

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

In the Matter of)
)
Telecommunications Relay Services and) CG Docket 03-123
Speech-to-Speech Services for)
Individuals with Hearing and Speech Disabilities)
)
E911 Requirements for IP-Enabled Service Providers) WC Docket No. 05-196

To: The Commission

**COMMENTS OF GOAMERICA, INC.
ON FURTHER NOTICE OF PROPOSED RULEMAKING**

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Summary

GoAmerica, Inc. submits the following comments in response to the Commission's June 24, 2008 *Report and Order and Further Notice of Proposed Rulemaking* in this proceeding.

GoAmerica opposes any rule authorizing termination of a call in progress to accept 911 calls. The telephone network does not shed calls to accept 911 traffic. Relay providers should not be under different rules that cause relay callers to have different experiences than non-relay callers. GoAmerica supports the Commission encouraging providers and 911 service providers to enter into arrangements to exchange Registered Location data. However, it is premature to impose a mandatory requirement for exchange of this data given the relatively short time frame providers have to implement the numbering and 911 systems and related issues. GoAmerica supports Internet-based TRS providers having sufficient resources available at all times to handle emergency communications so that dialing around for a 911 call should not be necessary. GoAmerica considers that to be a potentially dangerous, time consuming and confusing practice.

The Commission should clarify whether registration is required as a condition on users receiving service from Internet-based relay providers. If that is the Commission's intent, GoAmerica sees a serious problem in handling dial around calls because the provider handling the call will not know whether the user is registered with another provider, much less whether the user is a "new" user. Consideration of this problem suggests there should be open registration. The Commission should also clarify that the

“no-incentives to make calls” policy is inapplicable to registration. That someone registers with a provider has no rational relationship to whether that person actually makes unnecessary calls through the provider.

With respect to multiple numbers, non-relay users frequently have multiple numbers—one for home, one for work and one for mobile purposes. With the PSTN, these different numbers are associated with access lines resident at separate locations or in the case of mobile telephones with one device. With the Internet it is possible to use a device at multiple locations and to assign through a login procedure separate numbers. Relay users should be allowed, if they see fit, to receive multiple numbers similar to non-relay users. What is not possible is for a single device to have multiple numbers assigned to it simultaneously. To prevent undue expense, providers should be able to recapture – after notice to the consumer -- numbers which appear to be no longer in service.

In GoAmerica’s view, toll free numbers go beyond functional equivalence. Toll free numbers are an enhanced service. Thus, all Internet based TRS users who are assigned numbers must be assigned geographically appropriate numbers. This is particularly important because toll free numbers do not work with the wireline e911 selective router system.

GoAmerica supports the industry voluntarily moving to a SIP based standard and inter-provider signaling because among other reasons it will help ensure a more secure environment for TRS users as well as enable future enhanced services. However, nothing should stand in the way of providers meeting the 10 digit numbering deadline of December 31, 2008.

GoAmerica sees it as potentially problematic to assign the same 10 digit number to different Internet-based relay services. Each service is enabled based upon different technology, operational platforms and end points. In the Internet environment, each device has its own IP address and therefore must have its own 10 digit telephone number. Otherwise the telephone network will not be able to route to the right device.

With respect to MLTS systems, there would appear to be no nexus between operating an MLTS system and Internet-based relay use. To the extent institutions distribute 10 digit telephone numbers to relay users, they must supply the relay provider with the appropriate Registered Location information.

In regard to who should be eligible for 10 digit numbers, hearing consumers should be able to obtain telephone numbers for the purpose of making point to point video calls to deaf and hard of hearing persons,

IP CTS providers should ultimately comply fully with the numbering and e911 requirements the Commission has adopted. How exactly they do it and when will depend on the exact manner they choose to provide IP CTS and on the time required to put technological solutions in place.

GoAmerica favors the goal of making the system more secure. Devices should be configured to register with the default network or at the very least with the provider that distributes the device. However, GoAmerica opposes limiting users to making calls through only their default provider as this would prevent consumers from effecting dial arounds and/or require consumers to register with multiple providers. This would be a retreat from functional equivalency.

Any registration validation scheme will involve tradeoffs between burden on legitimate consumers and effectiveness in preventing abuse. Consumer choice of relay provider on a per call basis is necessary for functional equivalency and therefore the Commission should not impose a mandatory registration requirement as a condition of using Internet-based relay. Anti-fraud technologies have been developed to the point where they have been effective in mitigating IP relay fraud. Registration would not necessarily eliminate fraud, since fraudsters could still sign up under assumed names and addresses, or worse, usurp valid users' accounts. Therefore, efforts that would otherwise be spent on verification should be directed towards the ongoing technological development and human observation of traffic patterns to combat fraud

GoAmerica supports adoption of a an anti-slamming rule along the lines the FCC suggests, with certain modifications. The key to preventing slamming is proper verification of preferred provider changes. The use of third party verification is warranted in certain circumstances. In addition, consumers should be able to elect freezes on default provider changes. The base penalty for slamming in the TRS context should be \$4,000 given that TRS providers are not considered carriers.

The Commission should junk its various policies concerning consumer contacts in favor of application of the CPNI rules to relay. The existing "no contact" policies are not supported by any grant of authority in the Act, are not embodied in any rule, have not been subject to notice and comment rulemaking, and impinge on the first amendment.

Requiring TRS users to pay for the costs of assigning numbers or to port their number from one provider to another will hinder the consumers' ability or desire to

acquire numbers or to switch providers, especially if providers are not able to subsidize this service on their own. Either number assignment and porting costs need to be compensated by the Interstate TRS Fund or providers should be free to charge or not charge end users at their discretion.

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ON FURTHER NOTICE OF PROPOSED RULEMAKING

GoAmerica, Inc., by counsel and pursuant to FCC Rule Section 1.415, submits its comments in response to the Commission’s June 24, 2008 *Report and Order and Further Notice of Proposed Rulemaking*, FCC 08-151 (“*Report and Order*” or “*FNPRM*” depending on context) in this proceeding, and shows the following:

The *Report and Order* adopted a uniform 10 digit telephone numbering system for Internet-based telecommunications relay service (“TRS”). The ten digit numbering system will enhance functional equivalence for Internet-based relay users by allowing them to receive TRS and point to point calls through a standard 10 digit telephone number. In addition, the system will facilitate E911 access, including the delivery to the appropriate public safety answering point (“PSAP”) of the relay user’s location information and call back number. The Commission is to be commended for taking this giant step toward true functional equivalency for deaf and hard of hearing users of Internet-based TRS.

In the *FNPRM*, the Commission seeks comment on various subsidiary issues relating to the assignment and administration of the ten-digit telephone numbering system. These issues include: (1) certain peripheral issues concerning the proper handling of 911 calls placed via Internet-based TRS; (2) the period for consumer registration; (3) the eligibility of Internet-based TRS users to receive multiple telephone numbers; (4) the use of toll free numbers; (5) what steps the Commission should take, if any, to facilitate implementation of standards-based signaling between service providers; (6) the assignment of a single telephone number to multiple services; (7) how numbers may be distributed in multi-line telephone systems; (8) eligibility to obtain Internet-based TRS telephone numbers; (9) the regulatory treatment of IP captioned telephone service (“IP CTS”); (10) additional security measures which would help ensure the integrity of the TRS system and Internet-based TRS equipment and networks; (11) methods for verification of registration; (12) application of the anti-slamming rules to protect relay consumers against unauthorized default provider changes; (13) the extent to which the CPNI rules should apply to Internet-based TRS providers; and (14) to what extent should the costs of acquiring numbers and porting fees be passed on to Internet-based TRS users. *FNPRM* at para. 105.

GoAmerica’s position on each of these issues is presented below.

1. 911 Issues.

