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plain language of the TRS rules nor the Commission's practice in administering those regulations nor the Communications Act itself supports an interpretation that any and all departures from the speed-of-answer benchmark must give rise to repayment of funding. To the contrary, the explicit provisions, context, and administrative history of the TRS rules confirm that providers are expected to be in substantial compliance with the rules. As long as that standard is met, there is no statutory violation (nor any violation of substantive rules implementing the statute), and thus no basis for seeking reimbursement.

The E-rate precedent is instructive, however, in two critical respects. First, even in the E-rate context, there is no automatic repayment penalty; rather, USAC issues a commitment adjustment notice, which the provider can appeal either to the Board of Directors of USAC or to the Commission. *See* 47 C.F.R. § 54.719. Accordingly, there is no automatic imposition of a repayment penalty and the provider has a full opportunity to show that no violation occurred.

Second, concurrent with the *COMAD Adjustment Order*, the Commission separately waived certain of its procedural E-rate rules – which otherwise would have required providers to repay funding – in part because the funding commitment letters “did not expressly state that USAC or the Commission may seek adjustment of the commitments after an applicant’s receipt of the funding commitment.” Although the commitment letters did state that the recipient “may be audited ... to ensure that you are abiding by all of the relevant regulations,” the Commission explained that “[t]his statement suggests that compliance with all regulations is a condition for receipt of a discount funding commitment, but may have left some applicants without sufficient notice as to possible adjustment of their funding commitments should program violations

be discovered after their receipt of funding commitments or subsequent disbursement.” *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Order*, 15 FCC Rcd 7197, ¶ 7 (1999) (“*USF Waiver Order*”). That is precisely the situation here: TRS providers were not on notice that they might be required to repay amounts received for days on which their speed of answer varied from the benchmark. Consequently, as discussed further in Section III below, waiver of the speed-of-answer benchmark for those days is “appropriate and in the public interest.” *Id.* ¶ 13.

* * *

For the foregoing reasons, the Commission should issue a declaratory ruling stating that the current TRS rules do not impose retroactive, automatic penalties for individual days where the observed speed of answer departed from the benchmark.

III. THE COMMISSION SHOULD WAIVE ANY REPAYMENT OBLIGATION ON THE FACTS PRESENTED HERE.

Even if the Commission could compel IP Relay providers to repay compensation that they received from the TRS Fund for days on which their observed performance departed from the speed-of-answer benchmark, it should waive any repayment obligation with respect to Verizon. The Commission is authorized to waive its rules “for good cause shown.” 47 C.F.R. § 1.3. In evaluating waiver requests, the Commission may take into account hardship, equitable considerations, and effective implementation of overall policy. *See Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). Moreover, waiver of the Commission’s rules is warranted where “strict compliance [with the FCC’s rules would be] inconsistent with the public interest.” *Id.*

Waiver of the speed-of-answer benchmark is warranted under these standards. The lack of notice that the Commission would require strict adherence to the speed-of-

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answer benchmark renders it grossly inequitable to compel repayment of millions of dollars where a provider such as Verizon has substantially complied with the rules. See *USF Waiver Order*. Moreover, the vast majority of the [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] days on which Verizon missed the speed-of-answer benchmark were due to causes outside the company's control, most notably fraud [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] unanticipated spikes in call volumes in addition to those caused by fraud alone [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] and other factors outside Verizon's control, such as tornados, power outages, and fiber cuts by an outside contractor ([BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] including ([BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] that also involved unexpectedly high call volumes). *Wood Declaration* at ¶¶ 5-8. These circumstances constitute the requisite "good cause" to waive the speed-of-answer benchmark for all of the days on which Verizon's observed performance was lower than the benchmark.

A. Waiver Is Justified Because Verizon Has Substantially Complied with the Speed-of-Answer Benchmark.

As one of the largest providers of IP Relay service, Verizon handles tens of thousands of calls each week through five call centers. Verizon also has been an innovator in the field, developing the first wireless IP Relay application, which allows individuals with speech or hearing disabilities true mobility by permitting telecommunications access on wireless devices. As such, Verizon is committed to ensuring that IP Relay service provides individuals with hearing or speech disabilities the best possible service. Overall service quality is also critical to Verizon's ability to succeed in the marketplace for IP Relay services, in which six providers vigorously

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complete. Not surprisingly, therefore, Verizon has complied substantially with the speed-of-answer benchmark, answering almost 90 percent of all calls within 10 seconds between May 2005 and June 2006, with an average time-to-answer of only 5.4 seconds, and meeting the speed-of-answer benchmark every day since January 10, 2006. *Wood Declaration* at ¶ 3.

