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July 31, 2006

REDACTED – FOR PUBLIC INSPECTION

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Verizon Petition for Declaratory Ruling or, in The Alternative, for Waiver of Section 64.604(b)(2)(ii) of the Commission's Rules,* CC Docket No. 03-123, Request for Confidential Treatment under 47 C.F.R. §§ 0.457 and 0.459.

Dear Ms. Dortch:

Enclosed are an original and four redacted copies of Verizon's[1] Petition for Declaratory Ruling or, in The Alternative, for Waiver of Section 64.604(b)(2)(ii) of the Commission's Rules. The Petition and supporting documents respond to a June 15, 2006 letter from the Consumer and Governmental Affairs Bureau.[2]

Portions of the Petition and supporting documents include confidential information. Verizon has redacted the confidential information and marked the pages "REDACTED – FOR PUBLIC INSPECTION." Verizon is filing a non-redacted confidential version of the Petition and supporting under separate cover. Each page of the confidential version is marked "PROPRIETARY." Except for the excised confidential portions of the redacted Petition and associated documents, the confidential and public filings are identical.

Verizon requests confidential treatment of the Petition and supporting documents, pursuant to 47 C.F.R. §§ 0.457 and 0.459. The Petition and associated documents contain confidential corporate and commercially sensitive information that is not customarily disclosed to the public or made available within the telecommunications industry. *See* 47 C.F.R. § 0.457(d). The

[1] The Verizon companies participating in this filing ('Verizon') are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

[2] Letter from Monica Desai, Chief, Consumer & Governmental Affairs Bureau, FCC to Tiina Keder, Verizon, dated June 15, 2006, at 3-4 ("June 15 letter").

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material for which Verizon seeks confidentiality falls squarely within the requirements of the Commission's rules.

(1) ***Identification of the specific information for which confidential treatment is sought.*** The documents for which Verizon seeks confidential treatment generally fall into two categories: (1) information describing internal procedures, safeguards, and past practices for satisfaction of the TRS program's minimum standards; (2) performance data and metrics under the TRS program. Each of the documents for which Verizon requests confidential treatment bears the legend "PROPRIETARY." This includes the Petition itself as well the supporting declaration and attachments. The confidential version of the Petition will be under separate cover.

(2) ***Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission.*** This letter and the attached Petition and supporting documents are being submitted in response to the June 15 letter referenced above and are being filed in [include proceeding].

(3) ***Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged.*** The Petition and supporting documents include a description of corporate policies and procedures as well as raw internal performance data that clearly are "commercial"[3] in nature. Further, the documents are plainly "confidential" in that they "would customarily not be released to the public."[4] The courts have elaborated that material "is 'confidential' . . . if disclosure of the information is likely to have either of the following effects: (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."[5] This second consideration is paramount in this instance given the robust competition among IP Relay service providers and among TRS providers more generally.

(4) ***Explanation of the degree to which the information concerns a service that is subject to competition.*** Verizon is an active competitor with a number of other entities providing IP Relay service specifically as well as other TRS service providers. According to NECA, the program administrator, Verizon competes with ten other TRS providers.[6]

(5) ***Explanation of how disclosure of the information could result in substantial competitive harm.*** If the information and data in the Petition were publicly available, it

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[3] *See Board of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 403 & n.78 (D.C. Cir. 1980) (courts have given the terms "commercial" and "financial," as used in Section 552(b)(4), their ordinary meanings).

[4] *Critical Mass Energy Project v. NRC,* 975 F.2d 871, 873 (D.C. Cir. 1992), *cert. denied,* 113 S. Ct. 1579 (1993) (citing the Senate Committee Report).

[5] *National Parks and Conservation Ass'n v. Morton,* 498 F.2d 764, 770 (D.C. Cir. 1974) (footnote omitted) (emphasis added); *see also Critical Mass Energy Project v. NRC,* 975 F.2d 871 (D.C. Cir. 1992), *cert. denied,* 113 S. Ct. 1579 (1993).

[6] NECA, Relay Service Providers, http://www.neca.org/source/NECA_Resources_2041.asp (last visited July 27, 2006).

would reveal many of Verizon's internal IP Relay policies and procedures. Each provider must comply with the Commission's minimum TRS standards and information as to the means by which Verizon does so would be a significant advantage for competitive providers. Verizon has invested considerable time and resources in the development of its policies, and disclosing information about Verizon's procedures and policies would facilitate copying by competitors, depriving Verizon of the benefit of investments undertaken to assure the flexible and efficient operation of its TRS call centers. Accordingly, public disclosure of the procedure and process designed by Verizon for staffing and managing the IP Relay service would result in competitive harm. Likewise, access to Verizon's raw performance data and evaluation of the specific challenges faced by Verizon (such as fraud and spikes in call volume) would place Verizon at severe competitive disadvantage.

Confidentiality also is requested because disclosure of such information and data would injure Verizon's competitive position. Responsiveness and overall service availability are key selling points for Verizon's IP Relay customers. Disclosing raw performance data could erode customers' confidence in the reliability of Verizon's service or lead them to change providers.

