

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

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

PETITION FOR RECONSIDERATION OF AT&T

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AT&T Services, Inc., on behalf of itself and its affiliates (collectively “AT&T”), hereby submits this petition for reconsideration of the Federal Communications Commission’s (“Commission”) *Second Report and Order* amending the certification rules for Internet-based Telecommunications Relay Service (“iTRS”) providers.¹

I. INTRODUCTION & SUMMARY

AT&T seeks reconsideration of those portions of the *Second Report and Order* that make the operation of call centers and the employment of communications assistants (“CAs”) requirements of the mandatory certification of all Video Relay Service (“VRS”) providers and that would prohibit VRS providers from subcontracting the core functions of VRS to another certified provider.² Together, these provisions dictate that VRS may only be provided by fully facilities-based service providers. The facilities-based service requirements are unjustified because: (1) they do not remedy the harm the Commission purports to address and are unsupported by the record; (2) they are in conflict with the spirit and letter of other recently adopted TRS rules; and (3) they disserve the Commission’s goals of controlling the costs of VRS and promoting VRS competition and innovation. As such, AT&T requests that the Commission

¹ See Structure and Practices of the Video Relay Service, CG Docket No. 10-51, FCC 11-118 (rel. July 28, 2011) (“*Second Report and Order*”).

² *Id.* at 8-10 ¶¶ 13-19.

promptly release an *Order on Reconsideration* indicating that otherwise eligible entities may be certified as VRS providers despite not operating their own call centers and employing CAs, and that they can subcontract core functions to other certified VRS providers so long as they exercise sufficient oversight of the other certified providers to monitor compliance with the Commission's iTRS rules.

II. THERE IS NO LOGICAL NEXUS BETWEEN THE FACILITIES-BASED SERVICE REQUIREMENTS AND THE HARM INTENDED TO BE ADDRESSED.

The Commission should reconsider its requirements that VRS service providers operate their own call center and employ CAs, and its prohibition on subcontracting core VRS functions from third parties, because the new rules in no way serve their stated purposes, nor do they remedy the harm purported to be addressed. Longstanding administrative law precedent makes clear that such a lack of a nexus between the remedy adopted by an agency and the harm purportedly addressed is the hallmark of arbitrary and capricious decision making.³ Where, as here, the connection between the new rules and the Commission's regulatory purpose is absent, and the record is bereft of evidentiary support for their adoption, the Commission's rules are infirm and should be reconsidered.

The *Second Report and Order* indicates that the purpose of the facilities-based service requirements is to eliminate waste, fraud, and abuse in the VRS industry. Yet, the record in this docket contains virtually no support for the idea that facilities-based providers are less likely to commit waste, fraud or abuse and the Commission identifies no evidence that the remedy will serve its stated purpose. In sharp contrast to the tepid support for the facilities-based service

³ See, e.g., *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[U]nder the 'arbitrary and capricious' standard . . . the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.") (quotation omitted).

requirements, even commenters that were at odds with each other over issues as fundamental as the appropriateness of requiring Commission certification for all VRS providers agreed that the facilities-based service requirements were superfluous and would not serve the Commission's stated goals.⁴ Rather than refuting this vocal opposition by pointing to record evidence to justify the new facilities-based service regime, the Commission merely asserts without support that the facilities-based service requirements will "ensure that certified providers exercise necessary oversight of their own operations," "enable the Commission to better oversee the core operations of these providers," "ensure quality of service and compliance with the Commission's rules," "reduce waste, fraud and abuse in the VRS industry," and "avoid the risks of lack of Commission oversight associated with allowing the contracting out of CA services or call center functions to entities that are not eligible VRS providers."⁵

The Commission does not even attempt to explain how its goals are better served by allowing only the facilities-based provision of VRS rather than allowing subcontracting between certified VRS providers for the core functions of VRS, as enunciated in the *VRS Practices R&O*,⁶ coupled with the other certification requirements adopted in the *Second Report and*

⁴ See, e.g., Comments of AT&T, CG Docket No. 10-51 (filed June 1, 2011); Comments of Sprint Nextel Corporation, CG Docket No. 10-51 (filed June 1, 2011) ("Sprint Nextel Comments"); Comments of Sorenson Communications, Inc., CG Docket No. 10-51 (filed June 1, 2011); Reply Comments of Gallaudet University, CG Docket No. 10-51 (filed June 16, 2011); see also Comments of SignOn: A Sign Language Interpreting Resource, Inc., CG Docket No. 10-51 at 6 (filed June 1, 2011) (recognizing the necessity of preserving subcontracting relationships); Comments of Hamilton Relay, CG Docket No. 10-51 at 9 (filed June 1, 2011) (indicating that it shouldn't matter whether operations are provided in-house or contracted to third parties).