Verizon also fully understands the importance of satisfying the speed-of-answer benchmark and has worked closely with other service providers and representatives of the disability community to develop proposed prospective remedies to address legitimate violations. The consensus proposal was presented to Commission staff on June 27. Notably, the proposal includes a sliding penalty scale so that penalties increase substantially based on the extent to which the speed-of-answer benchmark was missed, excludes misses caused by significant increases in call volumes, which in many cases are attributable to fraudulent calls, and assures that smaller providers are treated equitably by basing penalties on a percentage of revenues rather than a flat amount. The Commission is considering the consensus proposal and possible mechanisms for its implementation.

Against this background, waiver of the speed-of-answer benchmark for all of the days since May 2005 when Verizon's observed performance was below the benchmark is in the public interest. Verizon has complied substantially with the relevant benchmark (in accordance with the *Publix* decision discussed in section II above) and has shown its commitment to the TRS program through its performance and through its work in developing the consensus remedy program. Indeed, waiver is particularly warranted here because Verizon and other IP Relay providers were never placed on notice that the Commission might seek to impose penalties for days on which the speed-of-answer

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benchmark was missed, Relying on the “substantial compliance” standard announced in *Publix* and the requirement to provide “efficient access under projected calling volumes,” 47 C.F.R. § 64.604(b)(2)(i), Verizon has staffed its call centers at a reasonable level rather than over-staffing to accommodate any conceivable eventuality. Such overstaffing would have been directly contrary to the public interest because the expenses associated with TRS services, including IP Relay, are paid by all telecommunications users through an assessment on all interstate telecommunications services. *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Rcd 12475 ¶ 178 (2004) (IP Relay’s per-minute compensation rate is set to “cover the reasonable costs incurred in providing the TRS services mandated by Congress and our regulations”).

B. Waiver Is Further Justified Because Circumstances Beyond Verizon’s Control Caused the Vast Majority of the Missed Days.

As explained above, the Commission has recognized in a variety of contexts that service providers should not be penalized where their departure from a particular performance benchmark results from causes outside their control. In the speed-of-answer context, two types of causes beyond Verizon’s control underlie the vast majority of days on which Verizon’s observed performance was less than the speed-of-answer benchmark: fraudulent calls and unanticipated spikes in call volumes (whether or not due to fraud). Together, these causes account for [BEGIN PROPRIETARY] [REDACTED] END PROPRIETARY] of the [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] days missed since May 2005. *Wood Declaration* at ¶¶ 5-7. Other causes outside Verizon’s control account for [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] of the

remaining missed days, including [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] that also involved unexpectedly high call volumes.¹² The Commission should grant waivers for all [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] of the days on which such *force majeure* events prevented compliance with the speed-of-answer benchmark, and it should waive the remaining [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] days in light of the Commission's longstanding recognition that isolated performance disparities should not be held against a service provider in the face of substantial compliance, particularly where – as here – performance has improved over time.

1. The Commission Should Grant a Waiver for Days When the Speed-of-Answer Benchmark Was Missed Due to Fraud.

When calculating whether Verizon has complied with the speed-of-answer benchmark for any individual day, fraud-related calls should be excluded because of the difficulty providers face in handling these calls and because limiting the speed-of-answer calculation to legitimate IP Relay calls provides a more accurate measure of whether IP Relay users are receiving functional equivalency on any particular day. *See* 47 U.S.C. § 225(a)(3).

As the Commission recognized two years ago, IP Relay has become a popular target of criminals seeking to purchase goods through stolen and fake credit card numbers. *See* Public Notice, *FCC Reminds Public of Requirements Regarding Internet*

¹² [BEGIN PROPRIETARY] [REDACTED]

[END PROPRIETARY] *See Wood Declaration* at ¶ 8.

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Relay Service and Issues Alert, DA 04-1738 (June 18, 2004). The fraudulent misuse of IP Relay services affects Verizon's ability to meet the Commission's speed-of-answer benchmark in several ways.¹³ First, the widespread misuse of IP Relay services results in unpredictable spikes in call volumes, which substantially exceed reasonable call volume projections and make it difficult to staff to meet the daily speed-of-answer benchmark. The unpredictability of fraudulent IP Relay calls reflects the intentional efforts by fraudulent callers to vary their calling patterns to avoid detection. These shifts in call patterns inhibit traffic projections and undermine efforts to provide appropriate staffing levels.

