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

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

COMMENTS OF SORENSON COMMUNICATIONS, INC.

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EXECUTIVE SUMMARY

In November 2007, after a 16-month rulemaking, the Commission unanimously adopted a three-year incentive-based rate plan for video relay service ("VRS"), pledging to leave that plan in place until June 30, 2010. On May 14, 2009, however, the FCC unexpectedly released an opaque, one-paragraph Notice of Proposed Rulemaking ("NPRM") that proposes to abandon the three-year rate plan a full year ahead of schedule. This proposal has met with universal condemnation. Seven consumer groups, as well as Sorenson Communications, Inc. ("Sorenson") and other providers, have urged the Commission to rescind or otherwise reject the NPRM and in its place to initiate a new rulemaking on the long-term VRS rate methodology to apply after June 30, 2010. Many hundreds of individuals have also written to the FCC to urge it to adhere to its commitment to a three-year rate plan. The Commission should heed these voices for at least four reasons.

First, the express rationale for adopting the three-year plan was to ensure predictable, stable rates that would encourage VRS providers to make long-term business plans and investments. Sorenson has acted in good faith and reliance on the three-year plan by increasing its outreach efforts; increasing spending on research and development; increasing efforts to locate, recruit and train American Sign Language ("ASL") interpreters, who are in short supply; and hiring deaf individuals to install videophones and train and support consumers on VRS. If the FCC were to abandon the three-year plan, Sorenson would be forced to scale back or eliminate these initiatives. The consequences of this FCC action – diminished availability of VRS, a retreat from functional equivalence, increased wait times for VRS callers and lower quality of service,

and layoffs of significant numbers of deaf employees – would not serve the public interest.

Second, a decision to abandon the three-year plan would violate the Administrative Procedure Act ("APA"). The skimpy, one-paragraph NPRM cites no new development or exigent circumstance that might justify such a reversal, and none in fact exists. In the absence of any credible rationale, it would be arbitrary and capricious for the FCC to depart abruptly from its unanimous commitment to a three-year plan that was implemented only 15 months ago. Moreover, although the NPRM appears to contemplate a revival of the flawed cost-based methodology that the FCC wisely abandoned in 2007, the NPRM does not inquire about cost-related matters, including how to define the "costs" for which VRS providers are compensated. Any decision to revive a so-called "cost"-based approach in the absence of this critical information would be arbitrary and capricious for this reason as well. It also would be arbitrary and capricious (and perhaps unconstitutional) for the Commission to rescind its commitment to a three-year rate plan where deaf users and the firms that serve them have detrimentally relied on that commitment, as they have here, by making capital expenditure planning and investment decisions.

Third, a decision to abandon the three-year plan would be procedurally unsound for other reasons. The cursory one-paragraph NPRM does not disclose adequate details about its proposal to permit stakeholders to respond in a meaningful way when they submit their comments, and any decision issuing from that NPRM would likely run afoul of the Federal Advisory Committee Act and the Regulatory Flexibility Act.

Finally, reducing the quality or availability of VRS would violate the Americans with Disabilities Act ("ADA") and the Communications Act of 1934, as amended ("Communications Act"). Those statutes require the FCC to *ensure* that "functionally equivalent" VRS is made available to all deaf ASL users "to the extent possible and in the most efficient manner." The progress made under the three-year plan demonstrates that it is indeed "possible" for the Commission to establish a rate regime under which the twin goals of greater functional equivalence and more availability are advanced. Abandoning the three-year plan would reverse this progress, and therefore any FCC decision to head down that path would be unlawful. Concerns about the size of the Interstate TRS Fund could not justify a decision to reverse this progress. If the Commission is concerned that the Fund has grown quickly or become large, these developments should be taken as a sign that consumers are increasingly able and willing to use VRS and other relay services, as contemplated by Congress. To the extent the Commission believes that some of the Fund's growth is the result of waste, fraud, and abuse, that concern is legitimate and should be addressed aggressively. However, the problem of waste, fraud, and abuse is an enforcement issue and not a rate-related one.

For at least the foregoing four reasons, the Commission should reject its proposal to abandon the three-year rate plan and instead initiate a new rulemaking that seeks comment on the appropriate long-term rate methodology for VRS to take effect after June 30, 2010.

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ATTACHMENTS:

Attachment A – Declaration of Reed Steiner

Attachment B – Declaration of Pat Nola

Attachment C – Report of Gregory L. Rosston

Attachment D – Report of Andrzej Skrzypacz

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COMMENTS OF SORENSON COMMUNICATIONS, INC.

On May 14, 2009, the Commission released a Notice of Proposed Rulemaking (the "NPRM") seeking comment on whether to abandon the three-year rate plan for video relay service ("VRS") after only 15 months, and replace it with a new rate methodology that enables even the most efficient firms to recover only a portion of the costs they incur in providing VRS.[1] If adopted, this proposal could drive many, and perhaps all, VRS providers out of business, putting at risk the missions, goals, jobs, and needs of the deaf community, Congress, providers, and other stakeholders, including ASL interpreters. Any surviving VRS providers would, in turn, no longer be able to invest in making VRS more functionally equivalent, more available, more efficient, and more innovative, as contemplated by the Americans with Disabilities Act ("ADA"). Any decision to adopt the NPRM's proposal would be arbitrary, capricious, or otherwise contrary to law. The Commission should not harm the public, including the deaf community, or its own credibility in these ways. Rather, the Commission should reject the course proposed in

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1 *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Public Notice and Notice of Proposed Rulemaking, FCC 09-39, 24 FCC Rcd 6029 (rel. May 14, 2009) ("Public Notice" or "NPRM").

the NPRM, and in its place initiate a new rulemaking that seeks comment on the appropriate long-term VRS rate methodology to take effect after June 30, 2010.

I. INTRODUCTION AND SUMMARY

Since its inception in 2000, VRS has been governed by two radically different rate methodologies. Under the first approach, VRS rates were set annually based on providers' projected per-minute "costs" for the forthcoming rate year, as proposed to the FCC by the National Exchange Carrier Association ("NECA"), the administrator of the Interstate TRS Fund ("Fund"). Notably, the projected "costs" considered by NECA did not reflect the full costs to be incurred by VRS firms in providing the service, but only that portion of provider costs that NECA deemed to be compensable based on FCC rules and orders and informal direction from FCC staff.[2] Complicating the process, "costs" that were deemed allowable changed almost annually. Not surprisingly, this approach generated annual, extended controversies over what costs incurred in providing VRS would be compensable, the predicted impact of changes in the Commission's rules on provider costs, the projected pace of growth in VRS subscribership and demand, and whether the FCC should accept or adjust NECA's proposed VRS rate.

In November 2007, after a 16-month rulemaking, the Commission unanimously chose to move away from this unpredictable annual process, adopting instead a new methodology that would harness the providers' incentives to make ongoing gains in the efficiency of their operations, invest in new technologies that would improve the quality

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[2] As the Declaration of Reed Steiner appended as Attachment A ("Steiner Decl.") explains, the Relay Service Data Request form that VRS providers submit annually to NECA asks only for certain categories of costs that the FCC and NECA deem to be compensable. The Request fails to seek (or specifically excludes) information regarding many of the key business costs that Sorenson actually incurs.

(and lower the per-unit cost) of VRS, and concentrate their energies on expanding the reach of VRS to the deaf community. The centerpiece of this approach was the Commission's express commitment to a three-year rate schedule that would be stable, predictable, and self-executing, thereby enabling VRS providers to implement a longer term business planning cycle that was utterly impossible under the prior, year-to-year approach.[3]

The new methodology took effect on March 1, 2008 and thus far has been an unqualified success. Gone are the annual controversies over provider "costs" and the process by which NECA arrived at a projected VRS rate. Gone are the ever-shifting criteria by which the FCC either accepted NECA's proposed rate or adjusted it upward or downward. And gone are the wild swings in VRS rates from year to year, which were as high as 77 percent annually under the old approach. In their place, predictability, stability, and calm have prevailed. Relying on the transparent, self-executing, three-year rate schedule, providers have instituted long-range plans that advance the statutory goals

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[3] *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Declaratory Ruling, 22 FCC Rcd 20140, ¶ 2 (2007), *as corrected by Erratum*, 22 FCC Rcd 21842 (2007) ("*2007 Rate Methodology Order*") (VRS compensation rates "shall be effective for the 2007-2008 through 2009-2010 Fund years"); ¶ 11 (the FCC was "particularly interested in adopting a methodology that would result in more predictability for the providers"); ¶ 47 ("These rates will be set for a three-year period"); ¶ 51 ("Commenters argue that stable pricing will give providers the opportunity to budget their costs more effectively, and provide enough stability to make long-term investments and allocate money to programs that will reduce costs in the future."); ¶ 56 ("Commenters assert that a multi-year rate provides consistency that is necessary for planning and budgeting purposes, and avoids having to possibly adjust on short notice to a lower rate. We agree, and therefore conclude that the VRS tiers and rates will be adopted for a three-year period."); ¶ 67 ("These tiers and rates shall apply through the 2009-2010 Fund year"); ¶ 72 ("At the end of the three-year period, we will reassess what the tiers and rates shall be for the ensuing three-year period."); ¶ 97 ("The VRS . . . rates shall be set for three years, subject to certain annual adjustments.").

that VRS become more functionally equivalent, more innovative, more efficiently provided, and more widely available to deaf ASL users.[4] As explained in the attached Declaration of Pat Nola, Sorenson's President and Chief Executive Officer, Sorenson has taken the following steps in reliance on the Commission's commitment to a three-year plan:

- increased outreach to inform deaf ASL users about the availability of VRS and its life-changing potential;
- ramped up efforts to locate, recruit, and train video interpreters ("VIs"), thereby forestalling the inflationary wage pressures resulting from the nationwide shortage of qualified ASL interpreters and reducing hold times for VRS callers from over 50 seconds in November 2007 to under 20 seconds now;[5]
- accelerated hiring of deaf installers to ensure that deaf ASL users who request a Sorenson videophone can receive one as quickly as possible;
- rolled out new Sorenson videophones for distribution to customers;
- developed better call-routing software and enhanced safeguards to protect against waste, fraud, and abuse; and
- increased spending on research and development, including efforts to develop a third-generation videophone, which will be more functionally equivalent than any other videophone on the market, and efforts to develop a "mobile" VRS platform.[6]

The three-year rate plan was scheduled to remain in effect through June 30, 2010. On May 14, 2009, however, the Commission unexpectedly released the one-paragraph NPRM that is the subject of these comments. There, the Commission asks whether it should renege on its express commitment to a three-year rate plan by abandoning the incentive-based methodology after little more than a year, and replacing it with an

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4 47 U.S.C. §§ 225(a)(3), (b)(1), (d)(2).

5 *See* Report of Gregory L. Rosston, appended as Attachment C, at 9-12 ("Rosston Report").

6 Declaration of Pat Nola, appended as Attachment B, ¶ 5 ("Nola Decl.").

undefined new methodology that allegedly will be "correlate[d]" in some way to the artificially low NECA-allowed costs of providing VRS.[7]

As Sorenson and others have explained, the mere release of this proposal – much less its adoption – portends dire consequences for members of the deaf and hard-of-hearing community.[8] Sorenson promptly filed a motion asking the Commission to rescind the NPRM, or in the alternative to extend its compressed two-week comment period. Seven consumer groups, as well as other providers, also have asked the FCC to rescind the NPRM or otherwise reject its ill-conceived proposal to modify VRS rates in mid-course.[9] Many hundreds of individual consumers have also written to the Commission urging it to adhere to its commitment to a three-year rate plan. On June 3, the Consumer and Governmental Affairs Bureau ("Bureau") released an order extending the date for submission of initial comments until July 6, 2009, with reply comments due two weeks thereafter, on July 20.

As demonstrated below and in the attached reports of Dr. Gregory L. Rosston and Dr. Andrzej Skrzypacz, it would be an extraordinary act of poor governance and poor

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7 NPRM ¶ 11.

8 Letter from Sprint Nextel Corporation, Snap Telecommunications, Inc., Purple Communications, Inc., and Sorenson to Marlene H. Dortch, FCC Secretary, CG Docket No. 03-123 (May 1, 2009) ("Joint VRS Providers May 1 Letter").

9 Comments on 2009 VRS Rate NPRM of Telecommunications for the Deaf and Hard of Hearing, Inc., Association of Late-Deafened Adults, Inc., National Association of the Deaf, Deaf and Hard of Hearing Consumer Advocacy Network, California Coalition of Agencies Serving the Deaf and Hard of Hearing, American Association of the Deaf-Blind, and Hearing Loss Association of America, CG Docket No. 03-123, at i, 2, 5-6 (June 26, 2009) ("Consumer Groups Comments"); Letter from Karen Peltz Strauss, Legal Consultant to CSDVRS, LLC, to Marlene H. Dortch, FCC Secretary, CG Docket No. 03-123, at 2 (filed June 18, 2009); Comments on Public Notice and Notice of Proposed Rulemaking of Purple Communications, Inc., CG Docket No. 03-123, at 2-3 (June 18, 2009); Comments of Snap Telecommunications, Inc., CG Docket No. 03-123, at i-ii, 7-9 (June 15, 2009) ("Snap June 15 Comments").

economic policy for the Commission to abandon the three-year rate plan in mid-course and then replace it with a hastily conceived arrangement in which rates are flash-cut to confiscatory levels based on historic NECA-allowed costs.[10] The Commission should ensure that its rulemakings are fair, open, transparent, and based on solid facts.[11]

The opaque, one-paragraph May 14 NPRM clearly fails that test. Not only does it provide insufficient notice to interested parties, in violation of the Administrative Procedure Act ("APA"), but its principal factual claim is false. In the NPRM, the Commission claims that its proposal to modify VRS rates a full year ahead of schedule was spurred by its recent discovery of a disparity between the VRS rates and the historical NECA-allowed costs of providing VRS.[12] Yet historical NECA-allowed costs have always been known to the Commission, and the relationship of these artificially low

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[10] Rosston Report at 13-16; Report of Andrzej Skrzypacz, appended as Attachment D, at 3-4, 11-12 ("Skrzypacz Report").

[11] *See, e.g.*, "Remarks of Chairman Julius Genachowski to the Staff of the Federal Communications Commission, June 30, 2009," *available at*: <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291834A1.pdf>, at 4 ("We will be fair. We will be open and transparent."); Dissenting Statement of Commissioner Michael J. Copps, *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2117 (2008) ("This is not the way to do rational, fact-based, and public interest-minded policy making. It's actually a great illustration of why administrative agencies are required to operate under the constraints of administrative process—and the problems that occur when they ignore that duty. At the end of the day, process matters. Public comment matters. Taking the time to do things right matters. A rule reached through a slipshod process, and capped by a mad rush to the finish line, will—purely on the merits—simply not pass the red face test. Not with Congress. Not with the courts. Not with the American people."); Statement of Commissioner Robert M. McDowell, *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294, Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 09-33 (rel. May 5, 2009) ("Debates over policy, and the important subsequent decisions that often emerge, should be firmly grounded not only in law but in solid facts as well. Rendering rules on an unsure factual foundation is akin to building a house on quicksand.").

[12] *See* NPRM ¶ 11.

costs to the VRS rate has always been known to the Commission as well. Indeed, in its May 1, 2007 annual rate filing, NECA listed eight different VRS rates that were based in some way on historical NECA-allowed costs. Yet, within months of being apprised of these data, the FCC twice adopted a VRS rate significantly higher than any of the eight listed rates – thereby tacitly addressing part of the disparity between NECA-allowed costs and the true costs of providing VRS. It is thus misleading for the FCC to pretend that it only recently discovered that a difference existed. More importantly, the suggestion in the NPRM that VRS rates are supposed to be based on historical NECA-allowed costs is a red herring. Indeed, the Commission has never used historical NECA-allowed costs to set VRS rates, and the Commission expressly and unanimously rejected that approach in the *2007 Rate Methodology* proceeding, choosing instead the three-year incentive-based methodology in place today. A prime virtue of this methodology is that VRS rates are no longer based on unexpected, arbitrary decisions concerning what "costs" are allowable and what "costs" are not. As a result, providers are no longer confronted with a perverse incentive to maximize their allowable "costs" and minimize their non-allowable "costs." Instead, as a federal appeals court recently explained, the three-year rate methodology "give[s] [all] providers an incentive to innovate and reduce costs," regardless of how NECA categorizes those costs.[13] Indeed, so-called "actual costs" become irrelevant

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[13] *Sorenson Communications, Inc. v. FCC*, 567 F.3d 1215, 2009 U.S. App. LEXIS 12070 at *13 (10th Cir., June 4, 2009). The FCC also benefits. As the FCC learned in regulating the BOCs prior to 1989, a cost-based methodology requires the Commission to engage in ever-more burdensome, complicated, and arbitrary decision-making regarding what "costs" are allowable and what "costs" are not. Escaping from this vicious cycle was a key reason the FCC chose to abandon cost-based regulation of the BOCs in favor of an incentive-based methodology. *See, e.g., Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, ¶¶ 7, 9, 12 (1989) (cost-based regulation does not

under this approach: "The FCC has chosen to reward efficient providers by allowing them to retain the savings generated by providing TRS at a low cost. It does this by compensating providers *regardless of their actual costs in providing TRS*."[14]

When stripped of its specious claims about providers' "actual costs," the one-paragraph NPRM does not proffer a single fact, policy rationale, or legal theory that might justify abandoning the three-year rate plan a full year ahead of schedule. Not surprisingly, a rushed decision to abandon the three-year rate plan based on no new facts would be arbitrary or capricious, an abuse of discretion, or otherwise legally infirm. Indeed, it would be the epitome of an arbitrary and capricious process for the Commission first to invite providers to rely on a stable, predictable long-term rate, but then – after little more than a year – to revert to an unstable, unpredictable short-term rate without any new facts that might justify this reversal. Furthermore, it would violate the ADA for the Commission to adopt a new rate methodology that caused VRS to regress by becoming less functionally equivalent and less available than was the case under the three-year plan.

Beyond these legal problems, such a decision would simply be poor policy. If the three-year plan were to be abandoned, Sorenson would be forced to terminate or put on hold the various long-range initiatives it has undertaken in reliance on the three-year plan, including efforts to add new users and improve quality of service. The predictable consequences – less outreach, a smaller pool of qualified VIs, layoffs for deaf employees,

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encourage the kinds of economically efficient behavior that result in cost savings, product innovations, and lower rates, and is expensive and difficult to enforce. Incentive regulation could benefit consumers, increase efficiency, promote innovation and competition, and further the public interest at a lower cost to society.).

[14] *Sorenson v. FCC*, 567 F.3d 1215, 2009 U.S. App. LEXIS 12070 at *14.

delayed development of a third-generation VP, longer hold times, and stagnation of internal technologies and processes – would not serve the public interest and would degrade functional equivalency. Even worse, a decision to base rates on NECA-allowed costs would wreak havoc with the VRS industry, potentially driving many providers out of business and forcing any survivors to cut costs by laying off deaf videophone installers and VIs, thereby harming quality of service for deaf users. Litigation over such a decision could drag on for years, undermining the Commission's credibility on a range of disability-related issues. Even the Commission's incipient national broadband plan will suffer, since VRS will no longer be sufficiently funded to play the ambitious role that it should as the premiere broadband application for deaf ASL users.

Rather than head down this path, the Commission should reaffirm the three-year rate methodology and initiate a new rulemaking proceeding in which it seeks comment on the appropriate long-term rate methodology to apply to VRS after June 30, 2010.

II. BACKGROUND

A. Before March 2008, VRS Rates Were Set Through a Dysfunctional Process and Flawed Methodology

In February 2000, the Commission ruled that VRS was a form of relay service for which eligible providers may receive compensation from the Fund.[15] For the first eight rate years after this decision, the compensation rate for VRS was established through an annual process that lacked transparency or predictability and discouraged providers from making the long-term plans and investments necessary to improve VRS and advance the goals of the ADA.

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[15] *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, ¶¶ 22-26 (2000).

1. The Pre-2008 Approach Was Inherently Arbitrary, Opaque, and Confusing

The flawed annual rate-setting process would begin in January of each year, when VRS providers submitted to NECA their historical costs of providing VRS, as well as their projected costs of providing the service and their projected demand for the service for the forthcoming rate year, running from July 1 through June 30. The historical and projected cost data did not reflect the full costs incurred by companies in providing VRS. Rather, those data were limited to the costs deemed allowable by NECA under its interpretation of FCC rules, orders, and guidance. As a result, key VRS costs, such as videophone-related costs, were never reflected in the allowable cost data submitted to NECA.[16] Furthermore, neither NECA nor the FCC published guidelines on how to interpret FCC rules regarding allowable costs, how to account for allowable costs in the corporate books, how to distinguish allowable from non-allowable costs, and how to go about developing projections of allowable costs and demand for the forthcoming rate year. As a result, providers' submissions of historical and projected data lacked uniformity, consistency, or reliability.

Once NECA received the providers' data, it would spend several months engaging in an opaque and non-codified process designed to produce a per-minute VRS rate to be proposed to the FCC. First, NECA would exclude that portion of each provider's projected costs that it believed was not compensable under FCC rules or under additional informal guidance from FCC staff. These decisions were made on an *ad hoc* basis, with no prior notice to the public and according to shifting criteria. (For example, during one rate cycle, NECA created new definitions of "marketing" and "outreach," and

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16 *See infra* at section III.B.2. for a fuller discussion of this issue.

then used those definitions to propose treating marketing costs, but not outreach costs, as non-compensable.[17]) After whittling providers' projections down to what NECA deemed to be appropriate allowable costs, NECA would perform a similar process for providers' demand projections, again without the benefit of a codified or even non-codified process; the end result would be what NECA believed to be a reasonable projection of minutes of use for the forthcoming rate year. Finally, NECA would create an average of providers' projected allowable costs (weighted by the relative projected demand attributed to each provider), and then divide that weighted average by NECA's demand projection in order to create a recommended per-minute VRS rate for the forthcoming rate year.

