should initiate a rulemaking to expand the contribution base for the Telecommunications Relay Services Fund ("TRS Fund") to include intrastate revenues.[2] Expanding the TRS Fund contribution base in this way is well within the Commission's authority and is also more equitable because it will ensure that contributions correspond more closely with the services compensated from the TRS Fund.

While IDT is correct that the Commission can and should expand the contribution base, it overstates its case by contending that the Commission cannot continue to reimburse for intrastate IP-based TRS ("iTRS") from the Fund without an expanded base. The Commission's current cost-recovery system for iTRS is a valid exercise of the Commission's broad authority under the Americans with Disabilities Act ("ADA"). If the Commission does not wish to expand the contribution base at this time, it has ample authority to keep the status quo in place.

I. The Commission Should Expand the Contribution Base for the TRS Fund Such That Cost Recovery for iTRS Comes from Both Intrastate and Interstate Revenues.

Historically, the Commission has assessed carriers' contributions to the TRS Fund solely based on their interstate revenues. But the history of the Fund need not dictate its future. If the Commission so chooses, it may require (1) all interstate and intrastate carriers and VoIP

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[1] *Request for Comment on Petition for Rulemaking Filed by IDT Telecom, Inc., Regarding Interstate Telecommunications Relay Service Fund Contribution*, Public Notice, CG Docket No. 03-123 (rel. Dec. 18, 2015).

[2] IDT Telecom, Inc. Petition for Rulemaking, CG Docket No. 03-123 (filed Nov. 25, 2015) ("IDT Petition").

providers to pay into the Fund and (2) that the portion of carriers' Fund contributions designed to recover the cost of iTRS be based on both interstate and intrastate end-user revenues. Expanding the contribution base would make the funding of iTRS more equitable. Moreover, as discussed in Section I.C, this can be accomplished without changing existing revenue reporting.

A. The Commission Has Authority to Expand the Contribution Base.

The ADA plainly gives the Commission authority to include intrastate revenue within the contribution base. When Congress passed Title IV of the ADA, it sought to remedy a broken state-by-state system for providing telecommunications services to deaf and hard-of-hearing consumers, which had failed to meet consumers' needs.[3] Congress envisioned the creation of a "seamless interstate and intrastate relay system . . . that [would] allow a communications-impaired caller to communicate with anyone who has a telephone, anywhere in the country."[4] It therefore required the Commission to "ensure that interstate *and* intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States."[5] To that end, Title IV created an explicit exception to the scope of the Commission's general jurisdiction under Section 2(b) of the Communications Act:[6] 47 U.S.C. § 225(b)(2) expressly grants the FCC jurisdiction over both interstate and intrastate carriers for the purpose of administering the nationwide provision of TRS.[7]

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[3] H.R. Rep. No. 101-485(IV) at 27-28 (1990).

[4] *Id.*

[5] 47 U.S.C. § 225(b)(1) (emphasis added).

[6] 47 U.S.C. § 152(b).

[7] 47 U.S.C. § 225(b)(2) ("For the purposes of administering and enforcing the provisions of this section and the regulations prescribed thereunder, the Commission shall have the same authority, power, and functions with respect to common carriers engaged in intrastate

Additionally, Title IV requires that carriers bear the additional costs of providing TRS service.[8] However, it does not specify a mechanism for administering the carriers' payment for TRS, particularly as TRS has evolved such that the services are provided by third party entities unaffiliated with any carrier, but satisfy the requirement on all carriers to provide TRS.[9] By this silence, Congress gave the Commission flexibility to design a cost recovery mechanism pursuant to its Section 225(b)(2) jurisdiction to administer the nationwide provision of TRS. Notably, the ADA does not require the creation of the Fund at all, much less specify which entities should pay into or receive money from the Fund.

In an exercise of its Section 225(b)(2) jurisdiction, the FCC set up the TRS Fund in 1993, assessed carrier contributions to the Fund based on their interstate end-user revenue, and left to state entities the cost-recovery process for intrastate TRS.[10] The FCC later exercised jurisdiction to allow reimbursement of all iTRS calls from the Fund while continuing to assess carrier (and later, interconnected and non-interconnected VoIP provider) contributions based on interstate revenues.[11] Because Section 225(b)(2) gives the Commission jurisdiction over both interstate

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communication as the Commission has in administering and enforcing the provisions of this subchapter with respect to any common carrier engaged in interstate communication.").

8 47 U.S.C. § 225(c), (d)(1)(D).

9 *See id.*

10 47 C.F.R. § 64.604(c)(5).

