

**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)	
)	
E911 Requirements for IP-Enhanced Service)	WC Docket No. 05-196
Providers)	

To: Chief, Consumer and Government Affairs Bureau

PETITION FOR EMERGENCY STAY

Pursuant to sections 1.41, 1.43, 1.44(e), 1.45(d)-(e), and 1.298(a) of the Commission’s Rules,¹ Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), through its undersigned counsel, Association of Late-Deafened Adults, Inc. (“ALDA”), National Association of the Deaf (“NAD”), Deaf and Hard of Hearing Consumer Advocacy Network (“DHHCAN”), California Coalition of Agencies Serving the Deaf and Hard of Hearing (“CCASDHH”), American Association of the Deaf-Blind (“AADB”), and Hearing Loss Association of America (“HLAA”) (collectively, the “Consumer Groups”), hereby request that the Federal Communications Commission (“FCC” or “Commission”) stay implementation of the requirements delineated in its August 11, 2009 Public Notice implementing new requirements governing the use of toll-free numbers for Internet-based Telecommunications Relay Services (“iTRS”).² The Consumer Groups are simultaneously filing comments in support of the Petition

¹ 47 C.F.R. §§ 1.41, 1.43, 1.44(e), 1.45(d)-(e), and 1.298(a).

² “Clarification Regarding the Use of Toll Free Numbers for Internet-Based Telecommunications Relay Services,” Public Notice, CG Docket No. 03-123, DA 09-1787 (rel. Aug. 11, 2009) (“*Public Notice*”).

for Expedited Reconsideration filed by CSDVRS, LLC (“Petitioner”) on September 10, 2009,³ seeking reconsideration of the *Public Notice*. As detailed below, an emergency stay of the *Public Notice* is required because implementation of the requirements set forth in the *Public Notice* on November 12, 2009, including removal of toll free numbers from the iTRS database will result in disruption of service to the severe detriment of those consumers who currently use toll free numbers.

I. ARGUMENT

It is well settled by the United States Court of Appeals for the D.C. Circuit that “[a]n order maintaining the *status quo* is appropriate when a serious legal question is presented, when little harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant.”⁴ This standard requires the Commission to examine “whether: (1) petitioners are likely to succeed on the merits; (2) petitioners will suffer irreparable injury absent a stay; (3) a stay would substantially harm other interested parties; and (4) a stay would serve the public interest.”⁵ Courts have considered these factors to be elements of a “sliding scale,” such that when “the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas” are less compelling.⁶ This is particularly true where, as here, a stay request simply seeks to preserve the *status quo* pending Commission review of the *Public Notice*. Indeed, the Commission has in the past indicated that

³ “Petition for Expedited Reconsideration” of CSDVRS, LLC, CG Docket No. 03-123 (Sept. 10, 2009)(“Petition”).

⁴ *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) (“*Holiday Tours*”). See also, *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

⁵ *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in *Holiday Tours* at 843.

⁶ See *Serono Labs v. Shalala*, 158 F.3d 1313, 1317 (D.C. Cir. 1998).

a stay maintaining the *status quo* should be granted “when a serious legal question is presented, if little harm will befall others if the stay is granted and denial of the stay would inflict serious harm.”⁷

A. There is Ample Justification for the Stay

The analysis as to whether to issue a stay begins with an evaluation of the likelihood of the petitioner’s success on the merits. However, because the four factors originally established in *Virginia Petroleum Jobbers* are applied on a sliding scale, there is no rigid requirement that a petitioner demonstrate “a mathematical probability of success.”⁸ In this case, the Consumer Groups will succeed on the merits because, as explained in the Petitioner’s Petition for Reconsideration, and the Consumer Groups’ comments in support, the *Public Notice* (1) violates Section 553 of the Administrative Procedures Act⁹ by implementing a new restrictive rule without first engaging in a notice and comment rulemaking proceeding; (2) is inconsistent with principles of VRS interoperability adopted by the Commission and inconsistent with Commission requirements regarding point-to-point videophone calling; and (3) violates principles of functional equivalency required by Section 225 of the Communications Act of 1934, as amended (the “Act”), 47 U.S.C. § 225.

Violation of Section 553. As detailed in the Petition and Consumer Groups’ comments, the Commission violated Section 553 of the APA because the *Public Notice* for the first time prohibited populating the iTRS database with toll free numbers, even though there was nothing

⁷ *Florida Public Serv. Comm’n*, 11 FCC Rcd 14324, 14325-26 & n. 11 (1996).

