

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

In the Matter of )  
 )  
Structure and Practices of the Video Relay Service ) CG Docket No. 10-51  
Program )  
  
To: The Commission

**APPLICATION FOR REVIEW OF  
DECLARATORY RULING**

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  
Hearing Loss Association of America

March 29, 2010

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## Summary

The Consumer Groups seek review of the portion of the Consumer and Government Affairs Bureau's February 25, 2010 Declaratory Ruling addressing VRS calls placed to and from an employee of a VRS provider or employee of a contractor of a VRS provider ("Employee VRS Calls"). The Consumer Groups maintain that the Bureau adopted a new rule without notice and comment rulemaking in violation of the Administrative Procedures Act and exceeded its delegated authority in doing so. The Declaratory Ruling will result in unintended adverse consequences to people who are deaf, hard of hearing, deaf-blind and speech-disabled because it discourages the use of VRS by employees who must use VRS to fulfill their everyday job requirements. The Consumer Groups therefore request that the Commission vacate the portion of the Declaratory Ruling addressing Employee VRS Calls and initiate a notice and comment rulemaking proceeding to determine whether Employee VRS Calls should be treated differently, and if so, how.

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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”), pursuant to Section 1.115 of the Commission’s Rules, 47 C.F.R. § 1.115, hereby submit their Application for Review of the February 25, 2010 Declaratory Ruling issued by the Consumer and Government Affairs Bureau (the “Bureau”) in the captioned proceeding.<sup>1</sup>

In the Declaratory Ruling, the Bureau, in an effort to clarify the Commission’s Video Relay Service (“VRS”) rules, ruled that (1) VRS calls placed to and from an employee of a VRS provider or employee of a contractor of a VRS provider (“Employee VRS Calls”) are not eligible for compensation from the Interstate Telecommunications Relay Service (“TRS”) Fund on a per minute basis, but may be included as a business expense in the rate base; (2) VRS calls placed for the purpose of generating compensable minutes are not compensable from the TRS Fund; (3)

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<sup>1</sup> *Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51, Declaratory Ruling, DA 10-314, released February 25, 2010 (“Declaratory Ruling”).

VRS Voice Carry Over (“VCO”) calls between two hearing users are not compensable from the TRS Fund; and (4) VRS calls used to connect two users who are both outside the United States are not compensable from the TRS Fund.

The Consumer Groups applaud the Bureau for taking an important first step to clarify the Commission’s rules in its effort to prevent fraud and abuse on the part of VRS providers. In particular, the Consumer Groups fully support the Bureau’s unequivocal statement that calls placed for the purpose of generating compensable minutes are not compensable from the TRS Fund. However, as discussed below, although the Consumer Groups agree with the Bureau’s goal of eliminating the incentives for employees of VRS providers to make VRS calls that do not serve a legitimate business purpose, the Consumer Groups are troubled by the fact that the part of the Declaratory Ruling regarding Employee VRS Calls was made without the notice and comment rulemaking process required by Section 553 of the Administrative Procedures Act (“APA”), 5 U.S.C. § 553, for the adoption of new rules and policy. This rule will result in unintended consequences that could adversely affect consumers who must use VRS to fulfill everyday job requirements.

## **I. RELIEF REQUESTED**

The Consumer Groups hereby request that the Commission vacate the part of the Declaratory Ruling addressing the issue of Employee VRS Calls and initiate a notice and comment rulemaking proceeding to determine how VRS Employee VRS Calls should be compensated.

## **II. STANDING**

Many members of the Consumer Groups, including some of the representatives of the Consumer Groups signing this Application for Review, have hearing or speech disabilities and

utilize VRS and other forms of TRS on a regular basis. Because the Declaratory Ruling affects the delivery of VRS, the Consumer Groups are concerned with the unintended effects of the Declaratory Ruling and have standing to file this Application for Review.

### III. QUESTIONS PRESENTED

The Consumer Groups present the following questions for Commission consideration:

1. Whether the Bureau violated Section 553 of the APA when it issued the portion of the Declaratory Ruling addressing the issue of Employee VRS Calls without the Commission first conducting a notice and comment rulemaking proceeding.

2. Whether the Bureau violated Section 0.361(c) of the Commission's Rules, 47 C.F.R. § 0.361(c), when it issued the portion of the Declaratory Ruling addressing Employee VRS Calls by issuing new policy that could not be resolved under existing precedents and guidelines.

