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

In the Matter of	)	
	)	CC Docket No. 98-67
Telecommunications Services for Individuals with Hearing and Speech Disabilities	)	
	)	
Recommended TRS Cost Recovery Guidelines	)	
	)	
Request by Hamilton Telephone Company for Clarification and Temporary Waivers	)	

MEMORANDUM OPINION AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: December 17, 2001 **Released:** December 21, 2001

By the Commission:

I. INTRODUCTION

1. On November 9, 2000, the Interstate TRS Advisory Council and the TRS Fund Administrator (Advisory Council and Fund Administrator, respectively) proposed guidelines for interstate cost-recovery for traditional telecommunications relay service (TRS), speech-to-speech relay (STS), and video relay services (VRS).[1] These recommendations were filed in response to the March 6, 2000 *Improved TRS Order* which required the Advisory Council and the Fund Administrator to develop cost recovery guidelines for these services.[2] Based on the record in this proceeding, we agree with and implement the recommendations to the extent described below. On April 6, 2001, Hamilton Telephone Company (Hamilton) filed a request for clarification of the scope of the VRS rules and for a two year waiver of certain provisions relating to VRS contained in the *Improved TRS Order*.[3] We address Hamilton's request for clarification below.[4]

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[1] *Recommended TRS Cost Recovery Guidelines*, CC Docket No. 98-67 (rel. November 9, 2000) (*Recommendations*).

[2] Telecommunications Relay Services for Individuals with Hearing and Speech Disabilities, *Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No 98-67, 15 FCC Rcd 5140 (2000) (*Improved TRS Order*); *Order on Reconsideration*, FCC 00-200, CC Docket No. 98-67 (rel. June 5, 2000).

[3] Hamilton Telephone Company, *Request for Clarification and Temporary Waivers* (filed Apr. 6, 2001) (*Hamilton Request*).

[4] The Common Carrier Bureau (Bureau) sought comment on Hamilton's waiver request in a separate public notice. *See* Common Carrier Bureau Seeks Comment on Request for Temporary Waiver of Video Relay Service (continued....)

II. BACKGROUND

2. Title IV of the Americans with Disabilities Act of 1990 (ADA)[5] requires the Federal Communications Commission (Commission) to ensure that TRS is available to the extent possible and in the most efficient manner to persons with hearing or speech disabilities in the United States. The Commission first ordered all carriers to provide TRS services nationwide on July 26, 1991.[6] The rules for cost recovery were established in the *TRS Third Report and Order*.[7] The Commission's rules require TRS providers to submit annually to the TRS Fund Administrator the data necessary to compute the TRS Fund requirements and payments.[8] The administrator uses these data to develop formulas that are filed annually with the Commission. Payments to relay service providers are distributed based on the approved formulas. The compensation formulas are based on conversation minutes of use for completed interstate TRS calls.[9] The *TRS Third Report and Order* required that the cost of interstate TRS be recovered from all subscribers of every interstate service, utilizing a shared funding cost recovery mechanism. The *TRS Third Report and Order* further mandated that every carrier providing interstate telecommunications services contribute to the TRS Fund on the basis of gross interstate and international telecommunications revenues.[10] In its July 1998 Biennial Review streamlining carrier reporting requirements, the Commission changed the contribution base from gross interstate and international telecommunications

(Continued from previous page)
Requirements, *Public Notice*, DA 01-1706, CC Docket No. 98-67 (rel. July 16, 2001) (*VRS Public Notice*). The Bureau also sought comment on a similar waiver request by Sprint in that public notice.

[5] Pub.L. No. 101-336, § 401, 104 Stat. 327, 336-69; 47 U.S.C § 225. TRS enables people with hearing or speech disabilities to communicate by telephone with persons who may or may not have such disabilities. This is accomplished through TRS facilities that deploy special technology and are staffed by communications assistants (CAs) who relay conversations between persons using either text or voice telecommunications devices. To access TRS, a text telephone (TTY) user dials the telephone number of the local TRS center. For the TTY user, this first step - the outbound call to the TRS center - is functionally equivalent to receiving a "dial tone." The caller then gives the number of the party she desires to call to the CA. The CA, in turn, places an outbound voice call to the called party. The CA serves as the "link" in the conversation, converting all TTY messages from the caller into voice messages, and all voice messages from the called party into typed messages for the TTY user. The process is performed in reverse when a voice telephone user initiates the call to a TTY user. *See* 47 C.F.R. §§ 64.601(5), (7). Other types of relay services use the CA to interpret the signed communication of one of the parties (video relay services) or to facilitate communications for individuals with speech disabilities (speech-to-speech relay services).

[6] Telecommunications Services for Individuals with Hearing and Speech Disabilities and the Americans With Disabilities Act of 1990, *Report and Order and Request for Comments*, CC Docket No. 90-571, 6 FCC Rcd 4657 (1991) (*1991 Report and Order*).

[7] *See* Telecommunications Relay Service, and the Americans with Disabilities Act of 1990, *Third Report and Order*, CC Docket No. 90-571, 8 FCC Rcd 5300 (1993) (*TRS Third Report and Order*); 47 C.F.R. § 64.604(c)(5)(iii)(E).

[8] *Id.* at para. 30.

[9] *Id.* at para. 29.

[10] *Id.* at para. 16.

revenues to end user interstate and international telecommunications revenues.[11]

3. On March 6, 2000, the Commission released the *Improved TRS Order*, which amended the rules governing the delivery of TRS by expanding the kinds of relay services available to consumers and by improving the quality of relay services. The *Improved TRS Order* changed many of the definitions and standards for traditional TRS and added STS and Spanish relay services as requirements.[12] It also permitted the recovery of VRS costs through the interstate TRS funding mechanism.[13] Finally, the *Improved TRS Order* directed the Advisory Council and the Fund Administrator to develop recommendations for how the compensation formula for each service should be structured.[14]

4. On November 9, 2000, the Advisory Council and the Fund Administrator submitted recommended guidelines outlining proposed cost recovery procedures for traditional TRS, STS, and VRS.[15] The recommendations were originally placed on Public Notice on December 6, 2000,[16] with comments due on January 5, 2001 and reply comments due on January 19, 2001. Comments were filed by Sprint Communications Corporation (Sprint), WorldCom, Inc. (WorldCom), Communications Service for the Deaf (CSD); and the American Speech-Language-Hearing Association (ASHA).[17] On July 9, 2001, a public notice was placed in the Federal Register, seeking additional comment on the recommendations.[18]

5. On April 6, 2001, Hamilton filed a request for clarification and temporary waiver of certain aspects of the *Improved TRS Order* relating to the provision of VRS.[19] Hamilton requests clarification and temporary, two-year waivers of portions of section 64.603 and 64.604 of the

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[11] 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, *Report and Order*, FCC 99-175, CC Docket 98-171 (rel. July 14, 1999).