The Commission seeks comment whether it should modify the call completion rules to allow for immediate answer of 911 calls. *FNPRM* at para.106. Thus, if a video interpreter (“VI”) or communications assistant (“CA”) is handling a non-emergency relay

call and identifies an incoming 911 call, the VI or CA would be allowed to terminate the existing call to answer the 911 call immediately. GoAmerica opposes any rule authorizing termination of a call in progress. The telephone network does not shed calls to accept 911 traffic. Relay providers should not be under different rules that cause relay callers to have different experiences than non-relay callers. Terminating existing calls would violate the functionally equivalent requirement and thus should not be allowed. Moving 911 traffic to the top of the answer queue would appear to be sufficient to ensure prompt access to 911 service in the overwhelming majority of occasions. The only conceivable exception might be in a disaster situation where 911 relay traffic becomes extraordinarily high. But if that is to be an exception it should apply across the board to non-relay traffic as well.

The Commission also seeks comment on the situation where “an Internet-based TRS user places an emergency call through an Internet-based TRS provider other than the Internet-based TRS user’s default provider, [and thus the provider] may not have access to the Internet-based TRS user’s Registered Location information.” Specifically, the Commission seeks comment “on ways in which Registered Location information might be made available to alternative relay providers for the purpose of routing emergency calls.” *FNPRM* at para. 107.

Fundamentally GoAmerica supports Internet-based TRS providers having sufficient resources available at all times to handle emergency communications so that dialing around for a 911 call should not be necessary. In fact, GoAmerica considers that to be a potentially dangerous, time consuming and confusing practice. These concerns

aside, GoAmerica supports the Commission encouraging providers and 911 service providers to enter into arrangements to exchange Registered Location data. However, it is premature to impose a mandatory requirement for exchange of this data given the relatively short time frame providers have to implement the numbering and 911 systems and related issues. The Commission also notes that “NeuStar proposes to require ‘inter-provider signaling,’... by which an alternative relay provider would route emergency calls to the 911 service provider utilized by the caller’s default Internet-based TRS provider, thus ensuring the call is routed according to the Internet-based TRS user’s Registered Location data.” Although this proposal has merit, GoAmerica is not in a position to make a recommendation at this time. Such a system would require coordination with other providers in terms of both functionality and technology that can best be explored after the numbering and Internet e911 systems are up and running, and providers have garnered experience with these new systems.

2. Registration Period

The *FNPRM* acknowledges that there must be a registration period to allow existing Internet-based TRS users to register with a default provider, provide their Registered Location, and obtain their new ten-digit NANP telephone numbers. It seeks comment on the length of time necessary for this registration period and whether there should be a cut-off date after which any Internet-based TRS user who has not registered with a default provider will lose the ability to use Internet-based TRS until he or she registers with a default provider. *FNPRM* at para. 109.

Preliminarily, we note that the Commission needs to clarify its registration requirement. The *Report and Order* states that “as of December 31, 2008, Internet-based providers must, prior to the initiation of service for an individual that has not previously utilized Internet-based TRS, register the new Internet-based TRS user, provide that user with a ten-digit NANP telephone number, obtain that user’s Registered Location, and fulfill all other requirements set forth [herein] that pertain to Registered Internet-based TRS Users.” See FCC Rule Section 64.611(b). This provision appears to create two classes of relay users. Those who have previously used Internet-based TRS, and those who have not. Those who have previously used Internet-based TRS are not subject to mandatory registration, whereas new Internet-based TRS users must register.

This dichotomy is problematic on several levels. First a provider has no way of knowing for sure whether a user previously used Internet-based TRS unless the user had previously used that provider’s service. Second, grandfathering existing TRS users would appear inconsistent with the Commission’s discussion at paragraph 44 of the *Report and Order*, that finds allowing users to opt-in or out of registration “is fundamentally inconsistent with our obligation to ‘encourage and support efforts by States to deploy comprehensive end-to-end emergency communications infrastructure and programs.’” Third, this provision appears at odds with the Commission’s inquiry whether users who fail to register should be denied service thereafter.

In light of this, the Commission should clarify whether registration is required as a condition on users receiving service from Internet-based relay providers. If that is the Commission’s intent, GoAmerica sees a serious problem in handling dial around calls. In

a dial around call, the user places the outgoing call through a provider other than the default provider. In that case, the provider handling the call will not know whether the user is registered with another provider, much less whether the user is a “new” user.

Consideration of this problem suggests there should be open registration. Indeed, consumers should be able to register immediately and obtain numbers well in advance of December 31, 2008. Registration should be required to obtain a ten digit telephone number, but not required to use VRS or IP Relay service. Users should not be forced to register if they do not want to and the “new” user/ “old” user dichotomy is simply unworkable. Unless the Commission is intending to require registration with every VRS provider,¹ there is no way to require registration while still maintaining a consumer’s ability to use any VRS or IP Relay service of his or her choice. However, in not registering, users place themselves at risk in terms of being able to use 911 service, and that risk should be discussed explicitly on the provider’s web sites.

We note also that in the case of “public” TRS phones in such places airports or hotels the consumer will have no Registered Location, although the device itself may.

With specific respect to IP Relay, GoAmerica agrees that registration may serve to combat fraud. The issue still remains, however, how to require registration while allowing a user to choose which provider he wishes to handle any outgoing call.

Finally, with respect to the registration requirement, the Commission should clarify that the “no-incentives to make calls” policy is inapplicable to registration.

¹ In the case of consumers registering with multiple providers, there would likely need to be some type of login system, which could sufficiently delay the making of an emergency call.

Providers at deaf trade shows typically have offered nominal gifts to attract consumers to their booths and to register them to use their service. Such items as a company ink pen, an ice cream cone, a bag of popcorn or a DVD disk of an ASL movie have been used. These nominal freebies do not result in unnecessary calls being made. They are a simple and relatively inexpensive marketing fact of life.

The purpose of the “no-incentives” policy is to prevent the making of TRS calls which would not otherwise be made but for the offering of the incentive. *See Marketing Public Notice*, 20 FCC Rcd 1471 (CGB 2005). That someone registers with a provider has no rational relationship to whether that person actually makes unnecessary calls through the provider. A consumer could be registered with a provider and never make a single call. In any event, providers are not paid from the Interstate TRS Fund based on registration. They are paid based on minutes of use occurring during TRS calls. It is clear from the record in this proceeding that registration is beneficial to the provision of TRS. Most importantly, registration facilitates emergency call handling. Providers should be allowed to encourage registration. And if that involves providing a nominal incentive, such as a cup of coffee or an ice cream cone, there is no harm done because it does not incent anyone to make an unnecessary call.

The Commission’s *November 2007 Declaratory Ruling*,² which declared the “no incentive to register” policy, posits no reason why providers should be prohibited from incenting consumers to register. Perhaps it could be assumed that a consumer who

² *Telecommunications Relay Services*, 22 FCC Rcd ___ (2007), *clarified* FCC 08-138 (May 28, 2008) (“*Consumer Contracts Declaratory ruling*”).

registers with a provider might feel some loyalty to that provider and be more inclined to place a call through that provider, but as long as the consumer is not incented to make calls he or she would not otherwise make, there is no harm done. In fact, there is little, if any, difference between giving a consumer a cup of coffee to register with a provider as opposed to licensing the consumer to use a videophone owned by the provider, which VRS providers have been allowed to do unhindered by the FCC for years. By accepting the videophone the consumer has in fact registered, providing at least as much information to the provider as he would give in registering without accepting the videophone.

As long as the provider does not monitor usage on that videophone in order to encourage the consumer to make additional calls through the provider's service, or condition receipt of the videophone on the making of calls through the provider's service, there is no violation of the "no-incentives to make calls" policy. GoAmerica does not interpret the *November 2007 Declaratory Ruling* as recently clarified by the *Consumer Contacts Declaratory Ruling*, as preventing providers from distributing videophones -- which have substantially more than nominal value -- to consumers and thereby registering them. In fact, the ruling seems specifically to countenance the provision of consumer equipment by providers. *See 2007 Declaratory Ruling*, at para. 94 & n. 244. If offering a videophone is not an incentive under the "no incentives to make calls" policy, then a cup of coffee, or a bag of popcorn, or a DVD cannot possibly be one. For these

reasons, the Commission should clarify that providers may employ nominal incentives to encourage consumers to register with them and to obtain 10 digit telephone numbers.³

3. Eligibility for Multiple Telephone Numbers.

The Commission seeks comment on whether consumers should be entitled to obtain multiple telephone numbers. It notes that, “Internet-based TRS providers will incur costs to acquire telephone numbers for their Registered Internet-based TRS Users” and presumably is concerned about unnecessary expense. *FNPRM* at 110.