Second, even when fraudulent calls do not increase overall call volumes above expected levels, they often are concentrated in short bursts within a few hours of each day, straining available staff resources. An unpredictable increase in call volumes for only a few intervals (half hours) during a day, and a corresponding decrease in answering speed during that time, can effectively foreclose a provider's ability to meet the speed-of-answer benchmark for the entire day.¹⁴

Third, fraud calls can last far longer than legitimate IP Relay calls, tying up staff resources. In fact, while the average legitimate IP Relay call lasts for five minutes or so, fraud calls often last for an hour or even longer, and on rare occasions one fraud call can occupy the equivalent of one communications attendant's entire shift or more. This is so

¹³ See Comments of Verizon, CC Docket No. 03-123 (July 3, 2006); *see also* *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities: Misuse of Internet Protocol (IP) Relay Service And Video Relay Service*, Further Notice of Proposed Rulemaking, FCC 06-58 (May 8, 2006).

¹⁴ *See also* Section III.B.2 *infra* (explaining that unanticipated volumes within a few half-hour intervals during a day can cause a miss of the speed-of-answer standard even if overall daily call volumes are within expectations).

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because fraudulent callers often instruct the attendant handling the call to try a series of numbers in a row.

Fourth, as the Commission has recognized, TRS providers like Verizon have been forced “to develop methods to determine which IP Relay calls are fraudulent.” *Id.* Although these procedures were implemented to protect users of IP Relay services, and they have succeeded in “prevent[ing] many of these [fraud-related] calls from reaching the intended victims,” they have not come without costs. *Id.* They require additional time-consuming steps for communications assistants, as well as supervisor involvement. Depending upon the level of fraud on any particular day, application of these safeguards means that there may be fewer communications assistants available to respond to legitimate IP Relay customer calls, which can dramatically affect Verizon’s daily speed-of-answer performance.

All told, the impact of fraudulent calls accounted for [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] of the [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] days that Verizon missed the speed-of-answer requirement. *Wood Declaration* at ¶ 5. When these fraud-related calls are excluded from the speed-of-answer calculation for those days, Verizon met or exceeded the speed-of-answer benchmark. *Id.* Given the difficulty Verizon faced in detecting and preventing fraudulent use of its IP Relay services during the time period at issue, excluding fraud-related calls when calculating compliance with the speed-of-answer benchmark is in the public interest, and waiver of the Commission’s speed-of-answer benchmark for the affected days is warranted.

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2. The Commission Should Waive the Speed-of-Answer Benchmark for Days on Which Call Volumes Were Greater than Reasonably Anticipated Levels.

Consistent with the Commission's requirement that carriers "account for the wide daily fluctuations in traffic loads," see *Improved TRS Order*, ¶ 63, Verizon examines and studies IP Relay traffic and minute data on a weekly, monthly, and quarterly basis to anticipate daily and hourly call volumes.⁴ Verizon uses these data to develop historical 8-week averages each day of the week that are then used to project call volumes for a given day. *Wood Declaration* ¶ 6. Verizon's forecasting also includes real-time daily modifications based on actual call volumes. Verizon uses this information to ensure that staffing is adequate to satisfy the Commission's service quality requirements, including the speed-of-answer benchmark. In particular, Verizon's staffing provides for a modest buffer over expected call volume to protect against unexpected increases in daily IP Relay usage.

Despite these efforts, call volumes – either for a day in its entirety or for a particular period within the day – may exceed Verizon's reasonable projections. On [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] of the [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] missed, Verizon experienced overall call volumes at least [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] percent greater than its reasonable estimates. *Wood Declaration* at ¶ 6. On [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] of those days, the unanticipated call volume occurred on days not included in the fraud calculation above. *Id.*

Similarly, on [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] of the [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] at least [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] percent of the half-hour intervals during

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the day experienced call volumes exceeding [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] percent of forecast levels. *Id.* at ¶ 7. On [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] of those days, the unexpectedly high call volumes during portions of the day caused Verizon to miss the speed-of-answer benchmark even though the total call volume for the day was within expectations. *Id.* at ¶ 7. These days were also not reflected in the fraud calculations. *Id.* Accordingly, for [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] of the [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] unreasonably high call volumes alone directly caused the observed departure from the speed-of-answer benchmark. *Id.* at ¶¶ 6-7.