[12] *Improved TRS Order*, 15 FCC Rcd at 5148-51, 5154-55 at paras. 14-20 and 28-31.

[13] *Id.* at para. 24.

[14] *Id.* at para. 33.

[15] *Recommendations* at 7-8.

[16] Interstate TRS Fund Advisory Council and TRS Fund Administrator's Recommended TRS Cost Recovery Guidelines, *Public Notice*, 15 FCC Rcd 23987 (CCB, 2000).

[17] Comments of Sprint Corporation (filed Jan. 5, 2001) (Sprint Comments), Comments of WorldCom, Inc. (filed Jan. 5, 2001) (WorldCom Comments); Comments of Communication Service for the Deaf (filed Jan. 17, 2001) (CSD Comments); Reply Comments of the American Speech-Language-Hearing Association (filed January 19, 2001) (ASHA Reply Comments); Reply Comments of WorldCom, Inc. (filed Jan. 19, 2001) (WorldCom Reply Comments).

[18] *See* 66 Fed. Reg. 35765 (July 7, 2001). Comments were due on July 30, 2001 and reply comments were due on August 6, 2001. The United States Telecom Association filed comments on July 30, 2001. These comments addressed procedural matters. *See* Comments of the United States Telecom Association (filed July 30, 2001).

[19] *Hamilton Request*. *See supra* note 3.

Commission's rules.[20] On July 16, 2001 the Common Carrier Bureau (Bureau) issued a public notice seeking comment on Hamilton's waiver request.[21]

III. MEMORANDUM OPINION AND ORDER

A. Cost Recovery for Improved Traditional TRS

6. Traditional TRS has been available on a uniform, nationwide basis since July 26, 1993.[22] The Advisory Council and the Fund Administrator state that the following changes contained in the *Improved TRS Order* will affect providers' costs: (a) the requirement that providers offer interstate Spanish relay service; (b) the requirement that 85% of all calls be answered in ten seconds by any method which results in the TRS caller's call immediately being made or attempted, not put in a queue or on hold; (c) the requirement that providers calculate the percentage of calls "blocked," or attempted by TRS users but not answered by the TRS center; (d) the requirement that communications assistants (CAs) stay with the call for a minimum of 10 minutes; (e) the requirement that CAs transcribe words at a minimum speed equivalent to typing 60 words per minute; (f) the requirement that providers transfer data on customers' TRS preferences in usable form at least 60 days prior to the provider's last day of service; (g) the requirement that TRS users have access to interactive menus, that CAs alert the user to the presence of a recorded message through a "hot key" on their terminal, and that relay centers record the recorded messages and retain them for the length of the call; (h) the requirement that relay service providers offer pay-per-call services; and (i) the requirement that TRS providers automatically and immediately transfer emergency calls to the appropriate 911 operator and that CAs pass along the caller's telephone number to the Public Safety Answering Point even if the caller disconnects before being connected to an emergency service provider.[23]

7. *Recommendations*. In developing cost recovery recommendations for traditional TRS, the Advisory Council and the Fund Administrator relied on several assumptions.[24] Based on those assumptions, the Advisory Council and the Fund Administrator recommended that the Commission: (1)

[20] *Id.* at 1. *See infra* at paras. 21 and 25-27.

[21] *See VRS Public Notice*. *See also supra* note 4.

[22] *See 1991 Report and Order* at 4657, para. 1 (requiring common carriers providing telephone voice transmission services to provide TRS no later than July 26, 1993). Traditional telecommunications relay services are those which facilitate telecommunications between an individual with a hearing or speech impairment and a hearing individual.

[23] *Recommendations* at 2-3.

[24] The assumptions are: (a) none of the relay provider requirements require a cost recovery model or expense categorizations different from what is currently in place; (b) most of the cost-causers are modifications to standards already in place and some providers already offer some of the newly required features; (c) calls to 900 numbers, like toll-free numbers, cannot be identified as intrastate or interstate and a billing methodology comparable to that used for toll-free minutes could be used to allocate 900 calls between jurisdictions; (d) costs associated with the improvements could be reported as part of the annual TRS Provider Data Request; (e) providers appear satisfied with the national average reimbursement methodology and the process of rate development; (f) for the July 2000 – June 2001 fund year, providers' costs could increase in December 2000 because of the implementation date associated with the new requirements; and (g) FCC staff comments concerning TRS cost recovery suggest that the fund stay within the current rules to the extent possible. *Recommendations* at 4.

continue to use the current national average costing and pricing methodology for the annual development of the interstate cost recovery reimbursement rate; (2) review the TRS Center Data Request to ensure that various sections and categories continue to be appropriate and up to date; (3) use the same allocation methodology in place today for allocating toll-free and 900 call minutes between interstate and intrastate demand; and (4) direct that Spanish relay costs be collected separately to test whether they are significantly different from English relay costs, and continue to reimburse providers on completed conversation minutes at a single national average reimbursement rate if there is no difference between the Spanish and English relay per-minute costs.[25] As discussed more fully below, we adopt all except the fourth of these recommendations.

8. *Cost Methodology.* We believe that the current average costing methodology represents an efficient and reasonable method of compensating eligible providers for the cost of furnishing interstate TRS.[26] Under this methodology, TRS providers submit certain TRS-related cost and demand data in response to a request by the TRS administrator. TRS providers submit historical data as well as forecasts of expenses and demand. After reviewing the data for unusual disparities and reconciling any problems, the TRS administrator develops projections of total nationwide and interstate TRS costs, average interstate TRS costs per minute, interstate TRS demand, and TRS funding requirements for the forthcoming fiscal year.

9. Because the cost recovery methodology works well, is relatively simple to apply, and promotes efficiency of operation, we see no need to modify it despite the changes in services required by the *Improved TRS Order*. The TRS administrator should continue to apply the average costing methodology to develop traditional TRS compensation rates. The use of an average compensation rate has encouraged TRS providers to find efficient ways of providing high quality service.[27]

10. We agree that some of the new or revised services mandated in the *Improved TRS Order* and identified by the Advisory Council and the Fund Administrator have the potential to affect costs. We also believe that in many cases the cost increases will be small or non-existent as illustrated by those providers who have already implemented the provisions of the *Improved TRS Order*. Many of the new requirements require no new expenditures. Furthermore, those requirements that do impose new costs are designed to promote efficiency in relay services which should negate any new costs.[28] Several of the requirements may require additional staffing or staff time, but with appropriate planning and studies, the

[25] *Id.* at 5.

[26] The Commission adopted the average costing methodology as the method for interstate cost recovery in Telecommunications Relay Services and the Americans with Disabilities Act of 1990, *Second Report and Order, and Further Notice of Proposed Rulemaking*, CC Docket No. 90-571, 8 FCC Rcd 1802 (1993). Eligible providers are defined as (1) TRS facilities operated under contract with and/or by certified state TRS programs pursuant to Section 64.605; or (2) TRS facilities owned by or operated under contract with a common carrier providing interstate services pursuant to Section 64.604; or (3) interstate common carriers offering TRS pursuant to Section 64.604. 47 C.F.R. §§ 64.604(f), 64.605.