Confidentially is further warranted given Verizon's continued efforts to combat and minimize the fraudulent use of IP Relay service. Release of information as to the measures adopted to combat fraudulent behavior could potentially encourage and facilitate further misconduct on the part of individuals who are misusing the service.

(6) ***Identification of any measures taken by the submitting party to prevent unauthorized disclosure.*** Verizon has kept confidential and has not publicly disclosed Verizon's policies and procedures for managing its TRS centers, Verizon's raw performance data in meeting the Commission's minimum standards, or Verizon's quality control and analysis of the Verizon performance data. Consistent with 47 C.F.R. § 0.459(a), the documents for which confidentiality is requested (i) are being submitted as attachments to, and are covered by, this request, and (ii) will be physically separated from the request and submitted under seal.

(7) ***Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties.*** The information and data Verizon has redacted are not available to the public and have not been disclosed to third parties.

(8) ***Justification of the period during which the submitting party asserts that material should not be available for public disclosure.*** Given the sensitive nature of these documents for which confidentiality is requested and the prospect of serious competitive harm, Verizon requests that confidential treatment apply until such time as the documents are returned to Verizon at the conclusion of this inquiry.

For these reasons, Verizon requests that the Petition and supporting documents be treated as confidential under the Commission's rules and precedent and withheld in its entirety from public inspection. Moreover, distribution within the Commission should be limited to a "need to know" basis. In the event that any person or entity requests access to the documents or seeks to make any or all of them part of the public record, Verizon requests to be notified immediately so that it can oppose such request or take other action as necessary to safeguard its interests.

Respectfully submitted,

Sherry A. Ingram

REDACTED – FOR PUBLIC INSPECTION

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

In the Matter of	)	
	)	
Verizon Petition for Declaratory Ruling or, in	)	CC Docket No. 03-123
The Alternative, for Waiver of Section	)	
64.604(b)(2)(ii) of the Commission's Rules	)	

PETITION OF VERIZON FOR DECLARATORY RULING OR, IN THE ALTERNATIVE, FOR WAIVER

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July 31, 2006

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In the Matter of	)	
	)	
Verizon Petition for Declaratory Ruling or, in The Alternative, for Waiver of Section 64.604(b)(2)(ii) of the Commission's Rules	)))	CC Docket No. 03-123

PETITION OF VERIZON FOR DECLARATORY RULING OR, IN THE ALTERNATIVE, FOR WAIVER

In accordance with Commission precedent, Verizon[1] has complied substantially with the Commission's telecommunications relay service ("TRS") speed-of-answer rules, and the vast majority of instances when the observed speed of answer for an individual day varied from the benchmark demonstrably were due to fraud or other causes beyond Verizon's control. Nonetheless, on June 15, Commission staff officially informed Verizon for the first time that it might be compelled to repay compensation to the TRS fund for individual days on which the speed-of-answer benchmark was not met, potentially without regard to the cause and degree of the non-compliance.[2] By this Petition, Verizon seeks a declaratory ruling that the Commission lacks authority to impose such a retrospective penalty or, alternatively, a waiver for the days covered by the June 15 letter because Verizon substantially complied with the TRS rules in accordance with Commission precedent and observed variances from the speed-of-answer benchmark were due to fraud or other events beyond Verizon's control.

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[1] The Verizon companies participating in this filing ('Verizon') are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

[2] Letter from Monica Desai, Chief, Consumer & Governmental Affairs Bureau, FCC to Tiina Keder, Verizon, dated June 15, 2006, at 3-4 ("June 15 letter"). The letter stated that Verizon could file a waiver request within 45 days, so this petition is timely.

I. BACKGROUND

IP Relay is a form of TRS that was established in 2002. IP Relay allows individuals with hearing or speech disabilities to place and receive telephone calls using a computer instead of a traditional text telephone ("TTY") or similar device. *See Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 7779 (2002). IP Relay has become popular with individuals with hearing or speech disabilities and represents 32 percent of the total 2006 Interstate TRS Fund, *i.e.,* 6.5 million minutes in 2005 alone. *See Letter from Richard T. Ellis, Verizon, to Marlene H. Dortch,* CC Docket No. 03-123, at 7 (Feb. 17, 2006).

The Commission requires TRS providers to answer 85 percent of all IP Relay calls within ten seconds of a call being delivered to the provider's network. 47 C.F.R. § 64.604(b)(2)(ii). Verizon's performance against this benchmark has been excellent. From May 2005 through June 2006, Verizon answered 89.7 percent of all IP Relay calls within 10 seconds (significantly above the 85 percent benchmark), and since January 10, 2006, Verizon has met the speed-of-answer benchmark 100 percent of the time. Appendix A, Declaration of Ron Wood at ¶ 2 (July 31, 2006) ("*Wood Declaration*"). In fact, Verizon's average speed-of-answer during that time period was only 5.4 seconds, significantly less than 10-second benchmark. *Id.* at ¶ 3.

