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June 4, 2010

Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Structure and Practices of the Video Relay Service Program*
CG Docket No. 10-51

Dear Ms. Dortch:

On March 29, 2010, Sorenson Communications, Inc. ("Sorenson") filed an Application for Review of the Declaratory Ruling issued by the Consumer and Governmental Affairs Bureau on February 25, 2010.[1] The timing of Sorenson's March 29 filing was appropriate if the Declaratory Ruling is a non-rulemaking document.[2]

On May 7, 2010, the Declaratory Ruling was published in the Federal Register.[3] In an abundance of caution, Sorenson is re-filing its Application for Review subsequent to the Federal Register publication in the event the Declaratory Ruling is deemed to be a document in a rulemaking proceeding required to be published in the Federal Register,[4] in which case Sorenson submits its Application for Review effective today.[5]

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1 *Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51, Declaratory Ruling, 25 FCC Rcd 1868 (2010) (DA 10-314) ("Declaratory Ruling").

2 *See* 47 C.F.R. §§ 1.4(b)(2), 1.4(j), 1.115(d).

3 *Structure and Practices of the Video Relay Service Program*, 75 Fed. Reg. 25,255 (May 7, 2010).

4 *See* 47 C.F.R. §§ 1.4(b)(1), 1.115(d).

5 The attached Application for Review is identical to what Sorenson originally filed, except its date has been changed to June 4, 2010.

Please do not hesitate to contact the undersigned if you have any questions or require anything further.

Sincerely,

/s/ Regina M. Keeney
Regina M. Keeney

Attachment

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

In the Matter of	)	
	)	
Structure and Practices of the Video Relay Service Program	)	CG Docket No. 10-51
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APPLICATION FOR REVIEW

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June 4, 2010

<u>**Executive Summary**</u>

On February 25, 2010, the Consumer and Governmental Affairs Bureau ("Bureau") released a declaratory ruling ("Ruling") stating that four types of video relay service ("VRS") calls are ineligible for compensation from the Interstate TRS Fund. In so doing, the Bureau took a momentous step toward ensuring that the Fund compensates only calls that advance the functional equivalence mandate of the Americans with Disabilities Act ("ADA"). While more work is needed, the Ruling is an encouraging sign that the Commission will take the steps needed to extirpate the abuses that have recently plagued the VRS industry and threatened the integrity of the Fund.

Sorenson supports the substance of all four prohibitions announced in the Ruling and does not challenge the prospective application of any of these prohibitions. Regrettably, however, one of the prohibitions has a retroactive component that is procedurally infirm. In particular, the Bureau lacks authority retroactively to prohibit compensation for calls to or from an employee of a VRS provider or its contractor. This prohibition does not clarify an ADA provision or an FCC rule or precedent; rather, it is an entirely new proscription that is at odds with existing rules and precedents. Neither the Bureau nor the full Commission may adopt such a retroactive prohibition.

Perhaps aware of this obstacle, the Bureau disavows responsibility, identifying the Fund administrator (the National Exchange Carrier Association, or "NECA") as the original author of the prohibition. Yet the Bureau's evidence for this prior authorship – instructions on a longstanding NECA form – has no probative value. The instructions cannot plausibly be read as prohibiting compensation for employee calls, and even if they could, NECA too lacked authority to issue the prohibition.

For these reasons, equity and law dictate that the Commission not retroactively apply the prohibition as written by the Bureau. Instead, the Commission should narrow the scope of the prohibition to ensure that any retroactive application is consistent with the FCC's preexisting rules and orders regarding employee calls. In particular, the Commission should clarify that a VRS employee call placed or received prior to February 25, 2010 may be treated as noncompensable if (i) the call was not between a hearing person and a deaf person, (ii) the call did not either originate or terminate in the United States, or (iii) the call was artificially manufactured through unlawful financial incentives or minimum usage requirements. These types of employee calls have long been unlawful, and the Commission should clarify that the Bureau was simply reminding providers of this fact for calls placed prior to the release of the Ruling on February 25, 2010.