[27] Although cost and demand data are collected on a carrier-by-carrier basis, the methodology does not rely on an individual provider's costs alone, but on the average cost of all providers. In this way, the compensation methodology rewards efficient providers while it creates incentives for providers with above average costs to reduce their costs.

[28] For example, the increased typing speed requirement may require additional training and higher salaries for CAs. This requirement, however, will reduce call times and promote efficiency.

cost impacts can be mitigated. We further believe that the average costing methodology will promote efficiency and that any cost increases incurred by providers will be minimal.

11. *TRS Center Data Request.* For the average per minute compensation methodology to be valid, the cost and demand data used to compute per minute costs must explicitly reflect specific activities required to provide TRS. Although we believe that the current TRS Center Data Request captures all of the changes that were established by the *Improved TRS Order*, we want to ensure that all providers are fairly compensated. We therefore direct the TRS administrator to review the TRS Center Data Request, and report to the Chief of the Common Carrier Bureau (CCB), on an ongoing basis, any changes necessary to ensure that TRS providers are fairly compensated for additional costs imposed by the *Improved TRS Order*. CCB will work with the TRS administrator to review the cost changes reported by relay service providers as they implement the requirements in the *Improved TRS Order*.

12. *Allocation Methodology.* We also agree with the Advisory Council and the Fund Administrator's recommendation that the same minutes of use allocation methodology in place for toll-free call minutes should be used for 900 call minutes.[29] Although the minutes of demand for interstate and intrastate calls made to geographic area code numbers can be separated, no direct data are available that identifies the jurisdiction of calls placed to non-geographic toll-free and 900 numbers. As a result, relay providers must estimate the interstate usage associated with calls made to these numbers. The Advisory Council proposes estimating the share of interstate toll-free minutes based on the relationship of interstate and international billed minutes to interstate, international, and intrastate toll minutes that were billed to the calling party. WorldCom also supports the Advisory Council and the Fund Administrator's recommendation to determine the interstate share of 900 call minutes by using a methodology similar to the method currently in use for allocating the interstate share of toll-free call minutes because non-geographic area codes, toll-free and 900 calls operate in a similar manner.[30] We accordingly adopt the toll-free minutes methodology and find that it should be applied to 900 calls as well.

13. *Spanish Relay Costs.* At this time, we see no need to adopt the Advisory Council and the Fund Administrator's recommendation that Spanish relay costs initially be collected separately and tested to determine whether they are significantly different from English relay costs.[31] Because there is no evidence in the record that Spanish relay costs will differ significantly from English relay costs, we conclude that providers should be reimbursed on completed conversation minutes for both English and Spanish relay costs at a single national average reimbursement rate. If, however, TRS providers believe that their costs for providing Spanish and English relay will differ significantly, they may track these data separately to verify that the costs are, in fact, different. If any TRS provider can demonstrate that the costs are different and, thus, that the services should be reimbursed at different rates, it may petition the Commission to establish different reimbursement rates for English and Spanish relay.

B. Cost Recovery for Speech-to-Speech Relay Service

14. The *Improved TRS Order* required STS to be in place by March 1, 2001. STS uses CAs who have been specially trained to understand different speech patterns, and to repeat the words spoken

[29] *See* 47 C.F.R. § 64.604(c)(iii)(E).

[30] WorldCom Comments at 2.

[31] *See Recommendations* at 5. WorldCom also agrees with the Advisory Council and the Fund Administrator's recommendation. *See* WorldCom Comments at 2.

by the person with the speech disability. Although STS does not require new or additional equipment, it could necessitate different staffing requirements than traditional TRS. Service providers are also subject to several, but not all, of the mandatory minimum requirements that the Commission established in the *Improved TRS Order* for traditional TRS providers.[32] In addition, the following now specifically apply to STS relay providers: a rule that requires relay providers to offer users the option of maintaining a list of frequently called names and telephone numbers at the relay center; a rule that permits CAs to retain information from a call at the request of the calling party to facilitate completion of subsequent calls; and a rule that requires CAs to stay with a STS call for a minimum of 15 minutes.

15. *Recommendations*. The Advisory Council and the Fund Administrator base their cost recovery recommendation for STS on several assumptions.[33] Using these assumptions, the Advisory Council and the Fund Administrator make the following recommendations for STS cost recovery: (1) the same cost recovery methodology used for computing the reimbursement rate in place today for traditional TRS interstate cost recovery could be used to develop the STS reimbursement rate; (2) due to its unique characteristics, a separate reimbursement rate based on STS costs and minutes should be calculated; (3) the TRS Center Data Request should be expanded to include specific STS sections to capture the costs and minutes separately from traditional TRS or VRS; and (4) providers should be reimbursed for completed conversation minutes at the national average reimbursement rate for STS.[34] As discussed below, we adopt each of these recommendations.

16. We favor the national average per minute methodology used for traditional TRS and believe it should be applied to STS as well. Although we find that STS is a materially different service from traditional TRS, we believe that the average national per-minute compensation methodology will both fairly compensate STS providers and, at the same time, encourage them to provide efficient and high quality service. By reimbursing providers at costs similar to those of the efficient providers, efficiency is encouraged for all providers.

17. We also adopt a separate per-minute national average compensation formula for STS and order the TRS administrator to develop annually a national average STS reimbursement rate for compensating STS providers. STS relies less on technology than traditional TRS and more on skilled

[32] STS services are excluded from the typing and spelling requirements, the ASCII and Baudot format competency requirement, and the capability to transmit conversations between TTY and voice callers in real time.

[33] These assumptions are (a) STS is a relatively new service; (b) STS is significantly different from traditional TRS due to the lack of technology involved and its primary reliance on the CA's listening and verbal skills; (c) historical data on STS are minimal and what data there are could be misleading because of the newness of the service and the lack of awareness in the community; (d) most providers did not estimate STS costs or minute volumes in their data submissions due to their lack of experience with the service; (e) providers' estimates of costs and minutes for 2000 and 2001 varied widely; (f) up-front technology costs to the TRS providers to establish STS service are not significant; labor is expected to be the major expense; (g) a limited number of regional centers will handle STS traffic, theoretically controlling costs better because of economies of scale; (h) STS calls reimbursed from the interstate fund will be made in English or Spanish and fall into the categories of interstate/international, toll-free and 900 minutes; (i) over time, set-up and conversation time for traditional TRS calls has decreased, however, there is not enough historical data to determine whether this will occur with STS; (j) costs associated with STS could be reported within the framework of the existing annual TRS Center Data Request, as traditional TRS costs are reported today; and (k) nothing inherent to the service would appear to require a model for provider cost recovery different from what is in place today for traditional TRS. *Recommendations* at 6.

