

4. Funding iTRS Access Technology

49. The Commission has consistently held that costs attributable to the user's relay hardware and software, including installation, maintenance, and testing, are not compensable from the Fund.¹³⁸ As the Commission has explained, "compensable expenses must be *the providers'* expenses in making the service available and not the customer's costs of receiving the equipment. Compensable expenses, therefore, do not include expenses for customer premises equipment – whether for the equipment itself, equipment distribution, or installation of the equipment or necessary software."¹³⁹

50. We also recognize, however, that providers continue to provide VRS access technology to VRS users free of charge,¹⁴⁰ and that in many cases these providers' primary or only source of revenue may be the TRS Fund. The TRS Fund is likely, therefore, implicitly or indirectly funding iTRS access technology costs. But because this funding is implicit or indirect, the Commission has no data on how many units of hardware or software are being distributed by providers, how many users are receiving iTRS access technology from providers, how much money is being spent on manufacturing, installation and maintenance, or other data that could help the Commission ensure that the TRS program is being run in as efficient a manner as possible, and in a manner that fully meets the needs of VRS users.

51. We do not seek to alter our prior decision that equipment costs are not "costs caused by interstate telecommunications relay service."¹⁴¹ We seek comment, however, on whether the "availability" mandate in 225(d)(3), discussed in greater detail in section VII below, provides the Commission authority to collect contributions to the TRS Fund to support iTRS access technology for VRS users and to disburse the relevant support. Would providing explicit compensation for iTRS access technology help further the goal of ensuring that TRS is "available, to the extent possible and in the most efficient manner?" Would the Commission be in a better position to collect data on costs associated with iTRS access technology if an explicit funding mechanism were in place? Should iTRS access technology funding be limited to low income consumers, as is contemplated in the discussion of the TRSBPP above,¹⁴² or would it be more appropriate to allow iTRS access technology costs to be covered by the TRS Fund for all VRS users? If the TRS Fund is used to support iTRS access technology, should the Commission require that ownership of supported technology be passed to VRS users to help reduce the possibility of user lock in?¹⁴³ What other legal and policy issues are relevant to the discussion of whether VRS access technology costs should be explicitly (rather than implicitly) compensable from the TRS Fund?

¹³⁸ See 2006 MO&O, 21 FCC Rcd at 8071, para. 17; 2007 TRS Rate Methodology Order, 22 FCC Rcd at 20170-71, para. 82.

¹³⁹ 2006 MO&O, 21 FCC Rcd at 8071, para. 17. We note that the Fund Administrator's cost data form explicitly states that the cost of equipment given to, sold to, or used by relay callers is not compensable from the Fund. See NECA, Relay Services Data Request Instructions at 5, available at <https://www.neca.org/cms400min/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=5069&libID=5089>.

¹⁴⁰ See Sorenson, <http://www.sorenson.com> ("Get a FREE Sorenson VP-200 videophone"); Purple, P3 – Make it Yours!, www.purple.us/p3 ("Download P3 Free"); CSDVRS, The Z Series, <https://www.zvrs.com/z-series/android> ("The Z4 Mobile app is FREE to download"); 2007 TRS Rate Methodology Order, 22 FCC Rcd at 20170-71, para. 82 ("some providers appear to continue the practice of giving video equipment to consumers and installing it at no cost to the consumer").

¹⁴¹ 2006 MO&O, 21 FCC Rcd at 8071, para. 17.

¹⁴² See *supra* section IV.A.1.

¹⁴³ See *supra* sections III.B.1, IV.B.

52. To the extent that we find we have the authority to provide compensation for iTRS access technology, we do not, given the focus of this *Further Notice* on the VRS program, propose to provide explicit compensation for iTRS access technology used to access IP Relay or other forms of iTRS at this time. We expect, however, that to the extent a VRS access technology funding program proved successful, the VRS program may serve as a model for other Internet-based TRS programs.

C. Instituting a More Efficient Compensation Mechanism and Reducing Incentives for Waste, Fraud, and Abuse

53. The Commission long has questioned whether a per-minute compensation methodology is appropriate for VRS, due in no small part to the significant difficulty of determining a “reasonable” per-minute compensation rate for VRS, given issues concerning CA staffing, labor costs, and engineering costs particular to VRS.¹⁴⁴ Although there has been significant effort directed to determining what categories of provider costs should be compensable from the Fund,¹⁴⁵ the Commission has not recently examined the fundamental question of whether a tiered, per-minute compensation model is best suited to VRS.

54. Based on information VRS providers have submitted to the Commission,¹⁴⁶ we believe that a tiered, per-minute compensation model may not be the most appropriate for VRS because it does not align compensation with costs (leading to structural inefficiency and lack of transparency), it provides a structural incentive to increase the number of VRS minutes billed to the Fund (leading to fraud), and it sustains numerous subscale players (leading to waste). We recognize that any compensation mechanism will have its benefits and its drawbacks, but in seeking a better alternative to the current model, we note the following with respect to the current compensation mechanism:

55. First, although the major cost item for each provider that varies with the number of VRS minutes is the direct CA cost,¹⁴⁷ if the average number of VRS minutes per user is constant – as we

¹⁴⁴ See 2003 Bureau TRS Rate Order, 18 FCC Rcd 12823; *Telecommunications Services for Individuals with Hearing and Speech Disabilities, Recommended TRS Cost Recovery Guidelines*, CG Docket No. 03-123, Further Notice of Proposed Rulemaking, 21 FCC Rcd 8379, 8389-90, para. 24; see generally 2000 TRS Order, 15 FCC Rcd at 5152-56, paras. 22, 26-27, 32-33 (directing the TRS Advisory Council to develop cost recovery guidelines for VRS; the Council recommended using the same methodology for VRS as used for traditional TRS); 2001 TRS Cost Recovery MO&O, 16 FCC Rcd at 22958-60, paras. 30-36 (declining to adopt a permanent cost recovery methodology for VRS and seeking additional comment on this issue); 2004 TRS Report & Order, 19 FCC Rcd at 12487-90, paras. 17-24 (declining to adopt a permanent cost recovery methodology for VRS); *Id.*, 19 FCC Rcd at 12565-67, paras. 234-40 (FNPRM seeking additional comments and noting that although the Commission had previously sought comment on this issue, the relative infancy and unique characteristics of VRS made it difficult to determine what the appropriate cost recovery methodology should be).

¹⁴⁵ See generally 2007 TRS Rate Methodology Order, 22 FCC Rcd 20140.

¹⁴⁶ See letter from William Banks, General Counsel, CSDVRS to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-51 attach. (filed Dec. 13, 2010); letter from David J. Bahar, Director of Government and Regulatory Affairs, Convo, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-51 attach. (filed Jan. 28, 2011); letter from Kelby Brick, Esq., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-51 attach. (filed Jan. 31, 2011); letter from John T. Nakahata, Counsel to Sorenson, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-51 attach. (filed Dec. 13, 2011); letter from David J. Bahar, Director of Government and Regulatory Affairs, Convo, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-51 attach. (filed Dec. 13, 2011); letter from John T. Nakahata, Counsel to Sorenson, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-51 attach. (filed July 29, 2011). With the exception of the attachment to the letter from William Banks dated Dec. 13, 2011, this information was provided to the Commission subject to requests for confidential treatment.

¹⁴⁷ Sorenson Oct. 30, 2006 Comments, CG Docket No. 03-123 at 31 (“costs associated with ASL interpreters are the single largest expense in the provision of VRS.”); CSDVRS Aug. 18, 2011 Comments, CG Docket No. 10-51 at 4 (continued....)

believe it is based on both discussions with providers and examination of historic usage data from the Fund administrator – then the CA cost is also effectively constant per user. That is, if the CA cost/minute is constant and the average minutes/user is also constant, then by definition the product of the two (*i.e.*, CA cost/minute * minutes/user = CA cost/user) is also constant when averaged over a period of time and customer base of reasonable size.

56. Second, we note that there are no other significant cost items that scale on a per minute basis. Indeed, all the other items (*e.g.*, iTRS access technology, installation, customer care, G&A, call center infrastructure, etc.) are either fixed or scale directly or indirectly with the number of users served.

57. Third, because a substantial fraction of the costs of providing VRS are not directly variable with either the number of users or equivalently the number of minutes handled, a providers' cost structure exhibits a scale curve, as illustrated in Figure 1.¹⁴⁸ The minimum efficient scale (V^*) is the point on the scale curve at which the volume of a firm's output is high enough to take substantial advantage of economies of scale so that the average costs are minimized. Put more simply, minimum efficient scale is the point at which the per-unit cost begins to "flatten" as the volume of output increases. The Commission implicitly acknowledged the existence of such a scale curve when adopting a tiered rate methodology by compensating providers with fewer overall minutes of use at a higher per-minute rate.¹⁴⁹ We note, however, that the current scheme provides no limit on the duration of support for subscale providers, resulting in an industry structure in which the Fund compensates numerous providers at the lowest volume, highest cost Tier I rates (\$6.24 per minute) and very few firms at the higher volume, lowest cost Tier III rates (\$5.07 per minute).

58. We seek comment on these observations regarding the current compensation mechanism, in particular on the shape of the scale curve and the point at which minimum efficient scale is reached. We also seek comment on whether a more reasonable and transparent mechanism for compensating providers would be: (a) based on a per user payment instead of a per minute payment, so that the compensation rate is better aligned with the costs of providing service, and so is easier to determine and more efficient; and (b) based on a predictable transition from the current tiered rates to a single at-scale rate. We discuss (a) in the remainder of this section and (b) in section IV.D.

(Continued from previous page)

("A proficient CA is typically a certified interpreter highly skilled in ASL, and accordingly, the primary cost driver of VRS.")

¹⁴⁸ This curve is illustrative, but consistent with cost data provided by several providers that generate different volumes of VRS minutes on a monthly basis. See letter from William Banks, General Counsel, CSDVRS to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-51 attach. (filed Dec. 13, 2010); letter from David J. Bahar, Director of Government and Regulatory Affairs, Convo, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-51 attach. (filed Jan. 28, 2011); letter from Kelby Brick, Esq., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-51 attach. (filed Jan. 31, 2011); letter from John T. Nakahata, Counsel to Sorenson, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-51 attach. (filed Dec. 13, 2011); letter from David J. Bahar, Director of Government and Regulatory Affairs, Convo, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-51 attach. (filed Dec. 13, 2011); letter from John T. Nakahata, Counsel to Sorenson, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-51 attach. (filed July 29, 2011). With the exception of the attachment to the letter from William Banks dated Dec. 13, 2011, this information was provided to the Commission subject to requests for confidential treatment.

