

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

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FCC Mail Room

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

ORDER ON RECONSIDERATION

Adopted: June 20, 2006

Released: July 12, 2006

By the Commission: Commissioners Copps. and Adelstein concurring and issuing separate statements.

1. INTRODUCTION

1. The 2004 TRS Report & Order¹ addressed numerous issues relating to the regulation and compensation of telecommunications relay service (TRS), and particularly Video Relay Service (VRS).² In response to that order, several parties filed petitions for reconsideration.³ We have resolved several of

¹ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket Nos. 90-571 & 98-67. CG Docket No. 03-123, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Rcd 12475 (June 30, 2004) (2004 TRS Report & Order).

² Telecommunications relay service (TRS), mandated by Congress in Title IV of the Americans with Disabilities Act of 1990, enables a person with a hearing or speech disability to communicate through the telephone system. See 47 U.S.C. § 225(a)(3). Video Relay Service (VRS) is a form of TRS that uses a broadband Internet connection between the VRS user and the communications assistant (CA), which allows them to communicate via video in sign language rather than text. See 47 C.F.R. § 64.601(17) (defining VRS).

³ Petitions for reconsideration were filed by Communication Services for the Deaf, Inc. (CSD) (Sept. 30, 2004), the National Video Relay Service Coalition (NVRSC) (Oct. 1, 2004), Hands On Video Relay Service, Inc. (petition for partial reconsideration) (Oct. 1, 2004), and Hamilton Relay, Inc. (Hamilton) (Oct. 1, 2004). Hamilton's petition raises an issue concerning an alternative cost recovery methodology for traditional TRS. On October 15, 2004, a Public Notice was released noting that parties may file oppositions to the petitions. *Communication Services for the Deaf, Inc., Hands On Video Relay Service, Inc., National Video Relay Service Coalition, and Hamilton Relay, Inc. File Petitions for Reconsideration of Telecommunications Relay Service Requirements from the Report and Order, Order on Reconsideration and Further Notice of Proposed Rulemaking*, CC Docket No. 90-571, CC Docket No. 98-67, CG Docket No. 03-123, Public Notice, 19 FCC Rcd 19929 (Oct. 15, 2004). In response to the Public Notice, four entities and 18 individuals filed comments, one entity filed reply comments, one entity filed an opposition, two entities filed a reply to the opposition, and one entity filed a surreply to the opposition. Comments were filed by CSD (Nov. 15, 2004), Sprint Corporation (Sprint) (Nov. 15, 2004), the United States Telecom Association (USTA) (Nov. 15, 2004), MCI, Inc. (MCI) (Nov. 15, 2004), and 18 individuals (14 of which were identical letters addressing non-shared language relay service); Hamilton filed reply comments (Nov. 30, 2004); Sorenson Media, Inc. (Sorenson) filed an opposition to the petitions for reconsideration (Nov. 15, (continued...))

the issues raised in these petitions in prior orders.⁴ We now address the remaining issues, which include: (1) the adoption of the final 2003-2004 VRS compensation rate of \$8.854;⁵ (2) whether the final VRS rate should be fully retroactive; (3) the compensability of research and development expenses incurred for TRS enhancements that go beyond the applicable TRS mandatory minimum standards from the Interstate TRS Fund (Fund); and (4) the applicability of “rate of return” regulation to traditional TRS and speed of answer requirements to VRS. For the reasons set forth below, we grant in part and deny in part the petitions for reconsideration.

II. BACKGROUND

2. TRS. Title IV of the Americans with Disabilities Act of 1990 (ADA) requires common carriers offering “telephone voice transmission services” to also provide TRS throughout the area in which they offer service, so that persons with hearing and speech disabilities will have access to the telephone system.⁶ The statute also mandates that eligible TRS providers be compensated for their costs of doing so.⁷ The cost recovery framework – and the annual determination of the TRS compensation rates – is intended to cover the “reasonable” costs incurred in providing the TRS services mandated by

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2004); Hands On (Nov. 24, 2004) and NVRSC (Nov. 30, 2004) filed replies to Sorenson’s opposition; and the Registry of Interpreters for the Deaf, Inc. (RID) filed a reply to a reply to the Sorenson opposition (Feb. 8, 2005).