[34] *Recommendations* at 6-7.

CAs who may need to be paid more. The reimbursement rates for STS, therefore, are significantly higher than for traditional TRS. As with traditional TRS, each provider of STS services will be compensated at the national average rate for every completed conversation minute. WorldCom agrees that STS has significantly higher labor and capital costs than other relay services.[35] Accordingly, WorldCom states that a single reimbursement rate for all TRS services would result in the undercompensation of operators providing STS, and the overcompensation of providers not offering STS.[36]

18. Given that STS service is of a more recent origin, we do not yet have sufficient data to conduct an up-front evaluation of its costs. Consequently, we adopt the Advisory Council and the Fund Administrator's recommendation that the TRS Center Data Request be expanded to capture separately STS costs and minutes. We find this recommendation consistent with the proposal to establish a separate compensation rate for STS. We therefore order the TRS administrator to expand the TRS Center Data Request to include specific sections to capture STS costs and completed conversation minutes for STS.

C. Cost Recovery for Video Relay Services

19. The *Improved TRS Order* did not require VRS, but did allow the costs of intrastate and interstate costs for VRS to be reimbursed from the interstate TRS Fund while the Commission continues to evaluate the service. The Advisory Council and the Fund Administrator base their VRS cost recovery recommendation on several assumptions.[37]

20. *Recommendations*. Based on these assumptions, the Advisory Council and the Fund Administrator make the following four recommendations with respect to VRS cost recovery: (1) the same methodology for rate development in place today for traditional TRS interstate cost recovery could be used to develop the VRS reimbursement rate; (2) providers should be reimbursed based on completed conversation minutes at a national average reimbursement rate; (3) the TRS Center Data Request should be expanded to include specific VRS sections to capture VRS costs and demand separately; and (4) due to its unique characteristics, a separate reimbursement rate based on VRS costs and demand should be

[35] WorldCom Comments at 1.

[36] *Id. See also* ASHA Reply Comments.

[37] These assumptions are: (a) VRS trials have occurred or are occurring in several states but the service has only been implemented in North Carolina and Texas; (b) VRS is significantly different from traditional TRS due to the video technology involved and the need for qualified VRS interpreters as CAs; (c) up-front technology costs to providers to establish VRS could be substantial, and ongoing labor expenses will be significant due to the difference in labor rates between traditional CAs and qualified VRS interpreters; (d) early RFPs for TRS initially focused on reimbursing providers for large, nonrecurring expenses up front but the bidding process quickly migrated to a price per minute methodology for all expenses; (e) historical data on VRS are extremely limited, coming primarily from trial situations; (f) most VRS providers did not estimate VRS costs or demand in their data submissions due to their lack of experience with the service; (g) the estimates of VRS providers who did project costs and minutes for years 2000 and 2001 varied widely; (h) a limited number of centers will handle VRS traffic, theoretically controlling costs better because of economies of scale; (i) VRS calls reimbursed from the interstate fund will be made in English or Spanish and fall into the categories of intrastate, interstate/international, toll-free, and 900 minutes; (j) costs associated with VRS could be reported within the framework of the existing annual TRS Center Data Request, as traditional TRS costs are reported today; and (k) nothing inherent to the service would appear to require a model for provider cost recovery different from what is in place today for traditional TRS. *Recommendations* at 7-8.

calculated.[38]

21. Sprint, WorldCom and CSD filed comments in response to the public notice seeking comment on the VRS recommendations.[39] WorldCom concurred with the Advisory Council and the Fund Administrator's recommendation that the Commission should maintain a separate reimbursement rate for VRS.[40] In addition, Hamilton requested temporary waiver of portions of section 64.604 of the Commission's rules for the provision of VRS.[41] Because Sprint, CSD and Hamilton raise alternative proposals for VRS reimbursement, the Commission is also issuing a Further Notice of Proposed Rulemaking (Further Notice) attached to this Memorandum Opinion and Order (MO&O) seeking comment on the issues raised in their filings, as well as further comment on VRS cost recovery in general.[42]

22. We agree with the Advisory Council and the Fund Administrator's recommendation that due to the unique characteristics of VRS,[43] a separate reimbursement rate for VRS should be calculated. We also agree with the Advisory Council and the Fund Administrator's recommendation that the TRS Center Data Request should be expanded to include specific sections to capture separately VRS costs and minutes for this service. The data provided to NECA by VRS providers demonstrate that VRS costs and payment requirements are materially different from those for traditional TRS. Specifically, VRS providers report significantly higher costs for providing VRS.[44] Consequently, the compensation rate calculated and approved for VRS is currently $5.539 per completed conversation minute, while that for traditional TRS is $1.328 per minute and for STS is $4.623 per minute. In light of the differences in technology and the reportedly higher cost associated with providing VRS, we will require NECA to expand the TRS Data Request to include data that are specific to VRS. Doing so will ensure that expenses relevant to VRS are being used to compute the VRS compensation rate. Thus, we adopt these two aspects of the Advisory Council and the Fund Administrator's Recommendation regarding cost recovery for VRS.

23. We decline at this time, however, to adopt permanently the Advisory Council and the Fund Administrator's recommendations to use the same methodology for rate development in place today

[38] *Recommendations* at 8.

[39] Sprint Comments, WorldCom Comments, CSD Comments, WorldCom Reply Comments.

[40] WorldCom Comments at 1.

[41] *Hamilton Request* at 1. Specifically, Hamilton requests temporary waiver of the following requirements: (1) to provide operator assisted calls and to bill certain types of long distance calls to end users; (2) to provide a system for incoming emergency calls that automatically and immediately transfers the caller to the nearest Public Safety Answering Point; (3) the new speed of answer requirement; (4) to provide equal access to interexchange carriers; and (5) to be capable of handling 900 number calls. The Bureau sought comment on these issues in a separate public notice and will address them in a separate proceeding. *See supra* note 4.

[42] *See infra* at paras. 30-36.

[43] VRS is a new service which uses video technology and VRS interpreters as CAs.

[44] *See TRS Fund Payment Formula and Fund Size Estimate*; *Supplemental Submission Concerning the Payment Formula and Fund Size Estimate for the Interstate Telecommunications Relay Services Fund for July 2000 through June 2001*, prepared by NECA (filed November 2, 2000).

for traditional TRS interstate cost recovery, and to develop a VRS reimbursement rate based on completed conversation minutes of use at a national average reimbursement rate. Although the national average compensation methodology has all the benefits that we described above, we are not convinced that this methodology will provide adequate incentives to carriers to provide video relay services. Both Sprint and CSD argue that compensation on a per-minute basis may not adequately compensate VRS providers for the substantial up-front capital costs required to provide the service.[45] We therefore find that additional comments on these recommendations are necessary and seek comment in the Further Notice attached to this MO&O.