In considering this issue, it is important to set the matter in context. Non-relay users frequently have multiple numbers—one for home, one for work and one for mobile purposes. With the PSTN these different numbers are associated with access lines resident at separate locations or in the case of mobile telephones with one device. With the Internet it is possible to use a device at multiple locations and to assign through a login procedure separate numbers. Relay users should be allowed, if they see fit, to receive multiple numbers similar to non-relay users in this regard. Likewise, it may be the case that a household would have multiple devices each with a different number. Although this may be difficult for the consumer to manage, GoAmerica sees no problem here. Likewise, relay users should be able to forward their office numbers to their home

³ The “no incentives to register” policy also suffers from several legal infirmities under the Administrative Procedures Act (“APA”) which are discussed in detail below in the discussion concerning the Commission’s “no contact” with consumers policy. Rather than repeat that extended discussion here, GoAmerica hereby incorporates it by reference.

numbers, or rollover to their cellular phones just like hearing persons.⁴ As always, functional equivalency should be the guide.

What is not possible in GoAmerica's view is for a single device to have multiple numbers assigned to it simultaneously. This would be problematical since the network could only send one of those numbers out as the ANI for caller ID or e911 purposes.⁵

One issue that is likely to arise is if consumers obtain one or more numbers, but for some reason, fail to utilize them to make calls. This might occur, for example, if a consumer replaces an existing videophone with a new videophone with a new number. To prevent undue expense, providers should be able to recapture – after notice to the consumer -- numbers which appear to be no longer in service. For example, if a provider assigns a number to a consumer and the consumer does not make or receive a call for, say 120 days, the provider should be able to recapture and recycle that number. The ability to recapture and recycle numbers is essential to cost efficiency. As an example, in GoAmerica's effort to port My IP Relay Numbers from Verizon to GoAmerica, it identified approximately 40 percent of numbers that were both unused and not renewed by the consumer when the consumer was contacted by email.

⁴ A situation where that might arise would be where one number could be configured to point to a device, but if the device does not answer, it could be programmed to "roll over" to another device. In fact, this is how My IP Relay Number worked prior to integration with GoAmerica: a call could first try a mobile device, then a VP endpoint, and then go back to a "text mail" service.

⁵ As discussed above, individuals would be able to use the same device to receive incoming calls to multiple numbers. They would also be able to switch service accounts to the same number

4. Use of Toll Free Numbers

The FNPRM acknowledges that certain Internet-based TRS users currently use toll free numbers issued or assigned by Internet-based TRS providers or other carriers and may continue to do so, and requests comment whether these Internet-based TRS users should be subject to a fee for use of a toll free number, as are hearing users. The Commission also seeks comment on any other issues involved in using toll free numbers for Internet-based TRS, including any impact the use of such numbers may have on the provision of 911 service. *FNPRM* at 111.

In GoAmerica's view, toll free numbers goes beyond functional equivalence. Toll free numbers are an enhanced service. Thus, all Internet based TRS users, who are assigned numbers, must be assigned geographically appropriate numbers. This is particularly important because toll free numbers do not work with the wireline e911 selective router system. To the extent Internet-based relay users desire to acquire and utilize toll free numbers as an enhanced service to their local geographic numbers, we see no objection. However, GoAmerica does not believe that the costs of toll free numbers should be paid for by the Interstate TRS Fund. Thus, providers should either absorb the cost of toll free numbers or consumers who want them should pay their costs directly.

5. Signaling.

The *FNPRM* notes (at para. 112) that NeuStar proposes that standards-based signaling be required between service providers. Specifically NeuStar advocates that there be established inter-provider signaling using Session Initiation Protocol ("SIP") for TRS to facilitate a transition from the current requirement that end devices implement

H.323 protocols to an environment that will support H.323 standard and SIP end devices. Although declining to adopt this suggesting immediately, the Commission seeks comments on NeuStar's underlying objective of transitioning to SIP-based end devices and steps the Commission could take to facilitate the process.

GoAmerica supports the industry moving to a SIP based standard and inter-provider signaling because among other reasons it will help ensure a more secure environment for TRS users as well as enable future enhanced services. However, nothing should stand in the way of providers meeting the 10 digit numbering deadline of December 31, 2008. After that time, the Commission should hold another stakeholder summit looking toward the adoption of SIP as the industry standard and regular interoperability testing between providers and end points that can be managed by a neutral third party. It is also important to note that even while adopting a requirement for SIP, that providers be allowed the flexibility to adopt future technological enhancements without prior Commission intervention and that provision be made to continue to serve legacy H.323 devices.

6. Assignment of a Single Telephone Number to Multiple Services.

The *FNPRM* (at para. 113) recites that, "The TDI Coalition asserts that functional equivalency requires that deaf and hard-of-hearing users should have one NANP number for multiple devices, such as a stationary videophone and a portable wireless videophone." Nevertheless, the *FNPRM* notes that currently, hearing users may not have one NANP number for multiple services, such as their home telephones and their portable wireless phones and generally need to employ some type of call forwarding functionality

in order to make it possible to receive calls placed to a single telephone number from multiple devices. *Id.*

Although we understand TDI's desire for this functionality, it may be problematic as different services (IP Relay, VRS, IP CTS) are enabled based upon different technology, operational platforms and end points. In the Internet environment, each device has its own IP address and therefore must have its own 10 digit telephone number. Otherwise the telephone network will not be able to route to the right device. It may be possible for a relay user's number to be set up to default to one device or particular service – e.g., a VRS videophone at home, but if a connection cannot be made, then route to another device on that service or another service, for example, a T-Mobile Sidekick wireless device.⁶ The Commission should not mandate that type of service, but should not prevent it either.

7. Multi-Line Telephone Systems.

The *FNPRM* (at para. 114) seeks comment on what, if anything, the Commission should do to ensure that Internet-based TRS users who work in government buildings, live on college campuses, or otherwise use multi-line telephone systems have access to functionally equivalent telephone numbers and E911 services. Specifically, the Commission asks if MLTS operators should be able to provide telephone numbers to Internet-based TRS users, what procedures would be required to effectuate such a system, what impact does the presence of an MLTS have on the ability of an Internet-based TRS

⁶Such functionality could be controlled from either the central numbering database or from the default provider.

user to select a default provider, and are any additional safeguards necessary to assure that emergency calls are properly routed and handled for Internet-based TRS users using MLTS.

MLTS system are not analogous to Internet based relay. MLTS systems involve a switching component and trunk groups not present with Internet access. For example, an MLTS system in an office by necessity will have one service provider of local telecommunications access since that one provider provides dial tone for the entire MLTS system. However, that same office may share a T-1 line among several users with each user will having a separate IP address and with each user choosing a distinct Internet-based TRS provider.

Thus, there would appear to be no nexus between operating an MLTS system and relay use. Government agencies, schools, or similar institutions may have internal telecommunications requirements. The FCC should not interfere in those requirements as long as users are entitled to register and receive 10 digit local telephone numbers and to provide their Registered Location for e911 purposes. To the extent a government agency, school or similar institution provides Internet-based relay numbers to its users, there should be a requirement that the appropriate Registered Location information be provided and TRS providers should be under a duty to use reasonable diligence to ensure that the appropriate Registered Location is obtained.