To the extent that the observed speed-of-answer did not meet the benchmark on certain days between May 2005 and early January 2006, the variance in almost every case was due to causes beyond Verizon's control. Most notably, [BEGIN PROPRIETARY] [redacted] [END PROPRIETARY] missed days were due to

fraudulent calls, which cause unpredictable spikes in call volumes (both within particular days and for entire days) and therefore make it difficult to staff effectively. Because these fraudulent calls often last longer than legitimate calls, they tie up staff resources and require additional time-consuming steps for communications assistants and their supervisors. Another [BEGIN PROPRIETARY] [END PROPRIETARY] of the missed days were due to either high call volumes (unrelated to fraud) that Verizon could not reasonably have anticipated or other events outside Verizon's control, including tornados, power outages, and fiber cuts – leaving only [BEGIN PROPRIETARY] [END PROPRIETARY] that Verizon may have missed for reasons that were not outside its control. *Id.* at ¶ 9.

Notwithstanding Verizon's high performance level, Commission staff sent Verizon a letter on June 15 indicating that Verizon might have to re-pay several million dollars for "monies paid where services may have been rendered in violation of the Commission's rules" – that is where the speed-of-answer benchmark was not met. June 15 letter at 3. The Commission lacks authority to impose such an automatic, retroactive penalty. The TRS regulations do not provide for such action, and until the June 15 letter, the Commission never has sought to compel retroactive repayment. To the contrary, since adoption of the speed-of-answer benchmark, providers have applied for reimbursement on a monthly basis and have received payment even when the benchmark was not met. During that entire period, the only agency statement applying the TRS service quality benchmarks – the *Publix* decision – indicated only that "substantial compliance" is required. Any effort to impose a penalty here would be contrary to this precedent and would violate prohibitions on applying new policies retroactively. Under

these circumstances, the Commission should grant a declaratory ruling that its rules do not impose an automatic penalty in the form of forfeiting compensation. Alternatively, the Commission should waive the speed-of-answer benchmark given Verizon's track record of strong performance and the fact that the overwhelming majority of missed days were due to factors outside Verizon's control.

II. THE EXISTING TRS REGULATIONS DO NOT AND COULD NOT IMPOSE AN AUTOMATIC PENALTY FOR OBSERVED VARIANCES FROM THE SPEED-OF-ANSWER BENCHMARK.

A. The Rules Expressly Provide that TRS Providers Must Be Reimbursed for their Costs and Nowhere Purport To Impose an Automatic Penalty in the Form of Forfeiting the Compensation that Is Owed Where the Observed Speed of Answer for an Individual Day Varies from the Benchmark.

The Commission's rules expressly state that TRS providers must be compensated "for reasonable costs of providing interstate TRS," based on a formula approved by the Commission. 47 C.F.R. § 64.604(c)(5)(iii)(E). That formula calculates a provider's reimbursement based on its "*total* monthly interstate TRS minutes of use," defined in the regulations as "minutes of use for completed interstate TRS calls placed through the TRS center beginning after call set-up and concluding after the last message call unit." *Id.* (emphasis added). In short, the TRS rules nowhere purport to provide for an automatic penalty whenever the observed speed-of-answer varies from the benchmark on any individual day.

Now, however, without the benefit of the process by which rules are developed, Verizon has been informed that it might be instructed to pay back compensation for past days on which the speed of answer was not met. The June 15 letter suggests that this new policy is based on language in the rules requiring that "the TRS Fund Administrator shall make payments only to eligible TRS providers operating pursuant to the mandatory

minimum standards . . . ." 47 C.F.R. § 64.604(c)(5)(iii)(E).[3] This provision cannot be used as a basis for compelling automatic repayment for days on which observed performance varies from the speed-of-answer benchmark.

First, reading the eligibility rule to require providers to forfeit compensation for variances from the speed-of-answer benchmark on individual days is untenable given the remainder of the rule and its context. The requirement that payments from the Fund are made "only to eligible TRS providers operating pursuant to the mandatory minimum standards" is aimed at ensuring that only certified TRS providers (i.e., the specific class of entities listed in § 64.605 of the Rules) receive payments from the Fund – not at automatically forcing certified TRS providers to repay compensation for days on which they miss the speed-of-answer benchmark. This language could mean that the Commission will consider performance in future certification applications, or could review performance and revoke certification for a provider that did not substantially comply with the technical rules (after providing notice and an opportunity to be heard), or could resolve complaints if a provider did not substantially comply. Nothing in the rules, however, expressly or implicitly creates an automatic penalty whenever a provider's performance departs from the daily benchmark. And nothing in this rule impinges upon the requirement that providers be compensated for total monthly minutes of use.