On May 1 of each year, NECA would submit to the FCC its recommendations for the per-minute compensation rates that would apply to the various forms of Telecommunications Relay Service ("TRS") for the forthcoming rate year. On the very next business day, the Commission would release a public notice, seeking comment on the rates proposed by NECA. The public notice would trigger a compressed pleading cycle: providers and the public would then have just three weeks to submit comments and replies on the rate proposed by NECA, giving the FCC a little more than a month to decide whether to adopt or modify the NECA-proposed rates. Typically, the FCC would release a decision setting a specific VRS rate just days prior to the commencement of the next rate year for which the new rate would be applicable.

From the outset, the foregoing process was plagued by problems, producing arbitrary decision-making, public confusion and anger, and (ultimately) regulatory gridlock. As an initial matter, both the recommended and adopted rates for VRS

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[17] *See, e.g.*, Comments of Sorenson, CG Docket No. 03-123, at 17-25 (May 17, 2006).

fluctuated wildly from year to year. The fluctuations reflected not only the flawed process described above, but also the FCC's proclivity on the one hand for imposing new mandates on VRS providers (thereby increasing the per-minute costs significantly on a year-to-year basis), counterbalanced on the other hand by the agency's proclivity for disallowing certain categories of costs in an apparent effort to limit expenditures on VRS. Beyond the year-to-year gyrations, the FCC repeatedly had to make mid-course corrections to the VRS rate for various reasons, further harming any expectation that VRS rates had the kind of stability and predictability that providers need in order to make long-term business plans or to raise capital. And, the FCC increasingly had to deal with allegations from providers and the public – including thousands of deaf consumers – that the rates proposed by NECA and adopted by the FCC were the product of a broken process and flawed methodology that harmed consumers and thwarted progress toward functional equivalency.

2. The Pre-2008 Approach Produced Increasingly Erratic Results and Ultimately Descended into Regulatory Gridlock

A brief history illustrates the various problems that used to plague VRS rate-setting. In June 2001, the FCC adopted a VRS rate of $7.449 for the 2001-2002 rate year.[18] This rate applied for only one month, and was retroactively raised to $9.614 to reflect exclusion of the data of a provider that had suspended its service.[19] In June 2002, the FCC, without explanation, adopted NECA's proposed VRS rate of $17.044, thereby

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[18] *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, Order, 16 FCC Rcd 12895, ¶ 10 (2001).

[19] *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, Order, 17 FCC Rcd 8840, ¶ 8 (2002).

effectuating a year-to-year increase of over 77 percent in the VRS rate.[20] For the 2003-2004 rate year, NECA proposed a VRS rate of $14.023, but the FCC rejected that proposal and instead adopted a rate of $7.751 – thereby causing a year-to-year reduction in the rate of 55 percent.[21] This time, the FCC attempted to explain its decision by theorizing that the allowable costs of providing VRS were unlikely to be significantly higher than the costs of video remote interpreting ("VRI"), even though VRI is neither a form of TRS nor regulated by the FCC.[22] The $7.751 rate remained in effect for only two months, however, and was retroactively changed to a rate of $8.854 to reflect amended allowable-cost data submitted by VRS providers.[23] For the next rate year, the FCC initially adopted NECA's recommended VRS rate of $7.293, but then retroactively increased that rate to $7.596, again to reflect amended cost data.[24]

This erratic process became even more unpredictable over the next three rate years, fomenting acrimony and confusion and eventually pushing the FCC into a sustained period of gridlock in which it was unable to adopt a new rate and instead twice

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20 *Proposed Payment Formula And Fund Size Estimate For The Interstate Telecommunications Relay Services (TRS) Fund For July 2002 Through June 2003*, Public Notice, 17 FCC Rcd 11242 (2002).

21 *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, 18 FCC Rcd 12823, ¶¶ 1, 37 (2003).

22 *Id.* ¶ 30.

23 *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Rcd 12475, ¶¶ 15, 166, 191-93, 272 (2004) (retroactively adopting rates effective September 1, 2003) ("*2004 TRS Order & FNPRM*").

24 *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, 19 FCC Rcd 12224, ¶ 24 (2004); Order, 19 FCC Rcd 24981, ¶ 4 (2004).

had to freeze in place the prior year's rate. For the 2005-2006 rate year, the VRS rate proposed by NECA and adopted by the FCC was $6.644. However, this rate did not reflect the weighted average of providers' projected allowable costs per minute, the standard that had previously applied. Rather, the $6.644 rate for the first time reflected the *median* projected allowable cost per minute of all the providers that submitted data. The FCC explained that it was compelled to adopt this non-weighted median rate because one "low cost" VRS provider represented such a large proportion of the VRS traffic that the FCC was concerned that a reimbursement rate based on the normal weighted-average approach would not be "fair and reasonable."[25]

In January 2006, VRS providers submitted projected costs and demand data supporting a VRS rate of $7.01 per minute for the 2006-07 rate year. On May 1, 2006, NECA – now excluding various provider costs (including many allowed in previous years) and using its own demand projections without corresponding cost adjustments – proposed that the FCC slash the VRS rate to $6.138 per minute for that rate year. This proposal met with universal criticism and opposition. Consumer groups, providers, and individuals expressed grave concerns about the adequacy of the proposed VRS rate; described various flaws in the NECA ratemaking process, including lack of transparency, consistency, and predictability; and identified methodological errors, which, if ratified by the FCC, would violate the ADA and the Communications Act by preventing providers from receiving reimbursement for the reasonable costs of providing VRS and conducting outreach and marketing. On May 24, 2006, NECA filed brief reply comments in which it

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[25] *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, 20 FCC Rcd 12237, ¶¶ 1, 9, 23, 26 (2005).

purported to address some of the criticisms raised in the record, even as it also conceded that it needed "specific guidance" from the FCC on key issues.[26] NECA's reply comments did not respond to the specific criticisms raised by commenters and, as a result, the record continued to support a VRS rate of $7.01. Perhaps recognizing that NECA's proposal was untenable legally and factually, the FCC effectively decided to abandon any pretense of calculating a rate and instead froze the rate for 2006-07 at the prior year's rate of $6.644.[27]

Two weeks later, in July 2006, the FCC, conceding problems with the existing rate-setting process, adopted an FNPRM that sought comment on the appropriate rate methodology for VRS and other relay services.[28] While the rate methodology proceeding was pending, NECA, on May 1, 2007, filed its proposed rates for 2007-08.[29] NECA again – without prior notice – abruptly changed course from its prior approach, this time proposing 24 possible rates for VRS.[30] The three-week comment cycle again produced universal condemnation of NECA's proposal. Consumers alone filed thousands of comments opposing many of the rates proposed by NECA as too low and contrary to

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26 Reply Comments of the National Exchange Carrier Association, CG Docket No. 03-123, at 3, 8 (May 24, 2006).

27 *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, 21 FCC Rcd 7018, ¶ 17 (2006).

28 *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Further Notice of Proposed Rulemaking, 21 FCC Rcd 8379, ¶ 1 (2006).

29 Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, attached to letter from John A. Ricker, NECA, to Marlene H. Dortch, FCC Secretary, CG Docket No. 03-123 (May 1, 2007).

30 *Id.* at 19-20 and Exhibit 1-4b.

functional equivalency. Faced with this record, the FCC again froze the VRS rate of $6.644, to remain in effect until a new rate methodology was adopted.[31]

B. In March 2008, the FCC Implemented a New Three-Year VRS Rate Methodology in Order to Move Away from the Dysfunctional Year-to-Year Approach Previously in Place

In November 2007, after a 16-month rulemaking, the Commission unanimously adopted the incentive-based "tiered" rate methodology for VRS that remains in effect today, resulting in VRS rates ranging from $6.30 to $6.77.[32] Although the Commission committed to keeping the new methodology in effect for at least three rate years, the methodology did not take effect until March 1, 2008, after most of the first rate year had passed.[33]

By adopting a stable, self-executing three-year methodology, the Commission decided to move away from a rate-setting scheme that involved annual, extended controversies over what costs incurred in providing VRS would be compensable, the predicted impact of changes in the Commission's rules on provider costs, and the projected pace of growth in VRS subscribership and demand. Instead, the Commission chose to adopt a rate plan that would harness the providers' incentives to make ongoing gains in the efficiency of their operations, invest in new technologies that would improve

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31 *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, 22 FCC Rcd 11706, ¶ 1 (2007).

32 *2007 Rate Methodology Order* ¶ 2. After June 30, 2008, the tiered rates automatically adjusted downward to reflect a 0.5% "X factor"; another such downward adjustment was reflected in the interim rates that took effect July 1, 2009. *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Order, DA 09-1451, ¶¶ 2-3, 11, 25 (rel. June 26, 2009).

33 73 Fed. Reg. 3197, ¶ 17 (Jan. 17, 2008).

the quality (and lower the per-unit cost) of VRS, and concentrate their energies on expanding the reach of VRS to the deaf community.[34]

The centerpiece of this approach was its predictability over the course of three rate years – a feature that enabled VRS providers to implement a longer-term business planning cycle that was utterly impossible under the prior, year-to-year approach that produced wild gyrations in the VRS rate, as described above. In the *Rate Methodology Order*, the FCC went to pains to highlight this feature and invite providers to make investments in reliance on it. The FCC repeatedly and unambiguously committed to a stable, predictable, self-executing rate schedule in which all parties would know ahead-of-time what the VRS rates would be over the course of three rate years.[35] The FCC pledged that "[a]t the *end* of the three-year period, we will reassess what the tiers and rates shall be for the ensuing three-year period."[36] It committed that a stable and predictable rate plan would remain in place for the entire multi-year rate period, supporting providers' "planning and budgeting purposes," and "avoid[ing] having to possibly adjust on short notice to a lower rate."[37] There was no suggestion that the FCC would consider revising the rates during the three-year period.

C. The Three-Year Methodology for VRS Has Been a Huge Success

The new three-year VRS methodology has worked as contemplated.[38] The new methodology has not provoked the controversies or unforeseen mid-year corrections that

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34 *See Sorenson v. FCC*, 567 F.3d 1215; 2009 U.S. App. LEXIS 12070 at *13-*14.

35 *See supra* note 3.

36 *2007 Rate Methodology Order* ¶ 72 (emphasis added).

37 *Id.* ¶ 56.

38 *See* Rosston Report at 7-13.

beset the preexisting approach, and, because the new methodology is self-executing, the Commission and providers have had to devote far fewer resources to the annual rate-setting process than was previously the case. The new methodology also has succeeded in inducing providers to make longer-range business plans and investments, making the VRS industry even more competitive.[39] Sorenson in particular has relied on the FCC's commitment to a three-year plan in a number of ways. For example, Sorenson has undertaken the following efforts:

- increased outreach to inform deaf ASL users about the availability of VRS and its life-changing potential;
- ramped up efforts to locate, recruit, and train VIs, thereby forestalling the inflationary wage pressures resulting from the nationwide shortage of qualified ASL interpreters and reducing hold times for VRS callers from over 50 seconds in November 2007 to under 20 seconds now;
- accelerated hiring of deaf installers to ensure that deaf ASL users who request a Sorenson videophone can receive one as quickly as possible;
- rolled out new Sorenson videophones for distribution to customers;
- developed better call-routing software and enhanced safeguards to protect against waste, fraud, and abuse; and
- increased spending on research and development, including efforts to develop a third-generation videophone, which will be more functionally equivalent than any other videophone on the market, and progress toward developing a mobile VRS platform.[40]

Collectively, these steps help protect the integrity of the Fund and promote the statutory goals of universal access, functional equivalence, efficiency, and improved technology.[41]

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39 *See, e.g.*, Joint VRS Providers May 1 Letter at 3 (describing millions of dollars invested by Snap!VRS in reliance on the stable, three-year rate plan adopted in the *2007 Rate Methodology Order*).

40 Nola Decl. ¶ 5.

41 47 U.S.C. §§ 225(a)(3), (b)(1), (d)(2); Nola Decl. ¶ 10.

D. The May 14, 2009 NPRM Proposes to Abandon the Three-Year Rate Plan in Mid-Course, a Full Year Ahead of Schedule

As noted, NECA traditionally has submitted its TRS rate proposals to the Commission on May 1 of each year, and the Commission traditionally has released a public notice seeking comment on those proposals on the very next business day. This year, however, a radically different process has transpired.

As expected, NECA submitted its annual TRS rate filing on May 1, 2009, proposing VRS rates for 2009-2010 in accordance with the three-year plan.[42] Rather than promptly releasing a Public Notice, however, the Commission waited almost two weeks and then, on May 14, 2009, released an unprecedented hybrid document – a combination of a Public Notice *and* an NPRM. The Public Notice is unexceptional: as anticipated, it seeks comment on NECA's proposed compensation rates for the 2009-2010 rate year, as well as NECA's proposed funding requirement and carrier contribution factor for the Fund. Sorenson has no concerns about the Public Notice, and supports adoption of the tiered VRS rates proposed for 2009-2010.

The NPRM portion of the item, however, is deeply troubling. There, the Commission proposes to abandon the three-year rate methodology for VRS after little more than a year, and in its place to establish an undefined new methodology, which allegedly would remain in effect for a single rate year and would be "correlate[d]" in some way to the NECA-allowed costs (which the FCC incorrectly calls "actual costs") contained in NECA's May 1 submission.[43] As explained below, a decision to adopt this

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[42] Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, attached to letter from John A. Ricker, NECA, to Marlene H. Dortch, FCC Secretary, CG Docket No. 03-123 (May 1, 2009).

[43] NPRM ¶ 11.

extraordinary proposal would harm the public interest and contravene the law. The Commission therefore should reject the proposal and reaffirm its original commitment to the stable, predictable three-year rate plan adopted in 2007.

III. THE FCC SHOULD ADOPT NECA'S PROPOSED RATES FOR 2009-2010 AND INSTITUTE A COMPREHENSIVE RULEMAKING TO EXAMINE THE VRS RATE METHODOLOGY TO TAKE EFFECT ON JULY 1, 2010

As explained below, the Commission should reject the NPRM's proposal purely on policy grounds: abandoning the three-year VRS rate plan will harm consumers and degrade functional equivalency – precisely the opposite of the policy goals the Commission should be striving to achieve. A decision to adopt the proposal would also be assailed, and in all likelihood struck down, as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[44] The Commission should avoid needless controversy, litigation, and harm to the deaf community by rejecting the course proposed in the NPRM and instead reaffirming that the three-year rate plan will remain in effect through June 30, 2010, as originally promised.

A. Abandoning the Three-Year Plan Will Harm Users, Deter Investment, and Lead to Years of Regulatory Uncertainty

The three-year rate plan was a critical milestone in the Commission's efforts to ensure that "functionally equivalent" VRS is available to all deaf ASL users. For the first time, providers could make prudent, long-term investment and outreach decisions without fear that those plans would be upended by an unexpected rate reduction produced by an arbitrary and opaque process.

As explained above, Sorenson in particular has already acted in reliance on the three-year plan, committing significant capital and other resources to expanding the

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[44] 5 U.S.C. § 706(2)(A).

availability of VRS to all deaf ASL users, expanding the pool of qualified VIs, hiring additional deaf installers of videophones, developing a new state-of-the-art videophone, and developing better call-routing software and enhanced safeguards to protect against waste, fraud, and abuse. These plans were predicated on the expectation that a stable, predictable rate environment would persist through June 30, 2010.[45] By seeking comment on a proposal to abandon the three-year plan, the Commission already has done great harm to this expectation, causing Sorenson (and, in all likelihood, other providers) to put on hold, disrupt, or defer certain projects, and forcing Sorenson and others to divert significant internal resources to devising new contingency plans that would apply if the FCC were to decide to abandon the three-year plan.[46] If the FCC were to compound these harms by actually adopting a new rate based on NECA-allowed costs, deaf and hearing consumers will bear the harmful consequences for years to come.[47]

Without a stable, predictable rate plan, providers will be forced to scale back dramatically, or abandon altogether, their near- and long-term plans and investments (or, even worse, abandon the VRS business altogether).[48] The predictable immediate consequences – less outreach, a more acute shortage of VIs, layoffs of deaf employees,

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45 Nola Decl. ¶ 5.

46 *Id.* ¶¶ 6-9.

47 *See generally* Rosston Report at 13-16.

48 Any decision to change VRS rates in the midst of the three-year plan would be a form of regulatory "hold-up": a situation in which a firm makes an investment but is not able to capture returns on it because a regulatory agency changes the terms of transaction in response to the investment. *See* Skrzypacz Report at 3-4 & n.3. Here, the hold-up would consist of an FCC decision to reduce rates unexpectedly in response to VRS firms investing in measures that improve quality or efficiency or that expand the availability of VRS. Such a decision would make firms less likely to make such investments in the future, thereby making VRS less functionally equivalent, efficient, and available than it otherwise would have been.

delayed development of new videophones, longer hold times, and stagnation of internal technologies and processes – would harm the public interest in general and deaf ASL users in particular.[49]

The longer-term consequences would be even more ominous. Since the inception of VRS, the Commission wisely has sought to promote the statutory goals of universal access, functional equivalency, efficiency, and innovation by ensuring that the service is provided competitively by multiple providers, each of which has a strong incentive to provide the highest-quality relay at the lowest cost. The FCC has deliberately set a rate that "rewards efficient providers while it creates incentives for providers with above-average costs to reduce their costs," thereby advancing the statutory goal that TRS be provided "in the most efficient manner."[50] Due to this incentive structure, which is especially strong under the existing three-year plan, the VRS industry is robustly competitive today, allowing consumers to benefit through greater outreach, reduced hold times, innovative products and features, and various other means.

The NPRM threatens to wreak havoc with the VRS industry and the robust competition that hitherto has flourished. As explained below, the true costs that Sorenson and other companies incur in providing VRS are much higher than the NECA-allowed costs that are deemed compensable by the FCC. Yet the NPRM apparently is seeking comment on whether to set VRS rates for 2009-2010 at or near the weighted average of historical NECA-allowed costs. Any decision to flash-cut rates to those levels would

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[49] Indeed, as explained below, it would violate the ADA for the Commission to implement a new rate plan that degraded the functional equivalence of VRS and made it less available to deaf ASL users.

[50] *Telecommunications Services for Individuals with Hearing and Speech Disabilities*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 22948, ¶¶ 2, 9 n.27 (2001).

effectuate an abrupt shift in FCC policy (the Commission has never based VRS rates on historical costs), and could destroy the economic viability of VRS for many, or even all, providers. The VRS industry would at best be decimated, and even if some providers managed to remain in business, they would be forced to slash service levels to bring their costs closer to the NECA-allowed costs on which the new rates would be based.

Since VRS is a labor-intensive business, providers would likely attempt to achieve significant cost savings by scaling back their labor costs.[51] The two largest components of many providers' labor costs are (i) the wages and benefits paid to employees who install videophones or otherwise expand the reach of VRS to new consumers; and (ii) the wages and benefits paid to video interpreters who handle VRS calls. By laying off significant numbers of both types of employees, some providers might be able to achieve enough cost savings to allow them to remain in business. The consequences of such layoffs, however, would be doubly devastating to the deaf community. Sorenson is one of the largest employers of deaf individuals in the nation, and currently employs hundreds of deaf Americans as installers of videophones. Laying off large numbers of these employees would cause deaf unemployment rates to spike at a time when deaf Americans are already struggling disproportionately in a sour economy. Laying off large numbers of VIs would further harm deaf ASL users by causing the hold times for VRS to increase, thereby making the service less functionally equivalent.

Without a commitment to a long-term rate plan, Sorenson also would have to reduce significantly its expenditures on research and development, including efforts to

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[51] Nola Decl. ¶ 8 (explaining that laying off VIs and deaf installers would be at the top of Sorenson's list of items to "cut" if VRS rates were reduced to levels based on NECA-allowed costs).

devise a mobile VRS platform.[52] Cutting this and other R&D initiatives would result in a lower standard of functional equivalence, a stalled rollout of new, next-generation videophones, and delay in providing mobility to deaf ASL users.[53]

Even if a few providers were able to survive as a result of aggressive cuts in service levels, a depleted roster of providers would lack the ability to fund further improvements in VRS or videophones. Each remaining provider would simply be subsisting in "survival mode" without any resources to devote to R&D, outreach, and other pro-consumer measures. Consumers will suffer: less choice, less innovation, less outreach, and functional disparity rather than functional equivalency.

There is no sound rationale for the Commission to head down this path. If the Commission is concerned that the Fund has grown quickly or become large (as the NPRM suggests), these developments should be taken as a sign of success and not as a cause for concern. As the most functionally equivalent form of relay available today, VRS has been remarkably successful in gaining acceptance in the deaf community. That deaf ASL users (and their hearing friends, family members, and colleagues) increasingly desire to use VRS – a goal mandated by Congress – surely cannot be a reason for changing the very rate methodology that has engendered this success. Indeed, it would be unlawful for the Commission to engage in a results-driven process in which it first determined an "appropriate" Fund size and then selected VRS rates that would produce that size; the only proper approach is for the Commission to set VRS rates (and the rate methodology) based on the goals of the ADA and sound rate-setting principles.

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52 *Id.*

53 *Id.* ¶ 9.

To the extent the Commission believes that some of the Fund's growth is the result of waste, fraud, and abuse, that concern is legitimate and should be addressed aggressively. However, the problem of waste, fraud, and abuse is an enforcement issue and not a rate-related one. Sorenson repeatedly has urged the Commission to enforce its existing rules regarding waste, fraud, and abuse,[54] and is planning to file a petition for rulemaking in which it asks the FCC adopt a comprehensive strategy for combating wasteful, fraudulent, or abusive practices. Sorenson anticipates that the centerpiece of this petition will be a proposal that relay providers be required to self-certify their compliance with a Code of Conduct that incorporates industry-wide "best practices" for detecting and preventing waste, fraud, and abuse. Sorenson urges the Commission to move quickly on the petition once it is filed.