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I. INTRODUCTION AND SUMMARY

Sorenson commends the Consumer and Governmental Affairs Bureau ("Bureau") and the Commission for their initial actions to address abuses by providers of Video Relay Service ("VRS") and delineate the types of VRS calls that are compensable from the Interstate Telecommunications Relay Services ("TRS") Fund. For more than a year, it has been apparent that the VRS industry has been operating in a regulatory void.[1] Regrettably, a handful of VRS providers have sought to exploit this void for financial gain, using illicit marketing schemes and other questionable means to generate revenues from the Fund. Over time, these practices have become more common and more egregious, giving rise in recent months to indictments for criminal fraud, investigations

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[1] *See, e.g., Ex Parte* Comments of the National Association for State Relay Administration, CG Docket No. 03-123, at 7 (Nov. 10, 2008; filed Nov. 19, 2008) ("*NASRA Nov. 19 Letter*") (asking FCC to clarify impermissibility of certain provider practices and to bring "swift" and "strict" enforcement action against their perpetrators); Sorenson *ex parte*, CG Docket No. 03-123 (Nov. 25, 2008) (strongly supporting *NASRA Nov. 19 Letter*); Sorenson *ex parte*, CG Docket No. 03-123 (May 12, 2009) (noting that, even though six months had passed since NASRA filed its letter, the FCC had yet to act on it); Petition for Rulemaking of Sorenson Communications, Inc., CG Docket No. 03-123, RM No. 09-__, EB Docket No. 09-__ (Oct. 1, 2009) ("Sorenson Petition") (asking the FCC to adopt rules that define what types of Internet-based TRS calls are compensable, what steps providers may take to prevent certain calls, and what information the FCC needs to develop data-driven tools for detecting wrongdoing).

by government agencies, public disclosures of dubious billings to the Fund, and at least one multi-million dollar settlement.[2]

On February 25, 2010, the Bureau took an important first step toward reversing this downward spiral. On that date, the Bureau released a declaratory ruling ("Ruling") stating that four types of VRS calls are ineligible for compensation from the Interstate TRS Fund: (i) calls placed for the purpose of generating compensable minutes; (ii) voice carry over calls used to connect two hearing users; (iii) calls used to connect two users who are outside the United States; and (iv) calls by or to any employee of a VRS provider or a provider's subcontractor while that employee is at his or her workplace ("employee calls").[3]

Sorenson applauds the Bureau for taking this momentous step. Although more action is needed,[4] the release of the Ruling for the first time signals the Commission's resolve to clarify the rules regarding VRS compensation and thereby eliminate the regulatory void that has emboldened a few actors to generate revenues in ways that do

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2 *See, e.g.*, News Release, Department of Justice, "Twenty-six Charged in Nationwide Scheme to Defraud the FCC's Video Relay Service Program; Arrests Made in Nine States" (Nov. 19, 2009), *available at*: <http://www.justice.gov/opa/pr/2009/ November/09-crm-1258.html>; Purple Communications, Inc., Current Report (Form 8-K), at 2 (March 2, 2010), *available at*: <http://www.irconnect.com/prpl/pages/sec-filings.html>; News Release, Federal Communications Commission, "Purple Communications Acknowledges Debt, Begins Payback to Telecommunications Relay Fund" (March 9, 2010), *available at*: <http://hraunfoss.fcc.gov/edocs_public/ attachmatch/DOC-296758A1.pdf>.

3 *Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51, Declaratory Ruling, DA 10-314 (rel. Feb. 25, 2010) (the "Ruling" or "Declaratory Ruling").

4 The Ruling does not address various reforms concerning compensable minutes proposed in Sorenson's Petition. Sorenson therefore continues to urge the Commission to release a Notice of Proposed Rulemaking seeking comment on those issues, using the detailed rules proposed in the Petition as a guide. *See* Sorenson Petition, Appendix A.

not advance the functional equivalence mandate of the Americans with Disabilities Act ("ADA").

The Bureau also is to be commended for the substance of the four prohibitions, which target some of the most egregious abuses regarding questionable Fund payments that have come to light in recent months. Most of the prohibitions are procedurally sound as well. The first three prohibitions either derive directly from the statutory treatment of TRS, or clarify prior FCC and Bureau decisions;[5] these prohibitions therefore were lawfully included in a Bureau-level declaratory ruling.