The Commission should grant a waiver of the speed-of-answer benchmark for those days because requiring strict compliance even in the face of unanticipated volume levels would force providers to over-staff, significantly increasing the size of the TRS fund and resulting in higher costs being passed through to consumers. While such over-staffing might facilitate compliance with the speed-of-answer benchmark on exceptional days, most of the time the extra attendants would be idle or under-utilized, decreasing morale and wasting consumers' money. The rules should not be applied to mandate such a result.

3. **The Commission Should Waive the Speed-of-Answer Benchmark for the Few Remaining Days As Well.**

As discussed above, fraud and unexpectedly high call volumes account for the vast majority of days on which Verizon's observed performance was below the speed-of-answer benchmark. Of the remaining [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] days, [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] were due to other causes outside Verizon's control: a tornado, a fiber cut, and a power outage.

(As noted above, one of those days also experienced unanticipated call volumes.) Under the precedent discussed in Section II.A above, waiver of the speed-of-answer benchmark plainly is warranted for those days.

This leaves only [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] days on which Verizon's observed variance from the speed-of-answer benchmark was not caused by events outside Verizon's control. As explained in Section II.A, the Commission's precedent has long recognized that providers should be excused from isolated instances performance lapses, particularly where overall performance is good and the provider's performance has improved over time. *See, e.g., Publix* ¶ 19 ("not every minor deviation would justify withholding funding from a legitimate TRS provider"); *New Jersey 271 Order* ¶ 132 ("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"); ¶ 116 (declining to find non-compliance even though Verizon did not meet a specific performance measure because of improvement in performance in later months). Consistent with this precedent, the Commission should waive the speed-of-answer benchmark for these few remaining days.

IV. CONCLUSION

For the foregoing reasons, the Commission should issue a declaratory ruling recognizing that the TRS rules do not impose retroactive, automatic penalties for individual days on which the observed speed of answer varies from the benchmark. In the alternative, the Commission should waive the benchmark for the days during the time

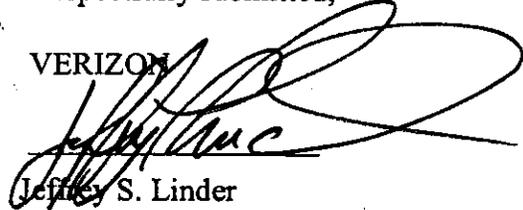
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period covered by the June 15 letter on which Verizon's observed performance was lower than the benchmark.

Respectfully submitted,

VERIZON

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July 31, 2006

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DECLARATION OF RON WOOD

1. My name is Ron Wood. My business address is 102 Sergeant Square Drive, Sergeant Bluff, Iowa 51054. I have worked for Verizon (or a predecessor company) for 19 years. My current title is Director, and my primary responsibilities include the day-to-day management of Verizon's TRS operations, including the operation of the Internet Protocol (IP) Relay service. In this capacity, I have information and knowledge relating to the data described in this Declaration.

2. The purpose of this Declaration is to provide greater detail about Verizon's speed-of-answer performance for IP Relay services from March 2005 to the present. The speed-of-answer benchmark provides that 85 percent of IP Relay calls each day must be answered within 10 seconds. From May 2005 through June 2006, Verizon's performance has been excellent: Verizon has answered 89.7 percent of all IP Relay calls within 10 seconds (significantly above the 85 percent benchmark), and since January 10, 2006, Verizon met the speed-of-answer benchmark each and every day.

3. Despite our best efforts, Verizon speed-of-answer performance was lower than the benchmark for [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] individual days between May 1, 2005 and January 9, 2006.¹ Nonetheless, during this time, Verizon substantially complied with this benchmark. In fact, the average speed of answer during that time period was 5.4 seconds, considerably less than the 10-second benchmark.

¹ The Commission letter identified [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] days during the relevant time period based on information that Verizon had provided to the Bureau. Verizon subsequently determined that an additional [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] days were lower than the speed-of-answer benchmark because of a rounding error, and it informed the Bureau of this fact.

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4. For the [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] in question, I have reviewed Verizon's TRS databases to ascertain why our performance was below the speed-of-answer benchmark for each day, and have grouped the days to reflect the primary reason that Verizon's performance did not meet the Commission's target. It should be noted that a specific day may fit within multiple categories.