8. Eligibility to Obtain Internet-Based TRS Telephone Numbers.

The *FNPRM* (at para. 115) also seeks comment on who should be eligible to obtain telephone numbers from Internet-based TRS providers, for example, friends or

family of deaf persons fluent in sign language, and asks commenters to address (1) any effect of their proposals on the Interstate TRS Fund, (2) number exhaustion concerns, and (3) safeguards that should be put in place.

For the purpose of making point to point video calls to deaf and hard of hearing persons, hearing consumers should be able to obtain telephone numbers. This furthers functional equivalency because it allows hearing signers and deaf signers to connect directly while saving the TRS Fund the cost of relay calls that need not otherwise be made. In other words, the FCC has two reasons to do everything it can to promote and enable point to point communications: (1) such calls are frequently the most functionally equivalent form of telecommunications for many individuals; and (2) such calls reduce charges to the Interstate TRS Fund.

GoAmerica believes that the FCC should allow the marketplace to determine whether each provider should charge the hearing user for a telephone number or absorb the cost itself. Even were the costs billed to the Interstate TRS Fund, the result would be positive because such calls would otherwise be made by VRS and the annual cost of a number assignment is considerably less than the cost of one VRS call. Number exhaustion is similarly not a substantial issue. The total number of additional numbers required in this instance would likely be nominal. As to safeguards, the most effective safeguard would be to require that hearing persons show fluency in sign language, a requirement GoAmerica has already implemented.

9. Regulatory Treatment of IP CTS.

The *FNPRM* suggests (at para. 116) that IP CTS raises distinct technical and regulatory issues in the context of numbering and indicates that there is insufficient information in the record to make a finding on this form of Internet-based TRS. Accordingly, the Commission seeks comment whether it should extend the numbering system to IP CTS. It seeks information on how IP CTS calls are routed and how such call routing differs from VRS and IP Relay services? It asks, “Would the unique characteristics of IP CTS make it difficult or infeasible to map a NANP number to an IP address? And what jurisdictional and regulatory issues must be taken into consideration should the Commission decide to extend the numbering system ... to IP CTS?”

To GoAmerica, the answer is relatively simple. IP CTS providers should comply fully with the numbering and e911 requirements. How exactly they do it will depend on the exact manner they choose to provide IP CTS and on the time required to put technological solutions in place. Currently IP CTS outbound calls employ the connection of a VCO number, which is typically a landline or wireless number. In such cases, extending the numbering system to IP CTS is unnecessary since the number already exists. Like other forms of Internet-based TRS, the IP CTS call center should pass along the VCO callback number as the “ANI” to the outbound party exists. Otherwise it would be problematic in 911 situations or in situations where the outbound party relies on the ANI for processing (e.g., calling to activate a newly-issued credit card, for which the consumer is supposed to call from the phone number on record with the credit card company). Given, that there may be other means of providing IP CTS, it may be

appropriate for the Commission to temporarily waive the December 31, 2008, deadline to become fully compliant. If so, waivers should only be granted upon a compelling justification.

With respect to the inbound call, an IP CTS user is simply another endpoint. As such, extension of the numbering plan to IP CTS should not be materially more complicated than applying it to other forms of Internet-based TRS. In other words it should be possible to map a call to an IP CTS device having a local phone number.

With respect to the jurisdictional issue, since the Commission has plainly stated that IP CTS covers any scenario where the captions are delivered via the Internet, it would always fall in the interstate jurisdiction. Thus, all inbound and outbound usage scenarios of IP CTS remain interstate as long as the captions are delivered via the Internet.

10. Security.

The *FNPRM* points out (at para. 117) that “NeuStar raises several concerns regarding the security of the TRS numbering system and of the equipment and networks used by Internet-based TRS users. We seek comment on NeuStar’s proposals to require device registration, close firewalls, and ‘close the network’ such that default Internet-based TRS providers only accept calls from their own Registered Internet-based TRS Users, from the PSTN, or from another Internet-based TRS provider.”⁷

⁷ See NeuStar Refresh Comments at 10-11, Attach. at 9-10. It is unclear what NeuStar means by “another Internet-based TRS provider.” We assume NeuStar is referring to point to point calls, i.e., calls made by one video user to another.

NeuStar's goals are laudable but its proposal is problematic. GoAmerica favors the goal of making the system more secure. Devices should be configured to register with the default network or at the very least with the provider that distributes the device. However, GoAmerica opposes limiting users to making calls through only their default provider as this would prevent consumers from effecting dial arounds and/or require consumers to register with multiple providers. This would be a retreat from functional equivalency. Especially given that answer speed requirements are relatively lax for VRS, consumers need the ability to dial around if their preferred provider does not provide an interpreter in a reasonable amount of time. The Commission should encourage providers to work toward providing more secure solutions, but should not prevent dial arounds or mandate registration with multiple providers, at least not for VRS users.

The *FNPRM* also asks, "Alternatively, are there standards-based technical solutions for user authentication and for securing the user firewall traversal that would permit users to continue to make or receive relay calls directly through providers other than their default provider? Could such technical solutions also enable two registered VRS users to connect directly to each other based only on information contained in a central database, without the need to rely on an intervening Internet-based TRS provider? What specific consensus-based standards would be required? We also seek comment on the Commission's authority to mandate the adoption of such security measures." *Id.*

SIP is one such signaling protocol that would allow registration of endpoints to a provider and also reduce the number of channels required to be opened for communication. The ITU H.235.x add-on to H.323 provides Authentication and Privacy

to the current VRS protocol as well. It is questionable whether the Commission should assume the role of enforcing security at the user's location. The majority of Internet-based TRS consumers use a hardware based device to access VRS service and these devices are placed in a separate DMZ from the rest of the user's computer equipment, thereby isolating the computer equipment from any perceived security risks. While the goal should always be to improve security across the Internet, and to provide guidance to end users on how to properly configure their routers to isolate their video equipment, we must be mindful not to remove choice from the end users as to which Internet-based relay provider they want to use for any given call.

11. Verification of Registration.

The *FNPRM* states (at para. 118) the Commission's belief "that requiring Internet-based TRS providers to offer their users a means of registering will help reduce the abuse of IP Relay for fraudulent purposes" and should benefit merchants, providers and users. The Commission therefore asks for comment on further rules that might curb these problematic practices. Specifically, it asks "would a closed system requiring Internet-based TRS providers to validate the registration of users before completing non-emergency calls help curb IP Relay fraud including specifically encouraging (or requiring) Internet-based TRS providers to filter out requests for Internet-based TRS that come from suspected illegitimate users, such as known fraudsters or overseas users?"

In GoAmerica's view these issues are predominately related to IP Relay and are largely inapplicable to VRS. Although it might be supposed that a mandatory registration requirement would likely help to curb fraud, the cost is a reduction of utility on the part

of IP Relay users and an erosion of functional equivalence since there are a variety of circumstances where hearing persons do not “register” e.g., pay phones, prepaid calling cards and disposable cell phones. Moreover, users would either have to register with all IP Relay providers in order to maintain their current ability to use any such provider, or IP Relay providers would be required to maintain and share information to validate the legitimacy of the consumer. Any validation scheme will involve tradeoffs between burden on legitimate consumers and effectiveness in preventing abuse. We believe that consumer choice of relay provider on a per call basis is necessary for functional equivalency and that therefore the Commission should not impose a mandatory registration requirement as a condition of using Internet-based relay. Anti-fraud technologies have been developed to the point where they have been effective in mitigating IP relay fraud.⁸ Registration would not necessarily eliminate fraud, since fraudsters could still sign up under assumed names and addresses, or worse, usurp valid users’ accounts. Therefore, efforts that would otherwise be spent on verification should be directed towards the ongoing technological development and human observation of traffic patterns to combat fraud. All relay providers should consider joining a consortium that shares blacklists, whitelists and other anti-fraud measures so that the entire TRS industry gets the benefit of all the protections developed.

