

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

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

REQUEST FOR STAY PENDING JUDICIAL REVIEW

RUTH MILKMAN
RICHARD D. MALLEN
LAWLER, METZGER, MILKMAN & KEENEY, LLC
2001 K St., N.W., Suite 802
Washington, DC 20006
Phone: (202) 777-7700
Fax: (202) 777-7763

DONALD B. VERRILLI, JR.
IAN HEATH GERSHENGORN
MICHAEL B. DESANCTIS
GINGER D. ANDERS
JONATHAN F. OLIN
JENNER & BLOCK LLP
1099 New York Ave., N.W., Suite 900
Washington, DC 20001
Phone: (202) 639-6000
Fax: (202) 639-6066

Counsel for Sorenson Communications, Inc.

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SUMMARY

Sorenson Communications, Inc. (Sorenson) hereby seeks a stay of Paragraphs 95 and 96 of the Federal Communications Commission's November 19, 2007 Declaratory Ruling in *In re Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 22 F.C.C.R. 20140 (2007) (2007 Declaratory Ruling), and the May 28, 2008 Declaratory Ruling in *In re Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Dkt. No. 03-123, FCC 08-138 (2008 Declaratory Ruling). After granting Sorenson's motion to stay Paragraphs 95 and 96 of the 2007 Declaratory Ruling and purporting to "clarify" its position in the 2008 Declaratory Ruling, the Commission has made things worse – not better – exacerbating the conflict with the requirements of the Constitution, the Communications Act of 1934, as amended ("Act"), and the Administrative Procedure Act (APA).

The Commission's restrictions on speech, as now "clarified," consist of two prohibitions: (i) TRS providers may not use TRS funds or information obtained through the provision of relay services to engage in "lobbying or advocacy activities directed at relay users," a broad community that includes every American, whether hearing, deaf, hard-of-hearing, or speech-disabled, who might place or receive a TRS call at home or at work; and (ii) TRS providers may not use "information derived from a consumer or call database established in conjunction with Section 225" of Act to communicate with their users for any purpose other than emergency calls, and customer and technical support. Sorenson and other providers thus are effectively restricted from, among other things, educating the American public about how it can participate in the debate over pending government proceedings that could have a substantial impact on the public's ability to communicate via TRS, as well as informing members of the public about the availability of new and improved products and services that can improve TRS users' quality of

life. If Sorenson were deemed by the FCC to have engaged in such activities or otherwise to have violated the speech restrictions, it would be subject to harsh FCC penalties, including (depending on the violation) being declared “ineligible for compensation from the [Interstate TRS] Fund,” *2007 Declaratory Ruling* ¶ 96 – a result that could quickly put Sorenson out of business since roughly 99.9 percent of Sorenson’s revenues are obtained from that Fund.

These restrictions violate the First Amendment in a number of ways. To take just one example, in imposing its sweeping ban on the use of TRS revenues for lobbying or advocacy activities, the Commission suggests that the prohibition should be viewed not as a burden on political speech, but as a reasonable limit placed on a federal “subsidy” to TRS providers. This suggestion is simply wrong. TRS payments are not federal grants or subsidies that the federal government has the right to control; they are instead reimbursement for services rendered in which the Commission has no legitimate continuing interest. *See Healthcare Ass’n of N.Y., Inc. v. Pataki*, 471 F.3d 87, 102, 105 (2d Cir. 2006) (money “earned from state . . . statutory reimbursement obligations” belongs to the service provider, not the State). The “subsidy” cases on which the Commission relies are thus inapposite and cannot save the instant restrictions. Rather, the case law is clear that such restrictions violate the First Amendment and must be voided *in toto*. *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984).

The restrictions also should be voided for their inherent vagueness. Indeed, the restrictions are so vague and sweeping – and the legal penalty for violating them is so severe – that Sorenson cannot risk undertaking many of the speech activities that it has undertaken in the past. For example, Sorenson frequently communicates with the full gamut of deaf and hearing Americans who might place or receive a TRS call in order to discuss important issues pending at the Commission or Congress. These communications may occur either directly (for example,

Sorenson makes a presentation at a deaf-oriented conference, places an American Sign Language video on its Website, or conducts outreach targeting all Americans), or indirectly (for example, Sorenson assists consumer organizations that themselves engage in such activities). In either case, Sorenson must assume that the full range of such efforts consists of “lobbying or advocacy activities directed at relay users” that are prohibited by the Rulings. That is because the Commission has made no effort to define what is meant by (i) “lobbying or advocacy activities,” (ii) “directed at,” or (iii) “relay users.” Conceivably, the first phrase sweeps in all informational or outreach efforts in which Sorenson, expressly or implicitly, takes a stand on a matter actually or potentially pending before the FCC or Congress. The second phrase may sweep in any mode of communication – whether a Web posting, newspaper advertisement, or offhand remark at a meeting – that might reach a person denoted by the third phrase, “relay user.” And that third phrase, in turn, conceivably sweeps in any living American, because all Americans, whether hearing, deaf, hard-of-hearing, or speech-disabled, have either already placed or received a relay call at home or work or may one day do so. (For example, when a deaf person places a relay call to make an appointment with her dentist, the hearing receptionist who receives the call is a “relay user,” regardless of whether the receptionist has any inkling of what TRS is.)

Not surprisingly, the compound vagueness of the phrase “lobbying or advocacy activities directed at relay users” leaves providers utterly uncertain regarding the scope of the Declaratory Rulings. Indeed, the restrictions are so vague that in the recent notice of proposed rulemaking discussing the application of Customer Proprietary Network Information (CPNI) rules to TRS, the Commission itself expressed confusion over the scope of its TRS restrictions. Such expansive vagueness, when conjoined with the dire sanction of losing what is effectively

Sorenson's sole source of revenue, is patently unconstitutional. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002).

Beyond their manifold constitutional infirmities, the instant restrictions are fundamentally at odds with Congressional policy underlying the ADA and are procedurally unsound. Under the ADA, as codified in Section 225 of the Communications Act of 1934, as amended ("Act"), the Commission is charged with making TRS available to "all" deaf and hard-of-hearing Americans, "to the extent possible and in the most efficient manner." 47 U.S.C. § 225(b)(1). This goal is subverted by the Declaratory Rulings, which effectively prevent TRS providers from encouraging consumer engagement with, and debate on, regulatory and political issues that affect their ability to use TRS services. As just one example, Sorenson now apparently may not educate TRS users about, or encourage them to participate in the public debate over, a bill recently introduced in Congress to expand the availability of broadband Internet access for video relay service (VRS). Affording deaf and hearing TRS users timely access to such information is critical to overcoming the communications barriers that have "isolate[d]" the deaf community, and which the TRS statutory scheme seeks to remedy. 42 U.S.C. § 12101(a)(2) & (a)(7); 47 U.S.C. § 225(b)(1). Yet, the speech restrictions in the Rulings arbitrarily and inexplicably cut off the vital flow of information, views, and ideas from providers to TRS users (many of whom are deaf) and, in turn, from TRS users to the nation's elected and appointed policy makers.

Finally, the restrictions are procedurally unsound because they were adopted in manner that violates the APA. The instant restrictions are a quintessential example of a general, prospective rule that, under the APA, can be adopted only after notice and comment: they were issued *sua sponte*, apply to all TRS providers, and take away a previously held right. It is also the type of rule for which the APA's requirements of reasoned deliberation are especially

necessary: it burdens a constitutional right, and it has wide-ranging effect on the provision of essential services to the deaf and hard-of-hearing public. Yet the FCC issued its Rulings without providing any notice to the affected parties, much less any opportunity to comment. As such, the restrictions cannot stand.