Regrettably, however, the Bureau overstepped its authority in promulgating the fourth prohibition, concerning VRS calls by or to an employee of a provider or its contractor. That prohibition, set forth in section III.A of the Ruling, retroactively expands the class of noncompensable employee calls in a way that does not derive from

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5 *See, e.g.*, 47 U.S.C. § 225 (limiting TRS "to hearing-impaired and speech-impaired individuals . . . in the United States" and defining TRS as "telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communications by wire or radio with a hearing individual"); *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, ¶¶ 93-94 (2007) ("*2007 TRS Rate Methodology Order*") (prohibiting financial incentive programs that have "the intent and the effect of . . . giving consumers an incentive to make relay calls that they might not otherwise make" and prohibiting "marketing and incentive practices [involving] calling a consumer and requiring, requesting, or suggesting that the consumer make VRS calls"); Public Notice, "Federal Communications Commission Clarifies that Certain Telecommunications Relay Services (TRS) Marketing and Call Handling Practices Are Improper and Reminds that Video Relay Service (VRS) May Not Be Used as a Video Remote Interpreting Service," 20 FCC Rcd 1471, DA 05-141 at 3 (2005) ("*2005 Clarification Public Notice*") ("VRS providers may not require consumers to make TRS calls, impose on consumers minimum usage requirements, or offer any type of financial incentive for consumers to place TRS calls"); *Publix Network Corp.*, Order to Show Cause and Notice of Opportunity for Hearing, 17 FCC Rcd 11487, ¶ 33 (2002) (minutes of use resulting from activity whose sole purpose is "to generate payments" from the Fund "would not constitute minutes of use within the Act and the Commission's rules").

any preexisting statutory or regulatory provision or any prior FCC or Bureau decision.[6] Instead, it is a newly minted proscription that was not even implicit in any FCC or Bureau statement prior to February 25, 2010. Neither the FCC nor the Bureau had ever before decreed that *all* calls to or from an employee of a provider or subcontractor are not compensable. While providers have long known that three subsets of employee calls are noncompensable – calls that are not between a hearing person and a deaf person, calls that do not originate or terminate in the United States, and calls that have been artificially manufactured – all other calls to and from employees (hereinafter referred to as "legitimate" employee calls) have been presumed to be compensable and, as far as Sorenson knows, have been compensated for years by the Fund administrator, the National Exchange Carrier Association ("NECA"). Under these circumstances, the Bureau lacks authority to issue a declaratory ruling retroactively changing this long-standing requirement.

Perhaps aware of its own lack of authority, the Bureau claims that it was another entity – NECA – that originally issued the prohibition by inserting it into the instructions of a form that providers submit annually. This claim is demonstrably false. Even the most agile of mental gymnasts could not find a way to read NECA's instructions as prohibiting compensation for all employee calls. Furthermore, even if the instructions somehow could be twisted to support the Bureau's interpretation, NECA lacked authority to prohibit compensation for employee calls in the absence of an FCC rule or order to that effect.

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6 As noted, Sorenson does not challenge the prospective application of the prohibition.

Since neither the Bureau nor NECA had authority to adopt the prohibition for calls placed prior to February 25, 2010, and since NECA never adopted the prohibition in the first place, it would be unfair and unlawful for the Commission to apply the prohibition retroactively in ways that providers could not have foreseen prior to February 25, 2010. On review, therefore, the Commission should narrow section III.A of the Ruling to conform to preexisting law regarding compensability. In particular, for VRS employee calls placed or received prior to February 25, 2010, the Commission should clarify that the Ruling deems as noncompensable only employee calls that were not between a hearing person and a deaf person, that were artificially manufactured, or that both originated and terminated outside the United States. Providers have long known that these employee calls are noncompensable, and the Commission should conform the Ruling's retroactive aspect to say no more and no less.

II. THE EQUITIES WEIGH AGAINST RETROACTIVELY PROHIBITING COMPENSATION FOR LEGITIMATE EMPLOYEE CALLS

The Bureau's retroactive prohibition on compensation for employee calls, as announced in section III.A of the Ruling, suffers from a number of legal flaws, some of which are readily apparent. Identifying and refuting all the legal flaws presents a complicated challenge, however, because section III.A is so unclear. While Sorenson does its best to tackle this challenge below, the Commission may wish to avoid altogether the hermeneutic tangles that a legal analysis demands. A simpler course would be to focus on the equities of the Bureau's action. Here, the Commission mercifully is faced with a single, easy-to-articulate question: Would it be fair for the Commission to give retroactive effect to the Bureau's newly minted prohibition on compensation for employee calls? Sorenson contends that the answer to this question is "no."