⁴ See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, CG Docket No. 03-123, Order on Reconsideration, 20 FCC Rcd 13140 (July 19, 2005) (recognizing ASL-to-Spanish VRS); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, CG Docket No. 03-123, Report and Order, 20 FCC Rcd 13165 (July 19, 2005) (*VRS Speed of Answer Order*) (adopting speed of answer rules for VRS, recognizing VRS Mail as a compensable service, and requiring VRS to be provided 24 hours a day, 7 days a week (24/7)); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Report and Order, and Order on Reconsideration, FCC 05-203 (Dec. 12, 2005) (certification of VRS providers); see also *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Order, FCC 06-81 (June 16, 2006) (order clarifying application of 10-minute in-call replacement rule to VRS CAs); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Declaratory Ruling and Further Notice of Proposed Rulemaking, FCC 06-57 (May 9, 2006) (requiring VRS equipment and service to be interoperable); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Further Notice of Proposed Rulemaking, FCC 06-58 (May 8, 2006) (seeking comment on ways to curtail misuse of VRS); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Access to Emergency Services*, CG Docket No. 03-123, Further Notice of Proposed Rulemaking, FCC 05-196 (Nov. 30, 2005) (*2005 TRS 911 NPRM*) (seeking comment on rules for access to emergency services for the Internet-based forms of TRS).

⁵ *2004 TRS Report & Order*, 19 FCC Rcd at 12548-12550, paras. 191-193; see *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Order, 18 FCC Rcd 12823, at 12835-12836, paras. 29-38 (June 30, 2003) (*2003 Bureau TRS Order*) (adopting TRS compensation rates for the 2003-2004 Fund year).

⁶ 47 U.S.C. § 225(c).

⁷ 47 U.S.C. § 225(d)(3). As a general matter, states compensate providers for the costs of providing intrastate TRS, and the Interstate TRS Fund compensates providers for the costs of providing interstate TRS. See generally *2004 TRS Report & Order*, 19 FCC Rcd at 12482-12483, paras. 7-8.

Congress and our regulations.⁸ The intent of Title IV is to further the Communications Act's goal of universal service by ensuring that individuals with hearing or speech disabilities have access to telephone services that are "functionally equivalent" to those available to individuals without such disabilities.⁹ TRS became available on a nationwide basis in 1993.¹⁰

3. *VRS*. In 2000, the Commission recognized VRS as form of TRS eligible for compensation from the Interstate TRS Fund.¹¹ As most frequently used, VRS allows a deaf person whose native language is American Sign Language (ASL) to communicate in ASL with the communications assistant (CA) through a video link. The CA, in turn, places an outbound telephone call to a hearing person. During the call, the CA communicates in ASL with the deaf person and by voice with the hearing person. As a result, the conversation between the two end users, deaf and hearing, flows in near real time and in a faster and more articulate manner than a TTY or text-based TRS call. VRS calls, therefore, reflect a degree of "functional equivalency" unimaginable in a solely text-based TRS world.¹²

4. *Cost Recovery*. Section 225 provides that the costs of providing interstate TRS "shall be recovered from all subscribers for every interstate service."¹³ This mandate requires both collecting contributions to establish a fund (the Interstate TRS Fund) from which TRS providers can be compensated, and paying money from the Fund to eligible providers for their provision of eligible TRS services.¹⁴ These duties are performed by the Interstate TRS Fund administrator, selected by, and under the direction of, the Commission.¹⁵ The current Interstate TRS Fund administrator is the National Exchange Carrier Association (NECA).

5. The TRS Fund administrator presently makes payments to eligible providers based on

⁸ 2004 TRS Report & Order, 19 FCC Rcd at 12543, para. 179; see generally 47 C.F.R. § 64.604(c)(5)(iii)(E) (providers shall be compensated for the "reasonable costs" of providing TRS).

⁹ See 47 U.S.C. § 225(a)(3).

¹⁰ See generally *Telecommunication 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 (July 26, 1991) (*TRS I*).

¹¹ See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, 5152-5154, paras. 21-27 (March 6, 2000) (*Improved TRS Order & FNPRM*) (recognizing VRS as a form of TRS): 47 C.F.R. § 64.601(17). Presently, all VRS calls are compensated from the Interstate TRS Fund. See *Improved TRS Order & FNPRM*, 15 FCC Rcd at 5154, paras. 26-27.