Given the numerous problems with the Commission's Rulings, the Commission should grant a stay and take the opportunity afforded by the CPNI proceeding to truly clarify and rationalize the regulations governing TRS providers. Failing that, the Commission should at the very least stay operation of Paragraphs 95 and 96 of the 2007 Declaratory Ruling and the 2008 Declaratory Ruling to allow for orderly judicial review of the unprecedented speech restrictions imposed here.

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REQUEST FOR STAY PENDING JUDICIAL REVIEW

Sorenson Communications, Inc. (Sorenson), pursuant to Sections 1.41 and 1.43 of the Commission’s rules, hereby requests that the Federal Communications Commission (Commission or FCC) stay, pending judicial review, Paragraphs 95 and 96 of the Federal Communications Commission’s November 19, 2007 Declaratory Ruling in *In re Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, FCC No. 07-186 (released Nov. 19, 2007), 73 Fed. Reg. 3197 (published Jan. 17, 2008), 22 F.C.C.R. 20140 (2007) (“2007 Declaratory Ruling”), and the May 28, 2008 Declaratory Ruling in *In re Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Dkt. No. 03-123, FCC 08-138 (“2008 Declaratory Ruling”). *See* 47 C.F.R. §§ 1.41, 1.43. Sorenson easily satisfies the requirements for a stay and respectfully requests that the Commission act on this request by July 24, 2008. If the request is not acted on by that date, Sorenson will seek a stay in the United States Court of Appeals for the Tenth Circuit, where Sorenson has already filed Petitions for Review (Case Nos. 08-9503; 08-9507; 08-9545), and where, as explained below, it is likely to prevail on the merits. In light of the Commission’s own confusion about the

scope of the Rulings reflected in the recent CPNI FNPRM, the Commission should stay Paragraphs 95 and 96 of the 2007 Declaratory Ruling as well as the 2008 Declaratory Ruling and use the opportunity presented by the CPNI proceeding to rationalize the TRS regulations. Alternatively, and at the very least, the Commission should stay the 2007 and 2008 Declaratory Rulings to permit orderly judicial review in the Tenth Circuit.

BACKGROUND AND PROCEDURAL HISTORY

Sorenson is a provider of telecommunications relay services (TRS) to the deaf and hard-of-hearing community. Those services include Sorenson Video Relay Service® (VRS), which enables deaf callers to conduct video relay conversations with hearing people through a qualified American Sign Language (ASL) interpreter, and Sorenson IP Relay™, which allows users to place text-based relay calls from either a mobile device or a personal computer to a hearing person, through a communications assistant. Sorenson receives compensation from the Interstate TRS Fund for its provision of TRS services to the deaf community. Indeed, reimbursements from the TRS Fund constitute virtually all – roughly 99.9% – of Sorenson’s annual revenue. *See* Decl. of Reed Steiner ¶ 3 (attached as Exhibit 1).

In 2006, the Commission issued a notice of proposed rulemaking to revisit the methodology under which TRS providers would be compensated for their services. Sorenson submitted comments, as did thousands of other entities and individuals, many of them TRS users. *See* Comments Filed in CG Docket No. 03-123.

During this time Sorenson, itself, and through the Video Relay Service Consumer Association (VRSCA) and other organizations, undertook an expansive education and outreach effort to inform both deaf and hearing VRS users of the importance of the rate methodology proceeding at the FCC and the potential impact on the future of VRS, and urged all to communicate with the FCC about the proceeding. The education and outreach efforts included

postings on the VRSCA Website (in English and in American Sign Language), presentations by Sorenson employees at conferences dealing with issues of concern to the deaf community, and direct contacts with VRS users, hearing and deaf. Indeed, it is these communications, between a provider and VRS users, that the 2008 Ruling has described as “lobbying or advocacy activities directed at relay users,” a group that includes every person, hearing or deaf, who might use TRS, at home or at work. The effort resulted in an outpouring of support – letters, postcards, and emails from more than 35,000 individuals who cared enough to take their own time to contact the FCC – urging the FCC to adopt a new rate methodology for TRS that would provide a stable, predictable, and adequate rate for TRS services. And the Commission apparently listened.

On November 19, 2007, the Commission issued its Order in *In re Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, FCC No. 07-186 (released Nov. 19, 2007), 73 Fed. Reg. 3197 (published Jan. 17, 2008), 22 F.C.C.R. 20140 (2007). In the first part of the Order, the Commission established a new and considerably more stable cost recovery methodology and set fair reimbursement rates that will govern the compensation of TRS providers for three years.

In addition, however, the Order went on to announce the 2007 Declaratory Ruling, adopted *sua sponte*, which, at Paragraphs 95 and 96, prohibited TRS providers from using “consumer or call data to contact TRS users for lobbying or any other purpose.” *2007 Decl. Ruling* ¶ 95. A provider that “misus[ed] customer information” would be subject to the ultimate penalty – it could be deemed “ineligible for compensation from the Fund” and might “also be subject to other actions.” *Id.* ¶ 96.

Sorenson and other TRS providers immediately raised substantial concerns regarding Paragraphs 95 and 96, noting that they inhibited commercial and political speech protected by

the First Amendment and were significantly broader than necessary to further the Commission's interest in preventing the encouragement of unnecessary calls. *See* AT&T Written Ex Parte Notice, *In re Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123 (Jan. 11, 2008). TRS providers proposed replacement language for Paragraphs 95 and 96 that would prohibit the use of improper incentive programs, while permitting the informational, lobbying, and educational contacts that TRS providers are entitled to make.

Sorenson subsequently moved the Commission to stay the effectiveness of Paragraphs 95 and 96 on the ground that the paragraphs burdened its First Amendment rights and would cause irreparable harm.¹ Sorenson also filed a petition for review of Paragraphs 95 and 96 in the Tenth Circuit Court of Appeals. On February 7, 2008, the Commission granted a stay, stating that "Sorenson and other providers have raised several concerns, including their asserted inability to contact users for emergency or consumer protection-related purposes, that . . . may cause the Commission to reconsider the language of paragraphs 95 and 96." *In re Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 23 F.C.C.R. 1705, ¶ 5 (2007) (footnote omitted).

On May 28, 2008, the Commission issued the 2008 Declaratory Ruling, which purports to "clarify the language" in Paragraphs 95 and 96 of the 2007 Declaratory Ruling, but also leaves those Paragraphs in effect. The 2008 Declaratory Ruling continues to restrict the use of call data for a wide range of political, commercial and other speech. It then *broadens* the Commission's

¹ The bulk of the 2007 Declaratory Ruling addressed issues related to TRS providers offering financial or other incentives to induce users to use the provider's service to make calls. Sorenson supports the Commission's goal of preventing providers from using improper financial or similar incentives to stimulate TRS demand. Sorenson thus did not challenge this aspect of the 2007 Declaratory Ruling, but only Paragraphs 95 and 96, which went beyond incentive issues and restricted *all* TRS providers' contacts with their users.

initial restriction on lobbying activities to prohibit any advocacy “directed at relay users” using TRS revenues, and it maintains the severe penalties for violations delineated in Paragraphs 95 and 96 of the 2007 Declaratory Ruling.

Specifically, the Rulings now prohibit the use of any “funds obtained from the Interstate TRS Fund, to engage in lobbying or advocacy activities directed at relay users.” *2008 Decl. Ruling* ¶ 10. Nowhere, however, do the Rulings define the terms “lobbying or advocacy activities.” The sweeping prohibition thus appears to forbid the use of TRS-based revenues – which make up approximately 99.9% of Sorenson’s revenues – for even those communications that are not targeted to specific customers, including posting informational messages about Commission proceedings on deaf community listservs or hosting conferences and forums to which TRS users are invited, as long as the activities are generally “directed at relay users.” Nor do the Rulings explain whether TRS providers have the burden of proving that they have not used TRS funds for a particular purpose, or how TRS providers would make any showing that might be required.