### IV. DISCUSSION

#### A. The ADA Requires that TRS be Functionally Equivalent to Voice Telephone Service.

The Declaratory Ruling refers to relay service as an *accommodation* for persons with disabilities.<sup>2</sup> This use of the word “accommodation” is inappropriate because Section 225 of the Communications Act of 1934, as amended (the “Act”), requires the Commission to ensure the availability of TRS.<sup>3</sup> The Act defines TRS as telephone transmission services that provide the ability for people who are deaf or hard of hearing to communicate with hearing people “in a manner that is *functionally equivalent*” to the ability of hearing people to communicate with each other.<sup>4</sup> In other words, the Americans with Disabilities Act (“ADA”)<sup>5</sup> requires a lot more than

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<sup>2</sup> Declaratory Ruling at ¶ 3.

<sup>3</sup> 47 U.S.C. § 225(b)(1).

<sup>4</sup> 47 U.S.C. § 225(a)(3) (emphasis added).

<sup>5</sup> PL 101-336, July 26, 1990, codified at 47 U.S.C. § 225.

that TRS be an “accommodation.” Title IV of the ADA specifically requires that TRS be “functionally equivalent” to the telephone services used by hearing people. TRS is a form of universal service. Just as the Universal Service programs ensure service at reasonable rates to consumers located in high cost areas or who have low incomes, it is the FCC’s statutory duty to ensure that TRS provides functionally equivalent services to the deaf and hard of hearing communities, and their hearing counterparts.

On the other hand, Title I of the ADA addresses accommodations that must be provided by employers to their employees as a cost of doing business. TRS is mandated by Title IV of the ADA to be provided by telephone companies to make their services accessible to the public. Employers provide telephone lines, Internet, equipment, and other access to TRS, but employers do not provide the actual relay service itself, which is paid for by the TRS Fund (made up of funds collected from every telephone company). What makes the Employee VRS Call section of the Declaratory Ruling highly irregular is that it muddles Title I and Title IV by singling out one particular type of employer and requiring ONLY that type of employer to provide relay services as a Title I accommodation to its employees and to treat relay services as an *accommodation*; as a cost of doing business. The Declaratory Ruling singles out one particular type of employer to pay for the relay services used by its employees as a business expense.

**B. The Declaratory Ruling Adopts a New Rule Without a Notice and Comment Rulemaking Proceeding.**

The Declaratory Ruling claims that VRS providers have had “ample notice” that Employee VRS Calls should be treated as a business expense and are not compensable from the TRS Fund on a per minute basis. However, no such “ample notice” is ever cited by the Bureau, and the Consumer Groups are unaware of any notice whatsoever. An informal poll directed at five VRS providers yielded the result that not one of the providers reported ever treating the cost

of such calls as a business expense. Each provider reported that all VRS calls were billed to the TRS Fund as compensable VRS calls.<sup>6</sup> If there was “ample notice,” it seems to have been missed by everyone.

Instead of citing to the alleged “ample notice,” the Declaratory Ruling goes through a procrustean analysis of the Relay Services Data Request form (“Relay Data form”) in a convoluted attempt to find the appropriate category of expense for Employee VRS Calls. First, the Declaratory Ruling suggests that just as a VRS provider bears the cost of telephone calls as a business expense, it should also bear the cost of Employee VRS Calls. This makes little sense, because it singles out Employee VRS Calls provided by the employer to be paid for by the employer only if the employer is a VRS provider or a contractor for a VRS provider, even though employees of any other type of business in the United States can make VRS calls that are compensable from the TRS Fund. To single out one particular category of business for disparate treatment without notice and comment rulemaking is clearly a violation of Section 553 of the APA.

The specific categories in the Relay Data form listed by the Declaratory Ruling as covering the expense of Employee VRS Calls simply do not fit. For example, since no other business in the United States pays for VRS calls (other than for the telecommunications expense of connecting to the VRS provider), normal accounting practices would not include VRS calls as a telephone expense pursuant to section I.A.1 or telecommunications expense pursuant to section I.B.4 of the form. Furthermore, Section I.B.4 includes within 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,

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<sup>6</sup> See also Partial Petition for Reconsideration, Convo Communications, Inc., March 8, 2010 (“Convo Petition”).

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.

The list above does not include VRS or any other form of TRS. Similarly, VRS calls do not fit within utility expenses, which according to Section I.A.2 of the form are:

Expenses associated with land and buildings, such as water, sewerage, fuel, T1 lines, internet connectivity and power. Telephone expenses, such as center toll free numbers, local and foreign exchange should also be included here.

Nowhere does the form mention VRS or any other form of TRS as a utility expense. Similarly, VRS or any form of TRS does not fit within section I.C.6 human resources, which does include:

Expenses incurred in performing personnel administration activities, including recruiting, hiring, forecasting, planning, training, scheduling, counseling employees and reporting.