24. In the interim, however, to ensure that providers are able to recover their fair costs related to providing VRS, we direct the TRS administrator to establish an interim VRS cost recovery rate using the average per minute compensation methodology used for traditional TRS. The interim rate shall be in effect until such time that the Commission is able to collect and assess additional data regarding what the permanent VRS compensation methodology should be.

D. Petition for Clarification.

25. Hamilton seeks clarification that section 64.603 of the Commission's rules does not require a provider of VRS to provide video-based STS or Spanish relay at this time.[46] Hamilton states that providers should be able to provide this service voluntarily, and that cost recovery should be provided on the same basis as VRS.[47]

26. Although section 64.603 of our rules mandates the provision of STS generally, we agree that this mandate should not extend to relay service providers in their provision of VRS. The nature of VRS is very different from STS; STS is a speech-based service that involves the use of specially trained CAs who are able to understand and repeat the words of individuals who have speech patterns that are difficult to understand,[48] while VRS is a visual service that utilizes interpreters to interpret sign language over video facilities. Moreover, because the provision of VRS is not mandatory at this time, we do not wish to make it more burdensome for the providers that wish to provide VRS on a voluntary basis. VRS is in its infancy; we therefore decline to make the provision of speech-to-speech mandatory for VRS providers at this time. If, however, VRS providers choose to offer speech-to-speech service they will be eligible for reimbursement from the TRS fund. As VRS is deployed and demand for the service increases, the Commission may reexamine this issue.

27. We also clarify that, under our current rules, VRS providers are not required to provide Spanish relay service at this time. Given the fact that VRS is still in its infancy and is not yet required, it is not feasible to require that it be provided in languages other than American Sign Language (ASL). We concur with Hamilton that until the market for VRS increases, it would be difficult to staff VRS with CAs that are not only fluent in ASL, but in other sign languages as well. Moreover, sign languages vary from one country to another and there are multiple sign language "dialects" for the various Spanish speaking countries around the world. To provide CAs that are able to interpret in all of these various dialects at a

[45] Sprint Comments at 1, CSD Comments at 1.

[46] *Hamilton Request* at 3-4.

[47] *Id.* at 4.

[48] *Improved TRS Order*, 15 FCC Rcd at 5148 para. 14.

time when VRS is in its infancy would be unduly burdensome to VRS providers. If VRS providers choose to offer Spanish relay service they will be eligible for reimbursement from the TRS fund. As Spanish relay services are deployed and demand for the service increases, the Commission may reexamine this issue.

E. Regulatory Flexibility Analysis

28. *See* Appendix A for the Final Regulatory Flexibility Analysis.

F. Paperwork Reduction Act Analysis

29. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 and is found to impose new or modified reporting and recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and recordkeeping requirements will be subject to approval by the Office of Management and Budget (OMB) as prescribed by the Act, and will go into effect upon announcement in the Federal Register of OMB approval. Paperwork Reduction Act of 1995.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Introduction

30. In this Further Notice of Proposed Rulemaking (Further Notice), the Commission solicits additional comment on the recommendations submitted by the Advisory Council and the Fund Administrator relating to the appropriate cost recovery mechanism for VRS[49] as proposed in comments to the recommendations by Sprint[50] and CSD.[51]

31. VRS allows a TRS user with a hearing and/or speech disability who uses sign language to communicate with a voice telephone user through video equipment installed at either the premises of the person with the disability or another appropriate location and at the relay center. The Commission's rules require that VRS CAs be qualified interpreters, defined as being able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.[52] VRS is generally subject to the same mandatory minimum standards as TRS.[53]

32. In the MO&O accompanying this Further Notice, the Commission adopted most of the Advisory Council and the Fund Administrator's recommendations for the recovery of costs associated with traditional TRS and STS, and some of the recommendations for the recovery of costs associated with

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[49] *Recommended TRS Cost Recovery Guidelines*, CC Docket No. 98-67 (rel. Nov. 9, 2000) (*Recommendations*).

[50] Comments of Sprint Corporation (filed Jan. 5, 2001) (Sprint Comments).

[51] Comments of Communication Service for the Deaf (filed Jan. 17, 2001) (CSD Comments).

[52] 47 C.F.R. § 64.604(a)(1).

[53] The following minimum standards do not apply to VRS: competent skills in typing and spelling for CAs; the capability to communicate with ASCII and Baudot format, at any speed generally in use; transmission of conversations between TTY and voice callers in real time; and the provision of services 24 hours a day.

VRS.[54] In addition, the order responds to Hamilton's request for clarification by confirming that the existing rules do not require providers of VRS service to provide STS or Spanish relay services at this time.[55]

B. Recommendations for VRS

33. The Advisory Council and the Fund Administrator made the following recommendations for VRS cost recovery: (1) the TRS Center Data Request should be expanded to include specific VRS sections to capture the costs and minutes separately; (2) due to its unique characteristics, a separate reimbursement rate based on VRS cost and demand should be calculated; (3) providers should be reimbursed based on completed conversation minutes of use at a national average reimbursement rate; and (4) the same methodology for rate development in place today for traditional TRS interstate cost recovery could be used to develop the VRS reimbursement rate.[56]

34. In the MO&O accompanying this Further Notice, the Commission adopts the Advisory Council and the Fund Administrator's recommendations that that the TRS Center Data Request should be expanded to include specific sections to capture the costs and minutes for VRS separately and that a separate reimbursement rate based on VRS cost and demand should be calculated.[57] The Commission declines to adopt the Advisory Council and the Fund Administrator's recommendations to use, on a permanent basis, the same methodology for rate development in place today for traditional TRS interstate cost recovery to develop a VRS reimbursement rate, and the recommendation to reimburse providers (based on completed conversation minutes of use) at a national average reimbursement rate.[58] The Commission nevertheless directs the TRS administrator to ensure that providers are able to recover their fair costs related to providing VRS by establishing an interim VRS cost recovery rate using the average per minute compensation methodology used for traditional TRS. We now seek further comment on what VRS cost recovery mechanism should be established on a permanent basis.

35. *Methodology and Reimbursement Rate*. Both Sprint and CSD contend in their comments to the recommendations that VRS will require a substantially higher initial capital expenditure than traditional TRS and that a per minute reimbursement rate may not allow them to recover that expenditure.[59] Sprint and CSD, therefore, suggest that the Commission adopt an alternative cost recovery mechanism that will encourage the rapid deployment of VRS by making it profitable to offer the service.[60] Sprint and CSD state that if VRS is to develop into a viable service, the Commission must ensure that relay providers that offer VRS are able to recover their full costs in a reasonable and timely

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[54] *See supra* at paras. 8-13, 16-18, 21-24.

[55] *Id.* at paras. 25-27. *See also* Hamilton Telephone Company, *Request for Clarification and Temporary Waivers* (filed Apr. 6, 2001).