In addition, the Rulings prohibit the use of “information derived from a consumer or call database established in conjunction with Section 225 to contact users” for any purpose that is not “directly related to the handling of TRS calls.” *2008 Decl. Ruling* ¶ 9. According to the Ruling, contacts that are “directly related to the handling of TRS calls” would include customer support contacts, such as “respond[ing] to a consumer’s call for emergency services” or providing “technical support.” *Id.* It is unclear, however, whether the Ruling continues to prohibit the specific activities that Sorenson discussed in its motion to stay the 2007 Declaratory Ruling and *ex parte* submission, including warning deaf and hearing consumers about prevalent TRS scams that Sorenson frequently detects, or informing them about the availability of new TRS and VRS

features and services designed to improve the quality of communications with the deaf, such as Spanish-language services.

On its face, the 2008 Ruling could be read to permit the use of call data to inform consumers of the availability of new TRS products and services, as they “relate to the provision of, or the consumer’s use of, TRS.” *Id.* The Commission itself has cast doubt on this permissive reading of the 2008 Ruling, however. In a recent Report and Order adopted on June 11, 2008, the Commission contrasted the 2008 Declaratory Ruling TRS restrictions with CPNI regulations that permit use of call data for marketing. *In re Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Dkt. No. 03-123, FCC 08-151, ¶ 145 (rel. June 24, 2008) (“CPNI FNPRM”). In the same discussion, the Commission also stated that “permit[ing] the use [of] consumer information for marketing purposes” might be “consistent” with the 2008 Ruling, and actually called for comment on that issue. *Id.* It thus is clear that even the Commission does not know exactly what communications using consumer and call data are permitted under the Declaratory Rulings. In light of Commission’s refusal to clarify the restrictions adequately and the severity of the penalties for violating the Rulings, Sorenson has no choice but to refrain from engaging in a wide range of otherwise protected commercial and core political speech.

REASONS FOR GRANTING THE STAY

The Commission assesses requests for a stay pending appeal utilizing the factors set forth in *Virginia Petroleum Jobbers Association v. Federal Power Commission, Inc.*, 259 F.2d 921 (D.C. Cir. 1958) (“*Virginia Petroleum*”) and *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) (“*WMATA*”). Under these factors, the party seeking a stay must demonstrate the likelihood of success on appeal, the extent it will suffer irreparable harm, and whether the stay will harm other parties or the public interest. Even

where the moving party has not established a likelihood that it will prevail on the merits, the Commission may decide to stay enforcement of its ruling if it finds that the movant has presented a “serious legal question” and that the other three factors weigh heavily in the movant’s favor. *WMATA*, 559 F.2d at 844. Here, the probability of success is high and the balance of harms tips sharply in favor of a stay.

I. SORENSON HAS A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS.

Sorenson has a substantial likelihood of succeeding on the merits of its challenges to the Declaratory Rulings. As we show below, both the restriction on the use of TRS reimbursements for “advocacy and lobbying directed at TRS users” and the broad prohibition on the use of customer and call data are patent violations of the First Amendment, are contrary to 47 U.S.C. § 225, and are arbitrary and capricious.

A. The Restrictions on the Use of TRS Reimbursements for Lobbying Violate The First Amendment.

1. The Restriction on the Use of TRS Reimbursements Cannot Withstand Strict Scrutiny.

The challenged Declaratory Rulings impose a stark and dramatic restriction on core political speech by prohibiting Sorenson and other TRS providers from using TRS reimbursements to engage in “lobbying or advocacy activities directed at relay users” – which includes Sorenson customers, members of the deaf community who are not Sorenson customers, and hearing people who may place TRS calls to or receive TRS calls from deaf people. *2008 Decl. Ruling* ¶ 10; see *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 348-49 (1995) (restriction on permissible manner of lobbying inhibited political speech). Although the term “lobbying or advocacy activities” is wholly undefined, it would appear to prohibit much of Sorenson’s core political speech as well as that of other providers. Sorenson regularly engages

in informational advocacy directed at TRS users, including making presentations and posting Website videos that inform the deaf community about TRS issues and petitions pending before the Commission, and solicits their views as TRS consumers and members of the deaf community. This speech includes communications that are vital to the deaf community. For example, by posting Website videos that depict communications in ASL, Sorenson allows deaf users of ASL to receive information that is conveyed in their primary language, rather than in printed English. This speech not only falls within the core protection of the First Amendment, *see City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 196-97 (2003), but it furthers Congress’s stated goal of enabling TRS to become as widespread as possible, *see* 47 U.S.C. § 225(b). The Commission has not justified and cannot justify this sweeping restriction on important political speech.

At the outset, these restrictions are viewpoint-based, because they limit the rights only of TRS users – many of whom are deaf – from receiving critical information that would enable them to participate in the public debate over the many issues affecting TRS services, and of TRS providers to communicate with their customers on these issues. The Rulings impose no comparable limits on opponents of TRS services and those who are hostile to TRS providers, so that those entities can spend what they want in any manner they want on lobbying Congress, the Commission or any other government agency. Such viewpoint-based restrictions are virtually *per se* unconstitutional. *See, e.g., Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 659 (1994) (“Regulations that discriminate among . . . different speakers . . . often present serious First Amendment concerns”); *Lavey v. City of Two Rivers*, 171 F.3d 1110, 1114 (7th Cir. 1999) (disparate treatment demonstrates that the restriction does not advance the Commission’s stated interest). And here,

of course, the viewpoint-based restrictions are particularly perverse, because the viewpoint the Commission has chosen to suppress is that of the very community whose communications opportunities Congress sought in Section 225 to expand.

Even if viewed as viewpoint neutral, however, the restrictions cannot stand. The Supreme Court has held that “[w]hen a law burdens core political speech, we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.” *McIntyre*, 514 U.S. at 347. Moreover, “because of the importance of First Amendment speech protections, ‘the government bears the responsibility of building a record adequate to clearly articulate and justify’ [its] state interests.” *Utah Licensed Beverage Ass’n v. Leavitt*, 256 F.3d 1061, 1069 (10th Cir. 2001).

In the Rulings, the Commission has articulated virtually no state interest to justify its extreme restriction on political speech. Rather, the Commission merely cites to a single *ex parte* letter from a single TRS user indicating that “at least one service provider has bombarded deaf persons with material.” *2008 Decl. Ruling* ¶ 10 & n.33. This single piece of anecdotal evidence cannot remotely justify the broad restrictions imposed by the Commission, *see US West, Inc. v. FCC*, 182 F.3d 1224, 1236 & n.8 (10th Cir. 1999) (record reference to consumers who did not wish to receive targeted marketing calls did not provide sufficient record to justify restriction on even commercial speech), particularly when the record demonstrates that *thousands* of deaf individuals responded positively to the advocacy outreach efforts of Sorenson and other providers and cared enough to express their views to the Commission individually.²

² To the extent that the lobbying prohibition is intended to relieve the Commission of the “burden” of hearing the views of the deaf community before it takes action that will have a substantial effect on that community, that interest is of no weight in the First Amendment calculus. *See United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 473-74 (1995). The Commission may not single out the deaf community to advance its convenience interests,

Although the Commission does not explain what state interest this one anecdote implicates, it would appear that the Commission is *implying* some general and unstated privacy interest. That is not enough. As the Tenth Circuit has explained in the context of even purely commercial speech, the government

must specify the particular notion of privacy and interest served. Moreover, privacy is not an absolute good because it imposes real costs on society. Therefore, the specific privacy interest must be substantial, demonstrating that the state has considered the proper balancing of the benefits and harms of privacy. In sum, privacy may only constitute a substantial state interest if the government specifically articulates and properly justifies it.