Finally, a decision to abandon the three-year plan would set a bad precedent whose aftereffects would harm the Commission and the public for years to come.[55] The Obama administration has touted the virtues of sound governance, characterized by openness, transparency, and accountability.[56] A decision to renege on the commitment to

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[54] Letter from Regina M. Keeney, Counsel for Sorenson, to Marlene H. Dortch, FCC Secretary, CG Docket No. 03-123 (May 12, 2009); Letter from Ruth Milkman, Counsel for Sorenson, to Marlene H. Dortch, FCC Secretary, CG Docket No. 03-123 (Nov. 25, 2008); *see also Ex Parte* Comments of the National Association for State Relay Administration, CG Docket No. 03-123 (dated Nov. 10, 2008; filed Nov. 19, 2008).

[55] *See* Rosston Report at 15-16; Skrzypacz Report at 11-12.

[56] The President also has strongly supported the rights of disabled Americans. *See* White House, Issues – Disabilities, *available at*: <http://www.whitehouse.gov/issues/disabilities/> ("President Obama will push for more consistent and effective enforcement of ADA, which can do more to prevent discrimination in employment, public services, public accommodations and telecommunications."); *id.* ("President Obama is committed to expanding access to employment by having the federal government lead by example in hiring people with disabilities; enforcing existing laws; providing technical assistance and information on accommodations for people with disabilities; removing barriers to work;

a three-year rate plan would flout each of those standards. The public had no prior inkling that the Commission would seek to break its pledge after barely a year, and no insight into the deliberations that led to this extraordinary development; the process is thus anything but open. As explained below, moreover, the one-paragraph NPRM is a paragon of vagueness and obfuscation, and therefore is anything but transparent. Most importantly, a decision to abandon the three-year rate plan will correctly be perceived by the public as signaling that the Commission does not view itself as obliged to keep its commitments regarding TRS rates.

This lack of accountability will have repercussions far beyond the instant debate. Any "permanent" rate methodology that the Commission adopts for the period after June 30, 2010 will not garner the public's confidence; providers, for example, will not make long-term investments in reliance on an allegedly permanent methodology for fear that the Commission would once again, at any time, hastily change the rules on short notice. This perception of regulatory uncertainty will be exacerbated by the inevitable appeals that will be initiated shortly after the announcement of any decision to abandon the three-year rate plan. The protracted appeals process will herald a sustained period of regulatory uncertainty, further impairing providers' willingness to make long-term plans and making it more expensive for providers to raise capital from nervous investors. The Commission can and should avoid these anti-consumer results by maintaining its commitment to the three-year rate plan, while simultaneously examining the appropriate methodology to take effect on July 1, 2010.

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and identifying and removing barriers to employment that people with public benefits encounter.").

B. Any Decision to Abandon the Three-Year Rate Plan Would Be Arbitrary, Capricious, and an Abuse of Discretion, in Violation of the APA

Under the APA, any decision to abandon the three-year VRS rate plan must be supported by a reasoned explanation that divulges the basis and purpose of the decision and rationally ties it to record evidence.[57] Although an agency "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate[,] [s]ometimes it must – when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account."[58]

The abandonment of a self-executing three-year plan would be a sudden departure from prior FCC policy that engendered serious reliance interests, as explained above. To justify such a departure, the FCC would need to explain why it no longer makes sense to encourage VRS providers to make long-term business plans and investments. A satisfactory explanation for such an abrupt departure almost certainly would need to be based on the discovery of new facts that undermine the logic of the three-year incentive-based plan. Here, however, no new facts or other developments have arisen since the Commission committed to a three-year rate that could rationally justify a decision to break its pledge.

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[57] *See* 5 U.S.C. § 553(b)-(c); *see also Motor Vehicle Mfrs. Assoc. of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, (1983) (agency rule may be deemed arbitrary, capricious or an abuse of discretion "if the agency has relied on factors which Congress has not intended it to consider, 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."); *New York Council, Assoc. of Civilian Technicians v. Federal Labor Relations Auth.*, 757 F.2d 502, 508 (2d Cir. 1985), *cert. denied* 474 U.S. 846 (1985).

[58] *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

1. A Decision to Abandon the Three-Year Plan Could Not Be Justified by Any New Development or Other Credible Rationale

The Commission's sole avowed reason for abandoning the three-year plan is transparently specious. Specifically, the Commission claims that it "now has the benefit of experience with two VRS rate cycles since the adoption of the *2007 TRS Rate Methodology Order*," and suggests that as a result of this new experience, it belatedly has discovered that the VRS rates adopted in 2007 may be higher than the NECA-allowed costs of providing VRS.[59] This suggestion is demonstrably false.

The historical NECA-allowed costs have always been known to the Commission, and the disparity between these artificially low costs and the VRS rate has always been known to the Commission as well. In its May 1, 2007 annual rate filing, NECA provided weighted-average historical and projected NECA-allowed costs to the Commission, and actually listed eight rates that reflected those costs for 2006, as reported by providers.[60] Yet the Commission, within months of being apprised of these data, *twice* adopted a VRS rate significantly higher than the NECA-allowed costs. First, the FCC on June 29, 2007 adopted a VRS rate of $6.644 per minute for the 2007-2008 rate year, to remain in effect

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[59] NPRM ¶ 11. The FCC also notes in passing that the size of the Fund has grown rapidly since the 2002-2003 rate year, and that "VRS continues to represent an increasingly large percentage of the total Fund size." *Id.* This statement, however, merely confirms that VRS has been remarkably successful in gaining acceptance in the deaf community, and continues to be successful under the existing three-year methodology. That deaf Americans increasingly desire to use VRS – a goal mandated by Congress – surely cannot be a reason for changing the very rate methodology that has engendered this success.

[60] Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, attached to letter from John A. Ricker, NECA, to Marlene H. Dortch, FCC Secretary, CG Docket No. 03-123, at 19 & Exhibit 1-4b (May 1, 2007).

on an interim basis pending adoption and implementation of a new rate methodology.[61] Four months later, the Commission adopted the new three-year "tiered" methodology for VRS that remains in effect today, resulting in VRS rates ranging from $6.30 to $6.77.[62] The FCC thus has long known that the NECA-allowed costs, even adjusted for inflation, are lower than the tiered VRS rates, and therefore it is misleading for the FCC to pretend that it only recently discovered that a difference existed.

More importantly, the suggestion in the NPRM that VRS rates are supposed to be based on historical NECA-allowed costs is false. Not only have VRS rates never been based on historical costs, as noted above, but the FCC decisively rejected this approach in favor of an incentive-based methodology. In the *2006 Rate Methodology NPRM*, the Commission explicitly sought comment on whether VRS rates should be "based on actual reasonable historical costs."[63] After sixteen months of comment and deliberation, the Commission unanimously rejected this approach, and instead decided to adopt an incentive-based methodology using "tiered rates for VRS based on the providers' *projected* costs and minutes of use."[64] By adopting a stable three-year methodology, the

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61 *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, 22 FCC Rcd 11706, ¶ 1 (2007) (extending the 2006-2007 rate of $6.644 on an interim basis for the 2007-2008 rate year).

62 *2007 Rate Methodology Order* ¶ 2. The new methodology took effect on March 1, 2008. 73 Fed. Reg. 3197, ¶ 17 (Jan. 17, 2008). After June 30, 2008, the tiered rates automatically adjusted downward to reflect a 0.5% "X factor."

63 *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Further Notice of Proposed Rulemaking, 21 FCC Rcd 8379, ¶ 29 (2006) ("*2006 Rate Methodology NPRM*") (seeking comment on whether providers "should be required to reimburse the Fund for any amount by which their payments exceed reasonable actual costs," or whether it should adopt a cost recovery mechanism "under which rates are set based on actual reasonable historical costs, thus eliminating any need for a true-up in most, if not all, cases.").

64 *2007 Rate Methodology Order* ¶ 52 (emphasis added).

Commission decided to move away from a rate-setting scheme that involved annual, extended controversies over what costs incurred in providing VRS would be compensable, the predicted impact of changes in the Commission's rules on provider costs, and the pace of growth in VRS subscribership. Instead, the Commission chose to adopt a rate plan that would harness the providers' incentives to make ongoing gains in the efficiency of their operations, invest in new technologies that would improve the quality (and lower the per-unit cost) of VRS, and concentrate their energies on expanding the reach of VRS to the deaf community. The centerpiece of this approach was a three-year rate plan that enabled VRS providers to implement a longer-term business planning cycle that was impossible under the prior, year-to-year approach. This decision has advanced the statutory goal that "functionally equivalent" VRS be provided in "the most efficient manner" to all deaf ASL users.[65]

Astonishingly, the Commission is now proposing not only to discard the existing methodology after little more than a year, but in its place to resuscitate the same discredited methodology that it explicitly rejected in 2007. The arbitrariness of this approach is underscored by the absence of any new developments that might form the basis of the reasoned explanation that an agency must present to justify an abrupt departure from prior policies.[66] No such development is cited in the NPRM, and Sorenson is aware of no such development or any other rationale that could justify the proposed sudden departure from the three-year rate plan.

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[65] 47 U.S.C. §§ 225(a)(3) & (b)(1); *see also 2007 Rate Methodology Order* ¶ 56 and accompanying Statement of Commissioner Jonathan S. Adelstein.

[66] *See, e.g.*, *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (agency must provide a detailed justification for an abrupt policy shift when the "new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.").

Perhaps aware of this factual and analytical void, the Commission suggests in the NPRM that it had planned all along to modify the tiered methodology prior to the end of the three-year period. In particular, the Commission partially quotes a footnote from the *2007 Rate Methodology Order* stating that providers' annual cost submissions to NECA "'will be helpful in reviewing the compensation rates . . . [adopted] and whether they reasonably correlate with projected costs and prior actual costs.'"[67] Although this footnote suggests that the FCC might "review" the VRS rates at any time, the main text of the *2007 Rate Methodology Order* also makes clear that any reassessment of rates would occur only after the end of the three-year VRS rate plan.[68] As noted, the FCC repeatedly and unambiguously committed to a three-year plan and pledged that "[a]t the *end* of the three-year period, we will reassess what the tiers and rates shall be for the ensuing three-year period."[69] It pledged that a stable and predictable rate plan would remain in place for the entire multi-year rate period, supporting providers' "planning and budgeting purposes," and "avoid[ing] having to possibly adjust on short notice to a lower rate."[70] There was no suggestion that the FCC would consider revising the rates during the three-year period, and, indeed, the very footnote partially quoted by the FCC goes on

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67 NPRM ¶ 5 (ellipses and bracket in original) (quoting *2007 Rate Methodology Order* ¶ 46 n.141).

68 The FCC necessarily would have to commence its review of VRS rates well before June 30, 2010, so as to be able to seek comment and reach a decision on any new methodology in time for it to take effect on July 1, 2010. It is thus unremarkable that the FCC would suggest that it would "review" providers' cost data during the three-year rate period.

69 *2007 Rate Methodology Order* ¶ 72 (emphasis added).

70 *Id.* ¶ 56.

to state that the cost information reviewed by the Commission would be used "to evaluate rates every three years."[71]

Given the clarity of the FCC's pronouncements in November 2007, providers undertook business plans and made investments in reliance on the settled expectation that a self-executing rate plan would remain in effect through May 30, 2010.[72] This reliance was not mere happenstance: as noted, the avowed justification for the three-year methodology was to encourage providers to make long-term investments and plans with confidence that a self-executing rate plan would be in place for at least three years.[73] It would be the epitome of an arbitrary and capricious process for the Commission first to invite providers to rely on a stable, predictable long-term rate, but then – after little more than a year – to revert to an unstable, unpredictable short-term rate without any new facts that might justify this reversal or adequate time for the public to comment on it.

The Commission does not even hazard a legal justification for this course of action, but instead simply cites a footnote from a thirty-year-old precedent.[74] That footnote, from the D.C. Circuit's *Telocator* decision, states that

> [t]he Commission has an ongoing obligation to monitor its regulatory programs and make adjustments in light of actual experience. . . . This duty to finetune its regulatory approach as more information becomes available is necessarily the price of leeway the courts accord the Commission to pursue plans and policies bottomed on informed prediction.[75]

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71 *Id.* ¶ 56 n.170.

72 *See, e.g.*, Joint VRS Providers May 1 Letter at 3 (describing millions of dollars invested by Snap!VRS in reliance on the stable, three-year rate plan adopted in the *2007 Rate Methodology Order*); Nola Decl. ¶ 5.

73 *See* Nola Decl. ¶ 5.

74 NPRM ¶ 11 n.40.

75 *Telocator Network of America v. FCC*, 691 F.2d 525, 550 n.191 (D.C. Cir. 1982).

By quoting this language, the Commission seems to be suggesting that it has learned something new over the past two years – presumably, that VRS rates are higher than NECA-allowed costs. As explained above, however, the Commission already knew this fact in 2007 when it adopted the three-year rate plan. Furthermore, unlike the regulatory scheme at issue in *Telocator*, the three-year rate plan was not "bottomed on informed prediction." Rather, the plan was adopted in order to leave behind the prior annual approach that many viewed as flawed precisely because it hinged on predictions about cost and demand. Thus, the *Telocator* decision is inapposite here and provides no legal foundation on which to base the Commission's arbitrary and capricious proposal.

2. A Decision to Abandon the Three-Year Plan Would Be Invalidated by the FCC's Willful Ignorance of Providers' True Costs

As noted above, the NPRM resorts to a euphemism ("actual costs") when it refers to providers' NECA-allowed costs. This nomenclature incorrectly may imply to some that NECA-allowed costs represent the full costs providers incur in provisioning VRS, when in fact they reflect only a portion of providers' full costs. Indeed, the FCC and NECA have expressly excluded the following categories of business costs that Sorenson (and presumably other providers) incur:

- Costs to research and develop technical solutions that would allow providers to meet mandatory minimum TRS standards that have been temporarily waived by the Commission because compliance was not technically feasible;
- Costs to develop, manufacture, install, and test videophones for use by deaf customers;
- Costs to train customers on how to use installed videophones and Sorenson VRS;
- Costs of acquiring ten-digit North American Numbering Plan telephone numbers (local or toll free) for distribution to deaf customers who choose Sorenson as their default provider of VRS;

- Costs of porting ten-digit numbers from or to Sorenson;
- E911 charges imposed under state or local E911 funding mechanisms;
- Costs associated with raising and servicing capital needed to remain economically viable (*e.g.*, interest payments on debt and refinancing costs);
- Costs associated with certain calls involving more than one VI; and
- Costs to support point-to-point calls between VRS users.[76]

The misleading nature of the euphemism is compounded by the FCC's failure to seek comment on issues that would be salient but for the euphemism's promiscuous use in the NPRM. For example, although the NPRM seeks comment on whether to base VRS rates on "reasonable actual costs," it tendentiously fails to seek comment on whether to return to a cost-based rate methodology for VRS, and, if so, whether new circumstances warrant revisiting the Commission's decisions regarding what costs are deemed "reasonable" and hence compensable.[77]

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[76] The vast majority of calls placed via Sorenson's videophones are point-to-point calls (*i.e.*, non-relayed video calls between two deaf ASL users). Although these calls are not TRS calls, the FCC has nonetheless regulated them under its ancillary jurisdiction, mandating that default providers support the ability of users to make point-to-point calls and that all providers ensure that their devices are capable of making point-to-point calls after a change in default provider. *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Second Report and Order and Order on Reconsideration, 24 FCC Rcd 791, ¶¶ 64-68 (2008 (FCC 08-275). Despite this regulation and the importance of point-to-point calling to deaf consumers, the FCC does not recognize as compensable the costs incurred by providers to support point-to-point calling.

[77] As explained elsewhere herein, under the existing methodology, providers' so-called "costs" are not relevant to the VRS rates. Thus, if the FCC is seeking to maintain the existing methodology for 2009-2010, it should not be looking at "cost" data in any form. If the Commission is bent on returning to a "cost"-based methodology, however, it should conduct a full and honest inquiry on "cost"-related matters, including how to define allowable "costs."

This failing underscores the arbitrary underpinnings of this proceeding: Courts have found that an agency action does not constitute reasoned decision-making where the agency "lacked – and balked at gathering – sufficient record evidence, . . . blind[ing] itself to the facts necessary to its statutorily mandated duty."[78] Here, for example, although the FCC has exerted increased regulatory control over provider-distributed videophones in just the last year,[79] videophone-related costs remain non-compensable under the FCC's rules. Likewise, Sorenson and other providers continue to be unable to recover costs incurred to develop solutions that permit compliance with temporarily waived standards, even though those solutions improve functional equivalence, enhance the safety of deaf users, and hasten the day on which the FCC may lift the temporary waivers.

If the Commission were intent on resuscitating a cost-based methodology with all of its inherent flaws, the agency also should have reopened the issue of what costs can be counted as "reasonably" incurred in the provision of VRS. The Commission also should have sought comment on providers' true actual costs and whether the VRS industry could survive a decision to base the VRS rates for 2009-2010 on the artificially low NECA-allowed costs that the FCC misleadingly suggests are "actual costs." Seeking comment on these matters and analyzing them on the basis of a full record is critical, and it borders on recklessness for the Commission to race ahead with proposals that may slash VRS rates without considering whether doing so – as Sorenson fears – bankrupt most, if not

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78 *Cross-Sound Ferry Servs., Inc. v. ICC*, 738 F.2d 481, 484, 487 (D.C. Cir. 1984).

79 *See, e.g.*, 47 C.F.R. 64.611(e) (regulating the customer premises equipment of VRS and IP Relay providers).

all, VRS providers. Any decision reflecting such infirmities would be arbitrary or capricious, or an abuse of discretion.

3. A Decision to Abandon the Three-Year Plan Would Unfairly Harm Investments that Providers Made in Reliance on the Plan

A premature decision to abandon the three-year VRS rate plan would be arbitrary or capricious for the additional reason that it would unfairly harm investments that providers reasonably made in reliance on the plan. Courts have recognized that a rule that "alter[s] future regulation in a manner that makes worthless *substantial past investment* incurred in reliance upon the prior rule . . . may for that reason be 'arbitrary' or 'capricious,' *see* 5 U.S.C. § 706, and thus invalid."[80]

As explained above, Sorenson has made large investments in reliance on the three-year plan.[81] For example, Sorenson has spent large sums on efforts to locate, recruit, and train new video interpreters and deaf installers. If Sorenson had to lay off those employees after only a short time on the job, those up-front investments could be

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[80] *Bowen v. Georgetown Univ. Hosp.*, Scalia, J., 488 U.S. 204, 220 (1988) (emphasis added); *see also Indep. Petroleum Ass'n of Am. v. DeWitt*, 279 F.3d 1036, 1039 (D.C. Cir. 2002), *cert. denied* 537 U.S. 1105 (2003) ("The legal effect of this secondary retroactivity is to add a nuance to ordinary review for whether the agency has been arbitrary or capricious: we review to see whether disputed rules are 'reasonable, both in substance and in being made retroactive.'"), quoting *U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 233-35 (D.C. Cir. 2000) (analyzing whether secondary retroactivity was "so unfair" as to render rule arbitrary and capricious); *cf. Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 9712, ¶ 74 (1995), *aff'd sub nom. DirecTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997) (rejecting restrictive cross-ownership rules because the industry had made investments in reliance on an earlier decision).

[81] *See supra* at section II.C.; Nola Decl. ¶ 5. Deaf users of VRS also presumably have reshaped their lives around VRS, the first and only form of relay that allows them to communicate in real-time in their own language. If the quality of VRS were to deteriorate materially as a result of an abrupt move away from the three-year plan, then those users also may have detrimentally relied on the FCC's commitment to a predictable three-year plan.

wasted.[82] Certain R&D initiatives – such as the development of a third-generation Sorenson videophone – also likely would have to be eliminated, depending on the severity of any cut in VRS rates, thereby resulting in additional stranded investments.[83]

The unfairness of such a retroactive annulment of investment would be especially acute here, where the sole avowed purpose of the Commission in November 2007 was to invite the very investment that would now be destroyed if the Commission were to renege on its commitment to a stable, predictable, three-year plan.[84]

C. A Decision to Abandon the Three-Year Plan Would Be Procedurally Unsound for Other Reasons

1. The NPRM Provides Insufficient Notice

An NPRM must "provide notice sufficient to fairly apprise interested persons of the subjects and issues" before the Commission.[85] In the Rate Methodology rulemaking commenced in 2006, the Commission needed 26 paragraphs to describe the various "subjects and issues" that were in play.[86] Here, by contrast, the Commission is

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82 Nola Decl. ¶ 8.

83 *Id.*

84 This case is different from the typical "secondary retroactivity" precedent, in which any reliance on an agency action was mere happenstance. The instant case therefore merits serious consideration as an instance of secondary retroactivity that is arbitrary and capricious because it upsets the settled expectation that was the whole point of the initial agency action. *See generally Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 289 (D.C. Cir. 1971), *cert. denied* 406 U.S. 950 (1972) ("[I]nvestments may be made in reliance on . . . an order," and at some point, "the public interest in finality is dominant over the public interest in possibly improving the administrative result on further consideration.").

85 *NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002); *see also United Church Bd. for World Ministries v. SEC*, 617 F. Supp 837, 839 (D.D.C. 1985) ("Adequate notice must reveal the agency's views 'in a concrete and focused form'" and "describe the range of alternatives being considered with reasonable specificity.") (citation omitted).