¹² As the following figures for approximate monthly minutes of use of VRS demonstrate, usage continues to rise: May 2003 – 189,422; July 2004 – 900,000; August 2005 – 2.7 million; April 2006 – 3.2 million.

¹³ 47 U.S.C. § 225(d)(3)(B).

¹⁴ See generally 47 C.F.R. § 64.604(c)(5)(iii)(A) & (E).

¹⁵ See 47 C.F.R. § 64.604(c)(5)(iii).

per-minute compensation rates for traditional TRS, IP Relay, Speech-to-Speech (STS), and VRS.¹⁶ The compensation rates are set on an annual basis. The TRS Fund administrator requests and collects projected cost and demand (*i.e.*, minutes of use) data from the providers.¹⁷ After the Fund administrator reviews the submitted projected costs and minutes of use, it calculates proposed per-minute compensation rates based on data submitted (or modified, as necessary).¹⁸ The Fund administrator then files these proposed rates with the Commission, and they are placed on public notice.¹⁹ The Commission reviews the proposed rates and, in adopting compensation rates for the ensuing Fund year, may approve or modify the proposed rates.²⁰

6. If either the Fund administrator or the Commission disallows any of a provider's submitted costs, the provider has the opportunity to contest the disallowances before they are finalized.²¹ The precise process by which the providers' challenges to cost disallowances have been handled has varied, depending in part on whether the Fund administrator or the Bureau has made the disallowance. The providers may further challenge the adopted rates, including any cost disallowances, by seeking review of the rate order. Since 1993, the Commission has released orders at least annually setting forth the per-minute compensation rates for the various forms of TRS.²²

¹⁶ In the *2005 TRS Rate Order*, the Commission concluded that it would adopt separate rates for traditional TRS and IP Relay beginning with the 2005-2006 Fund year. *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, CG Docket No. 03-123, Order, 20 FCC Rcd 12237 (June 28, 2005) (*2005 TRS Rate Order*).

¹⁷ See 47 C.F.R. § 64.604(c)(5)(iii)(C).

¹⁸ As NECA has explained, NECA calculates a national average cost per minute of use. It does so by totaling projected costs and minutes of use for all providers for a two year period, and then dividing each sum (costs and minutes) by two. Then the average costs are divided by the average minutes to determine the average cost per minute. See NECA, *Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate*, filed April 25, 2005, at 9 & Appendix 1E.

¹⁹ See, e.g., *National Exchange Carrier Association (NECA) Submits the Payment Formula and Fund Size Estimate for Interstate Telecommunications Relay Services (TRS) Fund for July 2005 Through June 2006*, CC Docket No. 98-67, Public Notice, DA 05-1175 (April 28, 2005) (*2005 TRS Rate Notice*).

²⁰ See generally *Telecommunications Relay Services and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Third Report and Order, 8 FCC Rcd 5300, 5305, para. 30 (July 20, 1993) (the TRS rate calculated by the administrator "shall be subject to Commission approval").

²¹ Because of confidentiality issues, this is generally done either in a telephone conversation or in an individual meeting with each provider.

²² The Commission released the first rate order on September 29, 1993. See *Telecommunications Relay Services, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Second Order on Reconsideration and Fourth Report and Order, 9 FCC Rcd 1637 (Sept. 29, 1993). Subsequent rate orders have been released at the bureau level, with the exception of the *2005 TRS Rate Order*.

III. DISCUSSION

A. The Final 2003-2004 VRS Compensation Rate was Based on Reasoned Analysis

7. *Background.* The 2003 Bureau TRS Order rejected NECA's proposed VRS rate of \$14.023 per minute and adopted an "interim" rate of \$7.751, subject to possible revision pending a more complete analysis of the providers' cost data.²³ Five parties filed petitions for reconsideration, challenging the adoption of the interim VRS rate of \$7.751 and requesting that the Commission accept NECA's proposed rate of \$14.023 retroactive to July 1, 2003 (the first day of the 2003-2004 Fund year).²⁴ The Commission concluded, based on its review of more complete cost data submitted by the providers, that it would adopt a final rate of \$8.854.²⁵ Hands On now contends that the Commission failed to adequately explain how it arrived at the \$8.854 rate.²⁶ Hands On also asserts that the exclusion of "proprietary" software in the rate analysis was wrong.²⁷