US West, 182 F.3d at 1235 (footnote omitted). Indeed, even if articulated with specificity, protecting privacy is rarely a sufficiently compelling justification for burdening political speech. See, e.g., *Initiative and Referendum Institute v. U.S. Postal Service*, 417 F.3d 1299, 1315-16 (D.C. Cir. 2005); *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 168 (2002) (privacy protection could not support burden on political in-person solicitation). Here, of course, the Commission has articulated *no* specific privacy interest at all, has not explained how the broad restriction imposed on political speech advances that interest, and has engaged in no analysis balancing the unexplained benefits of the restriction against the obvious and significant harm to the free flow of political debate that the restrictions impose.

Moreover, the Commission has not even attempted to demonstrate that the lobbying restrictions directly advance the interest of protecting TRS users' privacy. See *Meyer v. Grant*, 486 U.S. 414, 423 (1988) (emphasizing high burden of justifying burden on political speech). The single letter cited by the Commission does not remotely suggest that TRS users' privacy is universally threatened by providers' advocacy or even their directed communications. See *First*

especially in the absence of any record suggesting that the agency's "burden" of processing comments from the deaf community is unusually severe.

Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789-90 (1978) (“assumptions” cannot justify speech restriction); *US West*, 182 F.3d at 1238 (theorizing by the FCC cannot justify restrictions on speech without analysis and evidence).

Nor is the restriction on the use of TRS reimbursements for “lobbying and advocacy” activities narrowly tailored to advance the implied privacy interest (even if such interest were articulated). The Commission failed to consider whether a less restrictive approach, such as an opt-out regime, would accomplish the same goal. *See US West*, 182 F.3d at 1238-39 (“the FCC’s failure to adequately consider an obvious and substantially less restrictive alternative, an opt-out strategy, indicates that it did not narrowly tailor” the restrictive regulations).

Moreover, on its face, the prohibition on the use of TRS reimbursements is not expressly limited to targeted consumer communications – such as direct mail letters or e-mails – that arguably implicate privacy interests, but instead appears to apply to *all* lobbying and advocacy activities “directed at TRS users,” including communications that would be received only by those who choose to hear them, by attending TRS-related conferences and presentations or visiting a provider’s Website. The one consumer letter cited by the Commission is not sufficient to justify any restriction, let alone those that have no discernible nexus to unsolicited direct consumer contacts. As a result, the broad, undefined and wholly unjustified restriction of the use of TRS reimbursements for “lobbying or advocacy” activities cannot stand.

2. The Restriction on the Use of TRS Reimbursements Cannot be Justified as a Limitation on the Use of a Federal Grant

In imposing its sweeping ban on the use of TRS revenues for lobbying or advocacy activities, the Commission contends that the prohibition should be viewed not as a burden on political speech, but as a reasonable limit placed on a federal subsidy to TRS providers. *2008 Decl. Ruling* ¶ 11 & n.37 (citing *Rust v. Sullivan*, 500 U.S. 173, 196 (1991)). Under *Rust v.*

Sullivan, the Commission asserts, the government may designate the purposes for which its funds are used without violating the First Amendment. 2008 Dec. Ruling ¶¶ 10-12. That argument, however, is simply wrong. TRS payments are not federal grants or subsidies that the federal government has the right to control; they are instead reimbursement for services rendered in which the Commission has no legitimate continuing interest. *Rust v. Sullivan* and the other cases on which the Commission relies, see 2008 Decl. Ruling ¶ 12 & n.37, thus cannot save the restrictions here. See, e.g., *Healthcare Ass'n of N.Y., Inc. v. Pataki*, 471 F.3d 87, 102 (2d Cir. 2006); *Chamber of Commerce of the United States v. Lockyer*, 463 F.3d 1076, 1098-1100 (9th Cir. 2006) (Beezer, J., dissenting), *rev'd on other grounds*, 128 S. Ct. 2408 (2008).

In *Rust*, the Supreme Court held that where the government provides a grant or subsidy to private parties, it may define the scope of the subsidy program by specifying the activities for which the funding may be used and those for which it may not be used. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (permitting the government to “ch[o]ose[] to fund one activity to the exclusion of the other”). This entitlement flows from the government’s discretion to spend its money as it chooses (or not spend it at all) and to ensure that public funds are spent in a manner consonant with the government’s view of the public interest. *Id.*

But *Rust* did not hold, and has never been read to hold, that the government retains an interest in funds used by the government to purchase services. To the contrary, *Rust* has been applied only where the government has gratuitously provided a subsidy or grant to a private entity, such that the government may claim a proprietary interest in limiting the uses to which its own money is put by grant recipients. In *Rust* itself, for example, the government was permitted to provide prospective grants to family planning counseling that could not be used for abortion counseling. 500 U.S. at 192-94. Thus, the grants and programs that fall within the *Rust* line of

cases are those involving “gifts of the State,” which the government “ha[s] the right to withhold,” and therefore also has the right to control. *Healthcare Ass’n*, 471 F.3d at 102 & n.7; *id.* at 103 (entities “cannot contend” that public grant funds are their own funds); *see also Regan v. Taxation With Representation*, 461 U.S. 540, 544 (1983) (upholding lobbying restrictions imposed on tax-exempt entities because the tax exemption system enacted by Congress “has much the same effect as a cash grant to the organization”).

By contrast, where, as here, the government funds in question are not a grant or subsidy, but instead constitute payment *for services rendered*, the government cannot rely on *Rust* to justify restrictions placed on the entity’s use of the reimbursements. When a private entity performs services and is paid for them by the government, the government retains no proprietary interest in the funds after they are paid. Any regulation of such funds is thus a limit on the use of the entity’s *own* funds, and is therefore a regulation of the entity, itself, and not a mere refusal by the government to subsidize a particular activity. *See Healthcare Ass’n*, 471 F.3d at 102 (money “earned from state . . . statutory reimbursement obligations” belongs to the service provider, not the State); *Chamber of Commerce*, 463 F.3d at 1098-1100 (Beezer, J., dissenting) (“Once the exchange has been made and payment has been received, that money can no longer be considered ‘state funds.’”); *see also FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984) (where government attempts to use spending conditions to limit an entity’s use of private funds, the limitation is analyzed as a regulation).

Rust and its progeny are thus of no help to the Commission here. The money that Sorenson receives from the TRS fund represents reimbursements for services rendered, rather than a gratuitous public grant or subsidy. In order to receive any TRS compensation, a provider like Sorenson must first provide TRS services to consumers; the government then reimburses the

provider at a pre-determined rate. The Commission itself refers to TRS reimbursements as “compensat[ion]” for the costs “of providing TRS.” *2007 Decl. Ruling*, ¶ 3; *see also* 47 C.F.R. § 64.604(c)(5)(iii)(E) (“TRS Fund payments . . . shall be designed to compensate TRS providers for reasonable costs of providing interstate TRS.”). The payment that Sorenson receives is not only dependent on Sorenson’s provision of services, but is calculated according to the amount of service – the number of minutes of TRS service – that Sorenson has provided. *Id.*; *2007 Decl. Ruling*, ¶ 2; *id.* ¶ 5 (“providers are compensated on the basis of a per-minute compensation rate . . . for their reasonable actual costs of providing service”). Thus, TRS payments are not a gratuitous grant or subsidy from the government. When the government compensates Sorenson for its services, the government has already received the service for which the money was appropriated, and therefore the government’s interest in the funds is extinguished upon payment. Subsequent limitations on the manner in which Sorenson may use TRS reimbursements after they are received are thus analogous to regulations limiting how government employees can spend their salaries: the Commission is regulating Sorenson’s conduct, not simply limiting the scope of a gift or grant of public funds.³

Moreover, even if TRS payments constituted a federal grant or subsidy – and they do not – the Commission’s restrictions are still unconstitutional notwithstanding *Rust* and *Regan*, for at least four reasons. First, *Rust* and its progeny cannot justify the severe speech restrictions here

³ The fact that the direct recipients of Sorenson’s services are TRS users, and Sorenson is then reimbursed by the government, does not transform TRS payments into a “subsidy.” In the closely analogous context of Medicaid – in which the state reimburses providers who have furnished health care services to patients – the Second Circuit has characterized the government payments as payments for services rendered, and rejected the state’s argument that it was providing a subsidy under *Rust*. *Healthcare Ass’n*, 471 F.3d at 105 (“To the extent that section 211-a imposes restrictions on . . . proceeds earned from . . . statutory reimbursement obligations,” it attempts to regulate).

because the TRS program is not designed to “convey a governmental message.” As the Supreme Court made clear in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), the special “latitude” for speech restrictions that *Rust* permits arises from the government’s right to “take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.” 531 U.S. at 541 (quotation marks omitted). That rationale, however, has no application to a program “designed to facilitate private speech, not to promote a governmental message.” *Id.* at 542; *see also Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). *Cf. DKT Int’l v. United States Agency for Int’l Development*, 477 F.3d 758, 762 (D.C. Cir. 2007) (upholding speech restriction in part because “[i]n this case, as in *Rust*, ‘the government’s own message is being delivered’”) (citation omitted).