11 *TRS and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd. 5140 ¶ 24 (2000) ("*2000 R&O and FNPRM*") (allowing VRS compensation from the Fund); *Provision of Improved TRS and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling, 17 FCC Rcd. 7779 ¶¶ 20-21 (2002) ("*2002 Declaratory Ruling*") (same for IP Relay); *TRS and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Internet-Based Captioned Telephone Service*, Declaratory Ruling, 22 FCC Rcd. 379 ¶ 25 (2007) ("*2007 Declaratory Ruling*") (same for IP CTS).

and intrastate carriers, the Commission is free to revise its treatment of the Fund yet again and expand the contribution base to include intrastate end-user revenues.

In fact, as IDT notes,[12] Congress clearly envisioned that the FCC might exercise its jurisdiction to recover costs associated with intrastate TRS services, which the Commission has done. Although Title IV allows states to set up certified intrastate TRS programs, which can then oversee cost recovery for intrastate service,[13] states are not required to do so or to seek such certification.[14] Congress also directed the Commission to reject establishment of state programs or rescind the prior approval of programs that do not meet certification requirements.[15] By simultaneously mandating carrier-funded universal service and setting up a statutory scheme where states might not administer TRS programs, Congress clearly contemplated having the FCC recover the costs associated with intrastate TRS. Moreover, with respect to internet-based TRS, the FCC is now the sole certification authority; states can no longer certify iTRS providers for participation in the federal TRS program.[16]

No state currently recovers the cost associated with any form of iTRS, including with respect to wholly-intrastate calls. Section 225(b)(2) gives the FCC the power to step into this void and expand the contribution base for the TRS Fund such that cost recovery for iTRS comes from both intrastate and interstate end-user revenues, should it choose to do so.

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[12] IDT Petition at 10-12.

[13] *See* 47 U.S.C. § 225(f)(3).

[14] *Id.* § 225(f)(1).

[15] *Id.* § 225(f)(2), (4).

[16] 47 C.F.R. § 64.606(a)(2).

B. Expanding the Contribution Base for iTRS Would Make Cost Recovery More Equitable.

Expanding the contribution base presents public interest benefits. If the contribution base were expanded, the number of entities contributing to the TRS Fund would not significantly change, as few carriers or VoIP providers solely offer intrastate service.[17] However, the amount each provider pays would be more equitable. Under the current system, entities that primarily offer interstate and international service pay a larger share of their total end-user revenues on their TRS Fund contribution than do entities that provide large amounts of intrastate service. So, for example, companies that provide consumers with their primary residential wireline and wireless service—services that are primarily used to make intrastate voice calls[18]—contribute to the TRS Fund based on a relatively smaller portion of their end-user revenues.[19] Meanwhile, non-fixed (i.e. nomadic or mobile) interconnected VoIP service providers generally contribute to the TRS Fund based on a much larger portion of their end-user revenues.[20] This not only gives an artificial competitive advantage to companies that have a lower percentage of end-user telecommunications interstate and international revenues, as compared with those that have a higher percentage even when providing the same calling services, but it also fails to reflect the

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[17] *See* FCC, *Trends in Telephone Service*, at 15-1 (Sept. 2010), https://www.fcc.gov/general/trends-telephone-service (noting that "virtually all carriers" currently have interstate revenues that are assessed for TRS Fund contributions).

[18] *See id.* Tables 11.4, 14.1.

[19] For example, the FCC has adopted a "safe harbor" for cellular and broadband PCS services of 37.1% interstate, which means 62.9% can be classified as intrastate. *See* FCC, 2015 FCC Form 499-A Instructions, at 27 (issued Dec. 24, 2015), https://www.fcc.gov/document/2015-fcc-form-499-instructions.

[20] The FCC's "safe harbor" for interconnected VoIP is 64.9% interstate. *Id.* The interstate/international percentage of end-user revenues can be even higher for carriers that focus predominantly on international communications.

relative benefit provided when iTRS provides a way for that carrier to meet its Section 225(c) obligations to provide TRS. In this regard, it is important to keep in mind that iTRS represents 97.3% of all TRS minutes compensated by the federal TRS Fund, and 98.1% of all provider disbursements from the Fund.[21] Thus, expanding the TRS Fund contribution base to correspond more closely with the services currently compensated from the TRS Fund would promote competition, and more equitably—and in a competitively neutral manner—allow the contribution obligation to reflect the benefits of TRS.