8. *Discussion.* We deny Hands On's petition to reconsider the \$8.854 final VRS rate. After the release of the interim 2003-2004 TRS compensation rates, the Commission reviewed additional cost data submitted by the providers.²⁹ As the Commission explained, "because all of the providers filed for confidential treatment, the adjustments made [were] described in the aggregate."³⁰ The Commission noted that it added back various costs that were excluded in calculating the \$7.751 rate relating to salaries, engineering support, and return on capital investment, as well as the costs from one provider that had been excluded in their entirety.³¹ These adjustments resulted in including an additional \$9,503,801 in costs, and a corresponding increase of 213,415 in reimbursable minutes.³²

9. These adjustments resulted both from the Commission's analysis of the providers' supplemental cost data, and individual meetings with the providers after the release of the 2003 Bureau TRS Order. In these meetings, Commission staff discussed any adjustments to an individual provider's cost support with the provider in detail.³³ The Commission provided no specific dollar amounts and

²³ 2003 Bureau TRS Order, 18 FCC Rcd at 12835-12836, paras. 29-38.

²⁴ See 2004 TRS Report & Order, 19 FCC Rcd at 12538, para. 165 & n.474. These parties were Sprint, AT&T, Sorenson, Hands On, and CSD. *Id.*

²⁵ *Id.* at 12538-12539, para. 166.

²⁶ Hands On Petition at 11-17.

²⁷ *Id.* at 20.

²⁹ 2004 TRS Report & Order, 19 FCC Rcd at 12548-12549, para. 191.

³⁰ *Id.*

³¹ *Id.* at 12548-12549, paras. 191-192.

³² *Id.* at 12549-12550, para. 193.

³³ The Commission met with Hands On (July 11, 2003), Hamilton (July 10, 2003), Sorenson (July 17, 2003), and Sprint and CSD (July 18, 2003).

discussed adjustments in the aggregate because providers claimed that their cost data were confidential.³⁴ For these reasons, we find that the Commission adequately summarized the cost adjustments to the VRS rate.³⁵

10. We also reject Hands On's argument that the Commission has failed to set forth in sufficient detail what costs are "reasonable" in certain cost categories.³⁶ Providers are required to offer VRS in compliance with all applicable non-waived mandatory minimum standards, and entitled to be compensated for their reasonable costs of doing so. Each year the TRS Fund administrator, NECA, gives the providers instructions for the cost data request forms, which outline various cost categories and give examples of the types of costs that can be included.³⁷ NECA provides these guidelines so that providers consistently report only costs incurred in providing compensable services. The providers follow these guidelines, and Commission staff review the submitted costs to determine whether they are "reasonable"³⁸ and consistent with the applicable TRS mandatory minimum standards.³⁹ Commission staff subsequently review any disallowances with the individual providers.⁴⁰ This method for determining "reasonable" costs gives providers flexibility to determine how best to provide service in compliance with the rules.⁴¹

11. Hands On further asserts that the Commission erred in concluding that "proprietary" software is not a compensable cost.⁴² We agree that the categorical exclusion of such costs is not warranted, and clarify that software developed and owned by a provider that is used for the provision of TRS may be a compensable cost: (1) to the extent it is used for the provision of TRS in compliance with non-waived mandatory minimum standards, and (2) if it is not sold or licensed to any other entity. Further, such costs should be capitalized⁴³ and are subject to review under the general reasonableness

³⁴ See *2004 TRS Report & Order*, 19 FCC Rcd at 12548-12549, para. 191.

³⁵ See *id.* at 12548-12550, paras. 191-193.

³⁶ See, e.g., Hands On Petition at 14-16. Hands On takes issue with a lack of specific direction on certain standards for the provision of service, specifically the number of frames per second that should be used to ensure a clear picture and standards for compatibility between various computers, software, or video systems. *Id.*

³⁷ See, e.g., NECA, *Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate*, filed May 3, 2004, Appendix A.

³⁸ See 47 C.F.R. § 64.604(c)(5)(iii)(E).