Second, the Commission cannot seriously contend that the restrictions are justified by a need to prevent activities that are “inconsistent with the purpose of the TRS fund.” *2008 Decl. Ruling* ¶ 10; *see also id.* ¶ 11 & n.34. The FCC allows providers to spend their TRS funds on a host of lobbying and other activities. TRS providers can, for example, lobby the FCC or Congress directly. More to the point, TRS providers can take TRS funds and do a host of things that are plainly irrelevant to the program: they can pay for health club memberships for employees, they can make political contributions, and they can buy tickets to sporting events. Indeed, they can take the TRS funds and bury them in the ground, if they want. The net result of the Commission’s restrictions is not that funds will be used for TRS services, but only that the Commission will be relieved of the administrative burden of processing the views of the deaf community. The Commission’s contention that it merely seeks to limit activities that are inconsistent with the purposes of the TRS fund is an obvious pretext.

Third, *Regan* and its progeny do not permit the government to impose a speech restriction when the agency “discriminate[s] invidiously in its subsidies” so as to “suppress any ideas,” or when the restriction “has had that effect.” *Regan*, 461 U.S. at 548. But that is exactly what has happened here. The Commission allows non-TRS providers that may have an interest in specific outcomes with respect to the regulation of TRS unrestricted access to TRS users, as well as to the Commission, Congress, and other policymakers, while communications between TRS providers and the deaf users they serve are severely restricted. Nothing in the cases cited by the Commission permits the Commission to discriminate in such a fashion to suppress the opinions of the deaf community.

Fourth, *Rust* and *Regan* are inapposite because, in practice, the FCC’s restrictions operate as a restriction on the recipient, rather than on the use of federal funds. *See Rust*, 500 U.S. at 197 (noting that Court’s holding did not apply where conditions on funding “effectively prohibit[] the recipient from engaging in the protected conduct outside the scope of the federally funded program”); *Regan*, 461 U.S. at 544 & n.6. The Commission seeks to avoid that result by purporting to allow lobbying using non-TRS funds. But that is entirely illusory. Only one-tenth of one percent of Sorenson’s revenues comes from sources other than the TRS Fund, and some TRS providers lack non-TRS revenues altogether. Accordingly, prohibiting the use of TRS reimbursements for core political speech is tantamount to an outright prohibition. Moreover, the Commission gives no indication of what accounting mechanisms it will accept from providers to prove that only non-TRS funds are used for lobbying to TRS users. Yet, providers are subject to the threat of investigation into how they are funding their activities and of potentially severe penalties. *See 2007 Decl. Ruling* ¶ 96. That risk has been recognized by the Supreme Court as a significant burden. *See Chamber of Commerce of the United States of America v. Brown*, 128 S.

Ct. 2408, 2416 (2008) (noting that “litigation risks” can make engaging in advocacy using private funds “prohibitively expensive”). Thus, even under *Rust*, the inadequacy of non-TRS funds and the risk of penalties for noncompliance effectively make it impossible for Sorenson to engage in informational and educational efforts that were necessary in the past, and that Sorenson expects to be necessary in the future. If Sorenson is not allowed to communicate with the broad universe of “relay users” placed off limits in the 2008 Ruling – including every American who has or might make or receive a VRS call – Sorenson will be unable to fulfill its mission of making VRS available to all Americans, “to the extent possible,” as Congress envisioned. 47 U.S.C. § 225(b)(1). The Rulings imperil that mission by effectively imposing a blanket – and unconstitutional – prohibition on political speech directed at TRS users. *See League of Women Voters*, 468 U.S. at 400.

For all of these reasons, the Commission’s restriction on the use of TRS reimbursement for “lobbying and advocacy activities directed at TRS users” violate the First Amendment and likely will be vacated.

B. The Restrictions on the Use of Customer and Call Databases Violate the First Amendment.

In addition to the restrictions on the use of TRS reimbursements, the Declaratory Rulings prohibit the use of “information derived from a customer or call database established in conjunction with Section 225” for lobbying and advocacy activities directed at TRS users. *2008 Decl. Ruling* ¶¶ 9-10. The 2008 Declaratory Ruling further states that any direct contacts using such data “must be informational in nature and must relate to the provision of, or the consumer’s use of, TRS.” *Id.* ¶ 9. The Tenth Circuit has directly held that a limitation on the use of such customer and call data to contact customers is unquestionably a restriction on speech. *See US West*, 182 F.3d at 1232 (rejecting the FCC’s arguments to the contrary as “fundamentally

flawed”); *id.* (First Amendment protects right to use call data to target customers). As such, the restrictions on the use of customer and call databases established in conjunction with Section 225 are subject to First Amendment scrutiny, and cannot survive.

As an initial matter, the only justification that the Commission provides for its restriction on the use of customer and call databases is that such databases are “inextricably tied” to the federally funded TRS program and, therefore, under *Rust*, it is permissible for the Commission to have restricted their use. *2008 Decl. Ruling* ¶ 11. That analysis is sorely misplaced. As discussed above, because the TRS reimbursements are payments for services rendered and not gratuitous grants, *Rust* is entirely inapposite. Moreover, even in the government grant paradigm, the principle animating *Rust* is that the government has an interest in money it gives away gratuitously and, thus, it is entitled to dictate the things on which the grant money may be spent consist with the program for which it was disbursed. *See Rust*, 500 U.S. at 193. Because the TRS program is not a government grant program, the Commission’s assertion that call databases are “inextricably tied” to the provision of TRS services cannot serve to bring the databases within the ambit of *Rust*. Moreover, nothing in *Rust* or its progeny so much as suggests that that same government interest extends to the use of *information* that is generated during the administration of the program by private parties or to information databases that are created by those private parties. Such a rule, which has never been sanctioned by any court, would threaten the distinction between limitations on the use of government grants, which are permissible under *Rust*, and limitations on the *recipient* of government grants, which are not. 500 U.S. at 197.

Beyond its misplaced reliance on *Rust*, the Commission offers no meaningful analysis or other justification for its broad restrictions on the use of consumer and call databases for both commercial and core political speech. Instead, the Commission appears at most to imply a

privacy right by mere citation, without elaboration, to the one consumer *ex parte* letter discussed above. *2008 Decl. Ruling* ¶ 10. As shown above, this bare citation does not begin to approach the thorough analysis necessary to justify a restriction on speech by explaining, among other things, that the interest is real, that the restrictions advance that interest, that the restrictions are no broader than necessary, and that obvious, less restrictive alternatives were appropriately considered. *See, e.g., US West*, 182 F.3d at 1233-39; *Edenfield*, 507 U.S. at 770-71; *McIntyre*, 514 U.S. at 348-49; *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 564 (1980); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980).