[56] *Recommendations* at 8.

[57] *See supra* at paras. 25-27.

[58] *See supra* at para. 23.

[59] Sprint Comments at 1, CSD Comments at 1.

[60] Sprint Comments at 4, CSD Comments at 3.

manner.[61] To this end, Sprint and CSD propose that, for the present time, VRS compensation be based on a flat monthly payment for an assumed number of minutes rather than the completed conversation minutes of use at a national average reimbursement rate.[62] The parties state that a "guaranteed" monthly payment would allow VRS providers to recover their up front costs within a reasonable period of time.[63] Once VRS generates sufficient monthly use, however, the flat monthly payment could be abandoned for the completed conversation minutes methodology suggested by the Advisory Council and the Fund Administrator.[64]

36. Because the Sprint and CSD proposals are not sufficiently detailed for the Commission to act on them, we seek additional comment on these proposals, as well as any other proposals relating to VRS cost recovery. Specifically, we request comment on Sprint's and CSD's proposal that VRS compensation be a monthly flat charge based on a fixed number of conversation minutes. If a flat monthly compensation plan with an assumed number of minutes were to be utilized, how should the flat monthly charge be established and how many fixed minutes per-month should be assumed? What data would need to be collected from the VRS service providers? Should the flat payment plan be a permanent compensation plan or an interim program to encourage initial investment in VRS? If interim, how long should the flat monthly fee be in place? Parties supporting a flat rate pricing methodology should articulate the superiority of such a methodology over a usage sensitive approach. We also seek comment on whether it would be feasible to combine flat-rate and usage-based methodologies to obtain the benefits of both. Parties responding to this public notice are also encouraged to propose other compensation plans.

C. Procedural Matters

1. *Ex Parte* Presentations

37. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a) (1994). Written submissions, however, will be limited as discussed below.

2. Regulatory Flexibility Analysis

38. *See* Appendix B for the Initial Regulatory Flexibility Analysis.

3. Further Notice Initial Paperwork Reduction Act Analysis

39. This *Further Notice* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Second Further Notice*, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due at the same time as other comments on this *Further*

[61] Sprint Comments at 1-2, CSD Comments at 1.

[62] Sprint Comments at 3-4, CSD Comments at 2-3.

[63] CSD Comments at 3, Sprint Comments at 4.

[64] Sprint Comments at 4.

Notice; OMB comments are due 60 days after publication of this *Further Notice* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall enhance the quality, utility and clarity of the information collected; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

D. Comment Filing Procedures

40. Interested parties may file comments concerning this matter on or before thirty days after publication in the Federal Register and reply comments on or before forty-five days after publication in the Federal Register. All filings must reference Docket No. 98-67. Send an original and four copies to the Commission's Secretary, Magalie Roman Salas, Portals II, 445 12th Street, SW, Suite TW-A325, Washington, DC 20554 and two copies to Pam Slipakoff, Common Carrier Bureau, Network Services Division, 445 12th Street, S.W., Washington, DC, 20554.

41. Written comments by the public on the proposed and/or modified information collections are due on or before thirty days after publication in the Federal Register and reply comments on or before forty-five days after publication in the Federal Register. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collection(s) contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Edward C. Springer, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to Edward.Springer@omb.eop.gov.

42. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 13 FCC Rcd 11322, 11326 (1998). Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit electronic comments by Internet e-mail. To receive filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Or you may obtain a copy of the ASCII Electronic Transmittal Form (FORM-ET) at http://www.fcc.gov/efile/email.html.

43. The Advisory Council and the Fund Administrator's Recommended TRS Cost Recovery Guidelines, as well as Sprint's, WorldCom's, and CSD's comments; CSD's petition; Hamilton's request and any comments filed in response to this public notice will be available for review and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY-A257, Washington, DC, 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC, 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail qualexint@aol.com. Copies of the Advisory Council and the Fund Administrator's Recommended TRS

Cost Recovery Guidelines and the comments filed in response to that document may also be obtained from the Internet via the FCC's Electronic Comment Filing System (ECFS) http://izzy.fcc.gov/prod/ecfs/s_a/. Parties interested in obtaining comments from the ECFS should use the docket number "98-67" or "90-571" as the search term.

44. For further information contact Pam Slipakoff of the Common Carrier Bureau, Network Services Division at (202)418-7705 (voice), (202)418-0484 (TTY) or pslipako@fcc.gov.

V. ORDERING CLAUSES

45. Accordingly, IT IS ORDERED, pursuant to the authority contained in section 64.604 of the Commission's Rules, 47 C.F.R. § 64.604, and in sections 1, 2, 4, 225, 255 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 225, 255, 303(r) that the recommendations of the Advisory Council and the Fund Administrator relating to traditional TRS and STS ARE ADOPTED to the extent described herein.

46. IT IS FURTHER ORDERED, pursuant to the authority contained in section 64.604 of the Commission's Rules, 47 C.F.R. § 64.604, and in sections 1, 2, 4, 225, 255 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 225, 255, 303(r) that the recommendations of the Advisory Council and the Fund Administrator relating to the need for a separate reimbursement rate for VRS and expansion of the TRS Data Center Request to include specific sections for VRS reporting ARE ADOPTED as described herein.

47. IT IS FURTHER ORDERED, pursuant to the authority contained in section 64.604 of the Commission's Rules, 47 C.F.R. § 64.604, and in sections 1, 2, 4, 225, 255 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 225, 255, 303(r) that the TRS administrator SHALL USE the TRS reimbursement rate methodology, on an interim basis, to develop the VRS reimbursement rate, pending further action by the Commission.

48. IT IS FURTHER ORDERED, pursuant to the authority contained in section 64.603 of the Commission's Rules, 47 C.F.R. § 64.603, and in sections 1, 2, 4, 225, 255 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 225, 255, 303(r) that section 64.603 of the Commission's rules does not require VRS providers to offer Speech-to-Speech services or Spanish relay services at this time.

49. The collections of information contained herein are contingent upon approval by the Office of Management and Budget and will go into effect upon announcement in the Federal Register.

50. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Memorandum Opinion and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of Small Business Administration.

51. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Further Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A: FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act of 1980, as amended, (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Federal Register summary for the Interstate Fund Advisory Council and the TRS Fund Administrator's Recommended TRS Cost Recovery Guidelines.[2] The Commission sought written public comment on the proposals in the cost recovery guidelines, including comment on the IRFA. The comments received addressed only the general recommendations, not the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[3]

A. Need for, and Objective of this Memorandum Opinion and Order

2. This proceeding was initiated to formulate an appropriate method of cost recovery for telecommunications relay services (TRS), video relay services (VRS) and speech-to-speech (STS) relay service providers.[4] These cost recovery methods take into account changes in the TRS market and technology as well as the development of the new VRS and STS services. The new cost recovery guidelines will allow all relay providers to efficiently and effectively recover their reimbursable costs. Such reimbursement will also encourage the development of new technologies to aid individuals with speech and hearing disabilities.