¹⁴⁹ See 2007 TRS Rate Methodology Order, 22 FCC Rcd at 20162-63, paras. 52-53.

FIGURE 1. ILLUSTRATIVE ECONOMIES OF SCALE IN PROVIDING VRS

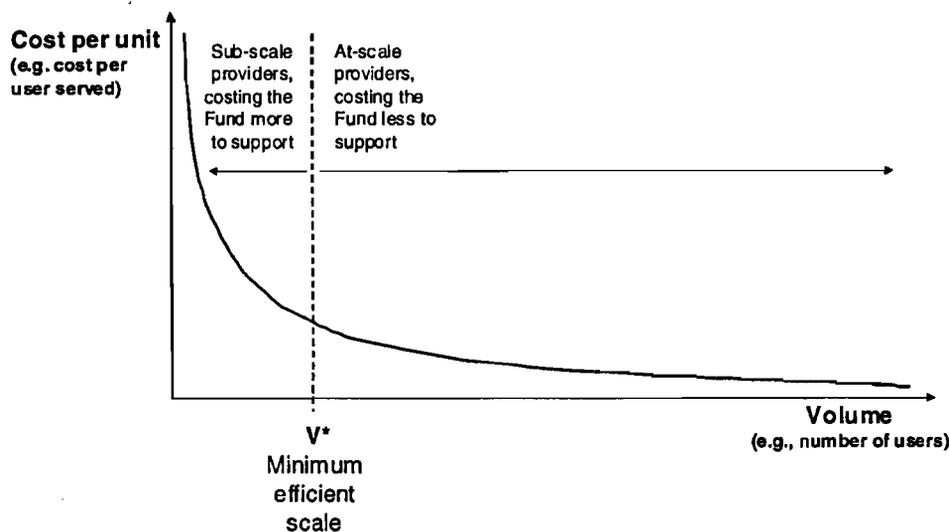


Figure 1

59. We seek comment on whether a per-user compensation mechanism would better align the compensation methodology with the providers' cost structure, and so be more efficient, easier to set, and more transparent. In addition, would such a mechanism eliminate providers' incentives to stimulate minutes of use, a common and difficult to detect form of VRS fraud?¹⁵⁰ Would such a mechanism incentivize VRS providers to add new users rather than promote additional minutes of use, thus better aligning the incentives of VRS providers with the goal of ensuring that TRS is available "to the extent possible and in the most efficient manner?" What pitfalls regarding potential fraud would come with a per-user approach? Will shifting provider incentives from generating minutes of use to adding users result in the providers fraudulently adding or reporting users to generate additional compensation? Would it be easier to detect the existence of fraudulent users than fraudulent minutes of use (particularly *ex post facto*), thus rendering the program easier to monitor and audit? What safeguards could be established to ensure that providers register only individuals that meet the requirements established in the statute and by our regulations? Would a per-user compensation mechanism render the program more transparent by allowing the Commission and the public to better understand the actual number of users of VRS and the cost per user – neither of which are known today despite the size of the program? Would the rate setting process be simplified, more predictable, and more transparent? Would a per-user mechanism, taken in combination with the transition plan described in sections IV.D and V.B.15, provide more certainty to VRS providers and investors, and better governance for the Commission? To provide a solid basis for discussion, a detailed explanation of a per-user compensation mechanism is set forth in Appendix C. We seek comment on the per-user compensation mechanism described in Appendix C. Would a per-user approach eliminate the need to provide funding for marketing to new-to-category customers?

60. *Active Users.* While a per-user compensation system would eliminate incentives to manufacture minutes of use, it would create incentives to enroll more users – even those who do not actually utilize the service and therefore do not generate costs for the VRS provider. It may also create incentives to enroll the same users with multiple providers. We seek comment on how these incentives can be lessened or eliminated. Should providers be compensated only for "active users" – those

¹⁵⁰ See *VRS Call Practices R&O and Certification FNPRM*, 26 FCC Rcd at 5549-50, para. 4.

registered VRS users that meet a minimum usage requirement?¹⁵¹ One proposal for defining active users is set forth in Appendix C. We recognize that if we adopt a minimum usage requirement for VRS users, it will require VRS providers to continue tracking the monthly use of its service by users. We seek comment on what steps we can take to ensure that VRS providers do not use this information to encourage or entice users to meet the minimum usage requirement for being considered an active user.¹⁵²

61. *Enterprise Users.* The record indicates that there are an increasing number of individuals who use VRS in the course of their employment, and that those users may have higher average monthly usage than those who do not use VRS in the course of their employment.¹⁵³ We recognize, for example, that a single deaf or hard of hearing individual may use VRS both as an “enterprise user” (*i.e.*, in the course of their employment) and for their own personal use, just as hearing individuals frequently have a phone provided by their employer for use at work, and separate phones for their personal use. We therefore seek comment on whether a VRS provider should receive additional compensation for “enterprise users” under a per-user compensation system.

62. An option for establishing a system to compensate VRS providers for enterprise users is set forth in Appendix C. We seek comment on the benefits of establishing a separate enterprise user compensation rate in general, and on the option in Appendix C in particular. Would the proposal in Appendix C help reduce barriers to employment for VRS users – as is requested by the Consumer Groups – because VRS providers would have an economic incentive to work with businesses to ensure that the workplace has functionally equivalent communications with which those employees can perform their assigned duties?¹⁵⁴ Would establishing a separate compensation rate for enterprise users help ensure that VRS providers are appropriately compensated for the reasonable costs of providing VRS? To what extent would this option impact the obligations of employers under Title I of the Americans with Disabilities Act to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship?¹⁵⁵

63. We note that under the existing compensation mechanism, VRS calls made by or to a VRS provider’s employee, or the employee of a provider’s subcontractor, are a provider business expense and are not eligible for compensation from the TRS Fund on a per-minute basis.¹⁵⁶ We propose that the same logic applies under a per-user compensation mechanism, and that the cost of calls made to and by employees of VRS providers and their affiliates, or subcontractors of VRS providers and their affiliates should be treated as a cost of providing service which is recovered through the compensation provided for service rendered to non-affiliated VRS users. We therefore seek comment on what safeguards should be put in place to ensure that VRS providers are not compensated at the enterprise rate for providing service to individuals who work for VRS providers or their affiliates and subcontractors of VRS providers and

¹⁵¹ For the sake of clarity, we note that “active users” is not intended to be a separate class of users from “enterprise VRS users” and “residential VRS users.” Rather, both enterprise VRS users and residential VRS users would be considered “active VRS users” if they meet the minimum usage requirement discussed herein.

¹⁵² It is considered a violation of the Commission’s financial incentive order if a VRS provider encourages or entices a user to make a call they would not otherwise have made but for the encouragement or enticement of the provider. *See generally 2005 Financial Incentives Declaratory Ruling*, 20 FCC Rcd 1466.

¹⁵³ *See* letter from Jeff Rosen, General Counsel, CSDVRS to Marlene H. Dortch, Secretary, FCC, attach. at 2-8 (filed Nov. 9, 2011).

¹⁵⁴ *See* Consumer Groups’ TRS Policy Statement at 7 (Objective 2.5).

¹⁵⁵ *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336 § 101 (1990), codified at 42 U.S.C. § 12111, *et seq.*

¹⁵⁶ *2010 VRS Declaratory Ruling*, 25 FCC Rcd at 1869, para. 3 (2010).

their affiliates.¹⁵⁷ For example, should employees of VRS providers and their affiliates be required to use a separate 10-digit number at work to denote VRS calls made in the course of their employment? Should the definition of Enterprise VRS Employer include an exclusion of these entities? Should the Enterprise VRS Employers of each Enterprise User be listed in the iTRS database? Should rules associated with call detail records be modified so that Enterprise Users and Enterprise VRS Employers are readily identifiable? How should self-employed VRS users be treated for the purpose of an enterprise rate?

D. Transitioning the Industry Structure To Ensure Economies Of Scale

64. Each of the structural reforms discussed above is worth exploring on its own merit. A major additional benefit of these reforms, if adopted, would be to create an opportunity to transition away from the current inefficient industry structure by giving all providers an opportunity to achieve minimum efficient scale. Specifically, the proposed TRSBPP could make VRS available to a significant pool of new-to-category potential VRS users, and the implementation of iTRS access technology standards could reduce switching transaction costs and make the existing base of VRS users more contestable than is currently the case (*i.e.*, more easily able to switch from their current provider to a new provider). At the end of a successful transition period, an industry structure could consist of multiple, at-scale providers serving a larger number of users than at present, with each provider being compensated at the same at scale per-user rate set by the Commission (see Figure 2). The ultimate result could be a program in which providers' incentives are aligned with the statute's goals of efficiency, functional equivalence, choice, and maximizing access to VRS, the Fund could be paying an effective rate per user that may better reflect the actual costs of providing VRS than is currently the case, and which could eliminate the current tiered rates, which provide seemingly indefinite support for subscale providers and introduce extra complexity into the management of the program.

FIGURE 2. TRANSITIONING TO MORE EFFICIENT INDUSTRY STRUCTURE

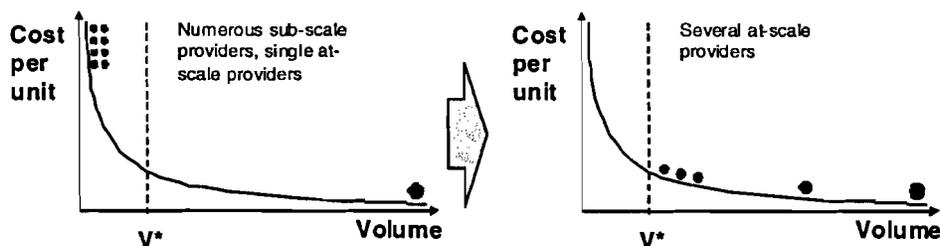


Figure 2

65. We note, however, that implementation of these reforms, if adopted, would need to be phased in over time, as some of the reforms would need to be conducted sequentially. For example, appropriate VRS access technology standards must be in place before providers can be expected to compete effectively for existing users. Further, providers that are currently subscale will not be able to achieve scale overnight, and some providers may have chosen to adopt capital structures requiring a level of profitability that may not be reflected in a reformed program, for example, because of increased competition or better alignment of rates with the actual costs of providing service. We therefore seek comment in section V on how the reforms in this section, if adopted, could be implemented so as to

¹⁵⁷ An individual that uses VRS at work could be affiliated with a particular VRS provider by, for example, working for an entity with common ownership, officers, shared directors, or a through a contractual relationship.

minimize the risk of inappropriate disruptions that could result from the transition to an at-scale per-user rate.