A. Equity Requires the Commission to Treat as Compensable All Legitimate VRS Calls to or from Providers' Employees that Were Placed Before February 25, 2010

The central claim of section III.A of the Ruling is the Bureau's claim that it is simply reminding providers of a prohibition reflected in instructions issued by the Fund administrator, NECA, as part of its annual Relay Services Data Request form (the "Form").[7] The Bureau does not specify the date on which these instructions were incorporated into the Form, the process used to adopt them, or the nature of the delegated authority under which they were adopted. Instead, the Bureau simply states that "providers have had ample notice that . . . costs [associated with employee VRS calls] should be treated as business expenses" that should be compensated through the VRS "rate base" and not on a per-minute basis from the Fund.[8]

To support its claim that providers have had "ample notice," the Bureau quotes from five separate sections of the Form instructions sent to providers in the spring of 2009:

> [S]ection I.A.1. . . . allows providers to report as business expenses annual recurring expenses related to providing Video Relay Service, including "[t]elephone service expenses." In addition, section I.B.4. refers to "[t]elecommunications expenses" associated with detecting service problems. Furthermore, section I.C.5. refers to "[o]perations support," which are expenses that "ensure the sustainability of service including troubleshooting, customer service and technical support." Finally, section I.C.6. refers to "[h]uman resources," which are expenses incurred in performing activities such as "training, scheduling, counseling employees and

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[7] *See* Declaratory Ruling ¶¶ 3-4.

[8] *Id.* ¶¶ 4-5.

> reporting," and section I.E. refers to marketing, advertising, and outreach expenses.[9]

Not one of these instructions states or implies that VRS calls to or from a provider's employees, or the employees of a contractor, may not be compensated on a per-minute basis like all other legitimate VRS calls.[10] Simply put, nothing about reporting a cost as a business expense on the Form suggests that legitimate VRS calls involving employees are not compensable; the Bureau's contrary assumption appears to be based on its belief, shown below to be incorrect, that "double recovery" would result otherwise. In addition to the instructions cited by the Bureau, Sorenson is aware of no other instruction on the Form or elsewhere that reasonably could be read as prohibiting per-minute compensation for employee calls. Rather, this prohibition was announced for the first time in the February 25, 2010 Ruling, and therefore it would be inequitable for the Commission to pretend that providers had "ample notice" of the prohibition before that date.

Supporting this conclusion is the absence of any reason for providers to suspect, prior to February 25, 2010, that employee calls were subject to a blanket prohibition on compensation. To the contrary, the law as it stood prior to February 25, 2010 reasonably led all providers to believe that VRS calls to or from employees were generally compensable, subject to three exceptions. First, in order for a VRS call to be eligible for

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9 *Id.* ¶ 4. The Declaratory Ruling does not specify when these instructions were first included in the annual Form. Sorenson therefore does not know whether the Bureau believes that providers had "ample notice" prior to spring 2009.

10 The Bureau appears to place great weight on the fact that the instructions require providers to report their "[t]elephone service expenses" and "[t]elecommunications expenses." It is not clear, however, to what extent VRS calls give rise to either type of expense. For example, as the Commission has found, "TRS cannot be considered 'telecommunications'" under the Act. *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, ¶ 81 (2000).

compensation, it must meet the statutory definition of TRS. As the Bureau itself concedes, calls to or from a provider's employees "meet the [statutory] definition of 'telecommunications relay services' to the extent that they are a call between a person with a hearing or speech disability and a hearing person."[11] Since the statutory definition of TRS dates back to 1991, long before the inception of VRS, providers have always had notice that a relayed video call to or from an employee is not compensable if the only parties to the call are deaf or, conversely, if the only parties to the call are hearing persons.

A second limitation also derives from the statutory treatment of TRS. Specifically, section 225(b)(1) of the Communications Act requires the Commission to ensure that TRS is available "to hearing-impaired and speech-impaired individuals in the United States."[12] Providers therefore have always had notice that a VRS call is not legitimate, and hence not compensable, if the call both originates and terminates outside of the United States.

A third limitation became apparent on January 26, 2005, when the Bureau made clear that legitimate TRS calls do not include calls that have been artificially induced

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11 Declaratory Ruling ¶ 5 (citing statutory definition of TRS as codified in 47 U.S.C. § 225(a)(3)).