⁸ For example, GoAmerica uses a variety of fraud suppression techniques to combat IP Relay fraud. These techniques include technological, operational, and analytical methods, which are inserted at multiple points in the end-to-end relay call sequence. GoAmerica has invested considerable resources in developing and utilizing these fraud suppression methods. Its operational experience in this area strongly suggests that we should continue these efforts on an ongoing basis to maintain the integrity of relay services without the need to require registration as a way to combat fraud.

12. Slamming Issues.

The *FNPRM* (at paras. 119-26) seeks comment on a number of issues relating to slamming in the TRS context, i.e., the unauthorized change of a TRS user's preferred provider. These include: (1) whether to adopt slamming rules; (2) whether such protections largely should track current telecommunications carrier slamming regulations; (3) the Commission's jurisdiction to adopt slamming rules for Internet-based TRS; (4) the specific measures the Commission should adopt, including (a) what should be sufficient to effectuate a provider change; (b) should third party verification be required; (c) what should be the requirements for a letter of agency allowing a preferred provider switch; and (d) should a freeze mechanism be instituted which requires a consumer to affirmatively advise the existing preferred provider that he wishes a preferred provider change.

In addition, the *FNPRM* (at paras. 127-30) seeks comment on how to craft liability provisions for violations of an Internet-based slamming rule, including how to handle the situations where the provider has been or has not been paid from the fund, whether there should be an additional 50 percent penalty, and the appropriate base forfeiture penalty for slamming in the Internet-based TRS context. Regarding complaint resolution, the *FNPRM* (at para. 128) seeks comment on what procedures to adopt when a provider is informed by a user of an unauthorized change in provider, including procedures by which the allegedly unauthorized provider may rebut the allegation that an unauthorized change occurred and whether there should be a deadline by which relay users must notify unauthorized providers of an alleged unauthorized provider change.

Finally, the *FNPRM* (at para. 129) asks whether the FCC should allow a VRS or IP Relay provider to acquire, by sale or transfer, either part or all of another provider's consumer base, provided that the acquiring provider complies with specific procedures.

GoAmerica supports adoption of a slamming rule along the lines the FCC suggests, with certain modifications. In GoAmerica's view, the functional equivalence standard of Section 225 of the Act provides sufficient jurisdiction to adopt and enforce anti-slaming rules. The intent of Section 225 is to afford deaf and hard of hearing persons with telecommunications service equivalent to that enjoyed by hearing persons. Because hearing persons enjoy the right to port their telephone numbers and choose their telecommunications providers, it follows that Internet-based relay users should be able to do so as well. Because slamming rules are necessary to protect the ability of TRS consumers to choose their preferred TRS provider, such rules are reasonably ancillary to Section 225's requirement of functional equivalence.

In GoAmerica's view the key to preventing slamming is proper verification of preferred provider changes. There is considerable opportunity for mischief if the rules are not properly formulated. Providers should be required to obtain and maintain verification that the person authorizing a change in the default provider is the person to whom the telephone number in question is assigned. This could include a requirement for submission of a government issued ID card with an in person, written or electronic request. Alternatively, verification would be considered sufficient if the request were made on a call from the device to which the number has been assigned, in which case the provider should be required to maintain a record of the call for a minimum of 180 days

after the default change is effected. GoAmerica also supports employment of a third party for verification purposes where a live person to person meeting is not possible. Third party verification, however, should not be required when in person written authorization is obtained. Third party verification is required for switching telephone service under certain telesales and online sales activity as a further means of consumer protection. Internet-based TRS users deserve no less protection. Letters of agency authorizing a switch of a TRS user's preferred provider should be required to contain the similar data as that required to switch telephone service.⁹ Consumer freezes on default

⁹ Applying by analogy FCC Rule Section 64.1130, which sets forth the requirement for letters of agency for preferred carrier changes, a letter of agency for a change of preferred Internet-based TRS provider would be a written or electronically signed separate document (or an easily separable document) or located on a separate screen or webpage containing only the authorizing language having the sole purpose of authorizing a preferred Internet-based TRS provider change. The letter of agency would be required to be signed and dated by the consumer requesting the preferred provider change.

The letter of agency could not be combined on the same document, screen, or webpage with inducements of any kind. Notwithstanding this restriction, the letter of agency could be combined with checks that contain only the required letter of agency language and the necessary information to make the check a negotiable instrument. The letter of agency check could not contain any promotional language or material. The letter of agency check would have to contain in easily readable, bold-face type on the front of the check, a notice that the consumer is authorizing a preferred provider change by signing the check. The letter of agency language would have to be placed near the signature line on the back of the check. At a minimum, the letter of agency would be printed with a type of sufficient size and readable type to be clearly legible and contain clear and unambiguous language that confirms:

- (1) The user's name and address and each telephone number to be covered by the preferred provider change order;
- (2) The decision to change the preferred provider from the current telecommunications relay services provider to the soliciting telecommunications relay services provider;
- (3) That the consumer designates [insert the name of the submitting provider] to act as the subscriber's agent for the preferred provider change;
- (4) That the consumer understands that only one telecommunications relay service provider may be designated as the subscriber's preferred provider for any one telephone number; and

(continued...)

provider changes should be an option available for TRS users who desire to make use of them to ensure that their preferred providers are not switched without their affirmative consent.

Providers should be required to place a notice on their web sites explaining how customers may complain of unauthorized provider changes. Since all providers announce their identity at the beginning of a call, consumer complaints of unauthorized provider changes should be required to be made within ten days of the consumer becoming aware of such a change and should be served on the provider in question and the FCC. Such complaints should be able to be filed electronically from the FCC web site and from all provider web sites. Providers should be required to respond to such complaints after service within fifteen business days. Consumers should be presumed to have been made aware of such an unauthorized provider change upon making a call through the new default provider. Complaints should be handled by the FCC and not by state commissions since Internet-based relay is an interstate service paid for at the federal level.

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(5) That the consumer may consult with the provider as to whether a fee will apply to the change in the consumer's preferred provider.

Letters of agency could not suggest or require that a consumer take some action to retain the user's current preferred provider. If any portion of a letter of agency is translated into another language then all portions of the letter of agency would have to be translated into that language. Every letter of agency would have to be translated into the same language as any promotional materials, oral descriptions or instructions provided with the letter of agency. Letters of agency submitted with an electronically signed authorization would include the consumer disclosures required by Section 101(c) of the Electronic Signatures in Global and National Commerce Act. Letters of agency could be good no more than 60 days after signature, except for letters of agency for multi-line and/or multi-location business customers that have entered into negotiated agreements during the course of a term agreement would be valid for the period specified in the term agreement.

The liability rules the *FNPRM* proposes, denial of compensation and a 50 percent penalty associated to the service number in question, make sense. Makeup payments to the switched from provider amount to a windfall, however. Instead, the TRS Fund should be reimbursed, for such payments, plus a 50 percent penalty fee. Given that TRS providers are not considered common carriers, and that many providers are relatively small enterprises, the \$40,000 base penalty for a slamming violation of a telecommunications carrier, is excessive. A \$4,000 penalty per instance of TRS slamming is more reasonable. Obviously, providers would have a right to show the consumer gave consent for the preferred provider change in defense of any enforcement action.

Finally, the Commission should allow a provider to obtain all or a part of another provider's registered customer base by purchase or assignment so long as each consumer affected is provided actual notice of the transaction via U.S. Mail or email.

13. Consumer Privacy.

The *FNPRM* (at paras. 131-46) seeks comment on what, if any, specific actions the Commission should take to ensure the privacy and security of TRS consumers' call records or other personally identifiable account or usage information, including the information users provide in connection with the Registered Location requirement..." Among the matters for which the Commission requests comment is the interplay between its current restrictions on the use of customer profile data and data generated in the course of providing TRS services as it concerns the Commission's policies on TRS marketing and the CPNI rules, if applied to TRS. *Id.* at paras. 145-46.

The Commission must draw a distinction between impermissible financial and other tangible incentives to make calls and permissible marketing of relay services to consumers. The former should be prohibited by an express rule; the latter is necessary given both the competitive relay market and the Congressionally mandated obligation for outreach to potential users of relay service.