86 *See 2006 Rate Methodology NPRM* ¶¶ 24-49 (seeking comment on issues pertaining to the appropriate cost recovery methodology for VRS, the nature and extent

contemplating adopting a new rate methodology based on a skimpy one-paragraph NPRM.

The NPRM does not identify or seek comment on any of the key issues or factual developments that would normally be implicated in a rate methodology proceeding, nor does it propose any rules or even identify a possible rate or rates that might apply to VRS after June 30, 2009.[87] These omissions are compounded by the FCC's failure even to acknowledge in the NPRM that it is seeking comment on a new rate methodology for VRS for the 2009-2010 year. Instead, the Commission suggests that it is proposing merely to "modify the compensation rates" for VRS for 2009-2010.[88] This proposal, however, would not merely tweak the existing three-year methodology, as the FCC implies; rather, it would replace it with an entirely new unspecified methodology.[89]

As noted, the centerpiece of the existing methodology is its assurance of a stable, predictable, self-executing rate structure to remain in place for three years. The

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of provider costs that are "reasonable," the extent to which provider "cost" data should be kept confidential, and steps to ensure that provider compensation is consistent with the integrity of the Fund and section 225).

87 *See* Statement of Commissioner Robert M. McDowell, Federal Communications Commission, Before the Committee on Commerce, Science and Transportation, United States Senate, at 6 (June 16, 2009), *available at*: <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291857A1.pdf> ("If confirmed, I will also continue to advocate for reform of FCC processes to make the Commission more open, transparent and user-friendly. For instance, it would be helpful if notices of proposed rulemaking actually contained *proposed rules* for adequate public comment.") (emphasis in original).

88 NPRM ¶ 1.

89 If the Commission is serious about not changing the existing three-year incentive-based methodology, then it may not, as a matter of law, base VRS rates on providers' historical NECA-allowed "costs." As the U.S. Court of Appeals for the Tenth Circuit recently found, those so-called "costs" are not relevant to compensation under the three-year methodology: "The FCC has chosen to reward efficient providers by allowing them to retain the savings generated by providing TRS at a low cost. It does this by compensating providers *regardless of their actual costs in providing TRS*." *Sorenson v. FCC*, 567 F.3d 1215, 2009 U.S. App. LEXIS 12070 at *14.

Commission is proposing to retroactively transform the three-year plan into something new and bizarre: a stable, predictable, self-executing rate structure to remain in place for 15 months, followed by an arbitrarily announced new rate structure, based on undisclosed new criteria, to remain in place for an additional 12 months. The Commission's failure to acknowledge, much less describe or seek comment on, this new rate plan renders the NPRM (and any order arising out of it) procedurally deficient.

2. A Decision to Abandon the Three-Year Plan Would Run Afoul of the Federal Advisory Committee Act

In its capacity as Fund Administrator, NECA appears to meet the definition of an "advisory committee" under the Federal Advisory Committee Act ("FACA").[90] Yet NECA apparently does not consider itself to be an advisory committee or act in compliance with FACA. It is doubtful, for example, whether NECA exercises independent judgment or is fairly balanced, as required by FACA. To the extent any decision to abandon the three-year rate plan for 2009-2010 is predicated on input from NECA, that decision may run afoul of FACA.

3. Any Decision to Abandon the Three-Year Rate Plan Would Run Afoul of the Regulatory Flexibility Act

Appended to the NPRM is the Commission's Initial Regulatory Flexibility Certification (the "Certification"). Under the Regulatory Flexibility Act ("RFA"), the Certification is legally deficient because it erroneously asserts, without providing any factual basis, that abandoning the three-year plan would effect "an administrative" change that "will not have a substantial economic impact on small entities."[91] These statements strain credulity past breaking: a mid-course change in a settled rate

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90 5 U.S.C. Appx § 3(2).

91 NPRM at Appendix ¶ 4.

methodology is a major substantive overhaul, not a administrative tweak; and, such an overhaul will have an enormous impact on small businesses, potentially putting several small VRS providers out of business.[92]

Because the Certification violates the RFA,[93] it renders the NPRM legally defective, requiring the FCC to reissue the NPRM with a full Initial Regulatory Flexibility Analysis explaining its effect on small entities.[94] Furthermore, if the FCC were to adopt a VRS rate order without first having reissued the NPRM, that order also would be legally defective under the RFA.

D. Reducing the Quality or Availability of VRS Would Violate the ADA and the Communications Act

Under the ADA, as codified in section 225 of the Communications Act, the FCC is required to ensure that "functionally equivalent" VRS is made available to all deaf ASL users "to the extent possible and in the most efficient manner."[95] As the only form of relay that allows deaf people to communicate in ASL, VRS "provides a degree of 'functional equivalency' that is not attainable with text-based TRS."[96] Full functional

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92 Snap June 15 Comments at 7-9, 18-20.

93 The Certification also violates the guidelines of the Small Business Administration. *See* SBA Office of Advocacy, "A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act," at 11 (May 2003), *available at*: <http://www.sba.gov/advo/laws/rfaguide.pdf> ("certifications that simply state that the agency has found that the proposed or final rule will not have a significant economic impact on a substantial number of small entities are not sufficient under section 605(b)").

94 *See* 5 U.S.C. § 603(a) ("Whenever an agency is required . . . to publish general notice of proposed rulemaking for any proposed rule . . . the agency shall prepare and make available for public comment an initial regulatory flexibility analysis.").

95 47 U.S.C. §§ 225(a)(3), (b)(1).

96 *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Order on Reconsideration, 20 FCC Rcd 20577, ¶ 5 (2005).

equivalence remains a distant goal, however, and therefore the FCC repeatedly has recognized that the minimum standards for VRS should continue to evolve over time, improving as technological and other barriers are overcome.[97] Full availability is also far from being achieved: Sorenson estimates that only about one-third of deaf ASL households have access to VRS today.[98]

The Commission has never suggested that it would be appropriate for the quality or availability of VRS to degenerate over time, or that such a state of affairs would be consistent with the ADA. Indeed, any Commission action that caused such a degeneration would be unlawful. As the FCC has found, it is obliged under the ADA "to ensure that TRS provides *the greatest degree of functional equivalence* for the 30 million

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97 *Telecommunications Relay Services, the Americans with Disabilities Act of 1990, and the Telecommunications Act of 1996*, Notice of Inquiry, 12 FCC Rcd 1152, ¶ 49 (1997) ("*1997 TRS NOI*") ("TRS is a fast-evolving segment of the telecommunications industry, and . . . new technologies should be used as they become available, to ensure that TRS provides the greatest degree of functional equivalence for the 30 million Americans with hearing and speech disabilities. TRS should accommodate, to the extent possible, the wide diversity of persons with hearing and speech disabilities, who have varying degrees of hearing and/or speech loss and use different modes of communication."); *2004 TRS Order & FNPRM* ¶ 189 (FCC standards that define functional equivalency "have not been static, and will continue to change as technology develops and the forms and types of TRS change"); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling, 18 FCC Rcd 16121, ¶ 10 (2003) ("the types and forms of relay services that we have found to fall within the definition of TRS have neither been static nor limited to relay services involving a TTY or the PSTN"); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling and Further Notice of Proposed Rulemaking, Statement of Michael J. Copps, 21 FCC Rcd 5442, 5474 (2006) ("With communications technologies evolving at a blistering pace, we have a special duty to ensure that our rules relating to functional equivalency are reviewed with a speed and vigor that reflects changes in the larger marketplace. This is not an easy task. But it is our obligation under the Americans with Disabilities Act.").

98 Rosston Report at 9-10.

Americans with hearing and speech disabilities."[99] The progress made under the three-year VRS rate plan demonstrates that it is indeed "possible" for the Commission to establish a rate regime under which the twin goals of greater functional equivalence and more availability are advanced in an "efficient manner."[100] If abandoning the three-year plan were to reverse this progress by making VRS less functionally equivalent or less available, it would be inconsistent with Congress's express mandate and hence unlawful.

E. A Decision to Abandon the Three-Year Plan Would Result in an Unconstitutional Taking

A decision to reduce VRS rates for 2009-2010 to levels at or near NECA-allowed costs could effect an unconstitutional taking by opportunistically denying Sorenson and investors the benefit of good investments made in reliance on the *2007 Rate Methodology Order*. The Supreme Court has stated that

> a State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions. In other words, there may be a taking challenge distinct from a plain-vanilla objection to arbitrary or capricious agency action if a rate making body were to make opportunistic changes in rate setting methodologies just to minimize return on capital investment in a utility enterprise.[101]

Sorenson and its investors made large investments in reliance on the three-year rate plan announced in November 2007. To the extent those investments have turned out to be prudent business decisions under that plan, it would be unconstitutional for the

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99 *1997 TRS NOI* ¶ 49 (emphasis added).

100 47 U.S.C. §§ 225(a)(3), (b)(1).

101 *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 526-527 (2002) (internal quotation marks omitted) (*citing Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315 (1989)).

Commission now to "make opportunistic changes in [VRS] rate setting methodologies just to minimize return on capital investment."

F. The FCC Should Reaffirm the Three-Year Plan in the Short Run, and in the Long Run It Should Move Away from "Costs" Altogether

As explained above, the FCC should renounce its proposal to modify the rate for 2009-2010 and instead reaffirm the three-year plan as originally promised. Such a decision would benefit not only the public but the FCC as well. Providers and consumers continue to want a stable, predictable, self-executing rate methodology that is divorced from periodic controversies over the levels of providers "costs." If the FCC were to revert to a process that relies on "costs," there will be no end to arguments about what "costs" should be allowable, whether those "costs" have been properly accounted for, and whether the projections of allowable "costs" are accurate – to name just a few likely disputes that will sap the resources of the public and the Commission. Therefore, the Commission should reject its implicit proposal to revert to a "cost"-based VRS rate methodology for 2009-2010 and expeditiously move toward a longer-range methodology that does not depend on "costs."

In particular, the FCC should promptly issue a new NPRM that seeks comment on the appropriate VRS rate methodology for July 1, 2010 and beyond. As part of that NPRM, the Commission should tentatively conclude that an incentive-based methodology for VRS rates should remain in place on a long-term basis after July 1, 2010. To evaluate this tentative conclusion, the Commission should ask the public to provide two types of data. First, in order to assess to what extent the tiered incentive-based plan adopted in November 2007 succeeded in advancing the goals of section 225 and the ADA, the Commission should collect information regarding growth in VRS

penetration, the ASL interpreter pool, growth in ASL interpreters, VRS industry structure, and VRS service quality. The Commission also should gather data regarding how the VRS rate(s) under a future incentive-based plan should be adjusted annually to take account of the variable effects of inflation and efficiency gains. The Commission should not ask providers yet again to provide information relating to their so-called "costs" of providing VRS. As explained above, such data is not only inherently unreliable (depending on arbitrary fiats regarding what "costs" are allowable and what "costs" are not), but also is irrelevant under an incentive-based regime. There is no sound reason to continue to collect this data, and the FCC should expressly disavow its relevance to the long-term rate methodology proceeding.[102]

If the FCC nonetheless were to decide, erroneously, to consider cost data for 2009-2010 or thereafter, it should not reflexively assume that VRS rates must be lowered. Indeed, if the FCC were to tally providers' true costs (as opposed to the artificially low NECA-allowed costs), it is likely that VRS rates would have to be increased. Any order should reflect those and other relevant facts, as described above.

IV. CONCLUSION

For the reasons stated above, the Commission should reject its proposal to modify the VRS rate methodology for 2009-2010, and instead reaffirm the three-year

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[102] "Cost" data would not be critical to re-initializing the VRS rate under a long-term incentive-based plan. In the LEC context, the FCC has found that it would be improper to use cost or earnings data to reinitialize rate levels because doing so would effectively keep in place the "perverse incentives of rate-of-return regulation" and blunt the incentives for achieving efficiency gains that the incentive-based methodology was designed to encourage. *Price Cap Performance Review for Local Exchange Carriers; Access Charge Reform,* Fourth Report and Order, 12 FCC Rcd 16642, ¶ 167 (1997); *see also id.* ("we have declined . . . many parties' suggestions that we reinitialize access rates based on LECs' individual rates of return").

methodology announced in November 2007 and initiate a fair and transparent process in which all stakeholders, providers, deaf consumers, and others discuss and decide the appropriate long-term rate methodology to take effect after June 30, 2010. Taking these steps will ensure that VRS continues to improve by becoming more functionally equivalent, more available, more efficient, and more innovative, as contemplated by the ADA.

Respectfully submitted,

/s/ Regina M. Keeney

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July 6, 2008

ATTACHMENT A

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

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

DECLARATION OF PAT NOLA ON BEHALF OF SORENSON COMMUNICATIONS, INC.

Based on my personal knowledge and on information learned in the course of my business duties, I, Pat Nola, declare as follows:

1. My name is Pat Nola. Since 2005, I have been the President and Chief Executive Officer of Sorenson Communications, Inc. ("Sorenson"). Before then, I was the Chief Operating Officer of Sorenson, a position I held for four years.

2. As President and CEO, I am responsible for determining the strategic direction of Sorenson, for approving the financial decisions made by the company, and for managing all departments within the company, including those related to Sorenson Video Relay Service ("VRS").

3. Sorenson began offering VRS in 2003. From that time until March 1, 2008, VRS was governed by an unpredictable annual rate process that often produced large and erratic swings in the VRS rate from year to year. In July 2006, the FCC sought comment on whether this annual approach should be replaced by a new rate methodology. In response, Sorenson and other providers filed comments urging the FCC to adopt an incentive-based methodology that would establish a

stable, fair, and predictable VRS rate plan for three years. Sorenson and other providers explained that a stable and predictable three-year rate plan would encourage providers to make the kind of longer-term business and investment decisions that were utterly impossible under the erratic, year-to-year approach.

4. In November 2007, the FCC released an Order adopting an incentive-based "tiered" VRS rate plan that was to remain in effect for three years. The new methodology took effect on March 1, 2008, and is scheduled to remain in effect until June 30, 2010.

5. I treated the November 2007 Order as explicitly inviting VRS providers to rely on a stable, predictable, three-year rate plan to encourage investment and innovation.[1] As President and CEO of Sorenson, I accepted this invitation and instructed managers under my direction to make a number of longer-range business plans and investments. As a result, Sorenson has:

- Rolled out new Sorenson videophones for distribution to customers;
- Increased outreach to inform deaf ASL users about the availability of VRS and its life-changing potential;
- Ramped up efforts to locate, recruit, and train video interpreters, thereby ensuring shorter hold times for VRS callers and forestalling the inflationary wage pressures resulting from the nationwide shortage of qualified ASL interpreters;
- Accelerated hiring of deaf installers to ensure that deaf ASL users who request a Sorenson videophone can receive one as quickly as possible;
- Developed better call-routing software and enhanced safeguards to protect against waste, fraud, and abuse; and
- Increased spending on research and development, including efforts to develop a third-generation videophone, which will be more functionally equivalent

[1] The Commission emphasized that it was "particularly interested in adopting a methodology that would result in more predictability for the providers" and stated explicitly that it was adopting its three-year plan to support providers' "planning and budgeting purposes" and to "avoid having to possibly adjust on short notice to a lower rate."

than any other videophone on the market, and efforts to develop a "mobile" VRS platform.

6. On May 14, 2009, the FCC released a one-paragraph Notice of Proposed Rulemaking ("NPRM"), in which it proposes to abandon the three-year rate plan for VRS after only 15 months, and replace it with a new rate methodology that would enable even the most efficient firms to recover only a portion of the costs they incur in providing VRS. This proposal to flash-cut to a new rate methodology on July 1, 2009 caught me (and others in the industry) completely by surprise, and has forced me to consider the steps I and Sorenson will have to take if the FCC actually decides to abandon the three-year plan.

7. With the FCC threatening to abandon the three-year plan on July 1, 2009, I have already directed a team to look at the steps Sorenson will need to take if the FCC carries out that threat. In particular, Sorenson is developing a "cut list." How many of these steps Sorenson will have to take and how far it will have to cut will depend on what path the FCC chooses.

8. At the top of the "cut list" are the following initiatives:

- *American Sign Language Interpreters*: Sorenson will have to cut or end efforts to locate, recruit and train interpreters – despite the severe nationwide shortage of those interpreters. Sorenson also may need to fire some interpreters. These steps will result in increased wait times for callers, lower quality service, and a regress from functional equivalence.
- *Economic Opportunity for Deaf Installers*: VRS videophones are installed by deaf individuals in communities across the country. These installations are often the only private source of income for these deaf individuals. Because Sorenson does not receive reimbursement for these installations, however, they are near the top of the "cut list." Cutting back on installations will cause many deaf people to experience a loss in income. This loss will be especially severe because many of those individuals will have meager employment prospects in this severe economic downturn.
- *Research and Development.* Without a commitment to a long-term rate plan, R&D is one of the first places where Sorenson will attempt to make cuts.

Developing a mobile VRS platform the biggest R&D item, and it could get shelved. Sorenson also might have to cease developing a third-generation videophone. Cutting these initiatives would result in a lower standard of functional equivalence, a stalled rollout of new, next-generation videophones, and delay in providing mobility to deaf ASL users.

9. Collectively, the foregoing cuts would cause interpreter training to falter, innovation to stagnate, and the quality of VRS to decline. Furthermore, providers will not risk relying on the Commission's promises in the future. I hope that the FCC will not force Sorenson to make these cuts, but instead will keep its commitment to a fair, predictable rate plan that encourages investment and innovation and furthers the FCC's mandate of ensuring that VRS is available to all deaf ASL users at functionally equivalent quality.

10. Under the three-year rate plan, Sorenson has dedicated much of its payments from the Interstate TRS Fund to pursuing the goals of making VRS available to all deaf ASL users and to providing ever closer approximations to functional equivalence, regardless of whether NECA counts our costs as reimbursable. If Sorenson's payments from the Fund or its expenditures were limited to what NECA and the FCC deemed to be allowable costs, then we would be able to make very little, if any, progress toward fulfilling the rights of all deaf to functional equivalence. I would be very disappointed if we were no longer able to make these investments in these goals.

I, Pat Nola, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Pat Nola

Executed on July 6, 2009

ATTACHMENT B

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

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

DECLARATION OF REED STEINER ON BEHALF OF SORENSON COMMUNICATIONS, INC.

Based on my personal knowledge and on information learned in the course of my business duties, I, Reed Steiner, declare as follows:

1. My name is Reed Steiner. Since 2006, I have been Vice President of Finance, Controller, and Secretary for Sorenson Communications, Inc. ("Sorenson"). Before that, I held the position of Controller at Sorenson for more than five years.

2. In my current position, I oversee all functions of the finance department and report directly to the CFO. My responsibilities include supervising Sorenson's annual submission to the National Exchange Carrier Association ("NECA"), which administers the interstate Telecommunications Relay Service ("TRS") Fund. I have been supervising these submissions for the past 7 years, including Sorenson's most recent submission which was sent to NECA on April 1, 2009.

3. As part of its annual submission, Sorenson provides NECA with estimates of anticipated demand for both VRS and IP Relay. Sorenson also provides both historic and projected information about specific categories of costs covered by NECA's annual Relay Services Data Requests ("Requests"). A copy of the most

recent Request is attached to this declaration. This Request is substantially similar to the Requests that NECA has sent out the past several years.

4. The Request asks only for certain categories of costs that the FCC and NECA deem to be compensable or allowable. The Request fails to seek – and in some instances, specifically excludes – information regarding many of the key costs that Sorenson may incur. For example, the Request does not cover research and development costs incurred to make progress toward fulfilling waived requirements, the costs of developing and distributing videophones, the costs incurred to train users on how VRS works and how to use their videophones, the costs of providing local numbers as mandated by the FCC, or other costs incurred by Sorenson and other providers. Moreover, neither NECA nor the FCC appears to consider any of these additional costs in setting or evaluating the reimbursement rate for VRS. Instead, the FCC and NECA continually seem to mistake the costs reported to NECA for providers' "actual costs."[1]

5. Although the Request does not ask for all the costs that providers incur, Sorenson has included information about its true costs in several NECA submissions. In its 2008 submission, for example, Sorenson included an additional line listing "[p]retax actual and necessary expenses not included in Sections A-E above." Sorenson then provided its actual additional costs for the prior two years, as well as its projected additional costs for the ensuing two years.

6. In its 2009 filing, Sorenson again noted that it incurred substantial costs that are not allowed in NECA's rate calculations. Sorenson did not quantify either the

[1] *See, e.g.*, NECA's May 1. 2009 submission to the FCC at 13-14 (referring to providers' "actual costs"); FCC's May 14 PN on the rates ¶ 11 (also referring to "VRS providers' actual cost per minute.")

actual or projected amounts of these additional costs in its 2009 filing, however. The decision not to include specific dollar amounts for these additional costs was based on a number of factors, including the continued failure of NECA and the FCC to acknowledge these costs, as well as the fact that Sorenson believed that its costs were irrelevant to the rate-setting process given the FCC's order adopting incentive-based regulation and setting VRS rates through the 2009-10 rate year. In addition, as Sorenson explained its 2009 submission to NECA, a number of factors – including the current economic climate – made predictions about costs unreliable.

7. Although NECA and the FCC refuse to recognize many categories of costs, Sorenson has continued to incur expenses that are not considered by NECA, but that are critical to Sorenson's ability to provide high-quality service to its users and important to deaf users' ability to use and access the service. The decision to continue incurring these expenses was based, in large part, on the company's expectation that the current VRS rate structure would remain in place and that the reimbursement rate would be predictable at least through June 2010. Any change in the expected rate for the 2009-10 rate year would therefore prove harmful to Sorenson.