12 47 U.S.C. § 225(b)(1). Providers have long known that calls that originate and terminate outside the United States are not compensable. In 2004, for example, Hands On Video Relay Service (now Purple) sought permission for requiring credit card billing for international calls on the theory that doing so would "reduce the potential for abuse or gaming of the system (*i.e.*, a caller located outside of the United States using United States VRS to complete a call to another party located outside of the United States)." *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, ¶ 128 (2004) (citing Hands On Petition at 6).

through improper financial incentives, or artificially manufactured through minimum usage requirements or others means that "require consumers to make TRS calls."[13] As of January 26, 2005, therefore, providers had ample notice that VRS calls to or from employees were not compensable to the extent the provider created bogus pretexts for employees to place VRS calls, subjected employees to a minimum usage requirement, or tied employees' salaries to their usage of VRS.

Outside of these three restrictions, however, providers reasonably relied on the expectation that a VRS call to or from an employee was legitimate and hence compensable. If the Commission were now retroactively to constrict the class of legitimate VRS calls, based on a prohibition that no provider could have divined prior to February 25, 2010, a manifest injustice would result. On review, therefore, the Commission should clarify that section III.A of the Ruling, as applied to the period before February 25, 2010, leaves the FCC free to impose forfeitures for, and seek disgorgement of any compensation paid by the Fund for, *illegitimate* VRS employee calls – *i.e.*, calls that were not hearing-to-deaf or deaf-to-hearing; that did not originate or terminate in the United States; or that were artificially induced by a bogus pretext, by an unlawful financial incentive, or by a minimum usage requirement.

B. The Balance of Equities Is Not Tipped by the Bureau's Fanciful "Double Recovery" Theory

The Bureau suggests that any "expenses" or "costs" that a provider reports on the annual NECA Form – including telephone and telecommunications costs – must be

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[13] *2005 Clarification Public Notice*, DA 05-141 at 3; *see also Telecommunications Relay Services And Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling, 20 FCC Rcd 1466, ¶¶ 1, 4 (2005); *2007 TRS Rate Methodology Order* ¶¶ 93-94.

recovered solely through the VRS "rate base" and not on a per-minute basis from the Fund.[14] Based on this predicate, the Bureau postulates that allowing recovery both through the "rate base" and through per-minute compensation "would result in double recovery from the Fund."[15] This "double recovery" theory is nonsensical for the simple reason that providers have always been able to recover their "costs" only once – by obtaining compensation from the Fund at the prescribed per-minute rate.[16] It has never been possible for providers to obtain any compensation, let alone additional (or "double") recovery, by simply having certain "costs" reflected in the annual Form filing.

From the inception of VRS in 2000 until March 1, 2008, VRS rates were established annually by the Commission pursuant to a cost-of-service rate methodology. As part of the annual rate-setting process under this methodology, providers completed the NECA Form in order to disclose the subset of their projected "costs" that the FCC recognized as appropriate for being compensated through the VRS rate. These disclosures were scrutinized by NECA and the FCC to set a per-minute VRS rate that was sufficient to compensate providers for their allowable projected "costs."

The point of this rate-setting process was to produce a per-minute VRS rate that reflected a broad range of projected provider "costs," including telephone and telecommunications expenses. The inclusion of these projected "costs" in the annual

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14 Declaratory Ruling ¶¶ 3-4. Properly understood, the term "rate base" refers to capital investments reported by providers in the annual Form and has nothing to do with providers' reported expenses. The Bureau uses the term inappropriately throughout the Ruling.

15 Declaratory Ruling ¶ 4.

16 As Sorenson and others have repeatedly explained, the "costs" recognized as compensable by NECA and the FCC do not reflect the full costs that providers incur in providing VRS.

Form and the subsequent setting of a rate based on those projections in no way effectuated a *recovery* of those "costs," however. Indeed, the FCC's act of setting the VRS rate has never produced a single dime of monetary recovery for providers. Rather, to recover their costs providers had to handle efficiently a sufficient volume of legitimate TRS calls to break even.[17] This approach guaranteed that "costs" were recovered only once – through compensation at the prescribed rate for legitimate VRS calls. It never has been the case that "costs" could be recovered both through the rate-setting process and through compensation at that rate for legitimate VRS calls.[18]

If possible, "double recovery" became an even more far-fetched possibility when the FCC replaced the cost-of-service methodology with a new, incentive-based methodology for determining VRS rates. As the U.S. Court of Appeals for the Tenth Circuit found, under the new methodology, which took effect on March 1, 2008, "[t]he FCC does not reimburse VRS providers for actual costs. Instead it compensates them based upon a tiered price cap formula."[19] The Court went on to state that the very "logic" of the "price cap-based compensation system" adopted by the FCC dictates that the FCC must "reward efficient providers by allowing them to retain the savings generated by

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17 As explained above, whether a call was legitimate (and hence compensable) was determined by applying statutory and regulatory directives that are entirely separate from the rate-setting process.