To date the Commission has largely failed to address this issue in a reasoned manner or in accordance with the requirements of the APA or the first amendment. The Commission has never completed a rule making on permissible marketing practices of TRS providers, much less adopted any rule. It has proceeded by the extremely questionable methodology of issuing declaratory rulings announcing potentially overbroad and vague policies without the advantage of notice and comment. And it has repeatedly confused valid and well established marketing practices designed to differentiate providers with what it calls financial incentives to make unnecessary calls. The Commission needs to junk its ad hoc decision making in favor of adopting rules which track the CPNI rules applicable to telecommunications providers. And having established a competitive service, it needs to cease its unconstitutional policy against providers contacting consumers in favor of a rule whereby consumers are allowed to opt out of those contacts which are not necessary to complete calls.

The Commission's policies on TRS consumer contacts has morphed from an initial prohibition on using customer profile data for purposes other than to complete calls (a quite narrow restriction), to a broad prohibition on using any call or consumer database to contact consumers for purposes unrelated to completing calls, and now even to a

prohibition on using funds paid from the TRS Fund for contacting consumers to advise them of issues relevant to TRS pending before the Commission. The no contact policy is not supportable and for several reasons should be junked in favor of simply applying the CPNI rules directly to relay.

First, the “no contact” restriction finds no support either in the Act or in the Commission’s rules. The closest analogous provision is in fact the CPNI rules. *See* 47 C.F.R. §64.2001 et seq. The CPNI rules were enacted specifically pursuant to Congressional direction. *See* 47 U.S.C. § 222. No portion of the agency’s enabling statute grants it authority to apply something beyond the CPNI rules to TRS. For the Commission to apply Section 222 by analogy to relay, it is plain that a blanket “no contact” rule sweeps far beyond Section 222's authorization. As the 10th Circuit has explained, Section 222 recognizes three types of customer information: (1) CPNI; (2) aggregate customer information; and (3) subscriber list information. *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1228 n.1 (10th Cir. 1999) (“*U.S. West*”). CPNI is afforded the highest level of protection. *Id.* Even though CPNI enjoys the highest protection level, Section 222 specifically contains an exception to the use of CPNI if the customer consents to such use. *Id.* at 1229. By contrast, the current “no contact” policy – which implicates subscriber list information, the least protected category of information -- contains no such exception, only the provision that contact is allowed “to complete a relay call.” Since the no contact policy goes substantially beyond the restrictions Congress authorized in Section 222, Section 222 and the CPNI rules offer no basis for a restriction on provider contact of TRS users.

Likewise the “no contact” restrictions find no authority in any other provision of the Act. There is no other provision of the Act which could be interpreted as a grant of statutory authority to the Commission to prohibit TRS providers from using consumer lists or funds derived from the TRS program to contact users for lobbying or any other lawful purpose. These restrictions plainly exceed the Commission’s mandate 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).¹⁰ These restrictions thus cannot stand.

Second, given the broad sweep of the “no contact” policy, it plainly violates providers’ free speech rights under the first amendment. In *U.S. West v. FCC*, 182 F.3d 1224, the court found the Commission’s then current CPNI rules to be an unconstitutional abridgement of the free speech rights of telecommunications carriers because it limited use of CPNI to only when the consumer opted-in to such use. The Court found that the

¹⁰ See *Am. Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir 2005) (agency may regulate only pursuant to express grants of authority or ancillary jurisdiction based on these express grants). Section 225 of the Act contains but a single speech-restrictive provision. That provision prohibits providers from “disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of the call.” 47 U.S.C. §225(d)(1)(F). And Section 705 of the Act simply prohibits providers from disclosing “the existence, contents, substance, purport, effect, or meaning” of any relayed communication, subject to certain exceptions. 47 U.S.C. §605(a). Neither provision confers authority on the Commission to impose broad speech restrictions, and GoAmerica is aware of no other provision in the Act that might even conceivably be so interpreted. Moreover, Congress’s express delegation (in Sections 225 and 705(a)) of authority to regulate disclosure of certain limited information related to TRS service and the corresponding absence of any express delegation here strongly suggests that Congress did not intend to allow the Commission to issue the broad speech regulations it has promulgated by the various declaratory rulings. See *Motion Picture Ass’n of America, Inc. v. FCC*, 309 F.3d 796, 805-06 (D.C. Cir. 2002). That suggestion is particularly strong here, where the regulations at issue curtail protected speech, because such regulations require careful balancing of the constitutional concerns. Cf. *Motion Picture Ass’n*, 309 F.3d at 805 (holding that Commission’s authority must be construed narrowly in context of regulations implicating protected speech, because “Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating” speech).

CPNI rules restricted speech because they restricted carriers' speech to their customers. *Id.* at 1232. Likewise the "no contact" policy restricts speech because it restricts TRS providers' rights to speak to their users. Applying the *Central Hudson*¹¹ test, which the 10th Circuit applied in *U.S. West*, necessitates the conclusion that the "no contact" policy violates the first amendment. That four part test is as follows: (1) Is the speech lawful and not misleading? (2) If so, is there a substantial state interest in regulating the speech? (3) If so, does the regulation directly and materially advance that governmental interest? And (4) if so, is the regulation no more extensive than necessary to serve the governmental interest? *Central Hudson*, 447 U.S. at 564-65. Here the restriction on speech fails all four *Central Hudson* tests.

First, the restriction on provider initiated contacts with relay users necessarily restricts speech concerning lawful activity and speech which is not misleading. Certainly, speech informing consumers of the existence of Commission proceedings which may affect TRS is lawful and not misleading. Thus, as a threshold, such speech is protected under the first amendment.

Second, there would appear no substantial governmental interest in restricting the speech in question. In fact, the example the FCC gave in the *November 19, 2007 Declaratory Ruling* specifically targets speech concerning an ongoing Commission proceeding, stating, "Therefore, for example, a provider may not contact its customers, by an automated message, postcards, or otherwise, to inform them about pending TRS

¹¹*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

compensation issues and urge them to contact the Commission about TRS compensation rates.” *November 2007 Declaratory Ruling*, at para. 95. Thus, the policy appears directly aimed at curtailing political speech and the right to petition for redress of grievances. This is speech at the very core of first amendment protection. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); Chafee, *Freedom of Speech* (1920).

Given that the policy implicates core first amendment values, it would be expected that the FCC would have asserted a compelling governmental interest in support of it. Yet it does not. Rather, the *November 2007 Declaratory Ruling* merely states that the “Commission has made clear not only in the 2005 [*Marketing Public Notice*] but also in the [*2000 TRS Order*] that TRS customer profile information cannot be used for any purpose other than handling relay calls.” *Id. citing Public Notice*, DA 05-141 and *2000 TRS Order*, 15 FCC Rcd at 5173-75. Although true, as far as it goes, the *2000 TRS Order*, by its own terms, is limited to customer profile information not consumer lists.¹²

Indeed, nothing in the *2000 TRS Order* prohibits consensual contacts between consumers and providers, or prohibits providers from informing consumers of regulatory issues. Likewise, although the *Marketing Public Notice* “questions” whether it is appropriate for TRS providers to contact or call prior users of the service, it fails to cite to any order, statute, rule or policy prohibiting any such contact. Both the *November 2007 Declaratory Ruling* and the *Marketing Public Notice* do recite that the role of the TRS

¹² Profile information is defined as customer preference information. *2000 TRS Order*, 15 FCC Rcd at 5173. Contacting a consumer to explain service enhancements or to inform the consumer of pending FCC proceedings that may affect TRS does not require access to customer preference information.

provider is to make itself available to provide TRS when the consumer may desire to use that service. Nothing about that role, however, is inconsistent with a provider contacting a user and advising him or her about pending regulatory issues or providing marketing information. After all, that role is the obligation of any common carrier, to make itself available for use by the public. Therefore, the restriction against contacting consumers runs afoul of the second element of the *Central Hudson* test since it lacks any substantial governmental interest.¹³

Furthermore, the only governmental interest even asserted in the *2000 TRS Order* (none being asserted in the *November 2000 Declaratory Ruling* or the most recent “clarification”) is the privacy interest in customer profile information. Even assuming customer profile information is implicated by provider contact of relay users -- and it is not -- there is no privacy interest to protect if the consumer consents to the contact.¹⁴

¹³It should not need to be said, that the FCC has no legitimate interest in being free of consumer complaints that its decisions on TRS matters – such as potentially cutting TRS rates, eliminating funding for outreach, or limiting funding for research and development – may adversely affect the TRS program. The first amendment’s petition clause conclusively forecloses such an interest from being legitimate.