I, Reed Steiner, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Reed Steiner

Executed on July 6, 2009

NECA Data Collection Forms

80 South Jefferson Road
Whippany, NJ 07981

Jill Cardoso
Manager, TRS Fund
Administration
PH 973-884-8124
FX 973-884-8262
jcardos@neca.org

January 15, 2009

TO: Providers of Telecommunications Relay Service (TRS), Captioned Telephone VCO Service (CTV), IP Captioned Telephone (IP CTS), Internet Protocol Service (IP), Speech-to-Speech Service (STS), and Video Relay Service (VRS), and All Sub-Contractors

SUBJECT: Annual Relay Services Data Request, distributed via email only

FILING DEADLINES:

- **All data requested for the annual MARS methodology must be filed by February 16, 2009.**
- **Actual and projected demand data for IP and VRS must be filed by February 16, 2009.**
- **Historical (actual) costs for calendar years 2007 and 2008 and projected costs for calendar years 2009 and 2010 for IP and VRS must be filed by April 1, 2009**

On November 19, 2007, the Commission released a Report and Order (FCC 07-186) adopting new cost recovery methodologies for the various forms of TRS. The Order also clarified the nature and extent that certain categories of costs are compensable from the Fund.

For interstate traditional TRS, interstate Speech-to-Speech (STS), interstate captioned telephone service (CTS), and interstate and intrastate Internet Protocol captioned telephone service (IP CTS) the compensation rates shall be based on the MARS plan. For Internet Protocol (IP) Relay, the compensation rate shall be based on price caps. For Video Relay Service (VRS), the compensation rates shall be tiered rates based on call volume.

The Commission requires providers of IP and VRS to file annual cost and demand data with the Fund Administrator as they have in the past (FCC 07-186¶56 note 170). This information, which includes actual costs for prior years, will be helpful in reviewing the reasonableness of the compensation rates adopted for IP Relay and VRS under the new methodologies, and whether they reasonably correlate with projected costs and prior actual costs.

For traditional TRS and STS, under the MARS plan each January the Fund Administrator will request each state TRS administrator, and each provider of interstate TRS, STS, and CTS to provide the following data for the previous calendar year: (1) per-minute compensation rates for intrastate traditional TRS ,STS, and CTS; (2) whether the rate applies to session minutes or conversation minutes; (3) the number of intrastate session minutes for traditional TRS, STS, and CTS; and (4) the number of intrastate conversation minutes for traditional TRS, STS, and CTS. If the contractual per-minute compensation rate does not include all of the costs paid by the state to the provider for the relay service, the state should also list other amounts paid to the provider during the relevant calendar year. The state and the provider should indicate what information should be considered confidential.

As mandated by the Commission (FCC), the Fund administrator's annual May 1st filing must still address all the payment formulas, the resulting rates that they have calculated for each form of TRS under those methodologies that will be effective in the upcoming Fund year, and the Fund size and carrier contribution factor that results from those rates and the Fund administrator's projected demand for each service. The new rates will become

effective July 1, 2009 upon Commission approval. Providers will receive reimbursement at the new rates for minutes handled from July 1, 2009 through June 30, 2010.

Even though sub-contractors will be providing cost and demand data to NECA directly, providers' data should also include their sub-contractors' data.

All data provided in the Data Request is treated as proprietary and confidential. Data is not disclosed to anyone other than authorized NECA staff, the auditor of the TRS Fund, or the FCC without prior notice and consent of those providing the data.

Your effort and cooperation contribute to the success of this annual process. Please contact Jeff Henderson, at jhender@neca.org or 973-884-8261, or me with any questions you may have on the Data Request.

Yours truly,

Jill Candelaria

Attachment

Cc: Relay Services Provider/Sub-Contractor Distribution List

RELAY SERVICES DATA REQUEST INSTRUCTIONS

FILING DEADLINES:

- **All data requested for the annual MARS methodology must be filed by February 16, 2009.**
- **Actual and projected demand data for IP and VRS must be filed by February 16, 2009.**
- **Historical (actual) costs for calendar years 2007 and 2008 and projected costs for calendar years 2009 and 2010 for IP and VRS must be filed by April 1, 2009.**

Return completed responses to:

Jill Cardoso
NECA TRS Fund Administration
80 South Jefferson Road, Room N3097
Whippany, New Jersey 07981

The **original signed forms must be returned** to NECA. Questions concerning the data request should be referred to Jill Cardoso at 973-884-8124 or via email to jcardos@neca.org. Also, Jeff Henderson at 973-884-8261 or via e-mail at jhender@neca.org is available to answer questions. This data will be the basis for determining the total fund size requirement. Carrier revenue information to determine the contribution base will be filed on April 1, 2009 via the FCC Form 499-A, Telecommunications Reporting Worksheet. NECA will use the provider rate and demand information and the carrier revenue information to calculate the carrier contribution factor and fund size. **On May 1, 2009, NECA will file with the FCC payment formulas, its proposed fund size requirement, carrier contribution factor and projected demand for each service for the fund year July 1, 2009 through June 30, 2010.**

A. GENERAL INFORMATION

On November 19, 2007, the Commission released a Report and Order (FCC 07-186) adopting new cost recovery methodologies for the various forms of TRS. The Order also clarified the nature and extent that certain categories of costs are compensable from the Fund.

For interstate traditional TRS, interstate Speech-to-Speech (STS), interstate captioned telephone service (CTS), and interstate and intrastate Internet Protocol captioned telephone service (IP CTS) the compensation rates shall be based on the MARS plan. For Internet Protocol (IP) Relay, the compensation rate shall be based on price caps. For Video Relay Service (VRS), the compensation rates shall be tiered rates based on call volume.

The Commission requires providers of IP and VRS to file annual cost and demand data with the Fund Administrator as they have in the past (FCC 07-186¶56 note 170). This information, which includes actual costs for prior years, will be helpful in reviewing the reasonableness of the compensation rates adopted for IP Relay and VRS under the new methodologies, and whether they reasonably correlate with projected costs and prior actual costs.

For traditional TRS and STS, under the MARS plan each January the Fund Administrator will request each state TRS administrator, and each provider of interstate TRS, STS, and CTS to provide the following data for the previous calendar year: (1) per-minute compensation rates for intrastate traditional TRS ,STS, and CTS; (2) whether the rate applies to session minutes or conversation minutes; (3) the number of intrastate session minutes for traditional TRS, STS, and CTS; and (4) the number of intrastate conversation minutes for traditional TRS, STS, and CTS. If the contractual per-minute compensation rate does not include all of the costs paid by the state to the provider for the relay service, the state should also list other amounts paid to the provider during the relevant calendar year. The state and the provider should indicate what information should be considered confidential.

The Order also provided that:

- **Indirect overhead costs are not reasonable costs of providing TRS. Appropriate overhead costs are those costs directly related to, and directly support, the provision of relay service. Indirect overhead costs may not be allocated to TRS by an entity that provides services other than TRS based on the percentage of the entity's revenues that are derived from the provision of TRS. (FCC 07-186, ¶74-75).**

RELAY SERVICES DATA REQUEST INSTRUCTIONS

- **Start-up expenses are compensable, but must be amortized in accordance with generally accepted accounting rules (FCC 07-186, ¶76-77).**

- **All costs submitted must directly support the provision of relay service (FCC 07-186, ¶75).**

- **Reasonable executive compensation for persons who directly support the provision of TRS is compensable from the Fund (FCC 07-186, ¶79). For example, if executives of a company that provides a variety of services in addition to TRS do not personally work on TRS issues, no part of their salaries can be included in the company's TRS cost submission (FCC 07-186, ¶75).**

- **Financial transaction costs or fees unrelated to the provision of relay service are not compensable as reasonable costs of providing service. Such costs include costs and fees relating to a change in ownership of the entity providing relay service, the sale of the entity, the spin off of part of the entity, or any other transaction directed at the ownership, control, or structure of the relay provider (FCC 07-186, ¶80).**

- **Costs attributable to relay hardware and software used by the consumer, including installation, maintenance costs, and testing are not compensable from the Fund. Compensable expenses do not include expenses for customer premises equipment – whether for the equipment itself, equipment distribution, or installation of the equipment or necessary software (FCC 07-186, ¶82).**

- **Do not include profit or tax allowances in expenses.** (FCC 04-137, ¶179-182)

- **Only expenses to meet the non-waived mandatory minimum standards should be included.** (FCC 04-137, ¶188-190)

- **Capital investment data, if applicable, must be submitted by service.** (FCC 04-137, ¶177-182)

- **If depreciated expenses are reported, the year end net book value of the capital investment from which depreciation was computed must be reported in Section F.**

- **STS providers must include a report detailing specific outreach efforts directly attributable to the additional support for STS outreach**

- **The following costs are not compensable from the fund: 1. Costs associated with an Internet-based TRS consumers' acquisition of a ten-digit geographic telephone number 2. costs associated with an Internet-based consumers' acquisition and usage of a toll free telephone number 3. E911 charges imposed on TRS providers under a state or local E911 funding mechanism.** (FCC 08-275, ¶47-56)

TRS providers must submit the following data:

- **total annual expenses** of providing IP Relay and VRS

- reported in only **one category**; the section total of expense categories should reflect the total expenses of providing each service (i.e. IP and VRS).

- **actual annual 2007** and **2008 expenses** and **projected** annual expenses for **2009 and 2010.**

Please complete the appropriate expense page for each of the services performed. Each expense form is identified by service type on the first line of the form.

All reasonable expenses of providing eligible relay services, whether as part of a state-contracted service or a stand-alone service, **are reportable**.

RELAY SERVICES DATA REQUEST INSTRUCTIONS

B. FORM INSTRUCTIONS

Provider Identification

A. Service Provider/Administrator: Provide the requested information about the service provider -- the entity responsible for providing TRS/IP/STS/VRS/CTV and IP CTS. The contact name requested is the name of the person who will serve as the official provider interface for the interstate TRS Fund Administrator.

B. Data Request Response: List the name and contact information for the person to whom questions and requests for clarification regarding the data request response should be directed.

C. Changes, Activities & Improvements: If significant changes have occurred or are expected to occur with this service, please provide an explanation.

D. Other Information: Provide the requested information for each state served. The rate information is confidential and will not be shared with anyone outside of NECA and the Commission.

E. Center Location: Please provide address, city and state, and the hours of operation for each relay center and list the services provided in that center.

F. Subcontractors, etc.: Please provide a listing of all subcontractors, marketing entities, websites, and any other entities through which relay services are provided.

I. Total Video Relay Service Expenses

Include **reasonable expenses attributable to providing Video Relay Service** in English as required under Part 64 of the FCC rules, such as gathering traffic, the center itself, and handing off calls to the interexchange carrier. When reporting expenses, please **round only to the next dollar**; report all amounts in whole dollars.

A. Annual Recurring Fixed/Semi-Variable Expenses

1. **Rent:** Annual payments solely for land and/or buildings rented for the provision of TRS.
2. **Utilities:** Expenses associated with land and buildings, such as water, sewerage, fuel, T1 lines, internet connectivity and power. **Telephone service expenses, such as center toll free numbers, local and foreign exchange should also be included here. Also see ITEM B. 4.**
3. **Building Maintenance:** Expenses for maintenance and repair.
4. **Property Tax (if owned):** Taxes paid on property owned and used for the provision of TRS.
5. **Furniture (if leased):** Lease or rental expenses associated with center furnishings.
6. **Office Equipment (if leased):** Lease or rental expenses associated with office equipment.

Subtotal Section A expenses.

B. Annual Recurring Variable Expenses (Direct TRS Operating Expenses)

1. **Salaries and Benefits:** Compensation to ***non-management employees (persons performing communications assistant and interpreter activities)***, such as wages, salaries, commissions, bonuses, incentive awards and termination payments; payroll related benefits paid on behalf of employees, such as pensions, savings plans, workers' compensation required by law, insurance plans (life, hospital, medical, dental, vision); and social security and other payroll taxes. **Included in this**

expense is the cost of "contract interpreters and/or communication assistants" who are not employees. ADDITIONAL DATA REQUIRED – see Appendix 1

2. **Salaries and Benefits:** Compensation to ***management employees (relay center managers & supervisors)***, such as wages, salaries, commissions, bonuses, incentive awards and termination payments; payroll related benefits paid on behalf of employees, such as pensions, savings plans, workers' compensation required by law, insurance plans (life, hospital, medical, dental, vision); and social security and other payroll taxes. **ADDITIONAL DATA REQUIRED – see Appendix 1**
   See discussion of executive compensation at paragraphs 78-79 of the Commission's Report and Order and Declaratory Ruling, released on November 19, 2007 (FCC 07-186).

3. **Salaries and Benefits:** Compensation to ***relay center staff***, such as wages, salaries, commissions, bonuses, incentive awards and termination payments; payroll related benefits paid on behalf of employees, such as pensions, savings plans, workers' compensation required by law, insurance plans (life, hospital, medical, dental, vision); and social security and other payroll taxes. **ADDITIONAL DATA REQUIRED – see Appendix 1**

4. **Telecommunications Expenses:** Expenses associated with inspecting, testing, analyzing and correcting trouble; repairing or reporting on telecommunications plant (switching, transmission, operator, cable and wire) to determine need for repairs, replacements, rearrangements, and changes; expenses for activities, such as controlling traffic flow, administering traffic measuring and monitoring devices, assigning equipment and load balancing, collecting and summarizing traffic data, administering trunking, and assigning interoffice facilities and circuit layout work. **Note: expenses reported here are in addition to the telephone service expenses reported in Section A 2.**

5. **Billing Expenses:** Rating of toll messages and billing functions not recovered from other sources.

6. **Relay Center Expenses:** Expenses not included in other accounts, such as providing food services, libraries, archives, mail service, procuring office equipment, office supplies, materials and repairs.

Subtotal Section B expenses.

C. Annual Administrative Expenses

Indirect overhead costs are not reasonable costs of providing TRS. Appropriate overhead costs are those costs directly related to, and directly support, the provision of relay service. Indirect overhead costs may not be allocated to TRS by an entity that provides services other than TRS based on the percentage of the entity's revenues that are derived from the provision of TRS. (FCC 07-186, ¶74-75).

1. **Finance/Accounting:** Expenses incurred in providing accounting and financial services. Accounting services include payroll and disbursements, property accounting, capital recovery, regulatory accounting, tax accounting, auditing, capital and operating budget and control, and general accounting. Financial services include banking operations, cash management, and benefit investment fund management, etc. **ADDITIONAL DATA REQUIRED - see Appendix 1**

2. **Legal/Regulatory:** Expenses incurred for legal and regulatory services. Legal services include conducting and coordinating litigation, providing guidance on regulatory and labor matters, court expenses, filing fees, cost of counsel, etc. Regulatory services include preparing and presenting information for regulatory purposes, such as responding to this data request. **ADDITIONAL DATA REQUIRED - see Appendix 1**

3. **Engineering:** Expenses incurred in the general day to day engineering operation of the TRS telecommunications plant and /or IP network to meet applicable non-waived mandatory minimum standards. **ADDITIONAL DATA REQUIRED – see Appendix 1**

4. **Research and Development:** Expenses incurred for R&D required to meet applicable non-waived mandatory minimum standards. **ADDITIONAL DATA REQUIRED – see Appendix 1**

5. **Operations Support:** Expenses that ensure the sustainability of service including troubleshooting, customer service and technical support.

6. **Human Resources:** Expenses incurred in performing personnel administration activities, including recruiting, hiring,

forecasting, planning, training, scheduling , counseling employees and reporting. **ADDITIONAL DATA REQUIRED – see Appendix 1**

7. **Billing:** Administrative expenses of rating and providing billing information to interexchange and exchange carriers, if not recovered by other means. **ADDITIONAL DATA REQUIRED - see Appendix 1**

8. **Contract Management:** Expenses of managing activities required by the provider contracts. **ADDITIONAL DATA REQUIRED – see Appendix 1**

9. **Risk Management:** Management expenses associated with workmen's compensation, payments in settlement of accident and damage claims, insurance premiums against losses and damages, sickness and disability payment, etc.

10. **Other Corporate Overhead:** Other administrative expenses of providing TRS not included in previous categories. All costs over $10,000 should be itemized. **ADDITIONAL DATA REQUIRED – see Appendix 1**
See discussion of overhead costs at paragraphs 74-75 of the Commission's Report and Order and Declaratory Ruling, released on November 19, 2007 (FCC 07-186).

Subtotal Section C expenses.

D. Annual Depreciation/Amortization Associated with Capital Investment
Depreciation listed in this section MUST tie to the capital investment reported in Section F.

1. **Furniture & Fixtures:** Depreciation expense on furniture and/or fixtures. **ADDITIONAL DATA REQUIRED – see Appendix 1**

2. **Telecommunications Equipment:** Depreciation expense associated with capitalized expenses of telecommunications equipment including switching equipment, operator services equipment, cable and wire facilities, transmission equipment, and power equipment. **ADDITIONAL DATA REQUIRED – see Appendix 1**

3. **Leasehold:** Amortization of leasehold improvements – improvements which become a permanent part of a building, like walls or carpeting. **ADDITIONAL DATA REQUIRED – see Appendix 1**

4. **Other Capitalized:** depreciation expense not accounted for in other categories. **ADDITIONAL DATA REQUIRED – see Appendix 1**

Subtotal Section D expenses.

E. Other Expenses

1. **Marketing/Advertising:** Marketing/Advertising is defined as being the expenditures by the provider to persuade users to choose their particular relay service over that of other relay service providers. **All costs over $10,000 should be itemized.** The cost of equipment given to, sold to, and/or used by relay callers, and call incentives are NOT to be reported as expenses.
ADDITIONAL DATA REQUIRED – see Appendix 1. See discussion at paragraph 82, Report and Order and Declaratory Ruling, released on November 19, 2007 (FCC 07-186).

2. **Outreach:** Defined as educational outreach via the following methods: newspapers, TV, internet, community forums, etc. to inform the general community of the availability of TRS service in its various forms and future forms as technology evolves. Outreach is more generic, teaching and educating the community at large about relay, how to use it, how to call and receive calls from deaf and hard of hearing people. ADDITIONAL DATA REQUIRED – see Appendix 1. **See discussion at paragraph 82, Report and Order and Declaratory Ruling, released on November 19, 2007 (FCC 07-186).**

3. **Sub Contactor:** 3rd party costs associated with a contract to provide IP and VRS services. **Do not include profit or tax allowances of sub-contractor.**

4. **Other:** Expenses not previously reported. **ADDITIONAL DATA REQUIRED – see Appendix 1**

Subtotal Section E expenses.
Total Video Relay Services Expenses (A-E only).

F. Capital Investments

Please provide the year end net book value of capital investments by categories listed in Section F from which the depreciation expenses in Section D was calculated. **ADDITIONAL DATA REQUIRED – see Appendix 1**

Total Section F. (Do not add the Capital Investments total to the Total Expenses.)

II. Total Internet Protocol Expenses

Include **reasonable expenses attributable to providing IP Relay** as required under Part 64 of the FCC rules, such as gathering traffic, the center itself, and handing off calls to the carrier. When reporting expenses, please **round only to the next dollar**; report all amounts in whole dollars.
Follow the same instructions for Sections A through F as listed above in Total Video Relay Services Expense Data.

III. Annual Relay Service Demand Data

All minute data should be reported in **conversation** minutes. Conversation minutes are measured in terms of conversation time, i.e., from calling party connection to called party to the disconnect of both parties. **Do not include** time for call set-up, call ringing, waiting for an answer, calls that reach busy numbers or receive no answers, and call wrap-up. **2007 minutes** should be **actual** conversation minutes. Provide actual **2008 conversation minutes** for 12 months (January through December 2008). Minutes for **2009 and 2010** should be **projected** conversation minutes by month. The projected minutes should reflect reasonable growth rates and include other considerations that might increase or decrease the minutes handled by a center, such as adding a new state to a center. Include a description of the methodology used to determine the projected minutes for 2009 and 2010

Provide annual and projected minutes as follows:

Total Interstate Internet Protocol (IP) minutes: 2007 and 2008 actual minutes and 2009 and 2010 projected minutes by month

Total Interstate Video Relay Services (VRS) Minutes: 2007 and 2008 actual minutes and 2009 and 2010 projected minutes by month

IV. Traditional TRS, STS, CTS intrastate rate, conversation and session minute data for the annual MARS methodology

A. Per the Commission Report and Order FCC 07-186, each state TRS administrator and each provider of interstate TRS and STS is to provide the following data for the previous calendar year: **per-minute compensation rates for intrastate traditional TRS and STS; whether the rate applies to session minutes or conversation minutes; the number of intrastate session minutes for traditional TRS and STS; and the number of intrastate conversation minutes for traditional TRS and STS.**

1. Per-minute compensation rate for intrastate traditional TRS. Indicate whether the rate is conversation or session by completing the appropriate box on the form.

2. Per-minute compensation rate for intrastate STS. Indicate whether the rate is conversation or session by completing the appropriate box on the form.

3. Number of intrastate conversation minutes for TRS and or STS.

4. Number of intrastate session minutes for TRS and or STS.

B. Per the Commissions Report and Order FCC 07-186, each state administrator and each provider of interstate CTS and interstate and intrastate IP CTS is to provide the following data for the previous calendar year: **per-minute compensation rates for intrastate CTS; whether the rate applies to session minutes or conversation minutes; the number of intrastate session minutes for CTS; and the number of intrastate conversation minutes for CTS.**

1. Per-minute compensation rate for intrastate CTS. Indicate whether the rate is conversation or session by completing the appropriate box on the form.

2. Number of intrastate conversation minutes for CTS.

3. Number of intrastate session minutes for CTS.

V. Additional Costs paid by the State for Intrastate TRS, STS and CTS for the annual MARS methodology

Per the Commissions Report and Order FCC 07-186, if the contractual per-minute compensation rate does not include all of the costs paid by the state to the provider for the relay service, the state should also list other amounts paid to the provider during the relevant calendar year.