³⁹ In some cases, a provider's submitted costs are compared to the costs of other providers of the same service, particularly if a provider's costs are substantially different from the other providers' submitted costs.

⁴⁰ See para. 5. *supra*.

⁴¹ The reasonableness standard, for example, satisfies Hands On's concerns over the lack of specific frames per second or quality standards for VRS. Hands On Petition at 15-16. If, for example, a provider's VRS service uses so few frames per second that the picture is not clear and the VRS user cannot understand what the interpreter is signing, the provider is not offering VRS at all and the service is not compensable.

⁴² Hands On Petition at 20; see *2004 TRS Report & Order*, 19 FCC Rcd at 12547-12549, paras. 188-189, 192.

⁴³ See *2004 TRS Report & Order*, 19 FCC Rcd at 12548, para. 190 n.543 (addressing capitalization of costs).

standard. This approach ensures that the Fund does not become a source of funding for software or other products that the provider develops and uses to provide non-TRS services, TRS services beyond those required by applicable non-waived mandatory minimum standards,⁴⁴ or to generate other income from research paid for by the Fund.

B. The Final VRS Rate Should be Fully Retroactive

12. *Background.* When the Commission adopted the final VRS rate on June 30, 2004, the Commission concluded that the rate would not be fully retroactive to the July 1, 2003, beginning of the Fund year because it was based on cost data submitted after the July 1, 2003, adoption of the \$7.751 interim rate.⁴⁵ The Commission concluded that the new compensation rate would apply to the provision of VRS services effective September 1, 2003.⁴⁶ Hands On asserts that the final 2003-2004 VRS rate should be fully retroactive to July 1, 2003.⁴⁷

13. *Discussion.* We agree that the Commission should have made the final 2003-2004 VRS rate of \$8.854 fully retroactive to July 1, 2003, rather than September 1, 2003. In adopting the interim rate, the Bureau stated that it would remain in force until the Bureau completed its examination of the providers' cost data, "after which time we will produce the final VRS cost recovery rate *for the July 1, 2003, through June 30, 2004, fund year.*"⁴⁸ Consistent with this statement, and in acceptance of Hands On's argument, we now determine that the final 2003-2004 VRS rate of \$8.854 adopted in the *2004 TRS Report and Order* should be made fully retroactive to July 1, 2003, the beginning of the 2003-2004 Fund year. Accordingly, upon the effective date of this *Order*, we direct NECA to make appropriate supplemental payments to those VRS providers compensated for providing VRS in July and August 2003 that reflect the difference between the interim rate of \$7.751 per minute and the final rate of \$8.854 per minute.

C. Costs Directed at Meeting Waived Mandatory Minimum Standards

14. *Background.* Petitioners seek reconsideration of the Commission's conclusion that research and development costs directed at meeting waived mandatory minimum standards are not compensable.⁴⁹ They argue that when a mandatory minimum standard has been waived due to

⁴⁴ See Section C, *infra*.

⁴⁵ *2004 TRS Report & Order*, 19 FCC Rcd at 12538-12539, 12549-12550, paras. 166, 193.

⁴⁶ *Id.*

⁴⁷ Hands On Petition at 21-23. Hands On asserts that the modified rate should be fully retroactive because providers' costs were the same for July and August 2003 as they were after September 1, 2003. Hands On also asserts that the providers could not submit additional data until after July 1, 2003. CSD and Sprint filed comments supporting Hands On's petition on this issue. CSD Comments at 1-4; Sprint Comments at 1-3.

⁴⁸ *2003 Bureau TRS Order*, 18 FCC Rcd at 12836, para. 37 (emphasis added).