In fact, this very subparagraph of the rules forecloses such an interpretation because it expressly states that providers are to be reimbursed for "total monthly minutes of use," which are "defined as the minutes of use for completed interstate TRS calls

[3] *See* June 15 letter at 3 (citing *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 20 FCC Rcd 13165 ¶ 4 & n.14 (2005), which in turn cites the referenced rule).

placed through the TRS center beginning after call set-up and concluding after the last message call unit." Consistent with this standard, the payment regulations require a TRS provider seeking payment to report to the Fund administrator "total TRS minutes of use, total interstate TRS minutes of use, total TRS operating expenses and total TRS investment in general accordance with part 32 of the Communications Act [*sic*] ...." 47 C.F.R. § 64.604(c)(5)(iii)(C). In contrast, under the reading implied by the June 15 letter, the basis for reimbursement no longer would be "total monthly interstate TRS minutes of use," notwithstanding the clear terms of the TRS rules. Rather, a TRS provider could expect to be reimbursed only for total monthly interstate TRS minutes of use *minus* all or some undefined portion of those minutes that occurred on days when the provider's performance departed from the speed-of-answer benchmark. Such a result cannot be reconciled with the rules' plain terms.[4]

Moreover, withholding or compelling reimbursement of payment for a failure to meet the speed-of-answer benchmark would not compensate a provider for "reasonable costs of providing interstate TRS," and thus would violate the terms of the TRS regulations and the intent of Section 225. Even when a TRS provider fails to meet the speed-of-answer benchmark, it still incurs costs. This is particularly true where the failure to meet the speed-of-answer threshold results from spikes in call volumes or fraudulent calls that could not reasonably have been predicted. In both cases, the reasonable costs associated with TRS can be greater for a TRS provider than in

[4] The FCC has not explained how funds reimbursed by a provider would be disbursed. The Fund Administrator is permitted to disburse to itself payments "for reasonable expenses incurred by it in connection with TRS Fund administration." 47 C.F.R. § 64.404(c)(5)(iii)(E). There is no suggestion, however, what would be done with payments made by the Fund to a provider and then reimbursed.

circumstances where the provider does meet the speed-of-answer threshold but the number of calls and incidence of fraud are lower.

Second, the interpretation suggested in the June 15 letter is a glaring, unexplained departure from the Commission's pre-existing policy that "absolute compliance with the [TRS] rules may not always be necessary to fulfill the purposes of the statute and the policy objectives of the implementing rules, and that not every minor deviation would justify withholding funding from a legitimate TRS provider." *In re Publix Network Corp.*, 17 FCC Rcd. 11487 ¶ 19 (2002). In *Publix*, the FCC held that "a TRS provider is eligible for TRS Fund reimbursement if it has substantially complied" with the TRS service quality rules. *Id.* This measured approach finds support in Section 225 of the Act as well as in the TRS regulations. Section 225 requires a TRS provider to provide service "that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment . . . ." 47 U.S.C. § 225(a)(3). Consistent with this requirement, the FCC's Technical Standards for TRS facility staffing require a provider to "provide callers with efficient access *under projected calling volumes*. . . ." 47 C.F.R. § 64.604(b)(2)(i) (emphasis added). The Standards do not require a provider to staff to meet unanticipated spikes in volume or other stresses on the system. Accordingly, a provider cannot be considered to have failed to meet the speed-of-answer benchmark for periods during which call volumes exceeded reasonable projections.

Notably, the "substantial compliance" standard announced in *Publix* is consistent with the Commission's general practice in other situations where performance benchmarks are at issue. For example, in the Section 271 context the Commission has held that it will not normally find a provider to be in breach of its obligations where the

non-compliance is minor or infrequent: "[i]solated cases of performance disparity, especially when the margin of disparity or the number of instances measured is small, will generally not result in a finding of ... noncompliance." *Application of Verizon New York Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Connecticut*, 16 FCC Rcd 14147 ¶ 12 (2001) ("*New York 271 Order*"); *see also Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance),NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions),Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in New Jersey,* Memorandum Opinion and Order, 17 FCC Rcd 12275, ¶ 132 (2002) ("*New Jersey 271 Order*") ("we look for patterns of systemic performance disparities that have resulted in competitive harm or that have otherwise denied new entrants a meaningful opportunity to compete. Isolated cases of performance disparity ... generally will not result in finding of checklist noncompliance.").

In addition, the Commission has been willing to excuse performance that is below the relevant benchmark where the provider has shown improvement over time, as is certainly the case with respect to Verizon's satisfaction of the speed-of-answer benchmark. *See, e.g.*, *New Jersey 271 Order* ¶ 116 (declining to find non-compliance even though Verizon did not meet a specific performance measure because of improvement in performance in later months); *Application by Verizon New England Inc., Verizon Delaware Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To*

Provide In-Region, InterLATA Services in New Hampshire and Delaware, Memorandum Opinion and Order, 17 FCC Rcd 18660, ¶¶ 101, 102 (2002) (same). The Commission cannot reasonably interpret the existing TRS rule in a manner that ignores this precedent.