⁵ *Second Report and Order* at 8-9 ¶ 16.

⁶ See Structure and Practices of the Video Relay Service Program, CG Docket 10-51, *Report and Order*, 26 FCC Rcd 5545, 5574 ¶ 58 (2011) ("*VRS Practices R&O*") ("[W]e amend our rules to make clear that an eligible provider is prohibited from engaging any third party entity to provide VRS CAs or call center functions (including call distribution, routing, call setup, mapping, call features, billing for compensation from the TRS Fund, and registration), on its behalf, unless that third party entity also is an eligible provider under our rules.").

Order. Indeed, allowing subcontracting where *both* the subcontractor and the service provider are Commission-certified would actually seem to *increase* the amount of Commission oversight by implicating two entities, each with independent obligations and transparency requirements. Unlike in the “white labeling” context, where the party providing the core VRS functions was outside Commission oversight and the regulated entity could claim ignorance of the subcontractor’s activities, where both parties are required to be certified there is an added layer of accountability to the Commission and the parties have incentives to act as ethical checks on each other.

The requirement that a VRS provider leasing an automatic call distribution (“ACD”) platform must locate the ACD platform on its own premises and must use its own employees to manage the ACD platform is similarly divorced from the Commission’s expressed regulatory goal.⁷ Just as with subcontracting of other call center operations, contracting for ACD services and keeping the ACD platform off the VRS provider’s premises has not been shown to have any correlation to waste, fraud, and abuse in the provision of VRS. Like the white labeling and certification rules the Commission has adopted, the compensation restrictions, prohibition on revenue-sharing, and requirement that all leases be in writing and filed with the application for certification will provide sufficient oversight to discourage malfeasance by VRS providers. There is no evidence that additional restrictions on the location and staffing of the ACD platform are necessary to, or will even be helpful in, preventing waste, fraud, and abuse.

In fact, there is powerful evidence contrary to the assumption that being facilities-based makes a service provider more likely to comply with the Commission’s rules. As Sprint Nextel Corporation explained on the record:

⁷ See *Second Report and Order* at 9 ¶ 17.

“Certainly the fact that both Viable and Purple owned and operated call centers did not deter them from engaging in conduct that (1) in the case of Viable, shuttered its operations and resulted in several of its executives pleading guilty to defrauding the government; and (2) in the case of Purple, led to a Consent Decree pursuant to which Purple has agreed to make voluntary payment to the United States Treasury and to execute a note to enable the TRS Fund to recover the upwards of \$19,000,000 Purple received from the TRS Fund for the provision of VRS that may have violated the Act and FCC’s rules.”⁸

These examples cited by Sprint Nextel, in fact, provide the ultimate irony about the Commission’s new rules, as facilities-based providers who may have previously engaged in fraud or abuse to the TRS Fund will meet the criteria to apply for certification while certain VRS providers that are not facilities-based but have no history of fraud or abuse to the TRS Fund will not meet the criteria to apply for certification without wasting resources on establishing call centers and employing CAs. The fact is that AT&T, which owns and operates four call centers and employs over 300 CAs for traditional TRS and IP relay service, is no more likely to defraud and abuse the TRS Fund because it does not own or operate VRS centers or employ VRS CAs.

The arbitrariness of the facilities-based requirements for VRS providers is further demonstrated when compared to the rational and fact-based approach taken by the Commission on the certification requirements for IP Relay and IP CTS providers. In the *Second Report and Order*, the Commission correctly refused to extend the facilities-based requirements to IP Relay and IP CTS providers because “to date there has been no public record of significant waste, fraud and abuse in those programs from the use of subcontractors.”⁹ In fact, IP Relay and IP CTS providers are no less susceptible to waste, fraud, and abuse than VRS providers, but have

⁸ Sprint Nextel Comments at 4 (citing *VRS Practices R&O* at ¶ 4 and n.14; *In re Hands on VRS, Inc., Go Am., Inc., & Purple Communications, Inc.*, 25 FCC Rcd 13090 (2010)).