66. We note that the transitions discussed in this section will be accompanied by risk. An appropriately implemented structural reform program and transition process potentially would give each provider a real opportunity to achieve minimum efficient scale during the transition period and may result in an end state for the program that is better for VRS users and VRS providers, as well as being more sustainable and efficient for the Fund. If, however, some providers are not able to manage their businesses, gain scale, or support their existing capital structures during a transition period, they will likely have to change their current business plans. This would be a reasonable result, and fully consistent with our settled policy, affirmed by the courts, that our duty is “to protect competition, not competitors.”¹⁵⁸ We seek to enhance competition in the provision of VRS services because it appears to be an effective way of furthering the goals of section 225, but will not act to preserve any particular competitor. We do not believe that any provider has an inherent entitlement to receive compensation from the Fund, and so do not regard as a goal the protection of VRS providers who are high cost and/or uncompetitive.¹⁵⁹

V. IMPLEMENTING STRUCTURAL REFORMS

67. In this section, we seek comment on how to implement the structural reforms discussed in section IV above, to the extent they are adopted. We also seek comment on whether any additional amendments or new rules are necessary to implement any reforms that are adopted.

A. VRS User Database

68. We seek comment on whether the Commission should establish a VRS User Database to facilitate four primary functions required to implement the reforms proposed in this *Further Notice*: (i) ensuring that each VRS user has at least one default provider, (ii) allowing for the identification of new-to-category users, (iii) supporting the operation of the TRS Broadband Pilot Program discussed in section IV.A.1 and Appendix A, and (iv) ensuring efficient program administration. A proposal for establishing a VRS User Database is set forth in Appendix D.

B. Rules Governing the VRS program

69. Implementation of the reforms discussed in this *Further Notice* will require that the rules governing the operation of the VRS program be amended. We seek comment on the need to modify existing rules or add new rules consistent with the proposals set forth in this *Further Notice*.

1. Restructuring section 64.604

70. Section 64.604 of our rules has become somewhat unwieldy since it was adopted in 2000. Initially focused on TRS mandatory minimum standards, the section now includes subsections that govern, *inter alia*, the administration of the TRS Fund and procedures for making complaints against providers.¹⁶⁰ We seek comment on whether, regardless of any substantive changes that are made in

¹⁵⁸ See, e.g., *Bell Atlantic Mobile Systems and NYNEX Mobile Communications Co., Memorandum Opinion and Order*, 12 FCC Rcd 22280, 22288 (1997); *SBC Communications Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995).

¹⁵⁹ We note that, in general, VRS providers generally have not developed any other source of revenue beyond disbursements from the Fund, and so may be extremely sensitive to changes in the program, and providers may also have left themselves unhedged against regulatory risk. Such sensitivity cannot, however, serve as a rationale for maintaining the status quo so long as any change adopted is well developed, phased in over a reasonable period of time, and implemented in a predictable way.

¹⁶⁰ See 47 C.F.R. § 64.604(c)(5), (6).

response to this *Further Notice*, section 64.604 of our rules should be broken into separate sections, each of which addresses a particular regulatory issue. To this end, we seek comment on whether we should adopt service-specific rules (e.g., VRS, speech-to-speech, captioned telephone relay service), transmission-specific rules (i.e., PSTN-based TRS vs. iTRS), or some other structure.

2. Improving Functional Equivalence in the Workplace

71. We note that in the employment context, the employer, rather than the employee, generally holds the contractual right to control certain aspects of the communications services and products used on the job. For example, employers generally procure telephone service and telephone numbers for their employees, and it is the employer that pays the phone bill (directly or indirectly), interacts with the providing carrier, and has the contractual right to port or reassign numbers through their carrier partner. This generally is not the case in the context of VRS.

72. As discussed in section IV.C and in Appendix C, we seek comment on whether to provide additional compensation to VRS providers for providing service to VRS users in the course of their employment if a per user compensation mechanism is adopted.¹⁶¹ We further seek comment on whether, if such a proposal is adopted, it can be implemented such that VRS service is provided in the workplace in a manner that is functionally equivalent to the way telecommunications services are provided to hearing employees.

73. Specifically, we seek comment on whether enterprises that have deaf employees could be treated as “VRS Users” for the purposes of our VRS program, except to the extent necessary to ensure that VRS providers appropriately receive and process calls, including emergency calls, from individual employees. Thus, for example, a business that contracts with a VRS provider to make VRS available to all of its deaf employees would be considered a “user” as that term is used in connection with the registration and number portability obligations set forth in section 64.611 of our rules,¹⁶² but each individual employee would be considered a user for the purposes of the emergency access obligations set forth in section 64.605 of our rules.¹⁶³ We seek comment on what changes to our rules, if any, would be necessary to implement such a proposal, particularly in the context of the more general proposals and requests for comment set forth in the remainder of this section V.B.

3. Removing the Need for Free Dial Around

74. Under our existing interoperability rules, Internet-based TRS users must be able to “dial around” to competing providers.¹⁶⁴ Specifically, Rule 64.611(a)(2) obligates default VRS providers, to “route and deliver all of that user’s inbound and outbound calls *unless the user chooses to place a call with, or receives a call from, an alternate provider.*”¹⁶⁵ If providers are compensated on a per-user basis, however, they will not be compensated for calls placed through them by another VRS provider’s registered user. If VRS users were permitted to dial-around their default provider under a per-user compensation mechanism, providers would have a perverse incentive to encourage their VRS users to dial around so as to avoid incurring the costs of processing their VRS calls. Dial around may also encourage VRS providers that seek to provide less than full service to free ride on other providers.

¹⁶¹ The defined terms used in this section are defined in Appendix C, section I.

¹⁶² 47 C.F.R. § 64.611.

¹⁶³ 47 C.F.R. § 64.605.

¹⁶⁴ See generally *Second Internet-based TRS Numbering Order*, 24 FCC Rcd 791.

¹⁶⁵ 47 C.F.R. § 64.611(a)(2) (emphasis added).

75. We recognize, however, that some consumers might value the ability to dial around to different providers for various reasons. For example, the availability of dial around could facilitate competition among providers to answer calls more quickly. In that case, some consumers might value the dial around feature because it allows them to direct their call to an alternate provider that they believe might be even more responsive than their default provider in particular instances.

76. Given these competing considerations, we seek comment on whether to modify or eliminate the dial around requirement if the Commission adopts a per-user compensation mechanism. Would it be appropriate to mandate dial around functionality only for the purpose of accessing emergency services? Could providers continue to offer dial around capability on a commercial basis (*e.g.*, on a charge per call basis)?

77. We note that eliminating the dial around requirement for VRS will make the way VRS service is provided more consistent with the way that most communications services are provided today.¹⁶⁶ For example, a subscriber to an interconnected VoIP service cannot make free calls via a second interconnected VoIP service to which she does not subscribe. However, we recognize that the availability of dial around currently serves as an incentive for VRS providers to meet or exceed “speed of answer” requirements because a customer who does not get their call answered quickly enough can redirect the call – and the per-minute compensation associated with the call – to another VRS provider. We therefore seek comment below on whether we need to revise this standard and whether there are other modifications that must be made to the Commission’s mandatory minimum standards so that they better reflect the actual minimum standards that are reasonable for VRS users to expect.¹⁶⁷

78. We seek comment on whether we should require VRS providers to accept 911 calls from users who are not their registered users should the proposal to require VRS users to sign a contract with a specific provider be adopted. We have anecdotal evidence that some VRS providers require users to register with them before completing the user’s 911 call. Such a requirement would be similar to the requirement that wireless providers complete 911 calls even if the caller’s contract for service has lapsed.¹⁶⁸

4. One Free Provider Per VRS User

79. Under the existing per-minute compensation mechanism, registering with multiple VRS providers is not necessarily problematic from an efficiency perspective, as the total reimbursements paid from the TRS Fund for each VRS user’s minutes of use will be roughly the same, regardless of which providers process the calls.¹⁶⁹ As described in Appendix C, however, a per-user rate should cover an at scale provider’s reasonable, annual costs to provide VRS service. Thus, under a per-user mechanism, allowing VRS users to register with multiple providers could result in significant increases in reimbursements paid from the Fund. Allowing individuals to register with multiple providers also makes it difficult to assess how many VRS users there are, and what the usage patterns of VRS users are, as well

¹⁶⁶ We note, for the sake of clarity, that the “dial around” functionality mandated for VRS service differs from the “dial around” obligations that adhere to payphone and interexchange carriers’ services. *See, e.g.*, 47 C.F.R. §§ 64.1300 *et seq.* We have anecdotal evidence that some VRS providers require users to register with them before completing the user’s 911 call.

¹⁶⁷ *See infra* section V.B.6.

¹⁶⁸ *See Revision of the Commission’s Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, RM-8143, Memorandum Opinion and Order, 12 FCC Rcd 22665, 22717-19, paras. 108-110 (1997); *see also* 47 C.F.R. 20.18(d)(2).

¹⁶⁹ Reimbursements could differ if the providers are in different fund tiers, but such differences are relatively limited given the average user’s monthly minutes of use.

as facilitating fraud and/or abuse of the Fund by allowing providers to obtain compensation from the Fund without necessarily providing all aspects of service that might be expected from a committed, at scale VRS provider. We seek comment on limiting VRS users to registering with a single VRS provider for the purposes of making and receiving calls that are reimbursable from the Fund. Would this be an effective means of ensuring that VRS is provided in an efficient manner, while at the same time making VRS available to all potential users?

80. If so, what mechanisms should a provider use to ensure that a user that it registers is not already registered with another provider? Would the existence of the VRS User Database (VRSURD) be sufficient to ensure that multiple registrations do not occur?¹⁷⁰ Are there specific requirements that should be placed on users that choose to register to use this service? What type of information should providers obtain to ensure that an individual is not already registered with another provider? What method or methods should a provider use to verify or validate the information provided by a potential VRS user? Should the Commission establish a standard certification form? Should providers establish a validation or verification process? Should the Commission establish guidelines or detailed rules governing what constitutes an acceptable verification or validation process? Should there be only one acceptable process, or should providers be entitled to use one of several methods to validate or verify information provided to ensure that a VRS user is registered with only one VRS provider? What information will be required beyond that which providers generally collect today?