18 The fact that recovery occurs only once – when a call is compensated via a Fund payment – is mirrored by the fact that "costs" are legally relevant only once – when the per-minute rate is set. Under the cost-based methodology, providers' "costs" were relevant to establishing a per-minute VRS rate, but had no bearing on whether particular VRS calls were legitimate and hence could be compensated at that rate.

19 *Sorenson Communications v. FCC*, 567 F.3d 1215, 1221 (10th Cir. 2009).

providing TRS at a low cost. It does this by compensating providers *regardless of their actual costs in providing TRS.*"[20]

In other words, even if the inclusion of certain "costs" in the "rate base" somehow effectuated a recovery of those "costs" for providers, such recovery would occur only under the old cost-of-service methodology. Under the new price cap methodology, the projected "costs" reported annually by VRS providers on the Form have no bearing on either the annual per-minute rate (which automatically resets each year to a predetermined level), the amount of aggregate compensation a provider receives for handling relay calls, or the specific types of calls that may be compensated at the per-minute rate. As a result, "double recovery" of "costs" is not possible under the new methodology as well.

The Bureau's "double recovery" theory becomes even more strained when one considers the consequences of applying that theory to providers' other telephone and telecommunications costs. The Bureau suggests that the reportable costs that providers incur in "providing telephone and telecommunications services" arise only from "use by employees" of those services.[21] However, providers also incur telephone and telecommunications costs every time they handle a VRS call between parties who are not employees. For instance, providers must pay for monthly recurring telephony charges (*i.e.*, T1 lines or equivalent) and for Internet access service regardless of whether a VRS call is to or from an employee. Accordingly, providers incur telephone and telecommunications costs for all VRS calls (not just employee calls). Since these costs

20 *Id.* at 1221-22 (emphasis added).

21 Declaratory Ruling ¶ 4.

would also be included in the annual Form (or "rate base," in the Ruling's nomenclature), under the Bureau's theory providers never should receive per-minute compensation for any VRS call. This result is absurd, of course, and therefore so too is the "double recovery" theory on which it rests.

Contrary to the Bureau's claim, therefore, the fact that VRS providers incur and report certain "costs" related to the provision of VRS for employees did not preclude providers from seeking compensation for legitimate VRS calls made by or to those employees prior to February 25, 2010.

C. The Balance of Equities Is Not Tipped by the Bureau's Flawed "Accommodation" Theory

The ADA requires employers – such as local banks or pharmacies – to provide "reasonable accommodations" (such as wheelchair ramps) to their employees. The Bureau appears to suggest that access to TRS is a "reasonable accommodation" whose costs must be borne by employers under the ADA, and therefore TRS providers, in their capacity as employers, may not receive per-minute compensation from the Fund for TRS calls to and from their employees.[22] This argument also is nonsensical: whether something is an "accommodation" has no bearing on the compensability of TRS calls.[23]

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22 The Bureau only hints at this argument in passing: "Just as a provider bears the business expense of providing telephone service for use by its employees who do not have a hearing or speech disability, it likewise bears as a business expense the costs of *accommodating* those employees who require relay service to use the telephone." Declaratory Ruling ¶ 4 (emphasis added).

23 As Sorenson and others have previously explained, TRS providers do not provide TRS as an accommodation to the public. *See* Comments of Sorenson Communications, CG Docket No. 03-123, at 16-19 (Oct. 30, 2006) (explaining that TRS is governed by Title IV of the ADA, which is a universal service mandate rather than an accommodation mandate). Sorenson assumes that the Bureau here is attempting to make a different point, that employers (including providers) must make TRS available to their deaf employees as an "accommodation."