⁹ *Second Report and Order* at 10 ¶ 20.

presumably just exercised better oversight of their subcontractors than VRS providers. After all, it is not the use of subcontractors, but the lack of oversight of those subcontractors, indifference on the part of VRS providers, or intentional conduct on the part of VRS providers that has given rise to fraud and abuse in the VRS industry. VRS providers that lack such oversight, are indifferent, or engage in such intentional conduct are more likely to engage in waste, fraud, and abuse of the TRS Fund than VRS providers without those attributes, regardless of whether they own and operate call centers or employ CAs.

III. THE FACILITIES-BASED SERVICE REQUIREMENTS ARE INCONSISTENT WITH, AND UNNECESSARY IN LIGHT OF THE OTHER RECENTLY ADOPTED TRS REFORMS.

Reconsideration of the *Second Report and Order* is appropriate because the facilities-based service requirements are unnecessary in light of the TRS reforms the Commission has already adopted and is in tension with the reasoning of the *VRS Practices R&O*. The Commission responded to the revelation of serious fraud within the VRS industry by putting into place significant structural safeguards, operational practices, disclosures, and certifications that combine to make VRS providers among the most closely monitored and tightly controlled entities under the Commission's jurisdiction. While most of these protections have been for the better, in its zeal to protect individuals with hearing and speech disabilities, the Commission went too far in the *Second Report and Order* and adopted facilities-based eligibility requirements that will ultimately drive competitors out of the VRS market and slow innovation while failing to afford additional protection to consumers.

The Commission is to be commended for its active engagement with the important TRS programs. In recent years, the Commission has undertaken extensive reforms intended to reduce the incentives and opportunities to engage in fraud and abuse of the TRS Fund. To enumerate the various reforms adopted, the Commission has: clarified that providers may not offer financial

or other incentives in an attempt to increase the length or frequency of TRS calls;¹⁰ imposed 10-digit number assignment obligations (including registration and verification of disability) on providers;¹¹ clarified how to measure conversation time;¹² clarified that the Interstate TRS Fund does not compensate providers for point-to-point calls,¹³ VRS calls made by or to VRS provider employees,¹⁴ VRS calls made or arranged for the purpose of generating revenue,¹⁵ calls between two voice users,¹⁶ VRS calls that both originate and terminate outside of the United States,¹⁷ IP Relay calls that originate or terminate outside the United States,¹⁸ and VRS calls for training or other programs in which a VRS provider is involved;¹⁹ required a TRS provider's Chief Executive Officer, Chief Financial Officer, or other senior executive to certify, under penalty of perjury, to their submissions to the Interstate TRS Administrator;²⁰ and imposed requirements

¹⁰ Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket 03-123, *Declaratory Ruling*, 23 FCC Rcd 8993, ¶ 13 (2008).

¹¹ Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, E911 Requirements for IP-Enabled Service Providers, CG Docket 03-123, WC Docket 05-196, *Report and Order*, 23 FCC Rcd 11591 (2008); Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, E911 Requirements for IP-Enabled Service Providers, CG Docket 03-123, CC Docket 98-67, WC Docket 05-196, *Second Report and Order* 24 FCC Rcd 791 (2008).

¹² TRS Providers Seeking Compensation from Interstate TRS Fund Must Comply with Standard Rounding Principles in Measuring the Conversation Time of the TRS Call, CG Docket 03-123, *Public Notice*, 24 FCC Rcd 1362 (2009).

¹³ Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket 03-123, *Order*, 24 FCC Rcd 11985 (2009).

¹⁴ Structure and Practices of the Video Relay Service Program, CG Docket 10-51, *Declaratory Ruling*, 25 FCC Rcd 1868, ¶¶ 3-5 (2010).

¹⁵ *Id.* at ¶ 6.

¹⁶ *Id.* at ¶ 8.

¹⁷ *Id.* at ¶ 9; *VRS Practices R&O* at ¶ 6.