81. We seek comment on the impact that a “one free provider per VRS user” rule would have on consumers. Some VRS users have recommended that “consumers not be restricted to one service provider for both fixed and mobile services,” arguing that “consumers may have different service providers preferences depending on the type of service and that consumers should be able to choose between different providers.”¹⁷¹ Were we to adopt a rule allowing dual registration (*i.e.*, for fixed and mobile services) would we be able to achieve the efficiencies sought after in this proceeding? How would this approach be implemented? We note that data provided by some providers suggests that when a VRS user utilizes both fixed and mobile services, that user’s mobile minutes tend to replace, rather than supplement, that user’s fixed minutes.¹⁷² If this is the case, would VRS providers be incented to offer high quality service on multiple platforms (*e.g.*, mobile and fixed) to attract more customers? In this manner could “a one free provider per VRS user” rule encourage competition and innovation between VRS providers, especially given the lack of price competition? Could providers offer users a single ten digit number that would allow inbound calls to be received on all platforms that a user possesses?¹⁷³ Could providers offer additional paid services (*i.e.*, services that are not needed to achieve functional equivalency) on a commercial basis, as some currently do for remote interpreting services?¹⁷⁴ Would “one free provider per VRS user” be consistent with the mandate of section 225?¹⁷⁵

¹⁷⁰ See *supra* section V.A, Appendix D.

¹⁷¹ See letter from Danielle Burt, Counsel for TDI, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-51 (filed Nov. 1, 2011).

¹⁷² See letter from Jeff Rosen, General Counsel, CSDVRS to Marlene H. Dortch, Secretary, FCC, attach. at 14-15 (filed Nov. 9, 2011).

¹⁷³ We note that at least one provider offers functionality that allows the user to receive calls placed to their single phone number via multiple platforms. See *e.g.*, David Colclasure, SIGNews, June 2011 at 3, available at <http://www.slideshare.net/PurpleCommunications/signews-purple-announces-one-number-for-all>.

¹⁷⁴ See, *e.g.*, CSDVRS, Video Remote Interpreting (VRI), <http://www.zvrs.com/z-services/video-remote-interpreting-vri> (last visited Sept. 8, 2011).

¹⁷⁵ 47 U.S.C. § 225.

82. Consistent with section V.B.1 and Appendix C, should an Enterprise VRS User's Enterprise VRS Employer be considered the "user" for the purposes of this restriction?¹⁷⁶

5. Contracts

83. We seek comment on whether to allow VRS providers to require VRS users who are either (i) new-to-category VRS users (*i.e.*, have not previously signed up for VRS) or (ii) switching from another VRS provider to enter into a service contract starting one year after the adoption of a per-user compensation mechanism.¹⁷⁷ We also seek comment on whether VRS providers should be allowed to require Enterprise VRS Employers to enter into a service contract starting one year after the adoption of a per-user compensation mechanism.¹⁷⁸ Some providers use service contracts in other communications markets, and we seek comment on the possible harms and benefits of allowing them in the context of a per-user compensation mechanism in the VRS industry.¹⁷⁹ For example, are there costs attributable to VRS user registration, start-up, or connection such that service contracts could make the program more cost efficient and administrable by restricting VRS users and Enterprise VRS Employers' ability to change their default providers with great frequency? Would explicitly allowing contracts lessen the incentive for providers to frustrate interoperability and portability by allowing providers to recoup the costs of providing iTRS access technology, customer setup, enrollment, and other upfront costs?¹⁸⁰ Would service contracts increase the stability of providers' revenues and reduce the amount of customer churn, lessening the incentives of providers to spend excessive funds on marketing and winback activities? Would limiting VRS providers to requiring contracts from new-to-category, switching VRS users, and Enterprise VRS Employers for some period of time help prevent VRS providers from contractually locking in their existing user bases, thus ensuring that the existing installed base of users is contestable (*i.e.*, users can easily switch from one provider to another) during the transition period described in section V.C? What harms may arise due to service contracts? For example, would a VRS providers have an incentive to provide subpar service to save costs and increase profits once it gains a new subscribers because they could be locked in for a period of time? Would revising our speed of answer and other mandatory minimum standards be sufficient to offset this possible harm?¹⁸¹ Should we require VRS providers to offer a trial period? If so, what period of time for a trial period would be appropriate?

84. If we were to adopt a per-user compensation mechanism and allow VRS providers to require service contracts, what would be an appropriate service term? Is a one-year term appropriate, or should terms be longer or shorter? What protections would need to be put in place for consumers? Should consumers be permitted to be released from a contract if the provider breaches its obligations to provide service in accordance with the Commission's TRS mandatory minimum standards? Conversely, if consumers are being provided free or discounted VRS access technology as part of their service

¹⁷⁶ One result of this proposed restriction is that each Enterprise VRS Employer is likely to have a written agreement with a single VRS provider. This should greatly simplify the paperwork demands on potential employers, and help ensure that this program promotes, rather than frustrates, the employment of VRS users.

¹⁷⁷ See *supra* section V.C.

¹⁷⁸ See *supra* section V.B.2 and Appendix C.

¹⁷⁹ See, *e.g.*, 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 at para. 93 (rel. June 27, 2001) (*Fifteenth Mobile Wireless Competition Report*).

¹⁸⁰ We note that this cost recovery exists separate and apart from the incentive payment discussed in section IV.A.2.

¹⁸¹ See *infra* section V.B.6.

contract, should providers be allowed to impose an early termination fee (ETF) if consumers wish to exit the contract before its expiration? Are there other costs that providers intend to recover over the course of a contract that might justify the use of an ETF? Would such fees be consistent with the requirements of section 225 of the Act, including that TRS users pay rates no greater than the rates paid for functionally equivalent voice services? If so, should a VRS provider be allowed to “buy out” a VRS user’s or Enterprise VRS Employer’s ETF with a competing provider in order to allow that user to switch without incurring a pecuniary transaction cost? Are there other terms that should be permitted or required that would address up-front costs? Likewise, are there other contract terms that should be required for or prohibited in such contracts?

6. Mandatory Minimum Standards (Performance Rules)

85. In view of the purpose of TRS, Congress specifically mandated in Section 225 that relay services offer access to the telephone system that is “functionally equivalent” to voice telephone services.¹⁸² The “functional equivalence” standard serves as a benchmark for determining the services and features TRS providers must offer to consumers, and is reflected in the TRS mandatory minimum standards contained in the Commission’s rules.¹⁸³ TRS mandatory minimum standards are defined in our Part 64.604 rules in terms of “operational standards,” “technical standards” and “functional standards.” These standards ensure that TRS users have the ability to access the telephone system in a manner that approximates, as closely as possible, the experience of a voice telephone user.¹⁸⁴

a. Operational Standards

86. We seek comment on whether the options set forth in this *Further Notice* necessitate modifications to our TRS operational standards,¹⁸⁵ or the establishment of separate operational standards for VRS. How would the adoption of a new-to-category incentive payment impact our rules governing data collection from TRS providers and information filed with the Administrator? Would the data for registered new VRS users be quantified by the certified VRS provider and submitted or quantified by the TRS Fund Administrator? If a per-user compensation system is adopted how and by whom would the data for “Active Users” be quantified? Do provider incentives under a per-user compensation system change such that the Commission will need to take extra precautions to ensure that providers will not be motivated to discourage high volume users from contracting with them or from making VRS calls? How can the Commission ward off such incentives, to ensure the continued provision of high quality service to all users, regardless of the quantity of calls they make? Should specific training requirements or qualifications be established for VRS CAs different from or beyond those general requirements set forth in section 64.604(a)(1) of our rules to ensure that providers maintain a certain level of CA qualifications for all calls handled? If specific qualifications are imposed on VRS CAs, what affect would this have on

¹⁸² 47 U.S.C. § 225(a)(3).

¹⁸³ 47 C.F.R. § 64.604. The legislative history of Section 225 makes clear that “[t]elecommunications relay services are to be governed by standards that ensure that telephone service for hearing- and speech-impaired individuals is functionally equivalent to voice services offered to hearing individuals.” House Report at 129; *see also Telecommunication Services for Individuals with Hearing and Speech Disabilities, and the Americans With Disabilities Act of 1990*, CC Docket No. 90-571, Report and Order and Request for Comments, 6 FCC Rcd 4657 (1991) (*TRS I*) (adopting the TRS regulations). We note that failure to meet the mandatory minimum standards could subject a TRS provider to enforcement action.

¹⁸⁴ *See 2000 TRS Order*, 15 FCC Rcd at 5196-5197, para. 138; *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67 & CG Docket No. 03-123, Second Report and Order, Order on Reconsideration, and Notice of Proposed Rulemaking, 18 FCC Rcd 12379, 12415-12416, para. 62 (2003) (*Second Improved TRS Order*).

¹⁸⁵ *See 47 C.F.R. § 64.604(a).*

the current pool of VRS CAs who may or may not meet those qualifications? What affect, if any, would different qualifications have on the ability of VRS providers to comply with the speed of answer requirement? Is there any need to modify the confidentiality and conversation content standards set forth in section 64.604(a)(2) to protect consumers from compromises in call quality? Should obligations with respect to the types of calls VRS providers must process be modified if a per-user compensation mechanism is adopted? Are there other operational standards that should be adopted or modified to ensure high quality VRS for all users?

b. Technical Standards

87. As discussed in section IV.B.2 and Appendix B, we seek comment on establishing detailed iTRS access technology standards. We seek comment on whether those proposals, or the other proposals set forth in this *Further Notice*, necessitate modifications to our TRS technical standards,¹⁸⁶ or the establishment of separate technical standards for VRS. For example, as discussed in section V.B.3 above, should the speed of answer requirements set forth in 64.604(b)(2) be modified? If adopted, would standards consistent with those set forth in Appendix D render the need for rules on equal access to interexchange carriers and caller ID treatment unnecessary?¹⁸⁷

c. Functional Standards

88. We seek comment on whether the proposals set forth in this *Further Notice*, if adopted, necessitate modifications to our TRS functional standards,¹⁸⁸ or the establishment of separate functional standards for VRS. For example, should VRS providers maintain the same types of consumer complaint logs as other providers of TRS?¹⁸⁹

89. Our TRS functional standards rules contain a number of subsections that govern unrelated aspects of the TRS program. Consistent with section V.B.1 above, we seek comment on restructuring our rules into separate logical sections and, in the following paragraphs, seek comment on the substance of these rules.