That said, IDT overstates the public policy benefits of expanding the contribution base for iTRS.[22] It mistakenly assumes that if the FCC fails to expand the contribution base, it must transfer administration of the entire iTRS program to the states. As discussed in detail below, the FCC has jurisdiction to continue to handle the administration of a single iTRS program while maintaining its current cost recovery system. So although they are substantial, the public policy benefits of having the FCC continue to administer (and recover the costs of) a single, nationwide iTRS program are irrelevant to the question of whether the FCC should expand the contribution base for iTRS.

C. The Commission Can Expand the Contribution Base to All End-User Telecommunications Revenues Without Requiring Additional Revenue Reporting.

If the Commission opens a rulemaking proceeding, any notice of proposed rulemaking should seek comment on assessing TRS contribution simply based on end-user

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[21] *See* Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate Supplemental Filing of Rolka Loube Associates LLC at Exhibit 2, CG Docket Nos. 03-123 and 10-51 (filed May 1, 2015) ("Rolka Loube Fund Estimate").

[22] IDT Petition at 14-16.

telecommunications revenue—data that is already collected on Form 499-A. No change in provider cost reporting would be required.

The simplest way to calculate carrier contribution amounts after expanding the rate base would be to apply a contribution factor to carrier end-user telecommunications revenues, as reported on Line 514(a), instead of using Line 514(b). The contribution factor would, as today, be calculated to recover the costs of the federal TRS fund.[23] Thus, the carriers and VoIP providers, who already must file a Form 499-A, would face no additional administrative burden associated with a rate base expansion. This would make the TRS Fund contribution base similar to that of the LNP and the NANPA,[24] which are also assessed based on all end-user telecommunications revenues.

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[23] Given that interstate non-IP-based relay services account for only 1.9% of all provider disbursements from the Fund, Rolka Loube Fund Estimate, Ex. 2, there is no reason to create separate funding calculations for both interstate non-IP-based relay services and interstate and intrastate iTRS. The administrative burdens on all providers, as well as Fund administrators, would be unwarranted.

Nor is there any reason to require iTRS providers to segregate intrastate from interstate iTRS minutes for purposes of compensation. And as the Commission has previously noted, iTRS providers cannot automatically determine caller location. *See Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order on Reconsideration, 20 FCC Rcd. 5433, ¶ 2 n.8 (2005); *TRS and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Rcd. 12,475 ¶ 25 (2004). As Sorenson has previously demonstrated, having iTRS providers segregate interstate and intrastate iTRS minutes would both be impractical and serve no service- or engineering-driven purpose. Sorenson Communications, Inc. and CaptionCall, LLC's Opposition to IDT Telecom, Inc.'s Application for Review at 13-16, CG Docket Nos. 03-123 and 10-51 (filed Aug. 11, 2015) ("Sorenson and CaptionCall Opposition").

[24] *See, e.g.*, 47 C.F.R. § 52.17(a).

II. The Commission Has Authority to Maintain the Status Quo.

IDT contends not only that the Commission should expand the contribution base, but that it must do so because, by permitting all iTRS calls to be reimbursed from the interstate TRS Fund, the Commission is violating the "jurisdictional separation of costs" language of Section 225(d)(3).[25] This is incorrect. Section 225(b)(2) gives the Commission discretion over how to fund TRS services. The current rules constitute an appropriate exercise of that jurisdiction. Moreover, even if the statute did require the FCC to fund intrastate calls solely from carriers' intrastate revenues, the Commission may classify all iTRS calls as "interstate" and therefore validly recover the costs associated from iTRS calls from solely interstate end-user revenues. Contrary to IDT's unsupported assertion, the Commission's previous statements that it might revisit iTRS funding at some undefined future time does not limit the Commission's power to continue its current funding methodology. The status quo is legally valid, and the Commission can keep it in place even if it declines to consider expanding the rate base.

A. The Jurisdictional Separation of Costs Language Does Not Apply to the Reimbursement of iTRS Costs from the TRS Fund.

Section 225(d)(3) says nothing about whether iTRS calls may be reimbursed from the Fund—indeed, no part of the ADA directly addresses the question, since no part of the ADA requires the creation of a TRS Fund in the first place. Rather, Section 225(d)(3) states that the FCC should generally "prescribe regulations governing the jurisdictional separation of costs for the services provided pursuant to this section."[26]

The jurisdictional separation of costs was a method of allocating costs between intrastate and interstate jurisdictions for the purposes of cost-of-service ratemaking. When the ADA was

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[25] *See* IDT Petition at 2-5.