A. Itemize additional costs paid by the State for Intrastate TRS and or STS. List each cost separately, one cost per line.
B. Itemize additional incentives or services with costs paid by the provider that the state was not required to pay for, for Intrastate TRS and or STS. List each cost separately, one cost per line.
C. Itemize additional costs paid by the State for Intrastate CTS. List each cost separately, one cost per line.
D. Itemize additional incentives or services with costs paid by the provider that the state was not required to pay for, for captioned telephone services. List each cost separately, one cost per line.

VI. STS provider specific outreach efforts directly attributable to the additional support for STS outreach

Per the Commissions Report and Order (FCC 07-186¶61) and the 2008-2009 TRS Rate order (FCC 08-1476¶13), STS providers must file a report annually with NECA and the Commission on their specific outreach efforts directly attributable to the additional support for STS outreach

1) Provide STS minutes reimbursed for the period of March 2008- December 2008
2) Provide dollars received from the Interstate TRS fund for the support of STS outreach – March 2008 through December 2008
3) Provide itemized list and description of specific outreach efforts attributable to the additional sums paid for outreach

VII. Certification

An officer or responsible accounting officer must certify the Center Data Request response. Please read the certification and sign accordingly.

****

RELAY SERVICES DATA REQUEST INSTRUCTIONS

APPENDIX 1 For IP and VRS

This Appendix applies to each service separately

SECTION B Annual Recurring Variable Expenses

1. Salaries and Benefits

A. Provide a detailed schedule of the number of full-time employees or part-time equivalent employees – ***Non-management* (persons performing communications assistant and interpreter activities)**, and the components of their compensation, including salaries and benefits. This includes the cost of contract interpreters and/or communication assistants. The schedule should tie to the actual and projected demand for 2007-2010.
Please provide data for each center.

B. Provide a detailed schedule of the occupancy and utilization percentages used to develop the number of employees required to meet call volumes. The schedule should tie to the schedule requested in A above.

Occupancy Percentage = # of minutes a CA/Interpreter is <u>occupied</u> processing a call(including set- up, wrap- up) / # of available minutes (payroll time)

Utilization Percentage = # of conversation minutes(does not include set-up, wrap-up) / # of minutes a CA/Interpreter is occupied processing a call(including set-up, wrap-up)

Please also include information on the normal workday length and the amount of time CAs/interpreters are at their desks waiting to take calls (available/payroll time minus lunch, breaks, vacation).

C. Provide the speed of answer you are staffing to meet for each center.

2. Salaries and Benefits

Provide a detailed schedule of the number of employees – ***Management employees* (relay center managers & supervisors)**, and the components of their compensation, including salaries and benefits. The schedule should tie to the actual and projected demand for 2007 - 2010. **Please provide data for each center and job description for each employee.**
See discussion of executive compensation at paragraph 75, 78-79 of the Commission's Report and Order and Declaratory Ruling, released on November 19, 2007 (FCC 07-186).

3. Salaries and Benefits

Provide a detailed schedule of the number of employees – ***Relay Center Staff* (clerical staff and others who perform non communications assistant and interpreter activities)**, and the components of their compensation, including salaries and benefits. The schedule should tie to the actual and projected demand for 2007-2010. **Please provide data for each center and job description for employee.**

SECTION C Annual Administrative Expenses

1. Finance/Accounting

a) Provide a detailed schedule of the number of employees and the components of their compensation, including salaries and benefits.
b) Provide job descriptions for finance/accounting staff
c) Provide other expenses incurred in providing accounting and financial services.

2. Legal/ Regulatory

a) Provide a detailed schedule of the number of employees and the components of their compensation, including salaries and benefits.

b) Provide other expenses incurred in providing legal services **and a description of those expenses.**

3. Engineering (day to day operations)

a) Provide a detailed schedule of the number of employees and the components of their compensation, including salaries and benefits.

b) Provide job descriptions for engineering staff.

c) Describe Engineering activities and explain how it relates to meeting the non - waived mandatory minimum standards. **(See FCC 04-137, ¶ 188-190)**

4. Research and Development

a) Provide a detailed schedule of the number of employees and the components of their compensation, including salaries and benefits.

b) Provide job descriptions for Research and Development staff.

c) Describe each TRS related Research and Development project and explain how it relates to meeting the non - waived mandatory minimum standards. **(See FCC 04-137, ¶ 188-190)**

6. Human Resources

a) Provide a detailed schedule of the number of employees and the components of their compensation, including salaries and benefits.

b) Provide job descriptions for Human Resources staff.

c) Provide other expenses incurred in performing personnel administration activities. This includes forecasting, planning, recruiting and reporting.

7. Billing

a) Provide a detailed schedule of the number of employees and the components of their compensation, including salaries and benefits.

b) Provide other administrative expenses incurred in rating and providing billing information to exchange and interexchange carriers if not recovered by other means.

8. Contract Management

a) Provide a detailed schedule of the number of employees and the components of their compensation, including salaries and benefits.

b) Provide job descriptions of employees.

c) Provide expenses of managing activities required by provider contract and a description of those activities.

10. Other Corporate Overheads

a) Provide a detailed schedule of the number of employees and the components of their compensation, including salaries and benefits.

b) Provide job descriptions of employees.

c) Identify and explain the expenses included in corporate overhead.

d) Itemize any costs over $10,000.

See discussion of overhead costs at paragraphs 74-75 of the Commission's Report and Order and Declaratory Ruling, released on November 19, 2007 (FCC 07-186).

SECTION D Annual Depreciation/Amortization Associated with Capital Investment

Depreciation method and period applied should be included. Departures from traditional depreciation methods should be explained in detail. **We emphasize that the depreciable life, depreciation method, and depreciation expense must be categorized by items listed in Section D.**

SECTION E Other Expenses

1. Marketing/Advertising

a) Provide a detailed schedule of the number of employees and the components of their compensation, including salaries and benefits. This includes product management expenses associated with managing product lifecycle.

b) Provide job descriptions of marketing/advertising staff.
c) Identify and explain the expenses included in marketing/advertising.
d) Itemize any costs over $10,000.
e) The cost of equipment given to, sold to, and/or used by relay callers, and call incentives are **NOT** to be reported in any expenses.
f) Expenses associated with installation and training on the equipment are **NOT** to be reported.

2. Outreach

a) Provide a detailed schedule of the number of employees and the components of their compensation, including salaries and benefits.
b) Provide job descriptions of outreach staff.
c) Identify and explain the expenses included in outreach.
d) The cost of equipment given to, sold to, and/or used by relay callers, and call incentives are **NOT** to be reported in any expenses.
e) Expenses associated with installation and training on customer premises' equipment are **NOT** to be reported.
See discussion of at paragraph 82 and Declaratory Ruling at paragraphs 89-94 of the Commission's Report and Order and Declaratory Ruling , released on November 19, 2007 (FCC 07-186).

4. Other

Do not include "Profit or Tax Allowances".

List and explain expenses not stated in other categories.

SECTION F Capital Investments

Support data for capital investment should include where appropriate, among other things: all capital equipment purchased in order to provide each form of TRS, itemized by equipment class, gross book values, accumulated depreciation, and net book values. **Only report the year end net book value in Section F.**

Only include capital investment items that are long term in nature and subject to depreciation. Items such as office supplies should be listed in Section B. 6. Relay Center Expenses.

Relay Services Data Request
Please read the attached instructions carefully before completing the data request.

Provider Identification

A. Service Provider/Administrator

Provider:_____

Contact Name:_____ Email ID:_____

Address:_____

City/State:_____ Zip:_____

Telephone:_____ Fax:_____

B. Data Request Response

Contact Name:_____ Email ID:_____

Telephone:_____ Fax:_____

The information included in this data request is true, accurate and complete to the best of my knowledge.

Contact Signature: _____ **Date:** _____

C. **To assist NECA in understanding your data,** please summarize any service changes/activities/improvements since the 2008 filing, or planned for 2009/2010, that caused/may cause substantial changes in cost and/or demand data. Include the methodology used to determine the projected minutes for 2009-2010. Examples: addition of a state; loss of a state contract; increase in volumes due to specific outreach program; call volume decrease due to use of internet or other non-TRS technology; decrease in minutes due to new, time saving technology; changes in volumes due to abnormal weather conditions; etc. Include any characteristics unique to a particular service or changes in the relay services marketplace as a whole.

_____

_____

_____

_____

_____

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_____

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_____

_____

_____

D. Other Information

If additional space is required in responding to this section, please make copies of this page.

Current State/Entity Contract and Funding Information

List all states and applicable service type where you have a contract to perform that service.

State/Entity:_____

Contract Dates From: _____To: _____

Per TRS Minute Contract Rate: _____Completed/conversation: ____Total/session:____

Per STS Minute Contract Rate: _____Completed/conversation: ____Total/session:____

Per CTS Minute Contract Rate: _____Completed/conversation: ____Total/session:____

Per IP CTS Minute Contract Rate: _____Completed/conversation: ____Total/session:____

Are there any costs for interstate TRS or STS minutes, or all IP or VRS minutes currently being recovered by a means other than the TRS Fund? Yes____ No____

If yes, please indicate other source of recovery:

_____

State/Entity:_____

Contract Dates From: _____To: _____

Per TRS Minute Contract Rate: _____Completed/conversation: ____Total/session:____

Per STS Minute Contract Rate: _____Completed/conversation: ____Total/session:____

Per CTS Minute Contract Rate: _____Completed/conversation: ____Total/session:____

Per IP CTS Minute Contract Rate: _____Completed/conversation: ____Total/session:____

Are there any costs for interstate TRS or STS minutes, or all IP or VRS minutes currently being recovered by a means other than the TRS Fund? Yes____ No____

If yes, please indicate other source of recovery:

_____

State/Entity:_____

Contract Dates From: _____To: _____

Per TRS Minute Contract Rate: _____Completed/conversation: ____Total/session:____

Per STS Minute Contract Rate: _____Completed/conversation: ____Total/session:____

Per CTS Minute Contract Rate: _____Completed/conversation: ____Total/session:____

Per IP CTS Minute Contract Rate: _____Completed/conversation: ____Total/session:____

Relay Services Data Request

Are there any costs for interstate TRS or STS minutes, or all IP or VRS minutes currently being recovered by a means other than the TRS Fund? Yes____ No____ If yes, please indicate other source of recovery:

_____

State/Entity:_____

Contract Dates From: _____To: _____

Per TRS Minute Contract Rate: _____Completed/conversation: ____Total/session:____

Per STS Minute Contract Rate: _____Completed/conversation: ____Total/session:____

Per CTS Minute Contract Rate: _____Completed/conversation: ____Total/session:____

Per IP CTS Minute Contract Rate: _____Completed/conversation: ____Total/session:____

Are there any costs for interstate TRS or STS minutes, or all IP or VRS minutes currently being recovered by a means other than the TRS Fund? Yes____ No____

If yes, please indicate other source of recovery:

_____

E. Center Locations

Please complete the following table with center location information.

SERVICE (TRS/STS/IP/CTS/VRS)	STREET ADDRESS	CITY, STATE & ZIP CODE	HOURS OF OPERATIONS

F. Subcontractors, etc. - Please provide a listing of all subcontractors, marketing entities, websites, and any other entities through which TRS services are provided. Use additional forms if needed.

Subcontractor Name:_____

Address:_____

City, State & Zip code:_____

Email Address:_____

Service Provided:_____

Subcontractor Name:_____

Address:_____

City, State & Zip code:_____

Email Address:_____

Service Provided:_____

VII. Certification

I hereby certify that I have overall responsibility for the preparation of accounting data for

_____

(TRS, STS, IP, IP CTS, IP CTS, and/or VRS PROVIDER)

Relay Services Data Request

I certify that I am an officer of the above-named reporting entity that I have examined the foregoing report and, to the best of my knowledge, information and belief, all statements of fact contained in this Relay Services Data Request are an accurate statement of the affairs of TRS. In addition, I swear, under penalty of perjury, that all requested information has been provided and is accurate.

Date: _____

Signature: _____

Name: _____

Title: _____

2009-2010

Relay Services Data Request

I. Total Video Relay Services Expense Data		*2007 Actuals*	*2008 Actuals*	*2009 Projections*	*2010 Projections*
A. Annual Recurring Fixed Expenses					
1. Rent					
2. Utilities					
3. Building Maintenance					
4. Property Tax					
5. Furniture (if leased)					
6. Office Equipment (if leased)					
	Subtotal	0	0	0	0
B. Annual Recurring Variable Expenses					
1. Salaries & Benefits (Relay Center: Non - Management)					
2. Salaries & Benefits (Relay Center: Management)					
3. Salaries & Benefits (Relay Center Staff)					
4. Telecommunications Expenses					
5. Billing Expenses					
6. Relay Center Expenses					
	Subtotal	0	0	0	0
C. Annual Administrative Expenses					
1. Finance/Accounting					
2. Legal/Regulatory					
3. Engineering					
4. Research and Development					
5. Operations Support					
6. Human Resources					
7. Billing					
8. Contract Management					
9. Risk Management					
10. Other Corporate Overheads					
	Subtotal	0	0	0	0
D. Annual Depreciation Associated with Capital Investment					
1. Furniture & Fixtures					
2. Telecommunications Equipment					
3. Leasehold					
4. Other Capitalized					
	Subtotal	0	0	0	0
E. Other TRS Expenses					
1. Marketing/Advertising Expenses					
2. Outreach Expenses					
3. Sub Contractor Expenses					
4. Other					
	Subtotal	0	0	0	0
Total Video Relay Services Expenses (Sections A - E only)		0	0	0	0
F. Capital Investments					
1. Furniture & Fixtures					
2. Telecommunications Equipment					
3. Leasehold					
4. Other Capitalized					
Total Video Relay Services Capital Investments (Section F only)		0	0	0	0

200910DataCollectionFormsfinal.xls

2009-2010 Relay Services Data Request

II. Total Internet Protocol Expense Data		*2007 Actuals*	*2008 Actuals*	*2009 Projections*	*2010 Projections*
A. Annual Recurring Fixed Expenses					
1. Rent					
2. Utilities					
3. Building Maintenance					
4. Property Tax					
5. Furniture (if leased)					
6. Office Equipment (if leased)					
	Subtotal	0	0	0	0
B. Annual Recurring Variable Expenses					
1. Salaries & Benefits (Relay Center: Non - Management)					
2. Salaries & Benefits (Relay Center: Management)					
3. Salaries & Benefits (Relay Center Staff)					
4. Telecommunications Expenses					
5. Billing Expenses					
6. Relay Center Expenses					
	Subtotal	0	0	0	0
C. Annual Administrative Expenses					
1. Finance/Accounting					
2. Legal/Regulatory					
3. Engineering					
4. Research and Development					
5. Operations Support					
6. Human Resources					
7. Billing					
8. Contract Management					
9. Risk Management					
10. Other Corporate Overheads					
	Subtotal	0	0	0	0
D. Annual Depreciation Associated with Capital Investment					
1. Furniture & Fixtures					
2. Telecommunications Equipment					
3. Leasehold					
4. Other Capitalized					
	Subtotal	0	0	0	0
E. Other TRS Expenses					
1. Marketing/Advertising Expenses					
2. Outreach Expenses					
3. Sub Contractor Expenses					
4. Other					
	Subtotal	0	0	0	0
Total Internet Protocol Expenses (Sections A - E only)		0	0	0	0
F. Capital Investments					
1. Furniture & Fixtures					
2. Telecommunications Equipment					
3. Leasehold					
4. Other Capitalized					
Total Internet Protocol Capital Investments (Section F only)		0	0	0	0

PROVIDER'S NAME:

B4

Relay Services Data Request

III. Annual TRS Demand Data

1. Interstate Internet Protocol (IP) Conversation Minutes

Minutes	2007 Actuals	2008 Actuals
Total IP Minutes		

2009 IP Projected Minutes	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
Total Minutes													-

2010 IP Projected Minutes	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
Total Minutes													-

2. Video Relay Service (VRS) Conversation Minutes

Minutes	2007 Actuals	2008 Actuals
Total VRS Minutes		

2009 VRS Projected Minutes	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
Total Minutes													-

2010 VRS Projected Minutes	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
Total Minutes													-

Intrastate Rate and Minute Data for TRS and STS MARS Methodology

Provider Name: **State:**

Providers complete one form for each state

IV. Annual TRS / STS Rate and Demand Data

A. Traditional Telecommunications Relay Service (TRS) and STS

Contract Term From date: To date:

2008 Minute and Rate Information	Actual TRS Conversation Rates	Actual STS Conversation Rates	Actual TRS Session Rates	Actual STS Session Rates
1. Per-minute compensation rate for intrastate traditional TRS. List conversation or session rate.				
2. Per-minute compensation rate for intrastate STS. List conversation or session rate.				
	Actual TRS Conversation Minutes	Actual STS Conversation Minutes	Actual TRS Session Minutes	Actual STS Session Minutes
3. Number of intrastate conversation minutes for TRS and or STS.				
4. Number of intrastate session minutes for TRS and or STS.				

If the intrastate compensation rate(s) paid for these services changed during the calendar year, or the provider changed indicate each rate separately and indicate the time period in which the rate was effective, whether the rate applied to session or conversation minutes, and the number of conversation and session minutes associated with each period below. Use additional forms if necessary.

Contract Term From date: To date:

2008 Minute and Rate Information changes	Actual TRS Conversation Rates	Actual STS Conversation Rates	Actual TRS Session Rates	Actual STS Session Rates
1. Per-minute compensation rate for intrastate traditional TRS. List conversation or session rate.				
2. Per-minute compensation rate for intrastate STS. List conversation or session rate.				
	Actual TRS Conversation Minutes	Actual STS Conversation Minutes	Actual TRS Session Minutes	Actual STS Session Minutes
3. Number of intrastate conversation minutes for TRS and or STS.				
4. Number of intrastate session minutes for TRS and or STS.				

Please indicate below what information should be considered confidential:

Intrastate Rate and Minute Data for CTS MARS Methodology

Provider Name: **State:**

Providers complete one form for each state

IV. Annual Captioned Telephone / IP Captioned Telephone

B. Captioned Telephone additional costs paid by the state to the provider

Contract Term **From date:** **To date:**

2008 Minute and Rate Information	Actual CT Conversation Rates		Actual CT Session Rates
1. Per-minute compensation rate for intrastate Captioned Telephone. List conversation or session rate.			
	Actual CT Conversation Minutes		Actual CT Session Minutes
2. Number of intrastate conversation minutes for CTS.			
3. Number of intrastate session minutes for CTS.			

If the intrastate compensation rate(s) paid for these services changed during the calendar year,or the provider changed indicate each rate separately and indicate the time period in which the rate was effective, whether the rate applied to session or conversation minutes, and the number of conversation and session minutes associated with each period below. Use additional forms if necessary.

Contract Term From date: **To date:**

2008 Minute and Rate Information changes	Actual CT Conversation Rates		Actual CT Session Rates
1. Per-minute compensation rate for intrastate Captioned Telephone. List conversation or session rate.			
	Actual CT Conversation Minutes		Actual CT Session Minutes
2. Number of intrastate conversation minutes for CTS.			
3. Number of intrastate session minutes for CTS.			

Please indicate below what information should be considered confidential:

Additional Costs paid by the State for Intrastate TRS and STS for the MARS Methodology

Provider Name:

State:
Providers complete one form for each state

V. Annual TRS / STS

A. Traditional Telecommunications Relay Service (TRS) and STS additional costs paid by the state to the provider

Contract Term **From date:** **To date:**

If the contractual per-minute compensation rate does not include all the costs paid by the state to the provider for the relay service, the state should also list other amounts paid to the provider during the relevant calendar year below. Use additional forms if necessary.

Description of 2008 Costs that were not included in the per-minute compensation rate that was paid to the provider	**TRS $ Amount**	**STS $ Amount**

B. Traditional Telecommunications Relay Service (TRS) and STS additional costs paid by the provider

Please identify any incentives or services that the TRS provider paid for or provided, during the calendar year 2008, that the state was not required to pay for.
Use additional forms if necessary.

Description of 2008 Costs that were not included in the per-minute compensation rate that was paid for by the provider	**TRS $ Amount**	**STS $ Amount**

Please indicate below what information should be considered confidential:

Additional Costs paid by the State for Intrastate CTS for the MARS Methodology

Provider Name:

State:
Providers complete one form for each state

V. Annual Captioned Telephone / IP Captioned Telephone

C. Captioned Telephone additional costs paid by the state to the provider

Contract Term **From date:** **To date:**

If the contractual per-minute compensation rate does not include all the costs paid by the state to the provider for the relay service, the state should also list other amounts paid to the provider during the relevant calendar year below. Use additional forms if necessary.

Description of 2008 Costs that were not included in the per-minute compensation rate that was paid to the provider	**CT $ Amount**

D. Captioned Telephone additional costs paid by the provider

Please identify any incentives or services that the TRS provider paid for or provided, during the calendar year 2008, that the state was not required to pay for.
Use additional forms if necessary.

Description of 2008 Costs that were not included in the per-minute compensation rate that was paid for by the provider	**CT $ Amount**

Please indicate below what information should be considered confidential:

Provider Name:

VI.

Provider Specific Outreach Efforts Directly Attributable to the Additional Support for STS Outreach

1. STS minutes reimbursed for the period of March 2008 through December 2008	
2. Dollars received from the interstate TRS Fund for the support of STS outreach for the period of March 2008 through December 2008	

3. Itemized list of specific outreach efforts and costs. Use additional forms as necessary

Outreach description	Cost

ATTACHMENT C

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

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

REPORT OF DR. GREGORY L. ROSSTON

I. Introduction

My name is Gregory L. Rosston. I have been asked by Sorenson Communications, Inc. ("Sorenson") to address the economic implications of the Federal Communications Commission's recent proposal to abandon the three-year rate plan for Video Relay Service ("VRS") a full year ahead of schedule.