7. Public Access to Information

90. In the *2010 VRS Reform NOI*, the Commission noted that it has been difficult to assess the effectiveness of funded outreach programs.¹⁹⁰ Outreach to the hearing community continues to be necessary; we are aware, for example, that some businesses refuse to accept relay calls, perhaps due to a failure to understand the nature of TRS.¹⁹¹ We do not, however, believe that our existing practice of relying on VRS providers to conduct effective outreach has been effective. We seek comment on whether the Commission should establish an independent outreach program to educate the general public about TRS, including VRS. Should such a program be conducted specifically by the FCC, a specialized contractor, consumer organizations, state and local governments, or some other entity or combination of

¹⁸⁶ See *id.* § 64.604(b).

¹⁸⁷ See *id.* § 64.604(b)(3), (6).

¹⁸⁸ See *id.* § 64.604(c).

¹⁸⁹ See *id.* § 64.604(c)(1).

¹⁹⁰ *2010 VRS Reform NOI*, 25 FCC Rcd at 8603, para 17.

¹⁹¹ See, e.g., Washington Relay, Don't Hang Up Washington, <http://www.washingtonrelay.com/hangup.html> (last visited Sept. 8, 2011); Alaska Relay, Don't Hang Up!, <http://www.akrelay.com/hangup.aspx> (last visited Sept. 8, 2011); New York Relay, Please, Don't Hang Up, <http://www.nyrelay.com/donthangup.htm> (last visited Sept. 8, 2011); NAD, Message to Businesses: Don't Hang Up!, <http://www.nad.org/issues/telephone-and-relay-services/relay-services/message-businesses-dont-hang> (last visited Sept. 8, 2011).

entities? We note that the Commission recently authorized the expenditure of \$500,000 annually from the Fund to allow entities that have significant experience with and expertise in working with the deaf-blind community to conduct outreach to deaf-blind individuals to make them aware of the availability of specialized CPE to low-income individuals who are deaf-blind.¹⁹² Would this effort serve as a model for VRS?

8. Jurisdictional Separation of Costs

91. We do not propose to modify our rules that govern jurisdictional separation of costs or cost recovery, but nonetheless seek comment on whether modifications to these rules are necessary.¹⁹³

9. Telecommunications Relay Services Fund

a. Contributions and Contribution Computations

92. If the Commission should choose to adopt any of the options set forth in this *Further Notice*, including implementing a TRSBPP or reimbursing expenses for iTRS access technology through the TRS Fund, what modifications, if any, should be made to our rules governing contributions and contribution computations?¹⁹⁴

b. Data Collection

93. If the Commission should choose to adopt any of the options set forth in this *Further Notice*, what modifications, if any, should be made to our rules governing data collection from TRS providers and information filed with the Administrator?¹⁹⁵ For example, is the general grant of authority to the Administrator to request information reasonably “necessary to determine TRS Fund revenue requirements and payments” sufficient? Should the Commission explicitly require providers to submit additional detailed information, such as information regarding their financial status (*e.g.*, a cash flow to debt ratio)?¹⁹⁶

c. Payments to TRS Providers

94. If the Commission should choose to adopt any of the options set forth in this *Further Notice*, including adoption of a per-user compensation mechanism, implementing a TRSBPP or reimbursing expenses for iTRS access technology through the TRS Fund, what modifications, if any, should be made to our rules governing payments to TRS providers, eligibility for payments from the TRS Fund, and notice of participation in the TRS Fund?¹⁹⁷

d. Administrator Reporting, Monitoring, and Filing Requirements; Performance Review; Treatment of TRS Customer Information

95. Many of the possible changes set forth in this item contemplate a role for the Administrator. If the Commission should choose to adopt any of the options set forth in this *Further*

¹⁹² See *Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Section 105, Relay Services for Deaf-Blind Individuals*, Report and Order, CG Docket No. 10-210, 26 FCC Rcd 5640, 5675-76, para. 80 (2011) (*CVAA Implementation Order*).

¹⁹³ See 47 C.F.R. § 64.604(c)(5)(i), (ii).

¹⁹⁴ See *id.* § 64.604(c)(5) (iii)(A), (iii)(B).

¹⁹⁵ See *id.* § 64.604(c)(5)(iii)(C), (I).

¹⁹⁶ Such information might, for example, inform the Commission’s understanding of a VRS provider’s ability to comply with the obligation to provide VRS every day, 24 hours a day. See 47 U.S.C. § 64.604(b)(4).

¹⁹⁷ See 47 C.F.R. § 64.604(c)(5)(iii)(E)-(G).

Notice, what modifications, if any, should be made to our rules governing the obligations of the Administrator, Commission review of the Administrator's performance, and treatment of TRS customer information?¹⁹⁸

e. Enforcement

96. If the Commission should choose to adopt any of the options set forth in this *Further Notice*, what modifications to our rules, if any, are necessary to ensure that they are enforceable?¹⁹⁹

10. Consumer Complaints

97. If the Commission should choose to adopt any of the options set forth in this *Further Notice*, what modifications, if any, should be made to our informal and formal complaint procedures?²⁰⁰

11. Registration Process

98. We seek comment on whether the options set forth in this *Further Notice* necessitate modifications to our iTRS registration rules.²⁰¹ In particular, we seek comment on what modifications, if any, would be necessary to implement the proposals regarding VRS in the workplace discussed in section V.B.2 above. What additional verification standards would be needed?

12. Emergency Calling Requirements

99. We seek comment on whether the options set forth in this *Further Notice* necessitate modifications to our emergency calling requirements.²⁰² In particular, we seek comment on what changes, if any, are necessary to accommodate the elimination of dial around discussed in section V.B.3, above, a one provider per-user system as discussed in section V.B.4 above, or the treatment of VRS in the workplace discussed in section V.B.2 above.

13. Preventing Discrimination

100. Section 225 of the Act requires the Commission to ensure that relay services "are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States."²⁰³ Section 225(d)(1) charges the Commission with the obligation of adopting regulations that, among other things, "prohibit relay operators from failing to fulfill the obligations of common carriers by refusing calls or limiting the length of calls that use telecommunications relay services."²⁰⁴ Pursuant to these statutorily mandated responsibilities and other Commission requirements, the Commission has issued a number of orders finding that specific types and forms of discrimination and fraudulent practices are unlawful and prohibited by the Act and our rules.²⁰⁵

¹⁹⁸ See *id.* § 64.604(c)(5)(iii)(H), (J); *Id.* § 64.604(c)(7).

¹⁹⁹ See *id.* § 64.604(c)(5)(iii)(K).

²⁰⁰ See *id.* § 64.604(c)(6).

²⁰¹ See *id.* § 64.605.

²⁰² See *id.*

²⁰³ 47 U.S.C. § 225(b)(1). Section 225 also requires that TRS provide "functionally equivalent" telephone service for persons with hearing or speech disabilities. *Id.* § 225(a)(3).

²⁰⁴ 47 U.S.C. § 252(d)(1)(E); 47 C.F.R. § 64.604(a)(3)(i) ("Consistent with the obligations of telecommunications carrier operators, CAs are prohibited from refusing single or sequential calls or limiting the length of calls utilizing relay services.").

²⁰⁵ See, e.g., *VRS Call Practices R&O and Certification FNPRM*, 26 FCC Rcd at 5551, para. 6.

As discussed in Section III.E above, however, some VRS providers' still have engaged in unlawful practices.

101. Under a per-user compensation mechanism, we recognize that VRS providers may continue to engage in unlawful practices. Under the per-minute compensation reimbursement method, these unlawful practices have generally occurred through discrimination (*e.g.*, favoring high-volume users over low-volume users), often resulting in waste, fraud, and abuse of the TRS Fund (*e.g.*, seeking payment for non-compensatory minutes through discriminatory practices and outright fraud). By way of example, anecdotal evidence suggests that the per-minute compensation scheme provides unintended incentives to VRS providers to give call priority to high-volume users by placing them first in line for connections and to favor such users by providing them with newer and better VRS access technology before low-volume users. Under a per-user compensation framework, providers likewise may have the incentive to discriminate against high-volume users in favor of low-volume users because providers would be compensated at the same level for all users, regardless of their call volume. Similarly, some providers may utilize a variety of practices geared toward ensuring that low-volume users make the minimum number of calls required to qualify as an "active user" for purposes of compensation from the Fund. Both call discrimination and practices aimed at acquiring and maintaining low-volume "active users" that would not otherwise utilize VRS could result in waste, fraud, and abuse of the TRS Fund and threaten the long-term sustainability of the VRS program.

102. It has become increasingly apparent that our "piece meal" approach to detect and outlaw discriminatory and fraudulent practices has not always worked. As we noted in Section III.E, in many cases, "when directed not to engage in certain calling activities," for example, "some providers have merely shifted to other arrangements that are not specifically prohibited and have engaged in attempts to make non-compliant calls in ways that have made them more difficult to detect."²⁰⁶ To the extent that VRS providers discriminate in the manner in which they handle calls (*e.g.*, the type of call or caller), except as provided for in the Commission's rules, they create inefficiencies in the VRS call processing system.²⁰⁷ Likewise, when a VRS provider engages in fraudulent practices by encouraging or causing VRS calls to be made that would not otherwise be made, or VRS users to be enrolled that would not otherwise be enrolled, except for a provider's desire to drive up its compensation from the TRS Fund, the VRS system is made inefficient. These types of unlawful practices artificially tie up CAs and limit the ability of legitimate callers to use VRS contrary to section 225 of the Act.

103. Further, unlawful VRS provider practices not only allow dishonest providers to obtain a competitive advantage over providers that operate in compliance with the Act and our rules, but undermine the key goals of Congress in enacting section 225. VRS provider practices that result in waste, fraud, and abuse threaten the sustainability of the TRS Fund and are directly linked to the efficiency and effectiveness of the TRS Fund support mechanisms upon which VRS providers rely for compensation. As the Commission has previously found, fraudulent diversion of funds robs the TRS Fund for illicit gain and "abuses a highly valued Federal program that, for the past twenty years, has been critical to ensuring that people with hearing and speech disabilities have the same opportunities to communicate over distances – with family, friends, colleagues, and others – as everyone else."²⁰⁸ Moreover, such practices

²⁰⁶ See *supra* n. 88.