More specifically, the fact that a provider bears certain "costs" for "accommodating" its employees has no bearing on whether a particular VRS call is eligible for per-minute compensation from the Fund. The ADA does not include any provisions concerning the compensation of TRS calls, much less provisions prohibiting per-minute compensation for calls to and from employees who have been "accommodated" under the ADA. As explained above, whether a particular TRS employee call is eligible for compensation from the Fund depends solely on whether a call meets the statutory definition of TRS and has been freely placed by the employee without having been manufactured or induced by the provider. If those requirements are met, then the call must be compensated at the applicable VRS rate, regardless of whether it is an employee call for which the employer bears certain costs pursuant to the "accommodation" mandates of the ADA. The Bureau's "accommodation" theory thus does not rehabilitate its otherwise erroneous claim that legitimate employee VRS calls were not compensable on a per-minute basis. The Commission therefore should reject the "accommodation" argument that the Bureau apparently has tried to make.

Here too, to hold otherwise would lead to absurd results. If VRS calls to or from an employee were deemed ineligible for compensation because the employer has an obligation to "bear[] as a business expense the costs of accommodating those employees who require relay service to use the telephone,"[24] then the Commission would have to apply this rule to *all* employers in the nation, and not just the small subset of employers that are VRS providers. As a result, if a deaf employee of the Post Office, a pharmacy, or an auto repair shop were to place a VRS call from work, and the employer had an

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24 Declaratory Ruling ¶ 4.

obligation to bear expenses to "accommodate" that call, then, under the Bureau's theory, the call would not be eligible for compensation from the Fund. Providers and NECA somehow would have to devise ways to identify on-the-job calls from each and every employee nationwide and remove those from their monthly submissions to NECA. Likewise, employers would have to bear as business expenses the full costs of "accommodating" their deaf employees by paying to VRS providers the per-minute compensation that the Fund pays today.

The Commission should not lend credence to such results, but rather should reject the Bureau's suggestion that the ADA's "accommodation" mandates somehow bolster the theory that TRS calls to or from employees are not compensable on a per-minute basis. Since the "double recovery" theory also is unavailing, the Commission should reject *in toto* the Bureau's reliance on NECA's instructions and refuse to give any retroactive application to the prohibition on compensation for legitimate employee calls. Instead, as explained above, the Commission should conform the prohibition's retroactive effect to preexisting law under which certain types of illegitimate VRS calls were noncompensable.

III. THE RETROACTIVE PROHIBITION IS PROCEDURALLY UNSOUND

If the Commission is disinclined to narrow section III.A of the Ruling based on the equitable considerations described above, then it is compelled to do so on legal grounds. The Commission must take this step regardless of whether it views the Bureau or NECA as the author of the prohibition.

A. The Bureau Has No Authority to Expand Retroactively the Types of Employee Calls that Were Noncompensable

Section 0.361 of the FCC's rules states that three types of matters fall outside of the Bureau's delegated authority and instead must be "referred to the Commission en banc for disposition."[25] Two of these non-delegated matters are relevant here: "[n]otices of proposed rulemaking . . . and final orders in such proceedings" and "[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines."[26]

The Bureau's retroactive prohibition on compensation for employee calls is either a new rule, in which case it should have been adopted pursuant to a notice of proposed rulemaking;[27] or it is an adjudicatory "matter that presents novel questions of law, fact or policy."[28] Either way, the Bureau had to refer the matter to the Commission and was not authorized to decide it on its own. The Commission therefore must narrow the prohibition to conform it to preexisting law, as discussed above.

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25 47 C.F.R. § 0.361.

26 47 C.F.R. § 0.361(a), (c).

27 The APA defines an agency "rule," in relevant part, as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . and includes the approval or prescription for the future of rates . . . or of valuations, costs, or accounting, or practices bearing on any of the foregoing." 5 U.S.C. § 551(4). With the exception of its retroactivity, this definition accurately describes the prohibition articulated in section III.A of the Declaratory Ruling.

28 As explained above, the prohibition purports to create an entirely new carve-out from the preexisting legal regime governing compensation for VRS calls. In so doing, the prohibition necessarily presents novel questions that cannot be resolved under existing precedents and guidelines.

B. NECA Had No Authority to Adopt the Prohibition

Section 225 does not delegate any authority to the Fund administrator, nor does it authorize the Commission to subdelegate its decision-making authority to any outside party.[29] Under these circumstances, the Commission lacked authority to subdelegate to NECA the agency's decision-making authority regarding the compensability of particular types of TRS calls.