A. Qualifications

I am Deputy Director of the Stanford Institute for Economic Policy Research ("SIEPR") and Deputy Director of the Public Policy program at Stanford University. I am also a Lecturer in the Economics Department at Stanford University. I received my Ph.D. and my M.A. in economics from Stanford University and my A.B. with Honors in economics from the University of California, Berkeley. My specialties include industrial organization, antitrust and regulation with an emphasis on telecommunications. I served at the Federal Communications Commission ("FCC") for three and one-half years as Deputy Chief Economist, as Acting Chief Economist of the Common Carrier Bureau and as a senior economist in the Office of Plans and Policy. In these positions, I had

significant involvement with, among other things, the FCC's implementation of areas of competition policy.

Since returning to Stanford from the FCC, I have regularly taught courses that involve competition policy. Several times I have taught a course entitled "Antitrust and Regulation" and I have also taught "Economics of the Internet" and "Economic Policy Analysis" that have focused on telecommunications, regulation, and antitrust issues. I have been the author or co-author of a number of articles relating to Internet and telecommunications competition policy. I have also co-edited two books on telecommunications and helped organize several telecommunications conferences. My curriculum vita is attached as Exhibit 1.

B. Background

1. Goals

It is my understanding Congress directed the FCC to enable all deaf Americans to have access to communication services that are functionally equivalent to those enjoyed by all other Americans.[1] In response to the Congressional mandate, the FCC put in place regulations creating a Video Relay Service ("VRS") industry whose structure, conduct, and performance has begun to fulfill these twin rights. However, the FCC has proposed a sudden and unpredicted cut in the 3-year incentive regulation plan that it chose as the instrument of effectuating the two Congressional mandates. Any material cut in the rate for reimbursing VRS, in my opinion, would make it harder to meet these incompletely fulfilled mandates by reducing the number of deaf users of American Sign Language

[1] Title IV of the Americans with Disabilities Act of 1990 (ADA), which added section 225 to the Communications Act of 1934, as amended, requires the Commission to ensure that TRS is available, to the extent possible and in the most efficient manner, to persons with hearing or speech disabilities in the United States. This requirement is codified at section 225 of the Communications Act of 1934, as amended ("Communications Act"). See 47 U.S.C. §§ 225(a)(3), (b)(1).

("ASL") who otherwise would have obtained VRS access and by reducing the quality of VRS so that it will be less "functionally equivalent."

Currently, Sorenson Communications is the market leader in terms of minutes of use. It has achieved that position by investing heavily to find deaf ASL households, communicate with the residents of those households, and, where permission is granted, install videophones and other equipment to facilitate VRS access. Sorenson's upfront investments in outreach, marketing, hardware and software design, equipment purchase, and installation have been essential to reach the current level of VRS access for deaf Americans. If the three-year rate is not diminished, investment is likely to continue that expands VRS to many more deaf Americans, moving toward the Congressional mandate that all deaf American have VRS access.

Interoperability requirements, mandated by the FCC in 2006, have enabled other VRS providers to use the Sorenson videophones to provide VRS. That resulted in all VRS firms competing in quality of service in two basic forms – drops in hold times and introduction of more user-friendly platforms. By stimulating this competition, the FCC has enabled the deaf to make progress toward the functional equivalence goal.

2. Predictions at the time of the rate order and interoperability

Two and a half years ago, I conducted an internal report for Sorenson Communications to examine the impact of interoperability on the competitive structure of the VRS industry. Subsequently, Sorenson submitted a non-proprietary version of my report to the FCC in connection with this docket. At that point in time, the VRS industry was growing rapidly, both in terms of minutes of use and in terms of users connected to VRS.

In my earlier report I explained the basic nature of the VRS business and the likely path of competition and impact on users. I predicted, among other things, that the FCC interoperability rules would enable other VRS providers to take advantage of Sorenson's investment. In addition, I predicted that to gain users firms would compete on quality of service, mainly in terms of response time and features offered to deaf users.

After I completed that report, the FCC adopted a predictable and reliable three-year rate plan for VRS. The FCC's chosen form of incentive regulation enabled VRS providers to make progress toward the goals of all deaf ASL users having functionally equivalent services, as I will review in this report.

In the remainder of this report, I will review the economic characteristics of VRS, discuss the competitive changes in the VRS industry, and examine the likely impact of any reduction in the reimbursement rate. I conclude that if the FCC were either to lower the rate materially and/or shorten the three-year rate plan, the FCC would reduce incentives for VRS providers to increase adoption of VRS by deaf ASL households, and also reduce the incentives to improve both hold times and the technological platforms that permit the deaf to achieve more functionally equivalent service.

3. Setup and per-minute costs

To make a VRS call, a video user needs to have a broadband connection, and a combination of video screen and camera capable of transmitting and receiving a sufficiently high-resolution image. Sorenson provides videophones (VP-200) and routers to video users free of charge and sends deaf installers to the users' homes to set up the systems and provide training on how to use VRS. Video users provide their own broadband services to carry the calls to Sorenson for routing.

Generally a customer learns about VRS from some of the outreach programs that Sorenson (or possibly another provider) funds. A potential customer will contact Sorenson and, if the customer is qualified, Sorenson will send an installer to the residence. The installer, who is deaf and can communicate in ASL with the customer, hooks up the videophone and a router to the customer's broadband connection. In addition, the installer provides training to the customer so the customer can use the service and understand the features.

Once a VRS user has a videophone installed and set up, the major cost driver is interpreter time. Interpreter costs are a function of the wage rate and the efficiency (defined here as the total VRS compensable time divided by the total time worked).[2]

Increasing demand for VRS minutes directly translates into increased demand for VRS interpreters. There is currently a very limited supply of VRS interpreters and it will take time to increase the supply, as training takes several years. There is some limited elasticity of supply as some possible interpreters are not working as interpreters, or are not working full time, and may respond to higher wage rates. In 2007, it was expected that increasing VRS usage would increase demand for interpreters. Because the supply of interpreters is relatively inelastic, this was expected to increase labor costs.[3]

In addition, to meet the immediate demand as more people are hired to be VRS interpreters, it is quite possible that new hires will need more training because they may be under-qualified at VRS interpreting. Additional training reduces efficiency because of the additional time spent training the new VRS interpreters and because of the increased

---

[2] Efficiency is far less than 100% for a number of reasons: break time, call set up and tear down time, time waiting between calls, administrative time, and other factors.

[3] Declaration of Dr. John H. Johnson, paras. 2, 14-15, 18, 20-25 (October 30, 2006), filed with Comments of Sorenson Communications, Inc., CG Docket No. 03-123 (October 30, 2006).

time spent by the experienced VRS interpreters training the new hires instead of servicing users.

One of the measures of quality is call answer time. There is a fairly straightforward way to decrease answer time – increase the number of interpreters on duty. However, increasing the availability of interpreters increases the chance that an interpreter will be waiting for a call rather than helping a user. Increasing quality (in terms of answer time) directly decreases efficiency and increases cost.

Increased labor costs due to higher wages and decreased efficiency are industry problems that will occur regardless of the source of growth. One solution to this problem is to encourage more investment in the training necessary to produce certified ASL interpreters (and the additional training needed to produce qualified VRS interpreters). Sorenson has invested in a training facility to enable ASL interpreters to become qualified to provide VRS service.

4. Additional costs of providing VRS

There are significant costs to providing VRS in addition to those described above. First, Sorenson and other companies spend money on research and development of their videophones. Increasing the video quality and adding features were two big improvements of the VP-200 as compared with the VP-100. For example, the VP-200 is much better than standard videophones at transmitting hand motions, which are critical to understanding sign language.

Second, Sorenson has been expanding its capacity by increasing the number of its call centers. Each time it opens a new call center, it investigates different areas of the country to determine where there is an available supply of interpreters, signs a lease for a

facility, builds out the facility so that it is capable of hosting interpreters, and gets the necessary telecommunications connections. All of these are upfront expenses that Sorenson undertakes in advance of generating any revenue from the new facility.

Third, in 2008, the FCC required that all VRS subscribers be assigned 10-digit North American Numbering Plan telephone numbers by 2009 (now by June 30, 2009). Sorenson has acquired numbers for nearly all of its subscribers. In addition, for enhanced 911 purposes, it keeps track of the "registered location" of all users who have selected Sorenson as their default provider of VRS. These efforts add to the costs Sorenson incurs for each of its subscribers, as there are costs to acquire the phone number, pay ongoing monthly and usage-based costs for the numbers, and educate customers about why they need to switch from their existing call address to a 10-digit number.

II. 2 years later – what has changed

A. 2007 Rate Plan Set Incentive-Based Rates

In its 2007 Order, the FCC adopted a three-year plan for VRS rates, with three different tiers: Tier 1, less than 50,000 minutes; Tier 2, 50,001 – 500,000 minutes; and Tier 3, more than 500,000 minutes. The rates for the different Tiers are in the table below. The FCC-mandated rates decline each year to account for gains in "productivity."

	MOU	2008-09 Rates	2009-10 NECA Proposed Rates
Tier 1	< 50,000	$6.7362	$6.7025
Tier 2	50,001 – 500,000	$6.4675	$6.4352
Tier 3	>500,000	$6.2685	$6.2372

The Commission's move from NECA-allowable projected "cost"-based rate setting to the three-year incentive-based regulation was motivated by a desire to

encourage firms to be efficient – as was the FCC's move from rate-of-return regulation to incentive-based regulation for large incumbent telephone companies in the late 1980s.

In contrast to rate of return or cost-based regulation, incentive-based regulation gives firms strong incentives to operate efficiently and in many cases makes the regulators' job much easier at the same time that it provides substantial benefits for consumers (in this case the Interstate TRS Fund) by preventing price increases. Incentive-based regulation also typically encourages investment by giving firms a longer range, stable, predictable planning cycle.

As predicted by economic theory of regulation, the Commission's incentive-based VRS ratemaking methodology provided incentives for VRS firms to improve quality and attract new users.[4] Sorenson (and likely its competitors) increased investment in outreach, equipment, research and development, and recruiting and training of interpreters.

In a typical market, firms would also offer users financial or other incentives to stimulate minutes per user, but FCC rules forbid this practice. As a result, VRS providers competed primarily on two dimensions: increasing penetration by installing videophone for new users, and attracting users from other VRS providers. Both these strategies – as the FCC must have intended – are aligned with the Congressional mandate of providing all deaf Americans functionally equivalent communications service.

[4] Often regulators worry that a monopoly subject to price cap regulation has incentive to reduce costs by reducing quality. However, with vigorous competition for consumers, VRS firms need to compete on quality.

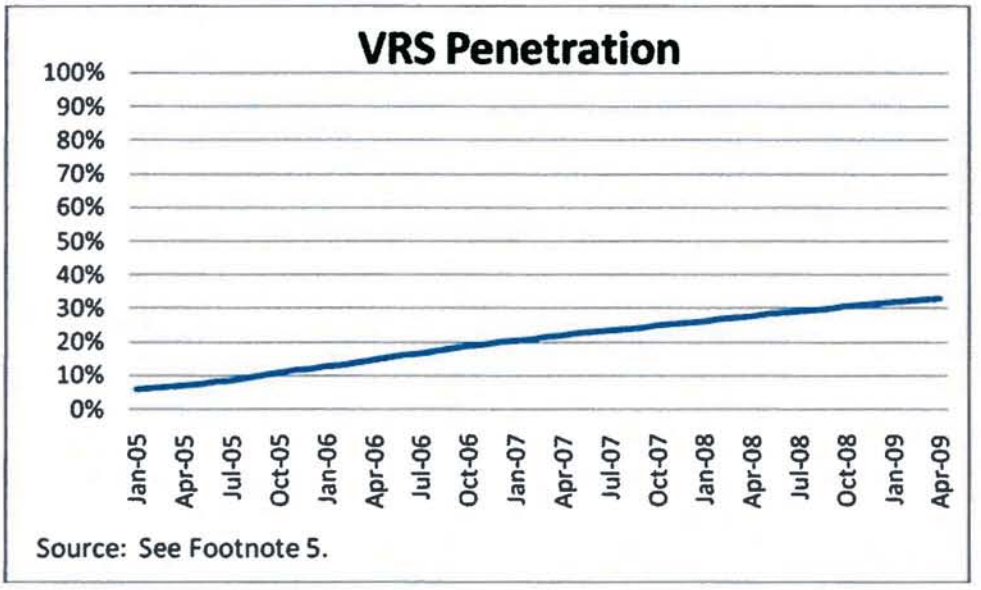
B. Increase in Users

Sorenson has responded to the FCC's incentive regulation plan by investing substantially in providing videophones to new users and increasing the quality of service for its existing users. At the same time, other providers have competed primarily by providing service via Sorenson's installations and, in some cases, providing their own equipment to users as well.

To attract new deaf users, Sorenson invests in outreach, provides deaf ASL households with equipment, and installs the equipment. Much of these significant expenses are not reimbursable under the FCC's rules. Technically, these expenses are not necessarily costs recognized by NECA and Sorenson does not have a guarantee of recovering its expenditures in these areas. Nevertheless it is these expenditures by Sorenson that are critical to the deaf achieving VRS access.

Because Sorenson has chosen to reduce its current net income by incurring current costs that drive growth in VRS users, the number of deaf people connected to the communications infrastructure through VRS has increased substantially. The chart below shows the estimated increase in the percentage of deaf households using ASL connected to VRS.[5]

[5] Sorenson believes there are anywhere from 500,000 to 1 million qualified deaf people who use ASL in the U.S. For the purposes of this chart, I used 500,000. I then adjusted that by assuming that each deaf household had 1.5 deaf ASL users, leading to 333,333 deaf households using ASL. I did not change the base over the time period of the chart. My assumption is that Sorenson has installed about 90% of all VRS videophones even though it has a much smaller share of VRS minutes of use because its rivals have access to Sorenson's installations.



The percentage of deaf ASL households with VRS has increased rapidly under the FCC's current regime to about 33%. However, even with the conservative assumptions underlying the chart, it is not close to 100% or even to the 95% penetration of voice telephones for hearing households.[6] Consequently, any material reduction in the reimbursed rate could be expected to slow or even stop further progress toward the goal of providing VRS access to all deaf Americans.

All VRS providers have tried to get users by training, outreach and improving the quality of the service by, for example, reducing hold times. However, because of its position as the leader in the industry, Sorenson's conduct has become the chief means for the Commission to increase penetration of VRS and meet the mandate of functional equivalence. Yet, it should be noted that Sorenson's rivals are starting to increase investment in adoption of VRS through new videophones and are also competing on

[6] FCC, "Telephone Subscribership in the United States," rel. March 2009.

quality, driving Sorenson to increase its quality also. Both of these competitive factors lead to better service for the deaf community.

Such investment is risky. Sorenson's guess is that about half of the households where it installs videophones will not use the phones significantly in any given month. Obviously, while these households still have access to 911 and other critical communication capabilities, Sorenson is unlikely to recover its upfront expenditures in a timely manner from these users. Nevertheless, because of the ostensible predictability of the FCC's three-year rate plan and competition that the incentive plan has invited, Sorenson has continued to provide videophone access, including such critical capability as 911, to a greater number of deaf Americans every month.

C. Increase in Quality

Other firms had a promising target in recruiting Sorenson's users to use their services: Sorenson had identified the users and then paid for and installed the equipment. Because Sorenson already has users who have and use videophones, its competitors with a lower share have the ability not only to attract new VRS users as Sorenson does, but they also have a ripe target of potential users they can attempt to compete away from Sorenson. This competition increases the quality of the VRS product for all users and increases the likelihood that non-users will adopt also. The chart below shows that quality competition has substantially reduced hold times. In 2007, Sorenson's hold times were above one minute. Sorenson subsequently invested in staffing to increase its speed of answer. For about the past year, Sorenson's average speed of answer is 20 seconds (and in 2009 under 15 seconds). As a result, the average hold times for deaf consumers have dropped dramatically.

This quality improvement is important to progress toward functional equivalence. However, the wait time for hearing Americans to be able to make a telephone call is generally measured in fractions of a second, so VRS has not yet reached that level.

Two years ago, competitors benefitted from the upfront capital investment made by Sorenson. While free-riding on that investment is still apparently the predominant form of competition, additional competition is coming from Purple, CDVRS and others who have introduced interoperable videophones and are now undertaking the expense of producing and installing these new videophones.

As discussed above, the cost structure of VRS is relatively straightforward – as conversation minutes increase and as hold times decrease, companies need proportionately more VRS interpreters. Sorenson and its competitors have invested heavily in equipment, new call centers and in locating, recruiting and training VRS interpreters. Without these investments, service quality would be much lower, harming the deaf community. However, developing phones, opening call centers and increasing the supply of video interpreters all require upfront investment. It is a basic tenet of

economics that firms make investments in the expectation that they will be able to recoup those investments in the future. A key reason for the investment in equipment and interpreter recruitment and training is the expectation that the VRS rates that were set in the 2007 order would hold for the promised time period.

D. Data Collection

The data described above – VRS penetration and average speed of answer – are estimates. The FCC should measure these and other relevant data to assess its success in meeting the statutory requirements of section 225. In particular, the FCC should collect information regarding growth in VRS penetration, the ASL interpreter pool, growth in ASL interpreters, VRS industry structure, and VRS service quality (including hold times).

E. Expected Profits Drive Investment

1. Lower rates and more uncertainty will lead to less investment.

For-profit firms invest in order to achieve future returns. Without the expectation of profits, firms will not undertake investments. In accounting terms, firms will reduce costs in order to keep net income above zero. In other words, it would be irrational to expect firms to lose money while providing VRS. As discussed above, VRS requires investment in outreach, videophones, technology, call centers and interpreter training. If the FCC were to reduce the previously set compensation rates, and especially if it were to increase the uncertainty and unpredictability of compensation, those actions would reduce the expected returns to investment, and firms, especially risk-averse firms, will be

less likely to undertake the necessary investments.[7] In this context, Sorenson has explained that in response to a material rate cut, it would reduce such critical costs as labor, installation, training and R&D. Cutting costs in these areas will harm deaf employees and contractors, harm interpreters, reduce otherwise achievable expansion of VRS access and reduce progress toward the goal of functional equivalence.

In other words, deaf persons will find it harder to get access to videophones and hence to VRS, quality of service will deteriorate and waiting times increase, and firms may exit the industry leading to less consumer choice.

2. Costs have increased

In 2007, the FCC set rates for the following three years. Those rates were adjusted downward each year to account for "productivity" gains. As should be evident from the discussion of the economics of the industry, while there is room for some productivity increases, with the largest cost factor being the labor cost of interpreters, productivity gains are unlikely to be large in the labor-intensive VRS industry.

Instead of experiencing cost decreases from 2007-2009, Sorenson's NECA-allowed "costs" per minute have increased, both in 2008 and in 2009. Industry historical average reported "costs" based on NECA filings also increased 4% from 2007-2008.[8] Industry data for 2009 are not yet publically available.

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[7] The direction of the effect is clear. Obviously higher levels of changes in the rate will lead to greater changes in investment behavior.

[8] Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate (filed May 1, 2009) (2009 TRS Rate Filing), p-14.

3. Lowering rates will reduce investment and competition

VRS users are not homogeneous – some make a lot of calls and others make only a few calls a month. Some users live far from cities and require much more travel time for installers and repair personnel. Similarly, interpreters are not homogenous – some are located in high wage areas and some are more efficient at their jobs.

These types of heterogeneity lead to the conclusion that lower rates will lead to less service and lower quality than if the FCC maintains its current rate plan. First, Sorenson would be likely to reduce its installations of new videophones in many areas where installation costs are expensive. Reducing rates could make the most expensive new installations unprofitable, and Sorenson would reduce its outreach to avoid having to pay the expense for the equipment and installation. Since there is only a limited amount of installation by other providers, if Sorenson were to cut back on installations as a result of reduced rates, this would make it much harder to achieve the adoption goal.

At the same time, Sorenson and its competitors would face reduced incentives to compete on service quality. Instead of the dramatic drop in service answer time, VRS providers could reduce the number of interpreters and try to increase interpreter efficiency by increasing hold times for users. Since all competitors face the same incentive as a result of reduced rates, this would harm the functional equivalence goal.

III. Conclusion

The FCC is considering abandoning its three-year VRS rate plan and reducing the compensation rate. Reducing rates and increasing the uncertainty of future rates will negatively impact VRS companies and through them deaf consumers, thereby making it harder to achieve Congress' mandate of functionally equivalent service for all deaf

Americans. Because firms will have a lower expected return on investment, they will invest less, including reducing investments in outreach and installation. As a result, there will be fewer deaf people with VRS than if the FCC had not reduced the rates, thwarting the adoption goal. In addition, it is likely that some firms will not only cut back new investments, but may exit the industry entirely if they cannot cover their forward-looking costs or if there is too much uncertainty regarding their ability to do so. As a result, existing users too will suffer as they will have more limited choice. Finally, firms will be less aggressive at investing in interpreter training. With fewer interpreters, hold times will increase and quality will decrease as firms will spend less on training, further frustrating the goal of functional equivalence. The Commission should measure its success under section 225 by collecting information regarding growth in VRS penetration, the ASL interpreter pool, growth in ASL interpreters, VRS industry structure, and VRS service quality (including hold times).

A related issue is that of the FCC's reliability. When the FCC announced VRS rates for the subsequent three years, firms made investments based on that Order. If the FCC changes its mind, firms will rely less on future FCC Orders, not only in VRS, but in all telecommunications aspects because the FCC's ability to go back and reverse a decision will be strengthened if the FCC does it here. The inability to rely on a regulatory decision will in turn make it much more difficult to ensure that decisions lead to the results that best serve the public.