²⁰⁷ See 47 C.F.R. § 64.605(a)(2)(ii) (iTRS providers shall "[i]mplement a system that ensures that the provider answers an incoming emergency call before other non-emergency calls (*i.e.*, prioritize emergency calls and move them to the top of the queue)").

²⁰⁸ *VRS Call Practices R&O and Certification FNPRM*, 26 FCC Rcd at 5551, para. 5.

unlawfully shift improper costs to consumers of other telecommunications services, including local and long distance voice subscribers, interconnected VoIP, and others.²⁰⁹

104. Accordingly, in furtherance of our express authority under section 225(b)(1) and section 225(d)(1)(E) and the goals underlying the provision and regulation of TRS, we propose to adopt regulations prohibiting VRS providers from engaging in practices that result in waste, fraud, and abuse of the TRS Fund, including discriminatory practices (e.g., screening for or refusing to register individuals who are likely to be high volume users, discrimination based on length of calls or call volume, and favoring some users with free or low-cost iTRS access technology based on call volume), and seek comment on this proposal. We conclude that such regulations should apply to all VRS providers as reasonably ancillary to the effective performance of our responsibilities under the Act,²¹⁰ including our mandate to ensure that relay services “are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.”²¹¹ We seek comment on this conclusion, and generally on the Commission’s authority to adopt such regulations as proposed.²¹²

14. Preventing Slamming

105. As discussed above and in the *VRS Call Practices R&O and Certification FNPRM*, the current VRS per-minute compensation structure has been vulnerable to unforeseen and difficult-to-detect waste, fraud, and abuse.²¹³ We recognize that a per-user compensation structure could lead to other abuses by providers in order to increase the number of their active users and generate revenue. For example, under a per-user compensation scheme, VRS providers would have an incentive to engage in

²⁰⁹ VRS users are not charged for use of the service. Rather, these costs are passed on to all consumers of telecommunications service by intrastate and interstate common carriers, either as a surcharge on their monthly service bills or as part of the rate base for the state’s intrastate telephone services. *2005 Financial Incentives Declaratory Ruling*, 20 FCC Rcd at 1468, para. 6. When a VRS provider engages in fraudulent practices, the costs are unlawfully passed on to the public.

²¹⁰ The Commission has authority to promulgate regulations to effectuate the goals and provisions of the Act if the regulations are “reasonably ancillary to the effective performance of the Commission’s various responsibilities” under the Act. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (upholding Commission regulation of cable television systems as a valid exercise of ancillary jurisdiction). *See also Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988) (upholding Commission authority to establish a “Universal Service Fund” in the absence of specific statutory authority as ancillary to FCC responsibilities under sections 1 and 4(i) of the Act). The Supreme Court has stated that “[t]he Commission . . . may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission’s general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.” *Comcast Corp. v. FCC*, 600 F.3d 642, 646–47 (D.C. Cir. 2010) (quoting *Am. Library Ass’n v. FCC*, 406 F.3d 689, 691–92 (D.C. Cir. 2005)) (alterations in original). The court further ruled that the second prong of this test requires the Commission to rely on specific delegations of statutory authority. 600 F.3d at 644, 654.

²¹¹ 47 U.S.C. § 222(b)(1).

²¹² *See infra* section VII.

²¹³ *See supra* section II.B; *VRS Call Practices R&O and Certification FNPRM*, 26 FCC Rcd at 5551, para. 6 (“[T]he Commission has attempted to curb the fraud pervading the VRS program by admonishing providers about improper call handling and other practices that generate VRS calls that would not otherwise be made by consumers, as well as arrangements and schemes that violate section 225 and our rules.”).

“slamming” and misleading marketing practices because reimbursement would be based on the number of registered users rather than on the total minutes of use.²¹⁴

106. The Commission has previously sought comment on the need for VRS specific rules against slamming to protect relay consumers against unauthorized default provider changes.²¹⁵ We incorporate by reference comments previously filed on this issue and seek to refresh the record on this issue.²¹⁶ To protect VRS users from unwanted changes in their default provider, we seek further comment on whether we should adopt rules governing a user’s change in VRS providers. We seek comment on the types of safeguards that should be put in place to protect users from unauthorized changes in their VRS default provider. We also seek comment on what type(s) of authorization providers must obtain prior to switching a subscriber’s default provider and how verification of any such authorization should be obtained and maintained by the receiving provider. Additionally, we seek comment on whether and how providers may use information obtained when receiving notification of a user’s service change to another provider, whether for marketing, win-back, or other purposes.²¹⁷

15. Audits.

107. Section 64.604(c)(5)(iii)(C) of our rules states that the TRS Fund Administrator “and the Commission shall have the authority to examine, verify and audit data received from TRS providers as necessary to assure the accuracy and integrity of fund payments.” We seek comment on whether the TRS Fund Administrator or the Commission requires additional authority to conduct audits under the rules we propose in this *Further Notice*.

C. Implementing the Transition from Per-Minute to Per-User Compensation

108. As discussed in section IV.D, implementation of the reforms discussed in this *Further Notice*, if adopted, would need to be phased in according to a well-developed and transparent plan. In this section, we seek comment on how to conduct such a transition.

1. Phases

109. A transition from a per-minute to a per-user compensation mechanism can be conceptualized as consisting of three phases. The first phase would be the “implementation phase,”

²¹⁴ In the context of telecommunications services, slamming occurs when a company changes a subscriber’s carrier selection without that subscriber’s knowledge or explicit authorization. *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers’ Long Distance Carriers*, CC Docket No. 94-129, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508, 1510, para. 1 (1998) (*1998 Slamming Order*). Section 258 of the Act and the Commission’s implementing regulations explicitly prohibit slamming by telecommunications carriers. See 47 U.S.C. § 258(a) (“No telecommunications carrier shall submit or execute a change in a subscriber’s selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe”); see also, e.g., 47 C.F.R. § 64.1120(a) (“No telecommunications carrier shall submit or execute a change on the behalf of a subscriber in the subscriber’s selection of a provider of telecommunications service except in accordance with the procedures prescribed in this subpart”).

²¹⁵ *Internet-based TRS Numbering Order*, 23 FCC Rcd at 11633-38, paras. 119-130.

²¹⁶ We specifically refer to comments filed in CG Dockets No. 03-123 and 10-51.

²¹⁷ Section 222 of the Act governs the use of comparable information (specifically, customer proprietary network information (“CPNI”)) by telecommunications carriers. See 47 U.S.C. § 222; *Bright House Networks, LLC v. Verizon California, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 10704 (2008), *pet. for rev. denied Verizon California, Inc. v. FCC*, 555 F.3d 270, (D.C. Cir. Feb 10, 2009).

during which all conditions necessary to prepare for the switch from per-minute to per-user compensation would be met, including measures to make the existing base of customers more contestable and bring new VRS users into the program. The implementation phase would begin immediately after the adoption of a final order in this proceeding, and terminate with the initiation of per-user compensation at an initial per user rate. The second phase would be the “growth phase” during which smaller providers would have the opportunity to achieve scale by adding users and all providers would transition from their initial per-user rate set during the implementation phase to a unitary at-scale “base rate” discussed in Appendix C (if those rates are different). The third and final phase would be the “scale phase,” during which all providers are compensated at a per-user compensation mechanism selected by the Commission to reflect the cost of providing VRS service at scale. We seek comment on whether these three phases are the appropriate logical structure for a transition from per-minute to per-user compensation. We also seek comment, in the following sections, on how each of the phases of a transition should be conducted.

a. Implementation Phase

110. As described above, the “implementation phase” would be the time period during which all conditions necessary to prepare for the switch from per-minute to per-user compensation would be met. The implementation phase would begin upon the adoption of a final order in this proceeding, and terminate with the initiation of per-user compensation. We seek comment in this section on how an implementation phase should be conducted.

(i) VRS Provider Compensation During Implementation Phase

111. We seek comment on how VRS providers should be compensated during the implementation phase. As discussed in greater detail in the following paragraphs, the Commission and the Administrator will need to gather data from VRS providers before an initial per-user rate can be established. We therefore seek comment on what the per-minute rate should be during the implementation phase. The Commission stated in the 2011 VRS Rate Order that the interim rates currently in effect would “be in effect on an interim basis until the Commission completes its examination of VRS rates and compensation as part of the 2010 VRS NOI proceeding” because “extending the current interim rates and compensation structure temporarily provided the best means to ensure stability and certainty for VRS while the Commission continues to evaluate the issues and the substantial record developed in response to the 2010 VRS NOI proceeding.”²¹⁸ Should the Commission extend the current interim rates during the implementation period to provide continued certainty during the implementation phase?

(ii) Actions to be conducted during the implementation phase

112. We seek comment on what actions need to be taken during the implementation phase and the timing of such actions. If we adopt a per-user mechanism, we propose to require that each of the following occur during the implementation phase:

- The VRSURD be established and operational;
- The TRSBPP be established and operational;
- iTRS access technology standards be adopted and implemented;
- “One provider per user” be implemented (*i.e.*, VRS users must select a single VRS provider); and
- The initial per-user rate (or rates) be calculated and published.

²¹⁸ 2011 TRS Rate Order at paras. 1, 7.

We describe in greater detail and seek comment on these conditions in the following paragraphs.

113. *VRSURD*. As discussed in section V.A and Appendix D, a VRSURD would be essential to (i) ensure that each VRS user has at least one default provider, (ii) allow for the identification of new-to-category users, (iii) support the operation of the TRS Broadband Pilot Program discussed in section IV.A.1 and Appendix A, and (iv) ensure efficient program administration. In order to establish a VRSURD, the neutral database administrator must be selected, construct the database, work with industry to populate the database, test the functionality of the database, and be prepared to support the functionality described in Appendix D before the Commission can effectively implement a “one provider per user” rule. The data that will be submitted to the VRSURD also will be critical to establishing a per-user rate.

114. We note that the Commission completed the comparable task of establishing the iTRS numbering directory in six months.²¹⁹ We seek comment on whether this is a reasonable timeframe for the establishment of the VRSURD. Are there issues that would make the process of establishing a VRSURD take more – or less – time than was needed to establish the iTRS numbering directory? If so, what are those issues, and what impact would they have on the timing?