The same goes for section I.C.5 operations support, which includes expenses that “ensure the sustainability of service including troubleshooting, customer service and technical support.”

VRS expenses are not included within this list. This is equally true for marketing, advertising and outreach found in Section I.E. Nowhere do those definitions include VRS. Since no other type of employer includes the cost of VRS within these categories, normal accounting practices would not include VRS costs for VRS providers.

Rather, it is the understanding of the Consumer Groups from their informal polling of the VRS providers, that the providers take the entire universe of allowable expenses when reporting their total costs. Although the Declaratory Ruling is concerned about double recovery, from the informal polling of VRS providers, it appears that the costs of interpreters and other expenses is reported only once, even when associated with Employee VRS Calls. Since the VRS providers appear to have been including the minutes of Employee VRS Calls within their report of total

number of VRS minutes provided, the costs associated with Employee VRS Calls were averaged with all other minutes for determining the per minute VRS rate. As a result, it appears as though there was no double counting.

If the VRS providers were being reimbursed on a per minute basis for Employee VRS Calls and including the cost of those Employee VRS Calls in the per minute VRS rate, there would have been double counting. However, that is not what happened.<sup>7</sup> Therefore, it was error for the Bureau to base its Declaratory Ruling on the premise of double recovery.

Since the Declaratory Ruling substantially changes what types of minutes are compensable, the way in which VRS rates are calculated, and the methodology for compensating Employee VRS Calls, notice and comment procedures were required by Section 553 of the APA. Since this did not happen, the Declaratory Ruling is in violation of Section 553 and must be vacated.

**C. The Bureau Violated Section 0.361(c) of the Commission’s Rules When it Issued the Declaratory Ruling.**

Section 0.361(c) of the Rules excludes from the authority delegated to the Bureau “[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines.” Since the Declaratory Ruling could not cite any precedents or guidelines in favor of its ruling in regard to Employee VRS Calls other than its convoluted interpretation of the Relay Data form, this is clearly a ruling that presents novel questions of law, fact or policy. As discussed above, since Section 553 of the APA requires notice and comment procedures, and Section 0.361(a) of the Rules, 47 U.S.C. § 0.361(a) excludes issuing a notice of proposed rulemaking from the Bureau’s delegated authority, the Consumer Groups request that

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<sup>7</sup> See, e.g., Convo Petition.

the Commission issue a notice of proposed rulemaking to determine if an alternate methodology for compensation for Employee VRS calls is necessary, and if so, what it should be.

**D. The Declaratory Ruling Will Result in Unintended Adverse Consequences to People Who are Deaf, Hard of Hearing, Deaf-Blind and Speech-Disabled.**

The Consumer Groups appreciate the Bureau's effort to remove the incentive of VRS providers to encourage placing calls for the purpose of generating compensable minutes. However, as a result of addressing the issue of Employee VRS Calls, the Declaratory Ruling has resulted in unintended adverse consequences to people who are deaf, hard of hearing, deaf-blind and speech-disabled. Specifically, because VRS is compensated in a price cap regime where costs are averaged among all providers to determine the price cap tiers, under the Declaratory Ruling, the specific costs of Employee VRS Calls would be recovered only theoretically and not on a per call basis in practice.

In other words, since all costs among all providers are averaged when determining the cost base, a provider who has a higher number of employees that use VRS than an employer who has a lower number of such employees would have higher actual VRS costs, but would not be compensated for those costs because the costs are averaged across all providers. This results in the unintended consequence of discouraging the hiring of employees who need to use VRS to do their work. On the other hand, when the ADA established the principle that a TRS call should never cost more than an equivalent voice telephone call, 47 U.S.C. § 225(d)(1)(D), the ADA established the important principle that a potential employee's need to use TRS is cost-neutral and thus should not factor into an employer's decision as to who should be hired or promoted.

Yet, as a result of the Declaratory Ruling, unlike any other business in the United States, it will cost VRS providers more to hire people who need to use VRS to do their work than those who do not need to use VRS to do their work. It should not be that way. The question of

whether and to what extent an employee needs to use VRS to do his or her work should be cost-neutral, as required by Section 225(d)(1)(D).

Footnote 5 of the Declaratory Ruling states that the principles enunciated in the Declaratory Ruling pertain to all forms of TRS. With one stroke of the pen, without any input from any stakeholder, the Bureau applied to the entire TRS industry a set of principles that were intended to address fraud and abuse in the VRS industry. For example, the Declaratory Ruling would exclude from compensable minutes a captioned telephone service (CTS) customer using CTS to call the customer service desk of a CTS provider.