Finally, the Commission repeats its concern that TRS providers not offer consumers “financial or other incentives to generate additional or longer calls that can be billed to the fund.” *2008 Decl. Ruling* ¶ 9. Sorenson does not dispute the legitimacy of this general concern. However, once again, the Commission posits no evidence indicating that prohibition of financial or other incentives is insufficient to achieve its goal. Nor does the Commission even begin to explain how its broad restrictions on the use of databases further that purpose, how the restriction is only as broad as absolutely necessary, and whether other, less restrictive alternatives were available. As such, the restrictions cannot possibly withstand judicial scrutiny. *See, e.g., US West*, 182 F.3d at 1233-39; *Edenfield*, 507 U.S. at 770-71; *McIntyre*, 514 U.S. at 348-49; *Central Hudson*, 447 U.S. at 564; *Schaumburg*, 444 U.S. at 637.

C. The Restrictions Imposed by the Commission Are Unconstitutionally Vague.

In addition to violating the First Amendment, the restrictions imposed in the Declaratory Rulings are unconstitutional because they are hopelessly vague. It is well settled that “[a] statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.

Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.” *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (citing *Chicago v. Morales*, 527 U.S. 41, 56-57 (1999)). As discussed above, the Declaratory Rulings prohibit the use of TRS reimbursements and consumer and call databases for “lobbying and advocacy activities directed at TRS users.” *See 2008 Decl. Ruling* ¶ 10; *see also 2007 Decl. Ruling* ¶ 95. Yet, the Commission nowhere defines the “lobbying and advocacy activities directed at TRS users.” It does not define what is considered lobbying or advocacy (terms normally thought of as speech directed at governmental lawmakers or policy makers). Nor does it define whether “directed at TRS users” is meant to prohibit only direct personal contacts such as mailings and phone calls, or whether it is meant to stifle communications at conferences for deaf Americans and other TRS users or on Websites accessible by the entire world but designed primarily for the benefit of TRS users.

Even less clear is the broad limitation on the use of consumer and call databases to “purposes related to the handling of relay calls.” *2008 Decl. Ruling* ¶ 9. In the same paragraph, the Commission explains that such use “must be informational in nature and must relate to the provision of, or the consumers’ use of, TRS.” *Id.* On its face, this would appear to permit contacts with consumers regarding the availability of new TRS and VRS equipment, such as advanced video phones, or new and improved services, such as Spanish language services, because marketing contacts such as these relate to the provision of TRS. Nevertheless, in a subsequent notice of proposed rulemaking, the Commission *contrasted* the TRS restrictions with other regulations (known as CPNI regulations) that *permit* the use of consumer and call data to contact consumers for the purpose of marketing new service offerings. *See CPNI FNPRM* ¶ 145. In fact, the Commission, in the same paragraph, called for comments on whether application of the CPNI regulations to TRS providers would be consistent or inconsistent with the Declaratory

Rulings. *Id.* Thus, even the Commission appears not to know what constitutionally protected communications its regulations permit and what they prohibit.

This unacceptably vague restriction on the use of consumer and call databases is made all the more unacceptable – and unconstitutional – by the fact that the Commission has threatened that misuse of customer information will render the provider “*ineligible for compensation from the Fund.*” 2007 Decl. Ruling ¶ 96 (emphasis added). For a company like Sorenson, that would mean the immediate destruction of their business – a business that employs over three thousand people and provides video relay and IP Relay services to tens of thousands of deaf and hearing consumers every month. As the Supreme Court has recognized,

With these severe penalties in force, few . . . speakers . . . would risk activity in or near the uncertain reach of this law. The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere.

Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002). Where, as here, the Rulings impose such dire penalties, yet even the Commission appears not to know exactly what protected speech they permit and prohibit, they are patently unconstitutional. *See City of Chicago v. Morales*, 527 U.S. 41, 56-57 (1999); *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 473-74 (1988).

D. The Declaratory Rulings Violate the Administrative Procedure Act.

Wholly apart from their constitutional infirmities, the restrictions adopted in the Declaratory Rulings also are invalid under the Administrative Procedure Act (APA) for a number of reasons.

1. The Declaratory Rulings are Contrary to Law

It is black-letter law that a federal agency implementing a federal statutory regime “must obey the dictates of Congress and administer the statute true to Congress’ intent.” *US West*, 182 F.3d at 1236 (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976)). The

Declaratory Rulings at issue here fail to meet this most basic tenet of administrative law in two ways.

a. The Rulings are Contrary to the Purpose of the ADA and Section 225

Congress enacted Section 225 of the Telecommunications Act of 1996 (“the Act”) as part of the Americans with Disabilities Act (“ADA”). In doing so, Congress directed the Commission to “ensure that [TRS] services are available ... to hearing-impaired and speech-impaired individuals in the United States.” 47 U.S.C. § 225(b)(1); *see Am. Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005). Because the people who are deaf, hard-of-hearing or have speech disabilities have been historically “isolate[d],” Congress expressly directed the Commission to foster the spread of TRS services in order to “make available to all individuals” – deaf and hearing persons alike – “a rapid, efficient nationwide communication service.” 47 U.S.C. § 225(b)(1); *see also* 42 U.S.C. § 12101(a)(2) & (a)(7).

The Declaratory Rulings at issue here directly and fundamentally frustrate that congressional mandate. Indeed, it was the extensive outreach and marketing efforts of Sorenson and others that made possible the nationwide penetration of video relay service to over 100,000 deaf or hard-of-hearing consumers who use ASL to communicate since the approval of VRS eight years ago. Similarly, it was due to Sorenson’s “lobbying and advocacy activities directed at TRS users” that over 35,000 historically isolated TRS users were educated about the TRS issues pending at the Commission and were sufficiently interested to make their views known to the Commission. That is precisely what Congress intended.

By limiting TRS providers’ ability to engage in discussions with, and solicit the views of, TRS users, the Rulings inhibit the exchange of information that would allow TRS users to take advantage of new and improved service offerings, to become more informed consumers and to be active participants in the political processes affecting TRS. At the same time, the Rulings

thwart TRS providers from learning how to better serve their users and the Commission and Congress from learning the views and concerns of their deaf constituents. Such burdens serve only to inhibit the spread of TRS services, not to encourage it. As such, the Declaratory Rulings run directly counter to Section 225.

b. The Commission Lacked Authority to Issue the Declaratory Rulings

It is telling that, in the Declaratory Rulings, the Commission never once cites a section of the Act that purports to authorize the restrictions on lobbying and advocacy. That is because no such provisions exist. In Section 225(d)(1)-(2), Congress set forth eight specifically enumerated areas in which the Commission is permitted to regulate the provision of TRS. None authorizes restrictions on providers' use of TRS reimbursements to contact consumers to educate them on issues pending at the Commission or in Congress. *See* 47 U.S.C. § 225(d). That Congress specified the areas in which the Commission may regulate TRS, and did not include lobbying and advocacy, is powerful evidence that Congress did not authorize the restrictions here. *See generally Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 805-06 (D.C. Cir. 2002).

Nor does the Commission have ancillary authority here to regulate TRS providers' use of their own TRS revenues, since the regulations seek to control the use of funds long after the relevant services have been provided. *See, e.g., Am. Library Ass'n v. FCC*, 406 F.3d at 703 (invalidating FCC "regulations on devices that receive communications after those communications have occurred").

2. The Commission Failed to Provide Proper Notice and an Opportunity to be Heard

The FCC's restrictions are also invalid because they were adopted in violation of the APA's procedural requirements. The FCC's Declaratory Rulings are a quintessential example of a general, prospective rule that, under the APA, can be adopted only after notice and comment:

they were issued *sua sponte*, apply to all TRS providers, and take away a previously held right. It is also the type of rule for which the APA's requirements of reasoned deliberation are especially necessary: it burdens a constitutional right, and has wide-ranging effect on the provision of essential services to the deaf and hard-of-hearing public. Yet the FCC issued its Rulings without providing any notice to the affected parties, much less any opportunity to comment. As such, the restrictions cannot stand.⁴

3. The Declaratory Rulings are Arbitrary and Capricious

Under the APA, an administrative decision is arbitrary and capricious if, *inter alia*, the agency has “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Furthermore, when issuing a decision, the Commission is required to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The restrictions contained in Paragraphs 95 and 96 – even as “clarified” by the Commission’s May 28, 2008 Declaratory Ruling – cannot withstand scrutiny under this standard.