The U.S. Court of Appeals for the District of Columbia Circuit has adopted a bright-line prohibition against subdelegation of an agency's decision-making authority to outside parties: "while federal agency officials may subdelegate their decision-making authority to subordinates [within the agency] absent evidence of contrary congressional intent, *they may not subdelegate to outside entities – private or sovereign – absent affirmative evidence of [congressional] authority to do so*."[30] Although the Court identified three narrow exceptions to the prohibition – "(1) establishing a reasonable condition for granting federal approval; (2) fact gathering; and (3) advice giving"[31] – none of these exceptions applies to the instructions adopted by NECA, as interpreted by the Bureau. Therefore, if the Commission lends credence to the Bureau's expansive interpretation of NECA's instructions, it must find that those instructions are null and void as a matter of law.

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29 NECA is a private, not-for-profit corporation established in 1983, and was chosen by the Commission as the "temporary" Fund administrator in 1993.

30 *United States Telecom Ass'n v FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004) (emphasis added).

31 *Id.* FCC rules subdelegate to NECA certain tasks that appear to fall within the second and third exceptions. For example, under 47 C.F.R. § 64.604(c)(5)(iii), NECA is granted authority to gather certain facts concerning TRS rates and to advise the Commission on rate-setting.

As explained above, of course, the Commission need not make this finding. Instead, the simpler course would be for the Commission to find that the Bureau has misinterpreted the relevant NECA instructions, and therefore those instructions, properly interpreted, have no bearing on whether certain VRS calls were compensable prior to February 25, 2010. Here, too, the Commission is compelled to narrow the scope of section III.A of the Ruling, as discussed above.

IV. A DECISION TO ENFORCE THE PROHIBITION RETROACTIVELY WOULD VIOLATE PROVIDERS' DUE PROCESS RIGHTS

Even if the Commission somehow were to convince itself that NECA's instructions were capable of sustaining the expansive interpretation advanced by the Bureau, and that NECA had authority to adopt them in that form, the instructions at best would be ambiguous, and the Bureau's strained interpretation of them would be only one of several possible interpretations that a party reasonably could have had prior to the Bureau's Ruling. Under these circumstances, if the Commission were to attempt to enforce the Bureau's interpretation of NECA's instructions retroactively by demanding repayment of compensation for employee calls placed prior to February 25, 2010, the Commission would be violating providers' due process rights.

It is well established that an agency rule will not be enforced to deprive a regulated party of property where it could not identify, with "ascertainable certainty," the standards with which the agency expects the party to conform.[32] Prior to the release of the Ruling, no VRS provider could have known with "ascertainable certainty" that

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[32] *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628-33 (D.C. Cir. 2000); *see also Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987) ("Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.").

legitimate VRS calls to or from employees were noncompensable. Accordingly, the Commission may not rely on the Bureau's newly minted interpretation of the NECA instructions to demand restitution from, or impose forfeitures on, VRS providers for actions they undertook prior to February 25, 2010.

The same result would apply if the Commission were to find (as it should) that NECA's instructions have no bearing on this matter, and hence the prohibition on compensating employee calls was articulated for the first time in the Ruling. Under that scenario as well, the Commission could not apply the prohibition retroactively to provider conduct undertaken prior to the Ruling's release date. As courts have found, reversal of agency action is compelled "where regulated parties do not have fair warning of the agency's interpretation of its regulations."[33] Clearly, if the prohibition was not announced until February 25, 2010, providers did not have any warning before that date that the FCC was interpreting its rules to prohibit payment for legitimate employee calls. Therefore, the Commission cannot retroactively apply the Bureau's prohibition to compensation paid for legitimate VRS calls placed prior to February 25, 2010.

33 *NetworkIP, LLC v. FCC*, 548 F.3d 116, 123 (D.C. Cir. 2008) (citation and quotation marks omitted); *see also id.* at 122 (summarizing long-standing law that agencies "may not retroactively change the rules at will," and that "traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule") (citations and internal quotation marks omitted).

V. CONCLUSION

For the foregoing reasons, the Commission should clarify that the retroactive prohibition on compensation for employee VRS calls, as set forth in section III.A of the Bureau's Ruling, is limited to calls that were already noncompensable prior to the release date of that Ruling.

Respectfully submitted,

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