B. Summary of Significant Issues Raised by Public Comments in Response to IRFA.

3. No comments were filed in response to the IRFA in this proceeding. The Commission has nonetheless considered any potential significant economic impact of the rules on small entities. The comments filed in this proceeding address the recommendations of the Interstate Fund Advisory council and the TRS Fund Administrator and do not specifically address small entities.[5]

C. Description and Estimate of the Number of Small Entities to Which the Actions Taken Will Apply

4. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[6] The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[7] In addition, the term "small business" has the same meaning as the

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* Interstate TRS Fund Advisory Council and TRS Fund Administrator's Recommended TRS Cost Recovery Guidelines, *Public Notice*, 15 FCC Rcd 23987 (CCB, 2000); *see also* 66 Fed. Reg. 35765, para. 1 (July 7, 2001).

[3] *See* 5 U.S.C. § 604.

[4] *See* Memorandum Opinion and Order at para 1.

[5] Comments of Sprint Corporation (filed Jan. 5, 2001); Comments of WorldCom, Inc. (filed Jan. 5, 2001); Comments of Communication Service for the Deaf (filed Jan. 17, 2001); Reply Comments of the American Speech-Language-Hearing Association (filed January 19, 2001); Reply Comments of WorldCom, Inc. (filed Jan. 19, 2001).

[6] 5 U.S.C. § 604(a)(3).

[7] 5 U.S.C. § 601(6).

term "small business concern" under the Small Business Act.[8] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[9] We note that any small entities affected by action taken herein, should not be adversely affected. Furthermore, like all other entities affected, this action aids small businesses by allowing them to recover costs for providing relay services. Below, we further describe and estimate the number of small entity licensees and regulatees that may be affected by these rules. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its Telecommunications Industry Revenue report, regarding TRS.

5. TRS Providers. Neither the Commission nor the SBA has developed a definition of "small entity" specifically applicable to providers of telecommunications relay services (TRS). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The SBA defines such establishments to be small businesses when they have no more than 1,500 employees. According to the FCC's most recent data, there are approximately 12 interstate TRS providers, which consist of interexchange carriers, local exchange carriers, state-managed entities, and non-profit organizations. Approximately five or fewer of these entities are small businesses.[10] The FCC notes that these providers include several large interexchange carriers and incumbent local exchange carriers.[11] Some of these large carriers may only provide TRS service in a small area but they nevertheless are not small business entities.[12] Consequently, the FCC estimates that there are fewer than 5 small TRS providers that may be affected by the proposed rules, if adopted.

6. Wireline Carriers and Service Providers. The SBA has developed a definition of small entities for telephone communications companies except radiotelephone (wireless) companies. The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[13] According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons. All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent local exchange carriers (LECs). The FCC does not have data specifying the number of these carriers that are

[8] 5 U.S.C. 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[9] 15 U.S.C. § 632.

[10] *See* National Association for State Relay Administration (NASRA) Statistics. These numbers are estimates because of recent and pending mergers and partnerships in the telecommunications industry,

[11] North American Industry Classification System (NAICS) code 513310.

[12] MCI, for example, provides relay service in approximately only 3 states but is not a small business.

[13] *1992 Census.*

not independently owned and operated, and thus are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, the FCC estimates that fewer than 2,295 small telephone communications companies other than radiotelephone companies are small entities or small incumbent LECs. [14]

7. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[15] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[16] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.[17]

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

8. The cost recovery requirements adopted herein should not require additional recordkeeping requirements for relay service providers. Providers have already been using similar methods to recover costs for traditional TRS and these methods are also similar to the new STS and VRS cost recovery guidelines. Furthermore, we are not mandating specific recordkeeping and compliance requirements. Rather, we are informing carriers that if they are seeking reimbursement there are guidelines to follow. How they record their data, however, is the carriers' choice. If any additional costs are imposed, they should be minimal because the tracking procedures are similar to those already in place for traditional TRS. Furthermore, these costs will impose no greater burden on small entities because all carriers must provide the same data for cost recovery. In addition, these measures will promote more efficient service and allow the TRS providers to be reimbursed more accurately for their costs, thus negating any minimal costs imposed by these requirements. Furthermore, the money received by small entities will enable them to more effectively compete in other areas such as the development of new technologies.

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[14] NAICS code 513310.

[15] 15 U.S.C. § 632.

[16] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, *to* William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. 632(a) (Small Business Act); 5 U.S.C. 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 CFR 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. *See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket, 96-98, First Report and Order, 11 FCC Rcd 15499, 16144-45 (1996).

[17] NAICS code 513310.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

9. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[18]

10. The Commission concludes that the cost recovery guidelines adopted herein will have no adverse economic impact on small entities because these rules are designed to allow all providers, including all small entities to be accurately reimbursed. Furthermore, the Advisory Council, which proposed guidelines for the rules proposed herein, consists of members of state regulatory bodies, relay users, members of the disabilities community, large and small TRS providers, and large and small TRS contributors. As a result, the cost recovery measures adopted herein are the result of input from the industry, including small business entities.

11. The Commission considered certain alternatives and found the measures adopted herein to be the most appropriate. For example, for Spanish language relay, we considered the alternative of requiring these costs to collected be separately and tested to determine whether the are significantly different from English relay costs. After careful analysis, however, we concluded that Spanish and English relay costs were sufficiently similar to calculate reimbursement based on completed conversation minutes for both Spanish and English relay.

12. In addition, because of the unique characteristic of the developing VRS market, we declined to adopt permanently the alternatives suggested by the Advisory Council and the Fund Administrator, i.e. the recommendation to use the same methodology for rate development in place today for traditional TRS interstate cost recovery for the development of a VRS reimbursement rate. We also declined to develop, as an alternative, a VRS reimbursement rate based on completed conversation minutes of use at a national average reimbursement rate. Although the national average compensation methodology has all the benefits that we described above, we are not convinced that this methodology will provide adequate incentives to carriers to provide video relay services. Instead, we found that additional comments on these recommendations are necessary and seek comment in the Further Notice attached to this Memorandum Opinion and Order.

13. Accordingly, this Memorandum Opinion and Order directs the TRS administrator to adopt an interim VRS cost recovery rate using the average per minute compensation methodology used for traditional TRS. Such an interim methodology will allow the Commission time to further consider VRS cost recovery and evaluate the comments on these recommendations that will be received in response to the Further Notice attached to this MO&O.

14. Thus, while significant alternatives have been considered, we believe that the actions taken herein are in the best interests of all entities, including small businesses.

[18] 5 U.S.C.§ 603(c).