⁸ *Holiday Tours* at 844.

⁹ 5 U.S.C. § 553.

in *iTRS numbering II*¹⁰ prohibiting such activity. The *Public Notice* was issued *sua sponte*, without any interaction between the Commission and the public. Meanwhile, in reliance on paragraph 32 of *iTRS Numbering II* the iTRS database was populated with toll free numbers *in addition to* directing those numbers to the SMS/800 database. As a result, the *Public Notice* for the first time adopts a new rule to the detriment of those that had relied on the previous Commission action in *iTRS Numbering II*.

The end result is the *Public Notice* adopts a new restrictive rule without first engaging in a notice and comment rulemaking proceeding as required by Section 553 of the APA. As detailed in the Petition for Reconsideration and supporting comments, the Commission can not rely upon any of the exceptions to the notice and comment procedures detailed in Section 553(b)(3)(A). The *Public Notice* does not qualify as an “interpretive rule” because it is not an interpretation of an already existing rule. Nor can the *Public Notice* be construed as a “general statement of policy” because it is not general at all. It provides a very specific prohibition for the first time. Other exceptions dealing with agency organization, procedure or practice clearly do not apply to the *Public Notice*.

Inconsistency with VRS Interoperability Requirements. The *Public Notice* directly conflicts with Commission requirements for interoperability and point-to-point videophone calling, and reestablishes VRS provider “walled gardens” that the iTRS interoperability and numbering proceedings were designed to correct. As explained in the Petition, and the comments filed by the Consumer Groups and Purple Communications, Inc. (“Purple”) in Support of the Petition: (1) a VRS caller attempting to place a point-to-point call using a toll free number

¹⁰ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP-Enabled Service Providers*, CG Docket No. 03-123, WC Docket No. 05-196, Second Report and order and Order on Reconsideration, 24 FCC Rcd. 791 (2008).

to another VRS user can do so only if the same default provider is used, and (2) but the same consumer would be unable to place the point-to-point call to another VRS customer using a different default provider. As a result, the *Public Notice* reinstates the walled garden that the Commission worked so hard to eliminate through its enactment of the *Interoperability Order*¹¹, *iTRS Numbering I*¹², and *iTRS Numbering II*¹³.

The final paragraph of the *Public Notice*, which suggests that a VRS user wishing to make a point-to-point call can dial the ten-digit geographic number of the called party, does not work for a consumer who has been given a toll free number, has notified his or her family and friends of the toll free number, but has not given out to anyone the associated ten-digit geographic number, and may not even know the associated ten-digit geographic number. That person will be cut off from everyone except those who are part of the same walled garden.

iTRS Numbering II specifically permits the optional use of toll free numbers that point to ten-digit geographic numbers.¹⁴ The *Public Notice* suggestion that ten-digit geographic numbers rather than toll free numbers must be used for point-to-point calling directly contradicts the permissive use of toll free numbers discussed in *iTRS Numbering II*. This directly contradicts the

¹¹ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Declaratory Ruling and Further Notice of Proposed Rulemaking, 21 FCC Rcd. 5442 (2006).

¹² *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP-Enabled Service Providers*, CG Docket No. 03-123, WC Docket No. 05-196, Report and order and Further Notice of Proposed Rulemaking, 23 FCC Rcd. 11591, at ¶ 1 (2008) (footnote omitted) (“*iTRS Numbering I*”).

¹³ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP-Enabled Service Providers*, CG Docket No. 03-123, WC Docket No. 05-196, Second Report and order and Order on Reconsideration, 24 FCC Rcd. 791 (2008) (“*iTRS Numbering I*”).

¹⁴ *Id.* at ¶ 32.

intent and purpose of the interoperability requirements previously established by the Commission, and is grounds in and of itself for rescission of the *Public Notice*.

Violation of Functional Equivalency Requirements of Section 255. The Petition and comments filed in support also describe in detail how the Commission's *Public Notice* adopts a new and very restrictive approach to functional equivalency that violates the requirements of Section 255 of the Act. Section 225(a)(3) of the Act defines TRS as:

. . . [T]elephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual *in a manner that is functionally equivalent* to the ability of an individual who does not have an hearing impairment or a speech impairment to communicate using voice communication service by wire or radio.