EXHIBIT 1

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Employment

Stanford University, Stanford, CA
- Deputy Director, Stanford Institute for Economic Policy Research, 1999-
- Deputy Director, Public Policy Program, 2006-
- Senior Research Fellow, Stanford Institute for Economic Policy Research, 2004-
- Research Fellow, Stanford Institute for Economic Policy Research, 1997-2004
- Lecturer in Economics/Public Policy, 1997-

Federal Communications Commission, Washington, DC
- Deputy Chief Economist, 1995-1997
- Acting Chief Economist, Common Carrier Bureau, 1996
- Senior Economist, Office of Plans and Policy, 1994-1995

Law and Economics Consulting Group, Berkeley, CA
- Senior Economist, 1990-1994

Economists Incorporated, Washington, DC
- Economist/Research Associate, 1986-1988

Education

Stanford University, M.A., Ph.D., in Economics, Specialized in the fields of Industrial Organization and Public Finance. 1986, 1994.

University of California, Berkeley, A.B. in Economics with Honors. 1984.

Papers and Publications

"An Economic Analysis of the Effects of FCC Regulation on Land Mobile Radio," unpublished Ph.D. dissertation, Stanford University. 1994.

"Competition in Local Telecommunications: Implications of Unbundling for Antitrust Policy" in Brock, G., (ed.) Toward a Competitive Telecommunication Industry: Selected Papers from the 1994 Telecommunications Policy Research Conference, LEA Associates, Mahwah, NJ. 1995 (with Harris, R. and Teece, D.).

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"Using Procurement Auctions to Allocate Broadband Stimulus Grants" Stanford Institute for Economic Policy Research *Policy Brief*, May 2009 (with Paul Milgrom and Andrzej Skrzypacz)

Other Activities

Editorial/Comittees

Associate Editor, *Information, Economics and Policy*, 2008-
Referee for *American Economic Review, Rand Journal of Economics, Industrial and Corporate Change, Journal of Industrial Economics, Information, Economics and Policy, Telecommunications Policy, Telecommunication Systems, Journal of Economics and Management Science, Antitrust Law Journal.*
Telecommunications Policy Research Conference, Program Committee 2002-2004.
Bay Area Economic Profile Academic Review Panel, 2003-2004.
National Research Council Committee on *Wireless Technology Prospects and Policy*, 2003-2007.

Testimony and Submissions

FCC Economist Panel on the Economics of Interconnection, May, 1996.
FCC Economist Panel on the Economics of RBOC Entry under §271, July, 1996.
FCC Economist Panel on Competitive Bidding for USF, March, 1997.
Consultant for the World Bank on Telecommunications Policy in Hungary, 1998.
FCC Academic Expert Panel on "A New FCC for the 21st Century," June 1999.
FCC Academic Expert Panel on AT&T—MediaOne Merger, February, 2000.
Principal co-author of 37 Concerned Economists submission on "Promoting Efficient use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets," February 2001
FCC Panel on Wireless Competition, February 2002.
FCC Workshop on Spectrum Policy, July 2002.
San Francisco Telecom Commission on Cable Competition, January 2003.
U.S. Senate Commerce Committee on Spectrum Policy, March 2003.
California State Senate Committee on Banking, Commerce and International Trade on the Economic Effects of Media Consolidation, March 2003.
San Francisco City Board of Supervisors Land Use Committee on Cable Competition, July 2004.
GAO Panel on Spectrum Allocation and Assignment, August, 2005.
Comments and Reply Comments (with Paul Milgrom) on Auction Rules for Advanced Wireless Services, February 2006
FTC Panel on Network Neutrality, February 2007.

FCC *En Banc* Hearing on Network Management, April 2008.
Co-chair, Economy, Globalization and Trade Committee, Obama for President, 2008
Obama Presidential Transition Team, 2008
Principal co-author of 71 Concerned Economists submission on "Using Procurement Auctions to Allocate Broadband Stimulus Grants" Submitted to the National Telecommunications Information Agency (NTIA) and Rural Utilities Service (RUS), April, 2009

Other
Sustainable Conservation, Advisory Board, 2007-
Nepalese Youth Opportunity Fund, Advisory Board, 2007-
Boards and Advisory Boards for private companies

Awards
Chairman's Distinguished Service Award, FCC, 1997.
University of California, Brad King Award for Young Alumni Service, 1994.
National Performance Review Hammer Award for Reinventing Government, 1994.

May 2009

ATTACHMENT D

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

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

REPORT OF DR. ANDRZEJ SKRZYPACZ

I. Introduction

My name is Andrzej Skrzypacz. I have been asked by Sorenson Communications, Inc. ("Sorenson") to address investment decisions faced by companies in the VRS industry.

A. Qualifications

I am an Associate Professor of Economics at the Stanford University Graduate School of Business ("GSB"), and starting September 1, 2009, I will be a Professor of Economics. I received my Ph.D. and my M.A. in economics from the University of Rochester and my B.S. and M.A. in economics from the Warsaw School of Economics. My specialties include industrial organization, applied game theory and market design. I am an associate editor at the American Economic Review and the Rand Journal of Economics. I teach courses in the GSB Master of Business Administration program that emphasize firm incentives in pricing and investment as well as courses on corporate

governance and financial returns. I have conducted research in economics and finance, and co-authored several academic papers related to the dynamic investment choices and firm strategies. I have also co-authored articles on the telecommunications industry. My curriculum vita is attached as Exhibit 1.

I have studied the VRS industry by reading FCC decisions regarding the industry and previous filings to the FCC regarding that industry. I have also studied the business model of Sorenson Communications, Inc. ("Sorenson"), consulting with company executives Scott Sorensen and Reed Steiner.

B. Summary

In this document, I discuss the main investment decisions faced by companies in the VRS industry. Long-term investments are not directly reimbursable by the FCC because the FCC pays only for actual interpreting minutes (and hence does not directly reimburse any costs). Yet long-term investments lead to bringing service closer to functional equivalence and making it available to more and more deaf people. For example, training of interpreters, opening new call centers, installing new equipment, basic training of new users and R&D of new hardware and software all benefit VRS users, but none of these expenses is directly reimbursed. Firms make these investments without knowing with certainty that their expenses will be recouped for at least three reasons. First, the FCC only pays for interpreting minutes and not for specific costs. Second, the FCC does not even ask for an accounting of some of the costs incurred by the VRS providers (in the NECA filings) and hence is unable to take them all into account in setting the per-minute rates. Third, I have been informed by Sorenson executives that the FCC does not promise to pay historic costs – expenses incurred in the past – and indeed

prudently has rejected using historic costs in setting future rates for VRS services to be rendered.[1]

Nevertheless, firms incurred these expenses because, as I describe below, these investments were intended to generate revenue over a multi-year span based on the FCC's stated promises of the three-year plan incentive regulation (which, as I am told, the FCC now considers to change unilaterally). In my opinion the FCC was right in recognizing in its 2007 Order that setting rates three years in advance helps firms in their budgeting decisions.[2] The reduced uncertainty in rates allows firms to invest with more confidence that they will be able to recoup the investment. As a result they invest more, which ultimately benefits the deaf community (by improving VRS access and quality of service) and improves economic efficiency.

Based on my analysis, firms responded to the 2007 Order by significantly increasing these beneficial investments. That raised the number of people with access to VRS, expanded the supply of interpreters available for the VRS (which kept the cost of interpreting from skyrocketing despite the increase in demand) and lowered hold times, bringing the service closer to functional equivalence.

Should the FCC reduce the rates before the end of the previously-announced period, it will put at risk the return on these past investments. It will also change future patterns of investing because an unexpected decision to changes the rates now would be a

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[1] An incentive-based rate methodology for VRS is far superior to a cost-based methodology for various reasons, one of them being that incentive-based regulation better motivates firms to invest in economic efficiency gains.

[2] See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Declaratory Ruling, FCC 07-186 (October. 26, 2007) paragraph 56: "*Commenters assert that a multiyear rate provides consistency that is necessary for planning and budgeting purposes, and avoids having to possibly adjust on short notice to a lower rate.*"

form of a regulatory hold-up[3] and would set an important negative precedent. In other words, if the FCC demonstrates its willingness to reduce rates unexpectedly in response to firms investing in quality improvements or in expanding penetration, it would make firms less likely to make such investments in the future. Since costs are not directly reimbursed, firms will incur them only if they lead to high enough expected revenues from some service that the FCC does purchase. Reductions in investment would not only harm VRS providers, but also would have negative public policy consequences: the lack of predictability of FCC actions would reduce future investment in activities that appear consonant with the public policy mandates of Congress to bring functionally equivalent relay service to all Americans with disabilities. In particular, the resulting reduction in investment would slow down penetration growth (towards the goal of 100 per cent access) and reduce quality of service intended to fulfill the goal of functional equivalence, as well as harm economic efficiency.[4]

II. Important long-term investments in the VRS industry

The main costs incurred in providing VRS can be divided into short-term variable costs of providing additional minutes of service and long-term fixed costs of investment in expanding scale, improving quality of service and lowering the variable cost. The main components of the long-term investments include:

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[3] A hold-up problem describes a situation in which a firm makes an investment but is not able to capture the returns of it because a party changes the terms of transaction in response to the investment. For example, if a supplier invests in reducing cost and the buyer subsequently reduces price to match that reduction, the supplier captures no return on that investment. The hold-up problem leads to important inefficiencies. Faced with a hold-up, a forward-looking supplier has no incentive to make efficiency-improving investments.

[4] It could also have negative spillover to any other services regulated by the FCC.

a) Providing new equipment (videophone and router) and installing it for new users, to increase penetration.

b) Providing training to new interpreters.

c) Opening new interpreting centers.

d) Funding outreach programs.

e) Funding research and development to improve current equipment and services as well as to offer new equipment in the future.

These investments provide benefits not only for VRS providers, but also for the deaf community. For example, because VRS providers hire deaf individuals to work as installers and in outreach programs, these providers are major employers of people with this disability in America. Moreover, ASL interpreters often work not only for VRS providers, but also in other areas important to the community (schools, courts, etc.)

It is also important to note that the investments in training of new interpreters and opening of new centers have several consequences for VRS. First, these investments are typically necessary to increase penetration. Since there is a limited number of qualified ASL interpreters in any given geographic area, to meet increasing demand VRS providers need to open centers in new areas and/or train new interpreters. Second, investing in new centers and training of new interpreters allows firms to moderate in the long run increases in labor costs by increasing the available supply. As predicted in 2007, the increase in penetration has led to higher salaries of interpreters. Yet, the observed increase in the interpreter costs would have been even higher if VRS providers had not invested in training of new interpreters and opening of new call centers. This is a prime example of economic efficiency gains possible in the absence of regulatory hold-up and in the

presence of predictable rates. Third, these investments allow firms to offer higher quality of service: one of the main dimensions of quality is the hold time (the time a caller has to wait for the interpreter service) and the reduction of hold time requires hiring more interpreters.[5] Improved quality greatly benefits the deaf community, bringing the service closer to functional equivalence.[6]

III. Prudent investment decisions

VRS providers face difficult tradeoffs in their investment decisions. They face a lot of uncertainty regarding demand, costs, rates and competitor strategies. A prudent investment decision considers the cost of an investment and the expected return over the duration of that investment, comparing the returns to the cost of capital.

What is the time horizon of the long-term investments discussed in the previous section? Most users do not need repairs of their videophones at least until the introduction of the next-generation phone. That was the case with the VP-100 videophones offered by Sorenson and that continues to be the experience with the current VP-200 videophones. Hence, the horizon for investments in new installations and in the outreach programs is at least three years (this is historically the typical time to develop a new generation of videophones), and therefore a three-year or longer predictable rate

[5] Another dimension of quality of service is the skill of the interpreters, which also requires investment in training.

[6] Title IV of the Americans with Disabilities Act of 1990 (ADA), which added section 225 to the Communications Act of 1934, as amended, requires the Commission to ensure that TRS is available, to the extent possible and in the most efficient manner, to persons with hearing or speech disabilities in the United States. This requirement is codified at section 225 of the Communications Act of 1934, as amended ("Communications Act"). See 47 U.S.C. §§ 225(a)(3), (b)(1).

aligns well with Sorenson's incentives to invest in installing new equipment and fund outreach programs.

Regarding interpreters, Sorenson's compensation and benefits package has resulted in low turnover rates. Since interpreters gain skill and provide better service over time, Sorenson's decisions regarding how much to invest in training of interpreters depend crucially on the long-term expectations of future rates. If the FCC does not provide long-term predictable rates, Sorenson may be induced to reduce spending on training (which will lead to lower skills and a smaller pool of interpreters).

Similarly, the decision to open a new call center has to be considered looking several years into the future, as centers are usually in multi-year operation. With a long-term predictable rate schedule, Sorenson is motivated to invest in centers that will improve economic efficiency and quality over time. Again, if rates are unpredictable, a reduction in investment is likely, especially if improvements in economic efficiency are expected to be matched quickly with a reduction in rates.

Finally, it took about three-and-a-half years to develop the VP-200 videophone that replaced the old VP-100 videophone. Similarly, it is expected that the next generation devices (stationary or mobile) will appear after a similar development cycle. Therefore, the decision to continue investments in R&D for new videophones depends on the expectations of revenues over several years in the future. Again, if rates are unpredictable, firms are likely to invest less in developing new devices and improving features of existing ones, leading to slower improvements towards functional equivalence.

In summary, the major investment decisions by VRS providers probably have multi-year consequences for the service, and hence economic theory and business practice dictate that future expectations should shape current investments by prudent and rational firms. That feature of the industry was recognized by the FCC in its 2007 filing:

> *Commenters assert that a multiyear rate provides consistency that is necessary for planning and budgeting purposes, and avoids having to possibly adjust on short notice to a lower rate.* ***We agree, and therefore conclude that the VRS tiers and rates will be adopted for a three-year period.***[7]

The greater the uncertainty of future rates and the lower the expected rates, the less willing a firm is to make investments in initiatives that improve penetration and quality of service. Moreover, if a firm expects economic efficiency gains to be met quickly with corresponding rate reductions, it will have much reduced incentives to invest in such gains. This is especially true regarding an incentive regulation system that does not directly reimburse any costs.

IV. Firms made substantial investments in expectation of the rates set for 2007-2010 and are likely to invest less if rates are changed.

As I discussed in the previous section, the perceived predictability of rates offered by the 2007 Order provided incentives for VRS providers to make investments that are not directly reimbursable by the FCC but yield long-term benefits that are consistent with the goals of making VRS accessible to all Americans with hearing disability and achieving functional equivalence. I now discuss evidence showing that firms indeed responded with such increased investment.

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[7] *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Declaratory Ruling, FCC 07-186 (October. 26, 2007) paragraph 56 (emphasis added).

First, the industry increased penetration by nearly 50%, from about 23% to 33% of deaf households.[8]

Second, VRS providers' quality of service has improved. For example, in 2007 hold times were above one minute for Sorenson, and then they improved to 20 seconds in 2008 and are predicted to drop even lower in 2009 (barring a change in reimbursement rates).[9]

Third, the Outreach and Marketing efforts of VRS providers, which are directed at increasing penetration and training in the use of VRS, have increased substantially since the 2007 Order. The total industry spending on outreach and marketing has more than doubled from 2006 to 2007 and more than tripled from 2006 to 2008.[10] According to Sorenson, this spending appears critical to providing access to all deaf ASL users. Sorenson expects this trend to continue in 2009, barring a change in reimbursement rates.

Fourth, Sorenson has increased its Research and Development budget by a large amount in recent years, and is planning continued increases for the forthcoming rate year, again barring an FCC rate change.[11] According to Sorenson, this spending is important to improving functional equivalence for communication via VRS.

Fifth, Sorenson has extensively invested in training of new interpreters. Sorenson estimates that the pool of ASL interpreters qualified to provide VRS has grown significantly since 2007. The budget for training new interpreters has increased continually from 2007 to 2009. In 2008, Sorenson Communications also opened a VRS

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[8] See the Report of Dr. Gregory Rosston.
[9] Ibid.
[10] Based on public NECA filings.
[11] Due to a significant portion of these costs not being reported and different definitions used by different VRS providers in the NECA filing, I am not able to estimate the changes on the industry level.

Institute in Salt Lake City that provides continuing education for ASL interpreters to train them in provision of VRS and to improve their skills. Sorenson Communications estimates that directly or through sponsored classes, it provided between 35% and 40% of all continuing education units to the national pool of interpreters in 2008. In Sorenson's view, this spending is critical to assuring that deaf Americans have access to high quality interpretation service within and outside VRS.

Sixth, Sorenson has invested in opening a significant number of new call centers since the 2007 Order. These investments include conducting research to find a location with access to local interpreters, finding and furnishing appropriate office buildings, connecting fiber optic broadband and signing long-term contracts.

This evidence of increased investments confirms the predictions presented in the previous section. In my opinion, these increased investments have been made at least partially in response to the predictable three-year rates established by the 2007 Order and the expectation that the rates will not be reduced in response to improved economic efficiency or improved quality of service or increased penetration. There seem to be no major exogenous shocks to the VRS industry since the 2007 Order that would warrant the FCC to react.

Since the 2007 Order, firms faced increasing interpreter salaries and increased competition in quality of service. They reacted by making investments that resulted in increased availability and quality of service and in an expanded pool of qualified interpreters that prevented interpreter salaries from skyrocketing. Last, but not least, these investments created additional benefits for people with hearing disabilities not captured by the firm making the investment, due in significant part to FCC decisions.

For example, a videophone installed by one firm can be used to make calls via VRS offered by another firm. These additional benefits improve the quality of life for people with hearing disabilities, and hence, even though not directly related to the burden on the Fund, they are important in achieving the goals of universal service and functional equivalence.[12]

In summary, the three-year horizon to set VRS rates chosen in the 2007 Order is an important part of the incentive-based methodology adopted in that order because in the VRS industry the service providers make important long-term investment decisions. There is evidence that firms responded to the 2007 Order by increasing investment. Changing the rates before the end of the three-year period will put these investments at risk. Also, should the FCC change the rates now, firms will form expectations that they cannot rely on the pre-announced rates and hence will need to be much more cautious making any long-term investments. Finally, an expectation that penetration, quality-of-service or economic efficiency gains will be matched with quick rate reductions will greatly reduce incentives to invest in technology or training, and that would undermine important benefits of the existing incentive-based rate methodology. The enhanced regulatory uncertainty may lead to cutbacks in investments and a fall-off in efforts to provide all deaf ASL users with access to functionally equivalent VRS.

V. Conclusion and Summary

The FCC is considering reducing the compensation rate for VRS despite the expectations created by the 2007 Order that the predictable reimbursements will be made

[12] Another indirect benefit is that the videophones are often used for direct communications between two deaf people. Such calls are at no cost to the users or the Fund.

until June 30, 2010. Such a change will put at risk investments made by VRS providers in installing new videophones, opening new call centers and training interpreters. It will also reduce incentives to make investments in the future because since these costs are not directly reimbursed, firms incur them only if they lead to predictable revenues from some items that the FCC does reimburse.

This outcome would not only harm VRS providers but also have negative public policy consequences: the lack of predictability of FCC actions would reduce future investment in activities that appear consonant with the public policy mandates of Congress to bring functionally-equivalent relay service to all Americans with hearing or speech disabilities. In particular, the resulting reduction in investment would slow down penetration growth and reduce quality of service intended to fulfill the goal of functional equivalence.

In fact, even if FCC decides not to make any changes at this time, the current proposal already has increased regulatory uncertainty and increased the worry of a regulatory hold-up, potentially having consequences for future investments. Therefore, in my opinion, it is important not only that the FCC decides to keep the planned rates but also that it reassures all stakeholders that it is doing so in order to protect the investments made in response of the 2007 Order, as well as investments that will be made in response to any future incentive-based regulation.

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Published and Accepted Papers

Yuliy Sannikov and Andrzej Skrzypacz (2009) "The role of information in repeated games with frequent actions." Forthcoming in *Econometrica*.

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Matthew Mitchell and Andrzej Skrzypacz (2008) "A Theory of Market Pioneers."

Joseph E. Harrington, Jr. and Andrzej Skrzypacz (2008) "Collusion with Monitoring based on Self-Reported Sales."

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Simon Board and Andrzej Skrzypacz (2008) "Optimal Auctions with Bidders Arriving over Time."

Qingmin Liu and Andrzej Skrzypacz (2009) "Limited Records and Reputation."

Johannes Horner and Andrzej Skrzypacz (2009) "Selling Information."

William Fuchs and Andrzej Skrzypacz (2008) "Bargaining with Interdependent Values and Generalized Coase Conjecture."

Earlier working papers:

Ilan Kremer and Andrzej Skrzypacz (2006) "Information Aggregation and the Information Content of Order Statistics."

Jerzy Konieczny and Andrzej Skrzypacz (2006) "Search, Costly Price Adjustment and the Frequency of Price Changes – Theory and Evidence."

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Ilan Kremer and Andrzej Skrzypacz (2004). "Auction Selection by an Informed Seller."

Andrzej Skrzypacz (2004) "Bargaining under Asymmetric Information and the Hold-up Problem."

Main Non-Refereed Articles

Paul Milgrom, Gregory Rosston, and Andrzej Skrzypacz "Using Procurement Auctions to Allocate Broadband Stimulus Grants." SIEPR Policy Brief, May 2009.

"Comments of 71 Concerned Economists: Using Procurement Auctions to Allocate Broadband Stimulus Grants," organized by Paul Milgrom, Gregory Rosston, Andrzej Skrzypacz, and Scott Wallsten, submitted to NTIA April 13 2009.

Gregory Rosston and Andrzej Skrzypacz "The FCC's 700 MHz Auction." SIEPR Policy Brief, December 2007

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