As an initial matter, the Commission’s contention that it decided to prohibit expenditures on lobbying to TRS users because the TRS Fund “was not intended to finance lobbying by TRS providers,” *2008 Decl. Ruling* ¶ 11, is not credible. The Commission permits providers to spend unlimited TRS reimbursements lobbying and advocating for their own positions directly to the

⁴ Sorenson raised and developed these arguments in its January 28, 2008 stay request, and it incorporates those arguments by reference here.

Commission or Congress on matters involving TRS and even on matters having nothing to do with TRS. Nor has the Commission restricted the ability of providers to spend unlimited TRS reimbursements lobbying and advocating to non-TRS users. In fact, once services have been provided, providers are free under the regulations to spend their TRS reimbursements on anything, paying taxes, investing in research and development, or donating to charity. Given that providers are free to spend their revenues on literally anything they choose, it is beyond the pale that the one thing the Commission felt compelled to prohibit – because it is beyond the purpose of the Fund – is communications with TRS users regarding pending TRS regulations and encouraging them to get involved in the political processes affecting them. Indeed, it seems more plausible that the Commission was not motivated by the purported purpose of the Fund, but was annoyed at having heard from thousands of deaf TRS users in the underlying docket and wished to take steps to silence them in the future.

Indeed, here it is even worse. In the spring of 2008, FCC staff contacted Sorenson, along with other providers of services regulated by the FCC, and asked for help in publicizing the DTV transition. Sorenson agreed that it would help educate and inform consumers about the DTV transition by putting a link to the Commission's DTV transition materials on the Sorenson Website, and including information in the Sorenson newsletter. It is the height of capriciousness for the Commission to ask Sorenson to communicate with its users about one FCC issue, which is unrelated to relay services, while preventing Sorenson from communicating with its users about policy and service issues that are germane to the availability and quality of relay services.

Compounding the problem, the Commission offers no reasoned explanation for the restrictions it imposed. Thus, for many of the same reasons that the Declaratory Rulings cannot pass muster under the First Amendment, they likewise constitute a textbook example of arbitrary

and capricious rulemaking. Indeed, even after its purported clarification, the Commission *still* has not explained how such broad restrictions on the use of TRS reimbursements and information databases are rationally related to any government interests – which are at best merely implied. Certainly, citation to a single anecdotal *ex parte* letter in the record complaining of direct customer contacts does not justify any restrictions, let alone restrictions on the use of TRS revenues for activities, such as lectures or Web postings, that are offered only to self-selected audiences and therefore do not implicate privacy at all. Nor is the blanket proscription on lobbying and the use of information databases justified when less-restrictive alternatives apparently were not considered. *See International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 815 (D.C. Cir. 1983) (finding that an agency's "failure to consider...alternatives, and to explain why such alternatives were not chosen, was arbitrary and capricious") (footnote omitted); *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604-05 (D.C. Cir. 2007) (agency's declaration of empirical fact, without offering evidentiary support, is "insufficient to make the agency's decision non-arbitrary"); *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 786 (7th Cir. 2002) (government generalization from "anecdotal" evidence was more reflective of stereotypes about people with disabilities than of reasoned consideration).

II. THE REMAINING FACTORS TIP SHARPLY IN FAVOR OF A STAY.

A. Sorenson Will Suffer Real and Immediate Irreparable Harm Absent a Stay.

It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Indeed, where First Amendment rights are threatened, irreparable harm is *presumed*. *See Community Commc'n Co. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981); *see also Sumnum v. Pleasant Grove City*, 483 F.3d 1044, 1055 (10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (2008). This is true whether the speech is treated as commercial, or as core political speech

“subject to the highest scrutiny.” *Summum*, 483 F.3d at 1055-56; *see also Utah Licensed Beverage Ass’n*, 256 F.3d at 1076. It is thus presumed as a matter of law that the inability to engage in the numerous activities described above presumptively will cause Sorenson irreparable harm in the absence of a stay.

Even apart from the presumptive harm, however, the restrictions at issue will cause concrete harms to Sorenson’s business and to consumers. The ability to use non-TRS funds is, for example, largely illusory. Some TRS providers have virtually no revenues outside of the TRS program; for these providers the restrictions act as a complete ban on lobbying and advocacy. Sorenson, for example, derives roughly *one-tenth of one percent* of its revenues from non-TRS sources, and thus it cannot rely solely on non-TRS revenues to maintain its consumer outreach programs. Decl. of Reed Steiner ¶¶ 3-4.

Moreover, as discussed above, the Rulings threaten severe sanctions, but give no guidance on how providers are to prove that lobbying and advocacy activities were funded through non-TRS sources and that other consumer contacts were made using databases unrelated to the provision of TRS. Sorenson pays employee salaries, overhead, equipment costs, and legal fees using all of its revenues, intermingled, and yet each of these costs may be comprised in part of lobbying expenditures or the development of information databases. The Declaratory Rulings do not state whether Sorenson has the burden of proof to show that it is not using TRS funds, and how it should make that showing if required.

In addition, given the draconian penalties that the Commission has threatened, Sorenson will have to immediately cease important and constitutionally protected communications with its customers or run the risk of being driven into bankruptcy. For example, Sorenson has in the past warned its users of constant scams or other abusive practices aimed at the deaf community.

Decl. of Michael Maddix ¶ 7 (attached as Exhibit 2). The inability to continue to do so is likely to result in the irrevocable loss of user goodwill. *See, e.g., Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1262-64 (10th Cir. 2004) (citing cases). Similarly, Sorenson may not be able to notify its users of new features and services, depriving Sorenson of the goodwill that results from Sorenson's continuing efforts to provide its users a comprehensive array of services that advance the congressional aims set forth in Section 225. Maddix Decl. ¶ 7.

Moreover, as Sorenson told the Commission in its first stay request, Sorenson frequently communicates with TRS users either directly, or indirectly, by assisting consumer organizations, to discuss important issues pending at the Commission or Congress. Maddix Decl. ¶¶ 4-5. By cutting off Sorenson's ability to engage in these communications, the restrictions severely restrict an important means by which the community of hearing and deaf TRS users becomes informed about issues of critical importance to it. This, in turn, prevents the FCC from hearing the viewpoints of its constituents, hindering the Commission's own decision-making process. For example, last year Sorenson contacted many of its customers regarding the FCC's rate methodology proceedings for TRS services. More than 35,000 people responded, writing to the FCC about the importance of this service in their lives and urging the Commission not to cut the VRS rate. Maddix Decl. ¶ 3. Had Sorenson and other TRS providers been unable to inform their users about these proceedings, the Commission would not have had the benefit of hearing from the people most directly affected.⁵

Currently, Sorenson has in place plans to contact TRS users regarding pending legislation, H.R. 6320, that proposes to redirect federal Universal Service Support to cover the

⁵ The thousands of responses stand in stark contrast to the evidence put forward by the Commission in support of the proposition that consumers are complaining about being "bombarded" by lobbying material: a letter from *one* person. *2008 Decl. Ruling* ¶10 n.33.

costs of broadband Internet access service for low-income deaf and hard-of-hearing people, enabling them to communicate in a manner functionally equivalent to that of hearing persons. Maddix Decl. ¶ 6. If enacted, this proposal could help deaf persons defray the costs of obtaining the broadband they need in order to use VRS. It is imperative that Sorenson communicate with its users about this bill. Yet the Declaratory Rulings appear to have the goal of prohibiting exactly this type of communication.