Third, the rule cannot reasonably be interpreted as imposing an automatic repayment penalty because it includes none of the details that are necessary to determine the scope and nature of such an obligation. For example, the rule does not indicate whether a failure to meet the speed-of-answer benchmark will be counted against the provider even when caused by events outside its control (such as fraud, volume levels that cannot reasonably be anticipated, and natural disasters). Nor does the rule state the time period over which performance is to be evaluated for purposes of determining whether a provider is in substantial compliance with the Commission's rules (*e.g.*, whether performance should be measured on an annual basis or on some other basis) or whether a remedy is warranted. Nor does it state whether a provider should be penalized even if the provider only misses the speed-of-answer benchmark on isolated occasions or by a small amount and generally provides service that meets or exceeds the Commission's requirements. And the rule is silent as to the level of the repayment penalty. By way of illustration, the rule gives no indication whether a provider whose speed of answer is only one percent (or five percent) below the required level should face the same repayment obligation as a provider that missed the benchmark by a wider margin. Nor does the rule state whether a provider should be forced to pay back all compensation for missed days, or only compensation for calls that were not answered in accordance with the benchmark. These are details that any rational repayment rule would have to take into account. The utter silence of the existing TRS regulations to address

these issues provides further compelling evidence that they cannot be read to impose a repayment obligation.

Fourth, in other settings where financial consequences result from non-compliant performance, the Commission typically excludes failures due to events beyond the provider's control, and it cannot rationally depart from that practice here. For example, in the Section 271 context,[5] the Commission has stated that it "may also find that the reported performance data are affected by factors beyond a BOC's control, a finding that would make it less likely to hold the BOC wholly accountable for the disparity."[6]

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[5] Likewise, in discussing the adoption of performance measures for unbundled network elements, the Commission sought comment on "an exceptions process ... to permit an incumbent LEC to explain or restate reported results to account for circumstances beyond its control." *Performance Measurements and Standards for Unbundled Elements and Interconnection*, Notice of Proposed Rulemaking, 16 FCC Rcd 20641 ¶ 32 (2001); *see also Amendment of Parts 2 and 25 to Implement the Global Mobile Personal Communications by Satellite (CMPCS) Memorandum of Understanding*, 18 FCC Rcd 24423 ¶ 87 (2003) ("Teledesic and Constellation objected to the proposal to hold licensed GMPCS service providers responsible for 'any and all proven infractions' because it could result in imposition of liability for actions beyond the control of service providers. ... We agree on these points."). The Bell Atlantic/GTE merger conditions also explicitly provided that "Bell Atlantic/GTE shall not be liable for voluntary payments to the U.S. Treasury if Bell Atlantic/ GTE's failure to provide parity or benchmark performance is attributable to an atypical event beyond the control of Bell Atlantic/GTE such as an Act of God, or a force majeure event." *GTE Corporation Transferor and Bell Atlantic Corporation, Transferee For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License,* Memorandum Opinion and Order, 15 FCC Rcd 14032 (2000). Similarly, the Commission's price cap rules provide that carriers are entitled to exogenous treatment for "costs that are triggered by administrative, legislative, or judicial action beyond the control of the carriers." See Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786,¶ 166 (1990); *1993 Annual Access Tariff Filings Phase 1*, Order Terminating Investigation, FCC 05-74, ¶ 27 (2005) (finding that Verizon's implementation of certain post-retirement benefits other than pensions (OPEBs) expenses "was beyond the carrier's control under the applicable exogenous price cap rules.").

[6] *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for*

Consistent with this precedent, the Commission has refused to hold BOCs liable where the observed results varied from the established benchmark due to factors outside their control. *See, e.g.*, *New York 271 Order* ¶¶ 165, 174, 181, 285-299 (BOC cannot be held responsible for non-performance resulting from actions by CLECs); *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts, CC Docket No. 01-9, Memorandum Opinion and Order, 16 FCC Rcd 8988*, ¶ 75) (2001) (same); *id.*, ¶ 195 (adjusting data to account for a strike and noting that performance as so adjusted met the relevant benchmark); *New Jersey 271 Order* ¶ 132 (excusing apparent non-compliance attributable to actions by CLECs). That precedent is directly on point here, where third-party fraud and calling volumes greater than can reasonably be anticipated underlie the overwhelming majority of days on which Verizon's observed performance was lower than the speed-of-answer benchmark.

B. The Commission Cannot Impose an Automatic Repayment Penalty In Any Event.

In addition to the fact that the TRS rules do not provide for an automatic penalty for observed performance that varies from the speed-of-answer benchmark, the Commission has no authority to impose such an automatic penalty in any event. The Act provides only two ways of holding carriers accountable for alleged violations of their obligations, and both require that the carrier's liability be proven before it may be held

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Authorization to Provide In-Region, InterLATA Services in Rhode Island, Memorandum Opinion and Order, 17 FCC Rcd 3300 (2002) at App. D; *Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in Arizona*, Memorandum Opinion and Order, 18 FCC Rcd 25504 (2003), at App. C

financially accountable. First, a customer may file a complaint under Section 208, and if it proves that the carrier has acted unlawfully, it may recover "the full amount of damages sustained in consequences of any such violation." 47 U.S.C. § 206. Second, the Commission may impose forfeitures against a carrier under Section 503, which are paid to the United States Treasury pursuant to Section 504.