⁴⁹ Hands On Petition at 17-20; CSD Petition at 18-22; see *2004 TRS Report & Order*, 19 FCC Rcd at 12523, 12547-12548, paras. 122, 188-190. For VRS, the following mandatory minimum standards are presently waived: providing STS; providing Spanish Relay; handling any type of call; emergency call handling; offering equal access to interexchange carriers; handling 900 calls; providing Voice Carry Over (VCO), Hearing Carry Over (HCO), (continued....)

technological infeasibility, a provider should be compensated for the expenses related to developing the technology to meet the waived standard.⁵⁰ CSD more specifically asserts that we should permit the recovery of costs for research and development to enable VRS to meet the requirement that all TRS emergency calls be automatically and immediately transferred to an appropriate public safety answering point (PSAP).⁵¹

15. *Discussion.* We reaffirm the general principle that engineering and other expenses for research and development to meet waived mandatory minimum standards, or provide enhancements beyond applicable non-waived mandatory minimum standards, are not compensable from the Interstate TRS Fund.⁵² As the Commission explained, TRS providers are obligated to provide functionally equivalent service, and that functionality is defined by the applicable mandatory minimum standards.⁵³ When “a provider offers eligible services that meet these standards it may recover its costs of doing so from the Interstate TRS Fund.”⁵⁴ As the Commission explained, “this conclusion best reconciles the Commission’s interest in avoiding placing undue burdens on the Interstate TRS Fund with the statutory mandate that the Commission’s regulations ‘do not discourage or impair the development of improved technology.’”⁵⁵

16. The Commission recognized the “apparent ‘Catch-22’ that so long as a mandatory minimum standard is waived providers cannot be compensated for the costs of meeting the requirement, but that without additional compensation they cannot cover the costs of meeting the requirement to therefore justify the end of the waiver.”⁵⁶ Nevertheless, the Commission took this approach because of the open-ended nature of the research and development that might be directed at a particular feature.⁵⁷ (Continued from previous page)

VCO-to-TTY, HCO-to-TTY, VCO-to-VCO, HCO-to-HCO; call release; 3-way calling; and speed dialing. See 2004 TRS Report & Order, 19 FCC Rcd at 12594-12596, Appendix E (waiver chart).

⁵⁰ Hands On Petition at 18; see also CSD Petition at 18-22 (asserting that it is not reasonable to expect a provider to meet a standard by a certain date (*i.e.*, the date the waiver expires) if the provider cannot be compensated for the expenses associated with developing a means to meet the standard).

⁵¹ See 2004 TRS Report & Order, 19 FCC Rcd at 12521, para. 116. Because VRS is an Internet-based service, the VRS provider does not receive the automatic number identification (ANI) of the calling party, cannot identify the calling party’s location, and therefore cannot automatically pass that information to the PSAP. *Id.* at 12522, para. 117. The Commission concluded that emergency call handling for VRS was technologically infeasible, and waived the requirement for VRS until January 1, 2006. See *id.* at 12522, para. 118. On November 30, 2005, the Commission released an NPRM seeking comment on rules for access to emergency services for the Internet-based forms of TRS. 2005 TRS 911 NPRM, note 4, *supra*.

⁵² 2004 TRS Report & Order, 19 FCC Rcd at 12523-12524, 12547-12548, paras. 122, 189.

⁵³ *Id.* at 12547-12548, para. 189. Title IV is intended to ensure that entities that offer telephone voice transmission services also offer TRS so that persons with certain disabilities have access to the *functionality* of a voice telephone call. See 47 U.S.C. § 225(a)(3) & (c).

⁵⁴ 2004 TRS Report & Order, 19 FCC Rcd at 12547-12548, para. 189 (emphasis in original).

⁵⁵ *Id.* at 12548, para. 190 (internal footnote omitted) (quoting 47 U.S.C. § 225(d)(2)).

⁵⁶ *Id.* at 12523-12524, para. 122.

⁵⁷ *Id.* at 12547-125478, paras. 189-190

The Commission stated that it would rely on the filing of annual reports for information indicating when the termination of a waiver may be appropriate and what additional costs may be necessary.⁵⁸ In other words, the Commission concluded that it would require the providers to identify the manner in which the waived standard might be met, and the projected associated costs involved, *before* a provider devoted potentially unbounded resources to trying to find a way to meet the standard for a particular form of TRS.⁵⁹

17. We continue to believe that, as a general matter, this approach is reasonable. First, to the extent that some waivers are the result of technological limitations presently inherent in Internet-based services generally, the Interstate TRS Fund should not be a source of funding to resolve these limitations. In addition, we do not believe we can meaningfully determine what costs are reasonable when they are incurred to resolve technological issues that no one can resolve in the near term. Further, it may be impossible for some waived standards ever to apply to certain forms of TRS. Therefore, we again conclude that, absent more specific direction from the Commission resulting from the annual waiver reports⁶⁰ or information otherwise brought to the Commission's attention, providers may not be compensated from the Interstate TRS Fund for research and development to meet waived mandatory minimum standards.⁶¹ Only in this way can we prevent the Fund from becoming an open source of funding for research and development efforts over which we, and the Fund Administrator, would have no control.