5. Fraud. Starting in February 2005, Verizon began to monitor the fraudulent use of IP Relay to protect against the misuse of IP Relay for fraudulent and/or criminal purposes. See, e.g., Comments of Verizon, CC Docket No. 03-123 (July 3, 2006). Verizon has also implemented means by which to track fraud-related calls for diagnostic purposes to evaluate the effectiveness of Verizon's fraud safeguards. I used these data to isolate the fraud-related calls made on each of the [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] on which Verizon was below the speed-of-answer benchmark. I then excluded each of the fraud-related calls from the day's overall call volume and determined a new speed-of-answer limited to the legitimate IP Relay calls for each day. As a result, I found that Verizon met or exceeded the speed-of-answer benchmark for legitimate IP Relay calls on [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] of the [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] missed days. Those specific days are listed in Attachment 1.

6. Daily Call Volume Spike. I also compared Verizon's daily actual call volumes with projected call volumes for that day. Verizon maintains detailed call forecasts for each day, which are used primarily for staffing purposes to ensure sufficient communications assistants are available in each call center. Verizon's current staffing protocol incorporates a buffer over expected call volume to protect against unexpected increases in

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daily IP Relay usage. Such forecasting requires an evaluation of a base set of data for each day of week. A minimum of 8 weeks is typically used to build the base forecasting models for inbound call centers. These historical data are then verified on a weekly basis and the new data are averaged into the forecast, creating an adjusted or new forecast. Historical data are maintained for months, days of week, and intervals (that is half-hour segments within each day). The daily and weekly forecasts can also be adjusted manually to compensate for other events and expectations, such as historical patterns and marketing activities. For each day, I determined the percentage by which actual call volumes exceeded projected calls volumes. I found that the actual call volumes exceeded projected call volumes by [BEGIN PROPRIETARY] [END PROPRIETARY] percent or greater for [BEGIN PROPRIETARY] [END PROPRIETARY] of the [BEGIN PROPRIETARY] [END PROPRIETARY]. Those specific days are listed in Attachment 2. In many of these days, the fraudulent misuse of IP Relay contributed to the increased call volume. However, on [BEGIN PROPRIETARY] [END PROPRIETARY] of these days, Verizon experienced unanticipated call volumes on days that do not fit within the fraud category above.

7. Inter-Day Call Volume Spikes. In addition to a comparison of actual daily call volumes to projected daily call volumes, I examined call volumes during the [BEGIN PROPRIETARY] [END PROPRIETARY] on a more granular, half-hour basis compared to forecasted levels. A sharp increase in call volumes over a short period – and corresponding increase in call answer time – often has a substantial impact on daily speed-of-answer performance. There is some degree of variability on all days, and Verizon staffs its IP Relay centers to respond to intermittent call spikes, including the re-

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forecasting within individual days to reflect actual call volumes and patterns. Such reasonable efforts are not as effective in those limited instances in which call volumes far exceed projected volumes. Again, fraudulent misuse of IP Relay is often the primary cause of such call volume spikes. In all, for [BEGIN PROPRIETARY] [END PROPRIETARY] out of the [BEGIN PROPRIETARY] [END PROPRIETARY] over [BEGIN PROPRIETARY] [END PROPRIETARY] or more of the day's half-hour intervals exceeded projected call volumes by over [BEGIN PROPRIETARY] [END PROPRIETARY] percent. Those specific days are listed in Attachment 3. Notably, on [BEGIN PROPRIETARY] [END PROPRIETARY] of these days, the spike in call volumes occurred on days that do not fit within the fraud category above. In addition, on [BEGIN PROPRIETARY] [END PROPRIETARY] of those [BEGIN PROPRIETARY] [END PROPRIETARY] days, there was also not a spike in daily call volumes.

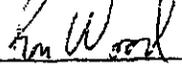
8. Other Events Out of Verizon's Control. Lastly, I examined Verizon's performance on three specific days in which IP Relay call centers were affected adversely by circumstances beyond Verizon's control. Specifically, Verizon's speed-of answer was below the benchmark in these [BEGIN PROPRIETARY] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [END PROPRIETARY] [BEGIN PROPRIETARY]
[REDACTED] [END PROPRIETARY] of the [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY]

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PROPRIETARY] days also experienced high calling volumes. Those [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] days are listed in Attachment 4.

9. In summary, events out of Verizon's reasonable control accounted for [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] out of the [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] on which Verizon's speed-of-answer was below the benchmark. In all, events out of Verizon's control, not including fraud, accounted for [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] of those [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY].
10. I hereby certify under penalty of perjury that the foregoing is true to the best of my knowledge, information, and belief.

Executed on July 31, 2006



Ron Wood

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Attachments 1-4 of Ron Wood's Declaration are proprietary. Each attachment is marked **CONFIDENTIAL – NOT FOR PUBLIC INSPECTION.**