Both Section 208 and Section 503 contain important procedural safeguards. Under Section 208, the complainant bears the burden both of proving liability and of establishing the amount of damages that it suffered. Under Section 503, the Commission must issue a notice of apparent liability; the notice must be received; the entity against which the notice has been issued must have an opportunity to show why no penalty should be imposed, *id.* § 503(b)(4); and the Commission must find by a preponderance of the evidence that the entity has violated the Act or a Commission rule. *SBC Communications, Inc, Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, 16 FCC Rcd 19091, ¶ 41 (October 16, 2001).

As the Commission has recognized, the Section 503 procedures are designed to assure that constitutional due process requirements are satisfied. *See Application for Review of Stephen Paul Dunifer*, 11 FCC Rcd 718, 729 (1995) (finding that "Sections 503 and 504 of the Communications Act provide safeguards which satisfy due process requirements. Specifically, the Notice of Apparent Liability (NAL) must specify the rules that are alleged to be violated, the facts upon which the charge against the violator is based, and the date upon which the alleged violation occurred. Additionally, the party is given an opportunity to respond to the NAL and to have a trial de novo."); *see also In re Jerry Szoka Cleveland, Ohio Order to Show Cause Why A Cease and Desist Order*

Should Not Be Issued, 14 FCC Rcd 9857, 9863 (1999). Any automatic penalty would transgress these requirements, first, by presuming that failure to meet the speed-of-answer benchmark is tantamount to violation of a statutory obligation, and second, by establishing an automatic level of damages or forfeitures, without regard to the seriousness of the performance lapse.

C. Because the Existing Rules Do Not Put Providers on Notice That They Might Be Required To Reimburse Payments, the Commission Cannot Use Those Rules To Mandate Retroactive Reimbursement.

The Commission cannot seek retroactive reimbursement from TRS providers for days on which providers' observed performance was lower than the speed-of-answer benchmark because the TRS rules afford providers no notice that they might face such an obligation. As the D.C. Circuit has long recognized, "[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without providing adequate notice of the substance of the rule." *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987). Due process requires that, before an agency can impose financial consequences for past conduct, the affected parties must be on notice such consequences were possible.[7]

The source for such notice is typically the regulations administered by an agency. When the agency's interpretation of its own regulations is not "ascertainably certain,"

[7] The Commission has further explained that "[i]t is hornbook law that "where [a] regulation is not sufficiently clear to warn a party about what is expected of it - an agency may not deprive a party of property by imposing civil or criminal liability." *SBC Communications, Inc. Apparent Liability for Forfeiture*, Forfeiture Order, 17 FCC Rcd 19928, ¶ 5 (2002); *see also ALLTEL Corp. Petition for Waiver of Section 61.41 of the Commission's Rules and Applications for Transfer of Control,* Memorandum Opinion and Order,14 FCC Rcd 14191 (1999) (Separate Statement of Commissioner Harold Furchtgott-Roth) ("No person should be penalized for violating a rule that is either so vague as to give no clear indication of the prescribed conduct, or entirely unpublished and thus unavailable to the public, residing only in the minds of regulators.").

General Electric Co. v. United States Env. Prot. Agency, 53 F.3d 1324, 1330 (D.C. Cir. 1995), the new interpretation cannot form the basis for retroactive penalties. *See id.* (deferring to the EPA's interpretation of its regulations but holding that the EPA could not fine a private party for failing to comply with a rule interpretation that was "so far from a reasonable person's understanding of the regulations that [the regulations] could not have fairly informed GE of the agency's perspective."); *see also Trinity Broadcasting of Fla. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2001) ("We thus ask whether by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform.") (internal quotation marks omitted).

For the reasons discussed above, it is not "ascertainably certain" that the existing speed-of-answer rule subjects providers to repayment obligations for days on which they miss the speed of answer benchmark. To the contrary, the FCC's decision to *begin* withholding and seeking reimbursement pursuant to a letter-perfect compliance standard is based on an unforeseeable interpretation of 47 C.F.R. § 64.604(c)(5)(iii)(E). Since the inception of IP Relay service, providers have been reimbursed based on their total interstate monthly minutes of use and have not had to forfeit payments for days on which the speed-to-answer benchmark was not met. Accordingly, TRS providers have not had prior notice of the FCC's intent to so read the regulations, and the FCC's course of conduct demonstrates its previous unwillingness to do so. Consequently, any effort to compel reimbursement of past payments to providers would be unlawful.

D. The Commission Cannot Adopt and Retroactively Apply a New Policy Withholding Payment for Days on Which Observed Performance Is Below the Speed-of-Answer Benchmark.