Footnote 6 of the Declaratory Ruling states: “calls made by installers and maintenance or repair personnel of VRS providers relating to the installation and use of customer premises equipment, including video phones (VP) and VP accessories are not compensable either on a per minute basis or through the rate setting process.” Without any notice and comment procedures, this sentence goes far beyond what was said in *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Report and Order and Declaratory Ruling, 22 FCC Rcd. 20140, 20170-71, para. 82 (2007 (“2007 TRS Rate Order”). Although the 2007 TRS Rate Order did preclude customer equipment costs from allowable compensable costs, it said nothing about VRS calls made by those who install, maintain and repair customer equipment.

VRS calls made by installation, maintenance and repair personnel working in every other business in the United States, including any form of telecommunications or information service, are compensable by the TRS Fund. Yet, with one stroke of the pen, installation, maintenance and repair personnel of VRS companies are singled out for disparate treatment. As with other Employee VRS Calls, the Declaratory Ruling has the unintended consequence of discouraging

the employment of installation, maintenance and repair personnel who need to use VRS to do their work.

**E. Notice and Comment Rulemaking is Needed to Resolve the Issue of Compensation for Employee VRS Calls.**

The Consumer Groups recognize that the situation prior to the issuance of the Declaratory Ruling, where VRS providers would make a profit from their employees making VRS calls, provided an incentive to VRS providers to encourage the placement of calls for the purpose of generating compensable minutes. The fraud and abuse resulting from that incentive is untenable, and the Consumer Groups would like to see it addressed, but addressed properly through a notice and comment rulemaking proceeding pursuant to Section 553 of the APA.

In its Petition, Convo suggests one way to compensate for Employee VRS Calls that is intended to be cost neutral to VRS providers. Without specifically addressing the merits of Convo's proposal, the concept of a lower per minute rate for Employee VRS Calls, calculated for each provider, rather than averaged between all providers, is one potential alternative which should be explored through notice and comment rulemaking, along with any other potential suggestions to resolve the situation. In other words the Consumer Groups want to discuss solutions that neither encourage nor discourage Employee VRS Calls. A notice and comment rulemaking provides such an opportunity for all stakeholders and interested persons to propose and comment on various methodologies to achieve this result and ultimately enable the Commission to arrive at a methodology that takes into account all concerns raised in the proceeding. That is precisely why Section 553 requires agencies to utilize notice and comment procedures before enacting new policy and regulations.

There are a number of questions that the Commission should consider asking in a notice of proposed rulemaking. These would include:

- Should TRS/VRS providers be treated differently with respect to the provision and payment of TRS/VRS calls made to or from their employees? Why or why not? Does such different treatment comport or conflict with federal non-discrimination or other law?
- Should an alternate compensation methodology be used for Employee VRS Calls? If so, how could such a methodology be devised to neither encourage nor discourage the use of VRS by employees?
- Should Employee VRS Calls made by installation, maintenance and repair personnel be compensated any differently from other Employee VRS Calls? If compensated differently, how and why?
- Should incoming Employee VRS Calls to any customer service helpdesk be compensated any differently from other Employee VRS Calls? If compensated differently, how and why?
- How are calls to and from employees of contractors of VRS providers to be compensated? Should all calls by the employees of contractors be treated as Employee VRS Calls, or should such treatment be limited to those employees of contractors dedicating a certain percentage of their time to the contracting operations? If so, what should be the threshold percentage?
- How can the FCC ascertain that the experience of placing VRS calls by employees of VRS providers is not different than that of VRS calls placed by consumers who are not employees of VRS providers?
- Should this compensation method apply to all VRS calls made and received by employees of VRS providers and their contractors or only when those calls are connected through the VRS provider/employer's services? In other words, how should calls made and received by VRS employees and contractors that are connected through another VRS provider be compensated? What about VRS calls between employees or contractors of two different VRS providers?
- Should personal calls made by employees of VRS providers and their contractors be compensated differently? If so, how? What about employees who work from home and regularly use their home phone or videophone for both personal and Employee VRS Calls?
- To what extent should the rules adopted apply to other forms of TRS? Is VRS unique? Why or why not?

## **V. Conclusion**

For the reasons stated herein, the Consumer Groups respectfully request that the Commission vacate the part of the Declaratory Ruling addressing the issue of Employee VRS

Calls and initiate a notice and comment rulemaking proceeding to determine how to compensate VRS providers for Employee VRS Calls.

Respectfully submitted,

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