¹⁸ *VRS Practices R&O* at ¶ 6 and n.106.

¹⁹ *Id.* at ¶¶ 43-46.

²⁰ Structure and Practices of the Video Relay Service Program, CG Docket 10-51, *Declaratory Ruling*, 25 FCC Rcd 6012 (2010).

relative to VRS call centers, CAs working from home, compensation for VRS CAs, entities that can provide VRS, whistle blower protection, and audits.²¹

Most relevant to the facilities-based service requirements, in the *VRS Practices R&O* the Commission adopted new eligibility and subcontracting rules intended to address waste, fraud, and abuse in the VRS market. The Commission determined that only entities that are eligible to receive TRS support may provide VRS, VRS providers may only enter into subcontracting agreements for the provision of VRS CAs or call center functions with third parties that are themselves eligible VRS providers, and that all third-party agreements must be executed in writing and copies of the agreements should be available to the Commission and the TRS Fund administrator on request.²² In adopting these rules, the Commission determined that its new subcontracting rules would “ensure that an eligible provider is responsible for providing the core components of VRS, rather than subcontracting out these responsibilities to third party entities, whose operations are not under the direct supervision of the Commission.”²³ The Commission explained that it was “satisfied that because eligible entities have already met the Commission’s eligibility requirements, they pose less risk to the integrity of the program.”²⁴ AT&T notes that the *Second Report and Order* does not purport to alter or amend Section 64.604(c)(5)(iii)(N)(1)(iii), which provides that VRS subcontracts are only allowable with other eligible providers, and thus this rule, and its underlying rationale, are still in force.

²¹ See generally *VRS Practices R&O*.

²² *Id.*, 26 FCC Rcd at 5574 ¶¶ 57-60.

²³ *Id.*, 26 FCC Rcd at 5574 ¶ 58.

²⁴ *Id.*, n.164.

Thus, the *VRS Practices R&O* expressly found that subcontracting with eligible providers alleviated many of the risks concerning the Commission.²⁵ Without any evidence that this prior reasoning was flawed or that the earlier-adopted rules were inadequate to protect individuals with speech and hearing disabilities, the Commission was not justified in adopting the inconsistent facilities-based service requirements. No such new facts or arguments were introduced in the record or by the Commission. Indeed this is unsurprising, as enough time has not passed since the adoption of the *VRS Practices R&O* to even begin to evaluate whether the rules adopted therein provided sufficient protection. The new service provider eligibility rules and restrictions on “white labeling” went into effect on June 1, 2011²⁶—the same day as initial comments on the FNPRM were due. The prohibition on VRS operations conducted by CAs from home became effective August 30, 2011.²⁷ As of the filing of this Petition, the new record keeping rules still have not gone into effect because of the time needed for analysis under the Paperwork Reduction Act of 1995. In light of this complete lack of opportunity to evaluate the interaction between the rules adopted in the *VRS Practices R&O* and the Commission’s previous TRS reforms, the Commission was not justified in adopting the change in policy represented by the facilities-based service requirements, and those provisions should be reconsidered.

IV. THE FACILITIES-BASED SERVICE REQUIREMENTS WOULD INCREASE OVERALL TRS COSTS AND WOULD CHILL VRS COMPETITION AND INNOVATION.

Implementation of the facilities-based service requirements would conflict with the Commission’s policies of controlling TRS costs and promoting competition and innovation in

²⁵ As discussed above, there are reasons to believe that in light of the robust certification requirements adopted by the Commission for all VRS providers, subcontracting between two certified providers further increases the protections against fraud and abuse. *See supra* 3-4.

²⁶ *See* Federal Communications Commission, *Structure and Practices of the Video Relay Service Program; Correction*, 76 Fed. Reg. 30841 (May 27, 2011).

²⁷ *Id.*

the provision of VRS. A desire to increase the predictability and efficiency of the VRS program while also controlling the growth of the TRS Fund has been an animating principle of the Commission's TRS Fund rulemaking actions in recent years.²⁸ Similarly, a main goal of Commission's TRS reform agenda has been to encourage innovation in the provision of VRS.²⁹ Because it will cause VRS providers to either undergo substantial and duplicative infrastructure investment they would not otherwise have engaged in or leave the VRS industry, the facilities-based service requirements will disserve these goals and should be reconsidered.