F. Report to Congress

15. The Commission will send a copy of the *Memorandum Opinion and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[19] In addition, the Commission will send a copy of the *Memorandum Opinion and Order* including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Memorandum Opinion and Order* and FRFA (or summaries thereof) will also be published in the Federal Register.[20]

[19] *See* 5 U.S.C. § 801(a)(1)(A).

[20] *See* 5 U.S.C. § 604(b).

APPENDIX B: INITIAL REGULATORY FLEXIBILITY ANALYSIS

Further Notice of Proposed Rulemaking

1. As required by the Regulatory Flexibility Act of 1980, as amended, (RFA),[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Further Notice of Proposed Rulemaking* (*Further Notice*). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Further Notice* provided above in paragraphs 40-44 of the *Further Notice*. The Commission will send a copy of the *Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[2] In addition, the *Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rules

2. The Commission is issuing this document to seek further comment on the recommended cost recovery guidelines for Video Relay Services (VRS) filed by the Advisory Council and the Fund Administrator on November 9, 2000. The Advisory Council and the Fund Administrator make the following four recommendations with respect to VRS cost recovery: (1) the same methodology for rate development in place today for traditional TRS interstate cost recovery could be used to develop the VRS reimbursement rate; (2) providers should be reimbursed based on completed conversation minutes at a national average reimbursement rate; (3) the TRS Center Data Request should be expanded to include specific VRS sections to capture VRS costs and demand separately; and (4) due to its unique characteristics, a separate reimbursement rate based on VRS costs and demand should be calculated.

B. Legal Basis

3. The authority for actions proposed in this Further Notice may be found in §§ 64.603, and 64.604 of the Commission's Rules, 47 CFR §§ 64.603, 64.604, and in sections 1, 2, 4, 225, 255, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 225, 255, 303(r).

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

4. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[4] The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[5] In addition, the term "small business" has the same meaning as the

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603(a).

[3] *See id.*

[4] *See* 5 U.S.C. § 603(a)(3).

[5] *See* 5 U.S.C. § 601(6).

term "small business concern" under the Small Business Act.[6] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[7] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[8] We note that any small entities affected by any action proposed herein, should not be adversely affected. Furthermore, like all other entities affected, this action will aid small businesses by allowing them to recover costs for providing relay services. Below, we further describe and estimate the number of small entity licensees and regulatees that may be affected by these proposals.

5. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its Telecommunications Industry Revenue report, regarding TRS.

6. TRS Providers. Neither the Commission nor the SBA has developed a definition of "small entity" specifically applicable to providers of telecommunications relay services (TRS). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The SBA defines such establishments to be small businesses when they have no more than 1,500 employees. According to the FCC's most recent data, there are approximately 12 interstate TRS providers, which consist of interexchange carriers, local exchange carriers, state-managed entities, and non-profit organizations. Approximately five or fewer of these entities are small businesses.[9] The FCC notes that these providers include several large interexchange carriers and incumbent local exchange carriers.[10] Some of these large carriers may only provide TRS service in a small area but they nevertheless are not small business entities.[11] Consequently, the FCC estimates that there are fewer than 5 small TRS providers that may be affected by the proposed rules, if adopted.

7. Wireline Carriers and Service Providers. The SBA has developed a definition of small entities for telephone communications companies except radiotelephone (wireless) companies. The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992. According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons. All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000

[6] *See* 5 U.S.C. 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[7] 15 U.S.C. § 632.

[8] *See* 5 U.S.C. § 601(4).

[9] *See* National Association for State Relay Administration (NASRA) Statistics. These numbers are estimates because of recent and pending mergers and partnerships in the telecommunications industry,

[10] North American Industry Classification System (NAICS) code 513310.

[11] MCI, for example, provides relay service in approximately only 3 states but is not a small business.

employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent local exchange carriers (LECs). The FCC does not have data specifying the number of these carriers that are not independently owned and operated, and thus are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, the FCC estimates that fewer than 2,295 small telephone communications companies other than radiotelephone companies are small entities or small incumbent LECs.

8. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[12] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[13] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

9. The proposed cost recovery measures may require additional recordkeeping requirements imposed for VRS. These costs, however, should be minimal because the tracking procedures are similar to those already in place for traditional TRS. In addition, these recordkeeping measures will promote more efficient service and allow the TRS providers to be reimbursed more accurately for their costs, thus negating any minimal costs imposed by these requirements. In addition, we do not expect these costs to burden small entities any more than large entities because the costs are part of the reimbursement process and will allow all providers to be accurately reimbursed and develop effective methods of providing VRS. Furthermore, the FCC tentatively concludes that the proposals in this document would impose minimum burdens on small entities. The FCC seeks comment on these tentative conclusions.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

10. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of

[12] 15 U.S.C. § 632.

[13] Letter *from* Jere W. Glover, Chief Counsel for Advocacy, SBA, *to* William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. 632(a) (Small Business Act); 5 U.S.C. 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 CFR 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. *See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket, 96-98, First Report and Order, 11 FCC Rcd 15499, 16144-45 (1996).

compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[14] The Commission has tentatively concluded that the proposed guidelines will have minimal, if any, adverse economic impact on small entities because they are designed to allow all providers to be accurately reimbursed.

11. The Commission is issuing this *Further Notice* to seek additional comment on the cost recovery methodology for VRS, which is a relatively new service offering. Both Sprint and CSD contend in their comments to the recommendations that VRS will require a substantially higher initial capital expenditure than traditional TRS and that a per minute reimbursement rate may not allow them to recover that expenditure.[15] To this end, Sprint and CSD propose that, for the present time, VRS compensation be based on a flat monthly payment for an assumed number of minutes rather than the completed conversation minutes of use at a national average reimbursement rate.[16] Once VRS generates sufficient monthly use, however, the flat monthly payment could be abandoned for the completed conversation minutes methodology suggested by the Advisory Council and the Fund Administrator.[17] The proposals provided by Sprint and CSD, however, are not sufficiently detailed for the Commission implement a cost recovery scheme. Thus, the Commission now seeks further comment on what VRS cost recovery mechanism should be established on a permanent basis.

12. The Commission has set forth the proposed rule primarily for the purpose of generating comment. At this time, the Commission has not tentatively concluded that any of the proposals provided should be adopted. To the contrary, the purpose of this further notice is to seek comments and proposals to develop the most effective method of cost recovery for VRS. Thus, the Commission is receptive of comments proposing alternatives to the ones provided by the Advisory Council and Fund Administrator, Sprint, and CSD. If comments received indicate that smaller entities may be impacted differently or adversely affected by the proposed rules or any alternative proposals, we will seek alternative that will prevent such an impact.

F. Federal Rules that May Duplicate, or Conflict With the Proposed Rules:

13. None.

[14] 5 U.S.C. § 603(c).

[15] Sprint Comments at 1, CSD Comments at 1.

[16] Sprint Comments at 3-4, CSD Comments at 2-3.

[17] Sprint Comments at 4.