A related line of cases bars the Commission from ignoring the existing rule, announcing a new policy of applying an automatic penalty in the form of withholding of payment, and then applying that new policy retroactively. As the D.C. Circuit has cautioned, "when there is a substitution of new law for old law that was reasonably clear, the new rule may justifiably be given prospective-only effect in order to protect the settled expectations of those who had relied on the preexisting rule." *Pub. Serv. Co. of Colo. v. FERC*, 800 F.2d 1147, 1152 (internal quotations and citations omitted). And even where an agency applies an existing rule to new factual situations, "retroactivity will be denied when to apply the new rule to past conduct or to prior events would work a manifest injustice." *Verizon Tel. Cos. v. FCC*, 260 F.3d 1098, 1109 (D.C. Cir. 2001) (internal quotations and citations omitted).

The D.C. Circuit has developed a series of equitable considerations in determining whether to apply new policies retroactively. *See id.* ("[T]here is a robust doctrinal mechanism for alleviating the hardships that may befall regulated parties who rely on 'quasi-judicial' determinations that are altered by subsequent agency action."). These equitable considerations weigh heavily in favor of barring the Commission from seeking to apply any new withholding-of-payment policy retroactively.

In particular, the D.C. Circuit, taking its lead from the Supreme Court's concern about the potential "ill effects" of retroactive application of policies announced in an agency's adjudicatory proceeding, *Chenery II*, 323 U.S. at 203, generally has applied a

five-factor balancing test for determining whether retroactive application of a new policy is appropriate.[8] The analysis considers the following:

> (1) Whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Retail, Wholesale and Dep't Store Union, AFL-CIO v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972) (hereinafter *Retail*). Resolution of this inquiry is a matter of law and the courts will give no deference to an agency's decision to impose a new policy retroactively. *Id.* (citing *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141 (9th Cir. 1952)). This inquiry strongly indicates that, if the Commission announces a new policy under which it will withhold payment from TRS providers for days on which the speed-of-answer benchmark was not met, that policy cannot be applied retroactively.

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[8] The D.C. Circuit has, in at least one case, substituted the five factor test developed in *Retail* for the standard for judicial retroactivity set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). *Dist. Lodge 94 Int'l Ass'n of Machinists and Aerospace Workers v. NLRB*, 949 F.2d 44, 447 (D.C. Cir. 1991) (noting that "[the *Retail*] test appears substantively indistinguishable from the standard for judicial retroactivity set forth in [*Chevron Oil*]" and applying the *Chevron Oil* test "for simplicity's sake"); *see also Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (while noting the *Retail* standard, finding it unnecessary "to plow laboriously through the [*Retail*] factors here. As we said in that case, the test's factors 'boil down . . . to a question of concerns grounded in notions of equity and fairness.'") (*quoting Clark-Cowlitz*, 826 F.2d at 1082 n.6). The court has continued, however, to rely primarily on the *Retail* standard as the basic test for whether policies developed in agency adjudications may be retroactively applied. *See, e.g., Heartland Regional Medical Center v. Leavitt*, 415 F.3d 24, 31 (D.C. Cir. 2005) ("Our cases establish a five-factor framework for evaluating retroactive application of rules announced in agency adjudications.") (internal quotation marks omitted).

First, the speed-of-answer benchmark has been in place for several years, and TRS providers consistently have been paid by the TRS Fund for days on which observed performance varied from the benchmark. (internal quotation and citation omitted). The FCC is *not* faced with new facts or a novel issue to which it must apply its existing rules for the first time. *Cf. Verizon*, 269 F.3d at 1109 ("In cases in which there are new applications of existing law, clarifications, and additions, the courts start with a presumption in favor of retroactivity"). Rather, the FCC simply intends to substitute a new policy for an existing practice. *See Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993) ("From our experience in applying the various versions of the *Retail Union* test, there has emerged '[a] basic distinction . . . between (1) new applications of law, clarifications, and additions, and (2) substitution of new law for old law that was reasonably clear.'") (quoting *Aliceville Hydro Assocs. v. FERC*, 800 F.2d 1147, 1152 (D.C. Cir. 1986)).[9]

As to the second factor, there is no doubt that "the new rule represents an abrupt departure from well established practice." *Retail*, 466 F.2d at 390; *see also Williams*, 3 F.3d at 1554 ("[W]e have repeatedly held that retroactivity is appropriate when the agency's ruling represents a new policy for a new situation, *rather than being a departure from a clear prior policy*.") (internal quotations omitted) (emphasis added). The practice of issuing complete payments to TRS providers even for days on which the speed-of-answer benchmark was not met is certainly well-established.