D. Other Issues

18. *MARS Plan.* Hamilton's petition for reconsideration asserts that the Commission should not have applied "rate of return regulation" to traditional TRS, *i.e.*, regulation requiring that the providers are not entitled to compensation that constitutes profit (*e.g.*, a mark-up on expenses) but are limited to a rate of return on capital investment.⁶² Hamilton asks the Commission to initiate a proceeding to adopt its proposed alternative cost recovery methodology (the Multi-state Average Rate Structure or MARS plan) for determining the compensation rate for traditional TRS.⁶³ Because, however, we construe Hamilton's

⁵⁸ *Id.* at 12523-12524, para. 122.

⁵⁹ *See generally id.*

⁶⁰ *See generally id.* at 12520-12521, para. 111 (waivers of mandatory minimum standards for IP Relay and VRS contingent on providers filing annual reports with Commission addressing continuing need for each waiver).

⁶¹ This principle applies to the waived emergency call handling requirement for VRS. *See* notes 4 & 51, *supra* (noting recent NPRM on access to emergency services for VRS and IP Relay).

⁶² Hamilton Petition at iii, 1; *see generally* 2004 TRS Report & Order, 19 FCC Rcd at 12542-12545, paras. 177-182.

⁶³ Hamilton Petition at 1-4. Under the MARS plan, the interstate traditional TRS rate would be calculated based on an average of the *intrastate* TRS rates paid by the states. According to Hamilton, this approach would be superior to the current cost recovery methodology because it is grounded in competition (because most states select an intrastate TRS provider through a competitive bidding process), it would be easier and less costly to administer, and would benefit consumers "by lowering interstate TRS rates to the competitively based market value." Hamilton Petition at 2-3. In response to Hamilton's petition, comments were filed by USTA, MCI, and Hands On, which generally support Hamilton's request. USTA Comments at 1-4; MCI Comments at 2-4; Hands On Reply (continued....)

petition for reconsideration as a request that we adopt a new cost recovery methodology for traditional TRS, we deny the petition for reconsideration to the extent it challenges the present cost recovery methodology for traditional TRS.⁶⁴ We will treat this as a petition for rulemaking and request public comment on the MARS plan in a future notice of proposed rulemaking.

19. *VRS Speed of Answer.* Finally, several parties seek reconsideration of the extension of the waiver of the speed of answer requirement for VRS providers until January 1, 2006, or at such time the Commission adopts a speed of answer rule for VRS, whichever is earlier.⁶⁵ On July 19, 2005, the Commission released the *VRS Speed of Answer Order*, which adopted speed of answer requirements for VRS providers, effective January 1, 2006.⁶⁶ Because the Commission has now adopted a speed of answer rule for VRS, this issue is moot.

IV. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1, 2, and 225 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, and 225, this *Order on Reconsideration* IS hereby ADOPTED.

21. IT IS FURTHER ORDERED that the petition for partial reconsideration filed by Hands On is GRANTED IN PART and DENIED IN PART, as provided herein, and the petitions for reconsideration filed by CSD, NVRSC, and Hamilton ARE DENIED, as provided herein.

22. IT IS FURTHER ORDERED that the final per-minute compensation rate for VRS for the 2003-2004 Fund year of \$8.854 SHALL APPLY retroactively to all VRS minutes provided during that Fund year commencing July 1, 2003.

23. IT IS FURTHER ORDERED that this *Order On Reconsideration* SHALL BE EFFECTIVE upon publication in the Federal Register.

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Comments at 3-4. Hamilton also filed reply comments, further urging the Commission to consider its MARS proposal. Hamilton Reply at 1-4.

⁶⁴ See generally *2004 TRS Report & Order*, 19 FCC Rcd at 12542-12545, paras. 177-182.

⁶⁵ See, e.g., CSD Petition at 13-18. See generally *2004 TRS Report & Order*, 19 FCC Rcd at 12522-12524, paras. 119-123.