B. A Stay Will Not Harm Other Parties.

A stay pending appeal will have no “serious adverse effect on other interested persons.” *Virginia Petroleum*, 259 F.2d at 925. A stay will simply preserve the status quo among TRS providers and users, in which providers are permitted to contact users for purposes other than offering improper incentives to make relay calls. Sorenson does not challenge the prohibition on contacting users for call-pumping purposes, and there is no evidence that customers’ privacy interests are harmed by receiving information or contacts that they can refuse or ignore. The stay, therefore, will simply permit contacts that are not harmful to any party. *See WMATA*, 559 F.2d at 843.

Moreover, far from harming any parties’ interests, a stay of the ruling would further the interests of other TRS providers, all of whom share Sorenson’s need – and entitlement – to engage in legitimate, TRS-related contacts with users, as well as the deaf consumers who benefit from TRS providers’ ability to communicate important information to them.

C. A Stay Is Decidedly in the Public Interest.

Finally, the public interest requires a stay. At the outset, because the challenged ruling abridges providers’ and users’ First Amendment rights, staying its enforcement is clearly in the public interest. *See Summum*, 483 F.3d at 1055; *Christian Legal Society v. Walker*, 453 F.3d

853, 859 (7th Cir. 2006) (“[I]njunctive relief protecting First Amendment freedoms are always in the public interest.”).

Granting the stay is also in the public interest because it will eliminate the restrictions and burdens that the Declaratory Rulings impose on the deaf community. The Rulings impair the ability of that community to learn about and make known its views on issues of overwhelming importance that are pending before the Commission and Congress, and hinder their ability to learn about new TRS services that will expand their ability to communicate. In turn, they impede the political process by impairing the ability of the Commission and Congress to be made aware of the concerns of their constituents – precisely the constituents with whom communication is most difficult. The policies that animate Section 225 – to ensure that TRS services are provided “in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States,” 47 U.S.C. § 225(b)(1), and to alleviate the treatment of disabled individuals as an “insular minority,” 42 U.S.C. § 12101(a)(2) & (a)(7) – confirm that granting a stay to alleviate the burden imposed on free interchange with the TRS community is in the public interest.

CONCLUSION

For the reasons stated above, the Commission should issue a stay of the 2008 Declaratory Ruling and Paragraphs 95 and 96 of the 2007 Declaratory Ruling pending judicial review. Sorenson respectfully requests that the Commission act on this request by July 24, 2008, so that Sorenson may seek a stay in the Tenth Circuit.

RUTH MILKMAN
RICHARD D. MALLEN
LAWLER, METZGER, MILKMAN & KEENEY, LLC
2001 K St., N.W., Suite 802
Washington, DC 20006
Phone: (202) 777-7700
Fax: (202) 777-7763

Respectfully submitted,

/s/ Donald B. Verrilli, Jr.
DONALD B. VERRILLI, JR.
IAN HEATH GERSHENGORN
MICHAEL B. DESANCTIS
GINGER D. ANDERS
JONATHAN F. OLIN
JENNER & BLOCK LLP
1099 New York Ave., N.W., Suite 900
Washington, DC 20001
Phone: (202) 639-6000
Fax: (202) 639-6066

Counsel for Sorenson Communications, Inc.

Date: July 14, 2008

Exhibit 1

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

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

DECLARATION OF REED STEINER

1. I am currently employed as Vice President of Finance for Sorenson Communications, Inc. ("Sorenson"). I previously held the position of Controller at Sorenson for over five years. I have a Bachelor's degree in Accounting from the University of Utah and over sixteen years of experience in the accounting industry as a licensed CPA. I have personal knowledge of the following facts and, if called and sworn as a witness, could competently testify thereto.

2. At Sorenson, I (along with the CFO) have responsibility for all financial information and reporting. I oversee all functions of the finance department and report directly to the CFO.

3. Sorenson is a provider of video relay services ("VRS") and other services to the deaf and hard-of-hearing community. As such, Sorenson receives compensation from the Interstate TRS Fund for its provision of VRS and IP Relay services. At present, reimbursements from the Interstate TRS Fund constitute approximately 99.9% of Sorenson's total annual revenues.

4. Historically, Sorenson has not earned sufficient revenue from sources other than the Interstate TRS Fund to pay for its many outreach activities that could be considered to constitute lobbying and advocacy activities directed at TRS users. Accordingly, if Sorenson were unable to use any funds from reimbursements from the Interstate TRS Fund for these activities, it would have to scale back dramatically its lobbying and advocacy activities.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 11th day of July, 2008 at Salt Lake City, Utah.



Reed Steiner

Exhibit 2

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

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

DECLARATION OF MICHAEL D. MADDIX

1. I am currently employed as Regulatory Affairs Manager for Sorenson Communications, Inc. I have personal knowledge of the following facts and, if called and sworn as a witness, could competently testify thereto.

2. My responsibilities at Sorenson include, among other things, overseeing Sorenson's advocacy at the Federal Communications Commission and in Congress; industry relations, including interacting with other Telecommunications Relay Service (TRS) providers and vendors that provide equipment and services used in the provision of TRS; helping users exercise their rights to use relay calls for business and personal calls; and outreach to public safety agencies and businesses to educate them on relay services.

3. It should go without saying that people who are deaf and hard-of-hearing are people for whom communication -- particularly telephonic communication -- presents considerable challenges. These challenges have contributed over time to the isolation and marginalization of these people in a variety of ways, including with respect to the nation's political processes. Consistent with the landmark Americans with Disabilities Act, the proliferation of Video Relay Service ("VRS") and other forms of TRS services has helped to

break down those historic communication barriers and is responsible for great strides in recent years toward the ability of people who are deaf and hard-of-hearing to function and flourish in society.

4. As the nation's leading provider of VRS, Sorenson frequently communicates with its users to raise important policy issues pending at the Commission or at Congress. For example, last year, Sorenson undertook an expansive outreach and education effort in conjunction with the Video Relay Service Consumer Association ("VRSCA") and other organizations, in order to inform both deaf and hearing VRS users of the importance of the rate methodology proceeding at the Commission and the potential impact on the future of VRS. Sorenson also encouraged VRS users to communicate with the Commission about the proceeding.

5. The education and outreach efforts included postings on the VRSCA website (in English and American Sign Language), presentations by Sorenson employees at conferences dealing with issues of concern to the deaf community, and direct contacts with VRS users. The effort resulted in an outpouring of support – letters, postcards and emails from more than 35,000 individuals who cared enough to take their own time to contact the Commission – urging the FCC to adopt a new rate methodology that would provide stable, predictable and adequate rates for TRS.

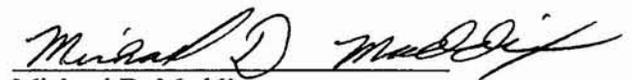
6. That is only one example of Sorenson's successful and ongoing outreach and education efforts. Just last month, a bill was introduced in Congress by Congressman Markey of Massachusetts that proposes to redirect federal universal service support to make broadband Internet access more affordable for the deaf. If enacted, this proposal could help deaf persons defray the costs of obtaining the broadband they need in order to use VRS. In anticipation of the

bill's introduction, Sorenson had spent time and money preparing materials in conjunction with VRSCA to educate the community about the bill and its implications and to assist deaf Americans in contact their representatives in Congress and the FCC and express their support for the federal universal service support for broadband Internet access for low-income deaf and hard-of-hearing people. Unfortunately, we have had to cancel this and other like efforts due to the recent ruling of the Commission prohibiting the use of TRS reimbursements for advocacy directed at TRS users.

7. Sorenson has also in the past contacted its users to warn of scams or other abusive practices aimed at the deaf community, and to keep its users informed of new features and services. The inability to continue to do so going forward is likely to result in an irrevocable loss of consumer goodwill.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 14th day of July, 2008 in Washington, D.C..


Michael D. Maddix