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[9] There are no opposing parties "whose efforts may have helped bring about the change." *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082 (D.C. Cir. 1987) (en banc). The decision to penalize TRS providers retroactively is driven by the FCC. It can hardly be said that the FCC needs an incentive to "to advance new theories or challenge outworn doctrines." *Id.*

Third, TRS providers unquestionably have relied on the current practice, so the effort to recoup payments would be highly inequitable. *Compare Pub. Svc. Co. of Col. v. FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996) (in determining retroactivity of FERC order, "the apparent lack of detrimental reliance on the part of the producers is the crucial point"). Month after month, TRS providers have reported their results at meeting the speed-of-answer benchmark, and month after month, TRS providers have received TRS Fund payments. Their reliance on the existing substantial compliance standard is demonstrated by the fact that TRS providers have staffed their operations sufficiently to handle anticipated call volumes, rather than overstaffing in order to minimize any risk of falling below the speed-of-answer benchmark. Now, in contrast, the June 15 letter raises that possibility that providers might have to disgorge a significant portion of those payments – possibly up to an entire day's compensation for IP Relay services – even in cases where their observed performance missed the speed-of-answer benchmark by only a small margin.[10] Not only would such treatment be inequitable, but it would create inefficient incentives for providers to over-staff in order to avoid any prospect of a penalty. Doing so inevitably would lead to much higher costs for providing IP and video relay service and thus would threaten the long-term viability of these valuable offerings.

Fourth, imposing retroactive penalties on TRS providers, particularly in the face of extenuating circumstances or where performance materially complied with the benchmark, would impose a substantial burden on providers and could expose them to

[10] Similarly harsh results would occur if the new policy were extended to other TRS quality benchmarks. For example, a TRS provider is expected to maintain Communications Assistants capable of typing sixty words per minute. 47 C.F.R. § 64.604(a)(1)(iii). It would be unreasonable for a TRS provider to be docked for days on which a Communications Assistant can manage only fifty-eight words per minute.

massive financial liability. This is in contrast to *Local 900, Int'l Union of Elec., Radio and Mach. Workers, AFL-CIO v. NLRB*, 727 F.2d 1184, 1195 (D.C. Cir. 1984), where the court approved retroactive application of an NLRB order where penalties were involved in part because the penalties were not significant. *See also NLRB. v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) (noting that an adjudicatory proceeding, and thus retroactive application of a new rule, was appropriate in part because "fines and damages were not involved.").

Finally, the substantial burden that would be imposed on TRS providers would not be outweighed by any significant gain in promoting the statutory interest in the efficient and reliable delivery of TRS services to the public. There is no evidence that TRS providers have sought to flout the speed-of-answer benchmark or have sought to provide sub-par service. To the contrary, TRS providers have offered, and will continue to offer, high-quality services aimed at meeting and exceeding the benchmarks set forth by Congress and the Commission. Certainly, there is no evidence that assessing substantial penalties for past conduct is necessary to create incentives to improve future service.

E. The Commission's E-Rate Precedent Does Not Compel a Repayment Penalty for Observed Departures from the TRS Speed-of-Answer Benchmark.

As explained above, the Commission lacks authority under the TRS rules and the Communications Act to force TRS providers to disgorge all or a portion of payments for days on which their observed performance was below the speed-of-answer benchmark. Nor is there any other source of authority for such an automatic penalty scheme. In particular, the agency's E-rate precedent, where the Commission concluded that the Debt Collection Improvement Act requires it to seek reimbursement of federal funds paid to

service providers in violation of law, is inapplicable here because sporadic misses of the speed-of-answer benchmark cannot be presumed to amount to a statutory violation.

In particular, the Commission's *COMAD Adjustment Order* – the seminal E-rate debt collection case – stands only for the unremarkable proposition that the Commission must seek to recover funds that were disbursed in violation of a federal statute. *See Changes to the Board of Directors of the Nat. Exchange Carriers Ass'n, Inc.; Federal-State Joint Board on Universal Service*, Order, 18 FCC Rcd 27090 (Oct. 8, 1999) ("*COMAD Adjustment Order*"). The Commission there explained that Supreme Court precedent "prohibits the disbursement of funds without statutory authorization," *id.* ¶ 7, and that, in violation of Section 254 of the Act, universal service funds had been paid to (1) providers of ineligible services, and (2) entities that provided telecommunications services even though they were not telecommunications carriers. *Id.* ¶¶ 4-5.[11] Because funds had been disbursed for unauthorized services and service providers, the Commission determined that it was required by Section 1.1911 of its rules (which implements the Debt Collection Improvement Act, 31 U.S.C. § 3701 *et seq.*) to seek repayment of those funds.

Here, in contrast, the disbursement of TRS funds to providers whose performance varied from the speed-of-answer benchmark on particular days does not amount to a payment without statutory authorization, for all the reasons discussed above. Neither the

[11] In so holding, the Commission reasoned that the provision of funds to providers of ineligible services violated Section 254(h)(1)(B) of the Act, which directs that funds be provided only for services included within the definition of "universal service" and instructs the Commission to define that term pursuant to specific statutory criteria. *Id.* ¶ 4 (citing 47 U.S.C. § 254(h)(2)(A)). Likewise, the Commission noted that Section 254(h)(1)(B) states that telecommunications services provided at discounted rates to schools and libraries shall be provided by telecommunications carriers.