47 U.S.C. § 225(a)(3) (emphasis added). Recognizing that a relay service cannot be technically identical to voice communications services, Congress used the words “functionally equivalent” to convey the concept that TRS must provide the same function as voice telephone service. This provision of the Act, and other provisions and cases detailed previously by the Petitioner and Consumer Groups in their comments, have shown a very clear Congressional directive to make available to people with disabilities the same types of services that are already available to people without disabilities, in a manner that is as functionally equivalent as possible. In recognition of this functional equivalency mandate, the Commission specifically required in *iTRS Numbering II* that providers support the ability of VRS users to make point-to-point video calls without the intervention of an interpreter.

Because implementation of the *Public Notice* will result in a videophone user being unable to place a call to a toll free number of a videophone user who does not have the same default VRS provider, the use of toll free numbers is not functionally equivalent to a voice telephone user, who can place a call to a toll free number of any other voice telephone user with

a toll free number without restriction. Moreover, in the case of a business with a videophone that needs a toll free number for business reasons, implementation of the *Public Notice* will result in a number ghetto for people with videophones. Since a videophone user with a VRS default provider different from the VRS default provider of the business with the videophone cannot call the business on its toll free number, the business will have to print business cards with two numbers--the toll free number for voice telephone users, and the ten-digit geographic number for videophone users. This number ghetto for videophone users is not functional equivalency.

B. The Consumer Groups and their Constituents will Experience Irreparable Injury

In applying the irreparable injury prong of the test for granting a stay petition, the Commission must find that the “injury is certain and great; it must be actual and not theoretical.”¹⁵ Further, the injury must be imminent such that “there is a clear and present need for equitable relief.”¹⁶

The Consumer Groups are harmed because the iTRS database has already been populated with a substantial number of toll free numbers. There are a number of consumers who utilize these toll free numbers, who have given their toll free numbers, and not their geographic numbers, to their family and friends, and who may not even know their own ten-digit geographic numbers. If the *Public Notice* were to take effect on November 12, 2009, these consumers will be cut off from video point-to-point calling by callers with different default VRS providers. In other words, once the *Public Notice* takes effect, there would be many consumers who will suffer serious disruption and potential harm. To prevent this injustice, the Consumer Groups urge the Commission to grant this stay request sufficiently in advance of the November 12, 2009 deadline

¹⁵ *Wisconsin Gas v. FERC*, 758 F. 2d 669, 674 (DC Cir. 1985).

¹⁶ *Id.*

so that the toll free numbers will not be removed from the iTRS database. A failure to stay the *Public Notice*, or grant the Petition for Reconsideration, will result in a certain and great injury to the Consumer Groups' members and their constituents.

C. A Stay Would Not Substantially Harm Other Interested Parties

The Commission should grant the requested stay because “little if any harm will befall other interested persons.”¹⁷ Although Sorenson Communications, Inc. (“Sorenson”) filed comments in opposition to the Petition, the Consumer Groups submit that Sorenson would not suffer any identifiable harm if the Commission were to grant the requested stay. Moreover, a stay will ensure that consumers who utilize these toll free numbers, who have given their toll free numbers, and not their geographic numbers, to their family and friends, and who may not even know their own ten-digit geographic numbers, will not be cut off from video point-to-point calling by callers with different default VRS providers. In the meantime during the stay period the Commission will have a chance to review the Petition for Reconsideration, and clearly see that the *Public Notice* violated Section 225 of the Act and Section 553 of the APA.

D. The Equities and the Public Interest Favor a Stay

For the final prong of the test for granting a stay petition, the Commission must consider the equities and the public interest. The general public would experience harm if the *Public Notice* is allowed to stand because consumers would no longer be able to make video point-to-point calls without having the same default VRS provider. As discussed in the Petitioner's Petition for Reconsideration and the Consumer Groups' comments in support, this would cause great confusion and harm to people who are deaf, hard of hearing, deaf-blind or have speech disabilities.

¹⁷ *Holiday Tours* at 844.

In addition, because the Consumer Groups are likely to prevail on the merits, people who are deaf, hard of hearing, deaf-blind or have speech disabilities are likely to suffer significant, immediate and irreparable injury if a stay is not granted, and other interested parties would not be harmed, a grant of a stay would serve the public interest. Therefore, since all factors favor a stay, the equities favor a grant of a stay by the Commission.

II. CONCLUSION

For these reasons discussed herein, the Commission should stay the effectiveness of the *Public Notice* pending Commission action on the Petition for Expedited Reconsideration.

Respectfully submitted,

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