In its most recent attempt to “clarify” this policy, the Commission cited to federal grant cases to support its position that it may control the use of funds paid TRS providers so as to prohibit such activities as lobbying with those funds. *See 2008 Declaratory Ruling*, at para. 11 & n.37, citing *Rust v. Sullivan*, 500 U.S. 173, 196 (1991). TRS payments, however, are not federal grants or subsidies that the government has a right to control. They are not even federal dollars. They are instead reimbursement for the cost for providing services rendered in which the Commission has no legitimate continuing interest after those services are performed. *See 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).

¹⁴In any event, as the 10th Circuit explained, the FCC “must specify the particular notion of privacy and interest served ... the specific privacy interest must be substantial [and the FCC must demonstrate that it] has considered the proper balancing of the benefits and harms of privacy.” *U.S. West*, 182 F.3d at 1235. Such a showing is lacking in any of the FCC’s various declaratory rulings.

Thus, it can hardly be said that the restriction of speech in question either protects customer profiles specifically or consumer privacy in general. It thus fails the third element of the *Central Hudson* test.

For the same reasons, the “no contact” restriction fails *Central Hudson’s* fourth element. The restriction is plainly more extensive than necessary since it prohibits any contact of users other than for completing calls, whether they consent to such contact or not. The policy could have adopted a lesser restrictive means to accomplish its goals. For example, like the CPNI rules, it could have allowed consumers to instruct TRS providers not to contact them or to identify when the consumer desires to be contacted. Since the “no contact” restriction is not narrowly tailored to achieve an (in this case un)asserted governmental interest, it cannot pass this fourth element of the *Central Hudson* test. *See U.S. West*, 182 F.3d at 1238-39 (“FCC record does not adequately show that an opt-out strategy would not sufficiently protect customer privacy”). Hence, the FCC must clarify when providers may contact TRS users and cannot adopt a blanket “no contact” rule.

In clarifying its no contact policy, the Commission must consider that contact with users advances important policy goals. Consumers need access to information from providers to make an informed choice among those providers. This is the essence of marketing and outreach. And consumers ought to be able to obtain information from providers on Commission and Congressional issues which may affect their lifeline relay service. Whether the Commission likes getting comments from the public or not, the nation’s policy as embodied in the APA, 5 U.S.C. § 500 et seq., is that agency action

should be made only after notice and public comment. The commenting public – which includes TRS users – needs access to information from all sources, including providers.

Still other problems exist with the “no contact” policy. It has been adopted and “clarified” in violation of the requirements of the APA because the Commission did not promulgate this policy using notice-and-comment procedures, and because the restriction is arbitrary and capricious. The “no contact” policy is a quintessential example of a general, prospective rule that, under the APA, can be adopted only after notice and comment: it was issued *sua sponte*, applies to all TRS providers, and takes away previously held rights. It is also the type of rule for which the APA’s requirements of reasoned deliberation are especially necessary. The policy 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 the policy without providing any notice to the affected parties, much less any opportunity to comment.

Although the FCC formed its “no contact” policy in a series of declaratory rulings, which are technically adjudications under the APA, *see* 5 U.S.C. § 554(e), it is the intent and effect of agency action, rather than the label that the agency gives to it, that are “decisive.”¹⁵ Here, the FCC’s “no contact” policy has the critical characteristics of a rule: it drastically alters a “regime of rights and duties,” *Kansas*, 787 F.2d at 1428, and is “of

¹⁵ *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 416 (1942). *See also State Corp. Comm’n of Kansas v. FCC*, 787 F.2d 1421, 1428 (10th Cir. 1986) (“*Kansas*”). An agency that intends to create “the effects of a rule, not of an adjudication” may not “avoid the requirement of notice-and-comment rulemaking simply by characterizing its decision as an adjudication.” *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994) (“*Yesler*”).

general...applicability and future effect designed to implement, interpret, or prescribe law or policy,” 5 U.S.C. § 551(4). Before the FCC took action, all TRS providers could use their customer databases to contact users for a variety of purposes; after the Commission’s action, all TRS providers are restricted in their interactions with users, regardless of the providers’ past practices or individual circumstances.¹⁶ *See Yesler*, 37 F.3d at 448-49 (HUD action retracting a right to pre-eviction hearings for “all public housing tenants” was a rule because it “affected the rights of a broad category of individuals”).

Because the Commission’s action is in all effects a rule that alters the rights of a class of entities, the Commission was required to provide the “procedural safeguards of formal rulemaking” set forth in Section 553 of the APA. *Kansas*, 787 F.3d at 1428; 5

¹⁶Although the FCC suggested in the *November 2007 Declaratory Ruling* (at para. 95) that two earlier decisions had indicated that customer contact might be improper in all circumstances, that is not the case. The first of the cited decisions stands for the unremarkable proposition that TRS providers may not “use their customer database to contact prior users of their service and suggest, urge, or tell them to make more VRS calls.” *See Marketing Public Notice*, 20 FCC Rcd 1471. Like the no-incentives policy, this no-urging policy is a more narrowly tailored directive designed to prevent providers from artificially increasing TRS usage. It nevertheless suffers from a number of infirmities discussed herein.

The second precedent the Commission cites, the *2000 TRS Order*, is similarly narrow. There, the Commission found that “customer profile” information collected by an exclusive statewide TRS vendor was not subject to the CPNI protections of section 222 of the Act; the Commission therefore directed outgoing statewide vendors to transfer that information to new vendors. In adopting this requirement, the Commission sought to protect “the reasonable privacy expectations of the TRS users,” and accordingly prohibited providers from using the profile information “for any purpose other than the provision of TRS.” *2000 TRS Order*, 15 FCC Rcd at 5175. The Commission has never suggested that this expectation would apply to entities other than statewide vendors or information other than “customer profile” data; nor has the Commission ever suggested that its holding in 2000 would have the effect of broadly restricting providers’ ability to communicate with TRS users. Moreover, although the *Marketing Public Notice* questioned “whether there are any circumstances in which it is appropriate for a TRS provider to contact or call a *prior* user of their service,” 20 FCC Rcd at 1473 n.9 (emphasis added), that rhetorical question has no force of law, and in any event ignores the many circumstances in which it is appropriate for a provider to contact a TRS user.

U.S.C. § 553(b)-(c). But not only did the Commission fail to provide notice-and-comment procedures, it neglected to provide *any* notice or process. Its *Further Notice of Proposed Rulemaking*, 21 FCC Rcd 8379 (2006) gave no indication of any intent to rule on TRS providers' right or ability to contact users and the Commission never sought comments on this matter. *See id.* The Commission's failure to do so directly contravenes the policies underpinning the requirement of notice and comment – to “assure fairness and mature consideration of rules of general application.” *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (plurality) (disapproving NLRB's use of adjudication to establish a prospective rule without notice and comment).¹⁷

Compounding the problem, the Commission failed to provide even the minimal notice required in informal adjudicatory proceedings. Agencies engaged in adjudication must provide “some sort of procedures for notice [and] comment” in order to create a record adequate for judicial review.¹⁸ As a result of the complete lack of any such procedures here, there is no administrative record supporting the “no contact” policy and the FCC has deprived TRS providers and the deaf community of core first amendment,

¹⁷ Although the court in *Kansas* upheld the Commission's discretion to use adjudication rather than rulemaking, the court carefully noted that the Commission had “issued its order only after providing public notice and an opportunity for the interested parties, including Kansas, to comment.” 787 F.2d at 1428. *See also New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58, 62 n.9 (2d Cir. 1982) (“The FCC's choice of a declaratory ruling in this case, *after notice and an opportunity for comments by interested parties*, was not an abuse of discretion.” (emphasis added)). As discussed, those procedures were totally lacking with the *Order*.