AT&T and many other reputable VRS providers currently use subcontracted call center services to provide innovative VRS services to a wide range of subscribers. If these providers were required to operate their own call centers and establish their own infrastructure for hiring, training, managing, and paying CAs, they would be entitled to include the costs of these activities in their annual cost submissions to the TRS Fund Administrator.³⁰ Because of inefficiencies when compared to a model that takes advantage of the already-established, and often shared, facilities of subcontractors, this development would be expected to apply significant upward pressure to the TRS Fund.

Perhaps even more likely, however, is that these service providers determine that the costs and risks inherent in establishing new VRS facilities outweigh the commercial benefits of

²⁸ See, e.g., Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Structure and Practices of the Video Relay Service, CG Docket Nos. 03-123, 10-51, *Order*, FCC 11-104 at 3 ¶ 5 (rel. June 30, 2011); 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 ¶ 16 (2007) (“We believe that this approach will simplify the rate setting process and result in more predictable, fair, and reasonable rates.”).

²⁹ See, e.g., *VRS Practices R&O*, 26 FCC Rcd at 5552 ¶ 7 (2011).

³⁰ See Sprint Nextel Comments at 6.

participation in the program and thus decide to cease providing VRS.³¹ This exodus from TRS could stall the innovation and growth in service offerings that have developed in the iTRS industry in recent years, which has resulted in a significant expansion of the communications choices available to the deaf and hard of hearing community. The Commission has recognized in various other contexts that reseller and subcontractor relationships promote competition and expand consumer choice. For example, the recently released *Fifteenth Wireless Competition Report* explained that wireless service resellers, or MVNOs, “often increase the range of services offered by the host facilities-based provider by targeting certain market segments, including segments previously not served by the hosting facilities-based provider.”³² The record in this proceeding contains multiple additional examples of analogous regulated activities that rely upon the cooperation of multiple parties to deliver a service to consumers.³³ A similar dynamic exists in the VRS industry and is jeopardized by the facilities-based service requirements.

The facilities-based service requirements also risks disrupting technical innovation, in contravention of the Section 225(d) directive that any TRS regulation “not discourage or impair the development of improved technology.”³⁴ Restricting VRS providers’ flexibility to enter the market on terms that make the most sense for them will ultimately drive the innovators out of the

³¹ Non-facilities based VRS providers are faced with weighing the significant financial investments needed to establish new VRS facilities without the information needed to make such an evaluation, as the Commission has yet to determine the long term compensation methodology.

³² Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 10-133, *Fifteenth Report*, FCC 11-103, 36 ¶ 33 (rel. June 27, 2011).

³³ See, e.g., Gallaudet University Reply Comments at 17; Reply Comments of Purple Communications, CG Docket No. 10-51 at 10 (filed June 16, 2011) (pointing out that subcontracting call center services is a common practice among Fortune 500 companies).

³⁴ 47 U.S.C. § 225(d).

industry.³⁵ For example, AT&T has developed in conjunction with its business partners a VRS iPhone 4 and iPad 2 app that is becoming popular with the deaf community. The Commission should not remove from the VRS market this and future consumer-centric iTRS products over unjustified and ineffective facilities-based service requirements. Similarly, these unwarranted regulations should not be permitted to exclude those VRS providers with a track record of innovation, and who may be best positioned to deliver other cutting edge broadband accessibility tools in the future.

³⁵ *See, e.g.,* Sprint Nextel Comments at 6.

V. CONCLUSION

For the reasons discussed above, AT&T respectfully requests that the Commission reconsider those provisions of its *Second Report and Order* that require VRS providers to operate their own call centers and employ their own CAs and that prevents these providers from subcontracting with certified third parties for the provision of VRS services. Continuing with the facilities-based service requirement may force AT&T to pull out of the VRS market, eliminating a TRS provider that has served the deaf community for over 30 years. Reconsideration is warranted because this facilities-based service requirement is unsupported by the record, conflicts with other well-reasoned aspects of the Commission's TRS rules, and would raise VRS costs while reducing VRS competition and innovation.

Respectfully submitted,

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