115. *TRSBPP*. As discussed in section IV.A.1 and Appendix A, we propose, to the extent there is unaddressed demand for VRS, to promote residential broadband adoption via a pilot program to provide discounted broadband Internet access to low-income Americans who are deaf, hard of hearing, deaf-blind, or speech disabled. We note that implementation of a TRSBPP would require that a VRSURD be established and that the Administrator, VRS providers, and broadband providers all take steps to establish and implement appropriate procedures. We seek comment on how much time should be allowed for the TRSBPP to be implemented. We also seek comment on whether it would be necessary to have the TRSBPP operational before the end of the implementation period, or whether that program, to the extent adopted, could be implemented at a later time.

116. *iTRS access technology standards*. Appropriate VRS access technology standards must be in place before VRS providers can be expected to compete effectively for VRS users. We seek comment on how much time the Commission should allocate for each of the actions described in Appendix D, including the adoption of iTRS access technology standards, the time necessary for any standards transition phases for the installed base of VRS access technology and/or for new VRS users, the establishment of a conformance and interoperability testing regime, and the establishment of an ongoing standards governance process. To what extent must the steps described in Appendix D be completed during an implementation phase? Could certain steps be completed during the growth phase?

117. *One provider per user*. As discussed in section V.B.4, users must select a single default provider under a per-user compensation system. At what point during the implementation phase would it be appropriate to implement such a requirement? How long should VRS users be given to make a provider selection? What should happen if VRS users fail to select a default provider during the time allotted? How long before the end of the implementation period should the selection period end to ensure that the Commission and the Administrator have accurate counts of each VRS providers’ user base on which to rely when establishing per-user rates?

118. *Calculation of initial per-user rate(s)*. As discussed above, we contemplate that the implementation phase would terminate with the initiation of per-user compensation. We seek comment on how the initial per-user compensation rate for each VRS provider should be calculated. Should all VRS providers be compensated at the same initial rate, or is it more appropriate to set a separate initial per-user rate for each provider? Should providers immediately be paid at the “target base rates”

²¹⁹ *Internet-based TRS Numbering Order*, 23 FCC Rcd at 11618, para. 74.

established as discussed in Appendix C? Should each VRS provider be compensated at an initial per-user rate that keeps them revenue neutral (*i.e.*, each provider would continue to receive the same amount of revenue immediately before and immediately after the switch to a per user rate)?

119. To the extent initial revenue neutrality is a goal, would the first year of the implementation phase be the appropriate reference period for determining the appropriate revenue level, or would some other time period be more appropriate? How would the appropriate level be established? When should a VRS provider's number of users be determined? Would it be appropriate to use the VRS user count immediately after VRS users are required to select a single default provider, or should a "settling in" period be allowed to pass first to allow for customers to switch providers? How long should such a settling in period be? We note that to the extent that providers are kept revenue neutral between the end of the per minute mechanism and the start of the per user mechanism, they may have an incentive to depress their initial user count to inflate the corresponding initial per user rate. We seek comment on ways to prevent this.

120. What other factors should be taken into account when establishing an initial per-user rate? For example, should there be a maximum per-user compensation rate established so as to ensure that VRS providers with very few users at the end of the implementation period are not paid an "excessive" per-user rate? Should a VRS provider's capital structure be taken into account when establishing their initial per-user rate? To what extent should the Commission be concerned that an initial per-user rate might increase the likelihood of a VRS provider being unable to sustain its current capital structure? How disruptive would such financial restructuring be to the service experienced by VRS users? How, if at all, would such a proceeding affect the TRS Fund in the long term?

121. *Other possible conditions.* We seek comment on what, if any, additional conditions should be met during the implementation phase. For example, should the new-to-category incentive payment, if adopted, be available during the entirety of the implementation phase, or should that incentive payment be made available only after the TRSBPP has been implemented? This would help to ensure that a new-to-category incentive is not paid for registering individuals who already are aware of the VRS program but did not register solely due to the cost of a broadband Internet connection.

122. *Duration.* Should the total duration of the implementation period be limited in time, or only by the achievement of the necessary conditions? If limiting the total duration of the implementation period is appropriate, what should the deadline be? Should there be interim deadlines established for meeting any of the conditions set pursuant to the discussion in the paragraphs above? What should those deadlines be? For the sake of clarity, commenters responding to these questions should reference the date that a final order is adopted in this proceeding (*e.g.*, "the deadline for such action should be one year from the adoption of a final order").

123. What should be the result if any deadlines established pursuant to the discussion in the preceding paragraph are not met? Would it be appropriate to implement one of the default alternatives discussed in section VI?

b. Growth Phase

124. The "growth phase" of a transition from per-minute to per-user compensation would be that time during which small providers would have the opportunity to achieve scale by adding users and transition from their initial per-user rate to the unitary, at-scale "target base rate" discussed in Appendix C (if those rates are different). The growth phase would terminate once all VRS providers are being compensated at the target base rate.

125. The growth phase would be defined primarily by three factors: the initial per-user rate for each VRS provider, the target base rate, and the transition from the initial per-user rate(s) to the target

base rate. As we seek comment above on how to establish the initial per-user rate(s) and below on setting the target base rate,²²⁰ we focus our inquiry in this section on the transition path.

126. As illustrated in Figure 3 below, two questions must be answered once initial per-user rates and the target base rate are established. First, how long should the growth period be? That is, how much time should elapse between t_{initial} and t_{final} ? Second, what should the per-user rate be during the growth period? Or, put another way, what should be the shape of the rate curve between t_{initial} and t_{final} ? We seek comment on these questions.

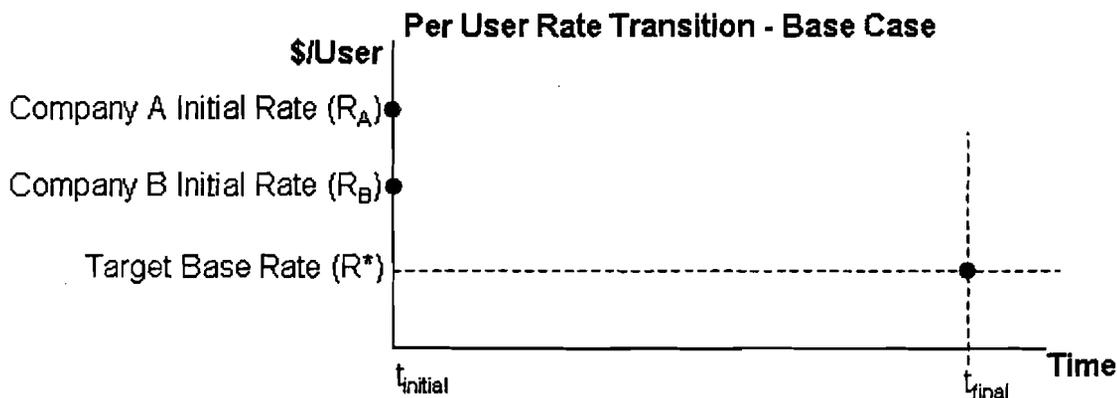


Figure 3

127. *Duration of growth period.* We seek comment on the appropriate duration of the growth period. How should the Commission balance the need to give providers a fair chance to adapt their cost structures to the new reimbursement scheme (e.g., by attaining scale economies and/or adjusting their financing commitments) against the knowledge that every year of paying rates above the target base rate, R^* , could be considered an unnecessary expenditure of Fund resources? What other factors should be taken into account when determining the appropriate duration of the growth period?

128. *Shape of the rate curve.* We seek comment on the appropriate per-user rate over the course of the growth period. One approach, illustrated in Figure 4, would be to simply compensate each VRS provider at the initial per-user rate established during the transition period. As discussed above, such rates could be unique to each provider (e.g., R_A and R_B as shown in Figure 4) or common to all providers (e.g., the target base rate, R^* , or another unitary rate).

²²⁰ See *supra* paras. 118-120; Appendix C.

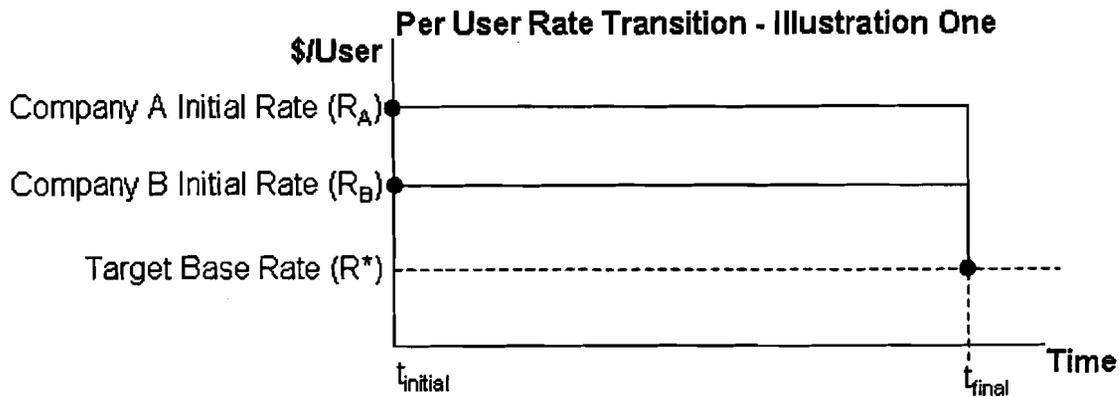


Figure 4

129. An alternative approach, illustrated in Figure 5, would be to reduce each provider's per-user compensation rate during the course of the growth period until the target base rate is reached. Figure 5 illustrates a simple version of this approach, with each VRS provider's per-user compensation being reduced to the target base rate in two steps, the first at t_1 and the second at t_{final} .