¹⁸ *See Indep. U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 926 (D.C. Cir. 1982) (invalidating ruling because “even in an informal adjudication parties have a right to be informed of and comment on” an agency's ruling) (“*Lewis*”); *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 796-97 (5th Cir. 2000) (upholding ruling because agency “specified the legal issues on which it would rule [and] allowed the parties to submit comments”).

associational and petition rights without any notice or opportunity to be heard. “All standards of fairness and due process in administrative law preclude such” a result. *Lewis*, 690 F.2d at 926.

The restrictions at issue here further fail the requirement of the APA because they are arbitrary and capricious. 5 U.S.C. § 706(2) provides that 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 “no contact” restriction cannot withstand scrutiny under this standard for several reasons.

First, the Commission provided *no* explanation why it adopted the relevant speech restriction, much less the reasoned or satisfactory explanation that the law requires. Second, the Commission failed to cite any factual or record evidence that might justify the speech restriction, and, as a consequence, the Commission utterly failed to articulate a rational connection between the (non-existent) facts found and the choices made. *See State Farm Mutual Auto. Ins. Co.*, 463 U.S. at 43. Third, the speech restriction is plainly much broader than any prior FCC precedent, including the two decisions misleadingly

cited by the Commission in support. Fourth, the Commission did not clearly identify any policy goals that the sweeping restriction might serve, and, in any event, the restriction is much broader than is necessary to serve any policy the Commission may have intended to advance. Finally the Commission clearly failed to consider an important aspect of the problem: the fact that its decision will have far-ranging consequences on the ability of TRS providers to market and differentiate their service to consumers, much less inform consumers of important legal developments involving TRS service.¹⁹ For all these reasons, the “no contact” restriction cannot pass muster under the APA. The Commission should junk its prohibition against provider contact of consumers and instead address the issue by simply applying the CPNI rules to TRS.

The existing CPNI rules provide a balanced and well thought out compromise between consumer privacy rights and the rights of providers to market competitive services. The CPNI rules adopt a “total service approach” whereby carriers may market new services incidental to existing services without securing permission from the consumer. And that approach should be followed with respect to TRS. The TRS CPNI rules should provide that consumers may opt out of being contacted by providers except in connection with call completion. If consumers do not want to receive marketing pitches or information concerning pending TRS proceedings, for example, they should be able to indicate such to providers and providers should be required to respect that choice.

¹⁹ Indeed, the Commission offered no consideration of the trade-offs that would inevitably be involved in proceeding in the manner it has chosen. *Cf. United States Telecom Ass’n v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002) (noting that courts expect “some confrontation of the issue and some effort to make reasonable tradeoffs” from the Commission).

Jurisdiction to adopt CPNI rules for TRS follows from the Commission's jurisdiction to adopt slamming rules. Both are necessary for functionally equivalent service and thus Section 225 provides sufficient jurisdiction to apply these rules to TRS. From the standpoint of jurisdiction, adoption of the CPNI rules is far more supportable than the existing ad hoc determinations on marketing and contact of consumers. As discussed above, the relatively narrow CPNI rules are supported by a specific Congressional grant of authority, Section 222 of the Act. The Commission would therefore be on solid ground applying those rules to TRS. The Commission's previously stated rationale for not applying CPNI rules to TRS, that TRS is not "telecommunication," as defined by the Act, if not plainly wrong in and of itself, ignores that relay is designed to be the functional equivalent of "telecommunications" and thus should be treated as such in light of Section 225's functionally equivalency mandate.

The CPNI rules should apply to all relay services, traditional TRS as well as Internet-based TRS. Sorenson's proposed revisions to the CPNI rules in its May 15th *ex parte* submission are an acceptable way to proceed, although GoAmerica would prefer that the Commission simply expand the definition of "telecommunications service" in FCC Rule Section 64.2003(p) to include TRS and other communications processed by TRS providers. This definition would include CPNI protections, as suggested by Sorenson, for consumers receiving point-to-point video services.²⁰ Since those calls must transit through VRS providers for routing and other purposes, those call should be given

²⁰ See Sorenson Rules *Ex Parte*, Attach. 1, at 2.

no less protection than relay calls. In addition, a consumer's Registered Location information plainly would be considered CPNI.

With respect to provision of CPNI to third parties, the rules should prevent transfer of this data, unless consumers have given their informed affirmative consent. The Commission should require consumer consent before a TRS provider may disclose customer records of a TRS user to third parties or to any specific type of third-party entity not necessary for call completion, except in accordance with lawful authority, such as a subpoena. Internet-based TRS providers should not be required to remove all personally identifiable consumer information for registered Internet-based TRS users that select a different default provider since it is possible that consumers may nevertheless subsequently use the former provider for a 911 or other call in the event such a call cannot be made through the consumer's default provider.

14. Cost Recovery Issues

The Commission has provided that Internet-based TRS providers may seek compensation from the Interstate TRS Fund for their costs of complying with the new requirements adopted in the *Report and Order*. It has not included, however, those costs directly related to consumers' acquiring a number or to the costs associated with number portability. The Commission seeks comment on whether Internet-based TRS users acquiring ten-digit numbers should bear these costs. *FNPRM* at paras. 147-49. The Commission notes that because Internet-based TRS users will now have a default provider – *e.g.*, the provider from which they obtained their number or a provider to which they port their number – that provider can pass the costs of acquiring the number,

or of porting the number, to the consumer. *Id.* at para. 149 The Commission also seeks comment on whether there are other specific costs that result from the requirements adopted in the *Report and Order* that, mirroring voice telephone consumers, should be passed on to consumers, including, for example, e911 charges. *Id.*

The establishment of monthly billing relationships with consumers is likely to cost more than the income received. The cost of assigning numbers to consumers is relatively nominal, as is the cost of porting numbers. The cost of sending monthly bills to consumers for numbering assignment will likely be more than the bill itself and will thus raise the overall cost of TRS or otherwise be uneconomic. Requiring TRS users to pay for the costs to port their number from one provider to another will hinder the consumers' ability or desire to switch providers, especially if providers are not able to subsidize this service on their own. Either porting costs need to be compensated by the Interstate TRS Fund or providers should be free to charge or not charge end users at their discretion.

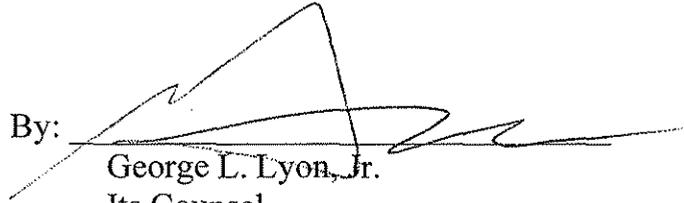
Beyond these practical considerations is the equitable consideration that Internet-based TRS users pay more for the ability to communicate than hearing persons. High speed Internet access lines cost considerably more than basic telephone service. Yet they are necessary for basic VRS service. Deaf persons also must, at least now, pay for telephone lines as well to have TTY access to 911 service or to have DSL service. So although it may sound reasonable at first blush to charge deaf and hard of hearing persons for phone numbers and porting charges for Internet-based TRS, the result is still discriminatory because they will end up paying more than hearing persons for telecommunications service.

Conclusion.

Although this proceeding encompasses a number of issues, it is important to once again emphasize that resolution of none of them should stand in the way of meeting the December 31, 2008 deadline for implementing 10 digit numbering and e911 for TRS. The deaf and hard of hear have waited long enough for this key element of functional equivalency.

Respectfully submitted

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