⁶⁶ See *VRS Speed of Answer Order*, 20 FCC Rcd at 13165-13166, para. 1. In this Order, the Commission required that: (1) by January 1, 2006, VRS providers must answer 80 percent of all VRS calls within 180 seconds, measured on a monthly basis; (2) by July 1, 2006, VRS providers must answer 80 percent of all VRS calls within 150 seconds, measured on a monthly basis; and (3) by January 1, 2007, VRS providers must answer 80 percent of all VRS calls with 120 seconds, measured on a monthly basis. *Id.* at 13175-13176, para. 19.

24. To request materials in accessible formats (such as braille, large print, electronic files, or audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY). This *Order* can also be downloaded in Word and Portable Document Formats (PDF) at <http://www.fcc.gov/cgb.dro>.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink that reads "Marlene H. Dortch". The signature is written in a cursive style with a large, stylized initial "M".

Marlene H. Dortch
Secretary

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order on Reconsideration,
CG Docket No. 03-123

The Americans with Disabilities Act spurred this country to make accessible to 54 million Americans the facilities that so many of us take for granted on a daily basis. For our part, the Act's mandate of "functional equivalency" directs the FCC to create rules that ensure that the deaf and hard of hearing have access to communications technologies on par with those technologies available to everyone else. To this end we have implemented and updated many times the rules that make telecommunications relay services (TRS) available to anyone who needs them.

Once again this Order on Reconsideration addresses the extent to which providers are entitled to compensation for certain activities going back to 2003. I concur in this decision because getting the reimbursement methodology right only treats the symptoms and not the underlying problem, which is the lack of transparency in the system. Consistent, clear and fully transparent rules benefit the disabilities community that relies on the availability of TRS as well as the providers who are the beneficiaries of a reliable reimbursement road map for the services they offer. As the stewards of this program, the Commission would also greatly benefit from a more transparent system and I hope we will promptly take the steps needed to shed more light on such a vital process.

**CONCURRING STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Order on Reconsideration, CG Docket No. 03-123

Video Relay Service (VRS) is an increasingly important tool for those portions of the deaf and hard of hearing community who rely on American Sign Language (ASL). VRS allows ASL and hearing individuals to have real-time conversations that more closely mirror the speed and natural flow of voice-to-voice conversations. VRS opens a world of new communications opportunities for many senior citizens, children, and others who may be unable to type on a TTY phone easily. Users of VRS rely on these services not only to communicate with friends and family, but also to run successful businesses, reach operators in the event of an emergency, and complete everyday tasks that many of us take for granted.

Among the issues raised in this Reconsideration Order is the Commission's process for determining the "reasonable costs" that may be recovered from the TRS Fund by VRS providers. During the past three years, this process has presented a variety of open questions and controversy among providers and consumers. No where was this more true than with respect to the 2003-04 funding year. In that case, the Commission's initial compensation rate elicited an outcry from not only service providers but from members of the deaf and heard of hearing community, who were concerned about the impact of VRS rates on quality of service. The Commission later restored some of the disallowed costs, raising the rates for service providers, and we affirm that corrective action today.

Working together, the Commission has taken important steps to improve VRS over the past year. I particularly appreciate the fine work of our Consumer and Governmental Affairs Bureau on VRS issues during this time. Yet, particularly with respect to the rate setting process, the Commission can raise the bar and improve VRS for all participants. I limit my support for this Order to a concurrence because it is imperative that the Commission take up comprehensively the broader questions raised about the VRS rate setting process. Providers have urged us to inject more transparency and predictability into this process, and I have called on the Commission to engage in this sort of review. It is absolutely critical that the Commission provide oversight to ensure that our VRS compensation rate is limited to "reasonable costs," the standard articulated in our rules. At the same time, we also have an obligation to ensure that providers have adequate notice of how we will apply this standard, so that they can plan their operations accordingly.

I continue to believe that this sort of comprehensive review and the development of predictable and transparent rules would benefit providers, contributors, and the many consumers with and without hearing disabilities who rely on VRS. I look forward to working with my colleagues, our CGB staff, members of the TRS Advisory Committee, and the many members of the disabilities community on these issues as we move forward.