[26] 47 U.S.C. § 225(d)(3).

passed, Congress reasonably assumed that TRS might be provided directly by monopoly telephone providers, who would recover their costs in cost-of-service ratemaking proceedings. These "jurisdictional separation of costs" provisions were designed to guide rate-makers in allocating a carrier's TRS costs in a ratemaking proceeding. These provisions say nothing about which carriers should contribute to the TRS Fund or how contributions should be assessed—questions that the statute simply does not address.

Moreover, even if the jurisdictional separation of costs were relevant to the analysis, the statute gives the Commission discretion to depart from a strict jurisdictional separation. As IDT recognizes, 47 U.S.C. § 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."[27] Thus, jurisdictional separation is not an inexorable command. By using the term "generally," the statute does not mandate that costs always be segregated—rather, it expressly gives the Commission flexibility to modify this general cost structure where the Commission's other mandates might so require.

The Commission did exactly this in deciding to permit recovery of costs associated with both intrastate and interstate iTRS calls from the TRS Fund. The Commission determined the various forms of iTRS are all necessary to provide many people with disabilities relay service that is functionally equivalent to voice communications, and that funding these services from the TRS Fund would result in the most functionally equivalent service.[28] Thus the Commission has exercised its statutory discretion to fund all iTRS from the interstate TRS Fund in order to carry

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[27] *Id.* (emphasis added).

[28] *See 2000 R&O and FNPRM* ¶ 28; *2007 Declaratory Ruling* ¶ 25; *2002 Declaratory Ruling* ¶¶ 20-21.

out its mandate to ensure that functionally equivalent TRS is available to all deaf and hard-of-hearing Americans.

B. Even if the ADA's Jurisdictional Separation of Costs Language Did Apply, the FCC Has the Power to Deem All iTRS Calls to Be Interstate.

Even if Section 225(d)(3) required the Commission to fund intrastate TRS solely from intrastate revenues and interstate TRS solely from interstate revenues in all cases—which it does not—the Commission would still have the power to continue to reimburse all iTRS calls from the TRS Fund without expanding the contribution base. This is because the Commission can exercise its discretion to treat all iTRS calls as interstate in nature.[29]

To determine whether a service is intrastate or interstate, the Commission traditionally applies the so-called "end-to-end analysis," which is based on the physical end points of the communication. The Commission considers "the continuous path of communications": where the end points of a communication are within the boundaries of a single state the service is deemed purely intrastate; where the service's end points are in different states or between a state and a point outside the United States, the service is deemed a purely interstate or international service.[30] Services that are capable of both intrastate and interstate communications are deemed mixed use.[31]

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[29] *See Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 3 (D.C. Cir. 2000); *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd. 22,404 ¶¶ 16-18 (2004) ("*Vonage Order*").

[30] *See id.*; 47 U.S.C. §§ 152(b)(1), 153(21).

[31] *See, e.g.*, *MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of A Joint Board*, Decision and Order, 4 FCC Rcd. 5660 (1989) ("*MTS Order*"); *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, Memorandum Opinion and Order, 7 FCC Rcd. 1619 ¶ 7 (1992); *Sw. Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998).

The FCC's treatment of mixed use services "is not an exact science, and the procedures involved must reflect administrative and other practical concerns."[32] The FCC has exercised its authority to treat mixed use services as purely interstate where it is impossible or impractical to separate the service's intrastate components from its interstate components.[33] For example, the FCC determined it should treat mixed use special access lines as interstate whenever the lines carried a non-de-minimis amount of interstate traffic because dividing interstate from intrastate usage was technically difficult, would "complicate billing," and would "undermine economic efficiency."[34]

The FCC has the discretion to do the same with iTRS, which it has explicitly done with respect to VRS.[35] iTRS is mixed use because it permits both intrastate and interstate communications. Coupling that with the impracticality—and lack of public policy benefit—of separating interstate from intrastate iTRS traffic leads to the conclusion that the Commission

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32 *MTS Order* ¶ 7.

33 *See, e.g., id.*; *AT&T Corp. v. Core Commc'ns, Inc.*, 806 F.3d 715, 727 (3d Cir. 2015). In the context of determining whether a service is "interstate" for the purposes of Section 2(b) of the Communications Act—which grants the FCC jurisdiction over interstate but not intrastate carriage—the FCC must also show state regulation of the intrastate component would interfere with valid federal rules or policies. *See, e.g., AT&T Corp.*, 806 F.3d at 727. But where, as here, the FCC has both interstate and intrastate jurisdiction and is not preempting existing state regulations, no such showing is required. *Cf. Vonage Order* ¶ 14 (the requirement that state regulation would "thwart federal law and policy" is necessary for preemption purposes). In any event, state regulation of iTRS would thwart federal law and policy. *See infra* Part III.

34 *MTS Order* ¶ 7.

35 *Structure and Practices of the VRS Program*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd. 8618 ¶ 16 n.43 (2013) (noting that "all VRS calls are compensated from the Fund because it is not possible to determine when a particular call is intrastate or interstate").

may reasonably treat iTRS as entirely interstate services.[36]

Indeed, an end-to-end analysis of iTRS technologies yields a similar result to the Commission's decisions in the VoIP context.[37] In its 2004 *Vonage Order*, the Commission applied an end-to-end analysis and ruled that telephone calls using broadband Internet connections that could be used from multiple locations would fall solely under interstate jurisdiction even where the technology allowed for intrastate calling.[38] The Commission acknowledged that certain characteristics of IP-enabled telecommunications services like VoIP weigh in favor of treating the service as purely interstate. These include among others "a requirement for a broadband connection from the user's location [and] a need for IP-compatible CPE."[39] VRS and IP CTS require a broadband connection and specialized, IP-compatible CPE in order to function. VRS can be moved from one geographic location to another. And IP CTS can be mobile or nomadic when the end-user's underlying service is mobile or nomadic—a fact not known to the IP CTS provider, which does not distinguish between fixed, nomadic, and mobile underlying services as chosen by the end-user.

The Commission also noted in its *Vonage Order* that there was no service-driven reason for VoIP providers to attempt to reengineer their technology to be able to locate both end points of a VoIP call.[40] Similarly, requiring iTRS providers "to attempt to incorporate geographic 'end-point' identification capabilities into [their] service solely to facilitate the use of an end-to-end approach would serve no legitimate policy purpose. Rather than encouraging and promoting the

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[36] *See* Sorenson and CaptionCall Opposition at 13-16.

[37] *See Vonage Order* ¶ 32.

[38] *See id.* ¶ 22 & n.85.

[39] *Id.* ¶ 32.

[40] *Id.* ¶ 25.

development of innovative, competitive advanced service offerings, [the Commission] would be taking the opposite course, molding this new service into the same old familiar shape."[41]

Thus, IDT is mistaken that the Commission lacks authority to continue to reimburse iTRS from the TRS Fund without expanding the contribution base. It is impractical for iTRS providers to segregate intrastate from interstate iTRS calling minutes, and there is no good policy reason to force them to do so. The Commission therefore can continue the status quo by exercising its discretion to treat iTRS as entirely interstate services.

III. Any Rulemaking Proceeding Should Not Revisit State Management of Intrastate iTRS Calls.

Any rulemaking proceeding need not reevaluate the FCC's decision to administer iTRS solely at the federal level and use the TRS Fund to compensate for all iTRS calls. Having states administer intrastate iTRS programs makes no sense where separating interstate from intrastate calls is impractical and would serve no public good. Even if calls could be separated, the FCC already has abundant information demonstrating that state administration of iTRS would frustrate the ADA's functional equivalence mandate. For instance, the Commission sought comment in 2013 on whether to transfer responsibility for IP CTS to the states (which included a request for comments on whether states should pay for intrastate calls while the TRS Fund paid for interstate calls).[42] Consumer groups responded negatively, explaining the dangers of, among other things, separating intrastate iTRS funding from the TRS Fund, arguing that such a decision would cut against the Commission's mandate to ensure the availability of TRS to deaf and hard-

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[41] *Id.*

[42] *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd. 13,420 ¶ 137 (2013).

of-hearing consumers.[43] No changes have occurred in the past three years that would warrant a different approach. Thus, the Commission need not revisit any jurisdictional separation decision as it explores expanding the contribution base.

CONCLUSION

The FCC has the power to either continue to recover the costs associated with iTRS from carriers' interstate revenues alone, or begin to recover costs from both intrastate and interstate revenues. Expanding the rate base would be better public policy, and a better choice. The Commission should grant IDT's petition.

Respectfully submitted,

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[43] *See* Petition for Stay of Telecommunications for the Deaf and Hard of Hearing, Inc., Association of Late-Deafened Adults, Inc., Deaf and Hard of Hearing Consumer Advocacy Network, Hearing Loss Association of America, National Association of the Deaf, American Association of the Deaf-Blind, Cerebral Palsy and Deaf Organization at 5, CG Docket Nos. 13-24 & 03-123 (filed Sept. 30, 2013); Comments of Hearing Loss Association of America at 8, CG Docket Nos. 13-24 & 03-123 (filed Feb. 26, 2013).