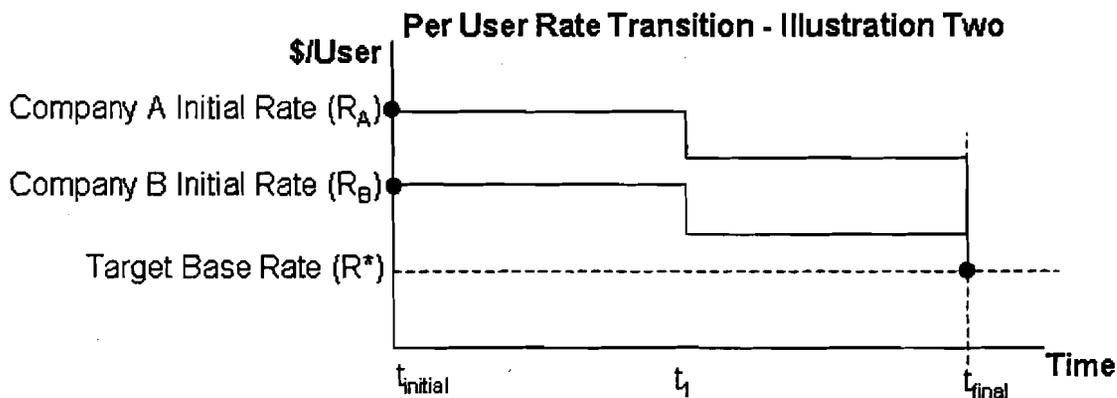


Figure 5

130. Note that, regardless of the shape of the rate curve, providers will benefit from the certainty of a pre-determined trajectory during the duration of the growth period, which will allow them to make operational and financing plans with minimal regulatory risk. We seek comment on the rates that should be paid during the growth period. Should there be a single rate during the growth period, or should the rate be reduced in steps over time? If the rate should be reduced, what should the duration of each step be, and how should the amount of the reduction be calculated? Commenters should provide detailed explanations of and justifications for their recommendations, to include any financial data necessary to support the use of a particular rate curve. If we transition to a per user rate following this NPRM, we expect to set t_{initial} , t_{final} , R^* , and the trajectory as soon as possible as part of the initial rate setting process to provide multi-year certainty for providers. Further discussion of the target base rate can be found in Appendix C.

131. *New entrants.* To the extent newly certified VRS providers are authorized to be compensated by the Fund and begin to provide service during the transition period ("new entrants"), how

should those entrants be compensated? Should they be compensated at the target base rate, the weighted average rate being paid to existing providers at the time of entry,²²¹ or some other rate?

c. Scale Phase

132. The third and final phase of a transition from a per-minute to a per-user compensation mechanism would be the “scale phase,” during which all providers are compensated at the same per user rate selected by the Commission. Thus, the scale phase would be the “steady state” that exists after compensation has transitioned to a per-user mechanism and all providers are being compensated at the efficient target base rate. We seek comment on the appropriate way to determine the annual per-user compensation rate during the scale phase.

133. If we adopt a per-user mechanism, we propose to adopt for the scale phase a price cap mechanism consistent with that adopted by the Commission for IP Relay in the *2007 Rate Order*.²²² Under that plan, the compensation rate is set for a period of three years, “during which time the rates would be adjusted upward annually for inflation (according to a pre-defined inflation factor) and downward to account for efficiency gains (according to a factor also set at the outset of price caps).”²²³

134. Specifically, we propose to adopt the general model established for IP Relay in the *2007 Rate Order*, with the exception of how the base rate is calculated. As described in the *2007 Rate Order*:

As a general matter, the price cap plan applies three factors to a base rate – an Inflation Factor, an Efficiency (or “X”) Factor, and Exogenous Costs. The basic formula takes a base rate and multiplies it by a factor that reflects an increase due to inflation, offset by a decrease due to efficiencies. The Inflation Factor will be the Gross Domestic Product – Price Index (GDP-PI). The Efficiency Factor will be set as a figure equal to the Inflation Factor, less 0.5 percent (or 0.005) to account for productivity gains. As a result the rate for a particular year will equal the rate for the previous year, reduced by 0.5 percent (*i.e.*, $\text{Rate}_{\text{Year } Y} = \text{Rate}_{\text{Year } Y-1} (1 - 0.005)$). Reducing the rate by this amount will encourage VRS providers to become more efficient in providing the service.

We will also adjust the rate, as necessary, due to exogenous costs, *i.e.*, those costs beyond the control of the IP Relay providers that are not reflected in the inflation adjustment. Therefore, to the extent the Commission adopts new service requirements, we will determine whether the costs of meeting the new requirements warrant an upward exogenous adjustment.²²⁴

135. A number of providers asserted at that time that a price cap approach would have at least three benefits: (1) it would create incentives for providers to lower costs; (2) the three year time frame gives providers “predictability about revenue to allocate money to programs that will reduce costs in the future;” and (3) it simplifies the rate setting process, saving time and money.²²⁵ One provider also emphasized that under price caps, providers would focus on increasing efficiencies to accommodate decreasing rates.²²⁶ We note that many of the same providers supported the establishment of a cost

²²¹ That is, the per-user rate being paid to existing providers in a given month weighted by each providers' actual user count.

²²² *2007 TRS Rate Methodology Order*, 22 FCC Rcd at 20159-60, paras. 43-44.

²²³ *See id.*

²²⁴ *Id.* at 10-11.

²²⁵ *Id.* at 2-3.

²²⁶ Sprint Nextel Corporation Oct. 30, 2006 Comments, CG Docket No. 03-123 at 6-7.

recovery methodology for VRS at that time, and believe that the benefits attributed to the adoption of a price cap methodology in that context will adhere equally in the VRS context.²²⁷

136. We seek comment on this proposal. Should the specifics of this methodology be modified for VRS? For example, should we adopt a different Inflation Factor or Efficiency Factor? Should the standards for an exogenous cost adjustment be modified? Is a three year time frame appropriate for VRS? What other factors might be appropriate for inclusion in such a methodology?

2. Contracts

137. In section V.B.5 above we seek comment on whether to allow VRS providers to require VRS users who are either (i) new-to-category VRS users (*i.e.*, have not previously signed up for VRS) or (ii) switching from another VRS provider to enter into a service contract after the adoption of a per-user compensation mechanism. If we were to adopt such a proposal, during what phase of the transition described above would it be appropriate to allow providers to require VRS users to enter into contracts?

VI. ALTERNATIVES TO STRUCTURAL REFORM

138. We seek comment on the rate methodology the Commission should adopt should (i) the Commission choose not to adopt the per-user rate methodology proposed in this *Further Notice* or (ii) should the transition to a per-user methodology be terminated before it is completed.²²⁸ We note that each of the reform proposals described in this NPRM – increasing VRS availability (via broadband subsidies, new to category incentives, and enterprise VRS), ensuring the interoperability and portability of VRS access technologies via standards, compensating VRS providers at a single at-scale rate, and moving to a per-user compensation scheme – is worth pursuing in itself to improve the program, although as they are mutually reinforcing we explore implementing them all, sequenced appropriately.

139. We note that the Commission in the *2010 TRS Rate Methodology Order* adopted interim VRS rates representing the average of the tiered rates established in 2007, which were based on providers' projected costs, and the Administrator's 2010 proposed rates, which, in turn, were based on providers' actual, historical costs.²²⁹ These interim rates reflect a balance between the goal of ensuring that VRS providers recover from the Fund only the reasonable costs caused by their provision of VRS²³⁰ and the goal of ensuring quality and sufficient service during the pendency of this proceeding.²³¹ In anticipation of the proposals set forth in this *Further Notice*, CGB waived the May 1, 2011 Fund Administrator filing requirement for VRS payment formulas and revenue requirements for the 2011-12 TRS Fund year,²³² and subsequently concluded that it would be more efficient and less disruptive to

²²⁷ *2007 TRS Rate Methodology Order*, 22 FCC Rcd at 20161-62, paras. 50-51.

²²⁸ For example, if the Commission should determine that the transition to a per-user methodology should be terminated prior to initiating the Growth Phase. See *infra* section V.C.1.b.

²²⁹ See *2010 TRS Rate Methodology Order*, 25 FCC Rcd at 8690, para. 2.

²³⁰ See 47 U.S.C. § 225(d)(3)(B).

²³¹ See *2010 TRS Rate Methodology Order*, 25 FCC Rcd at 8690, para. 2.

²³² *Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 10-51 and 03-123, Order, 26 FCC Rcd 5231 (CGB 2011) (*VRS Rate Filing Waiver Order*).

extend the existing interim rates while concluding the evaluation of the issues and the substantial record developed in response to this proceeding.²³³

140. We propose that if a per-minute rate methodology is retained, the Commission adopt, consistent with the recommendations of the Administrator for the 2010-2011 fund year, a per-minute rate based on weighted average actual per-minute provider costs for the most recently completed fund year.²³⁴ The Commission in the 2010 TRS Rate Methodology Order found that the Administrator's "proposed rates based on actual costs [were] reasonable and supported by record evidence," and that it was suitable that "we exercise our discretion to use them as a basis for setting an interim rate for the 2010-2011 Fund year."²³⁵ Although we have, during this interim period, allowed providers to recover their costs at rates well above those based on actual cost data so as to avoid "a significant and sudden cut to providers' compensation,"²³⁶ in the event that broader structural reform is not possible at this time, we find it reasonable to move to a rate based entirely on providers' actual costs. We seek comment on this proposal.

141. We further propose to eliminate the current tier structure and utilize a single rate based on the weighted average of providers' actual costs.²³⁷ The rationale for adopting the tiers in the *2007 TRS Rate Methodology Order* was that providers with a relatively small number of minutes generally have higher costs.²³⁸ We expect data from providers will show that this remains the case today. Consistent with our analysis above, however, the tiered rate structure supports an unnecessarily inefficient market structure, and apparently provides insufficient incentive for VRS providers to achieve minimal efficient scale.²³⁹ Further, our findings in the *2010 TRS Rate Methodology Order* continue to hold true: "[t]o the extent that one provider commands a substantial share of the VRS market, we find that [the Administrator's] use of weighted averages is appropriate, and properly balances, on one side, the greater relative costs incurred by smaller providers with, on the other, not penalizing providers operating at lower costs for their greater efficiency. We therefore conclude that [the Administrator's] methodology, and use of actual cost information submitted by the providers and certified under penalty of perjury to be true and correct, [was] reasonable."²⁴⁰ We seek comment on this proposal to eliminate the current tier structure and utilize a single rate based on the weighted average of providers' actual costs.

142. We seek comment on what steps the Commission and the Administrator should take to implement these proposals, should the Commission choose to adopt them. For example, by when should

²³³ See *2011 TRS Rate Order*, see also Video Relay Service Reform, Paul de Sa, Chief, Office of Strategic Planning and Karen Peltz Strauss, Deputy Bureau Chief, Consumer and Government Affairs (May 5, 2011) available at <http://www.fcc.gov/blog/video-relay-service-reform>.

²³⁴ See NECA, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate (filed Apr. 30, 2010) (*2010 TRS Rate Filing*). Thus, for example, we would use data from the 2010-2011 Fund year to set rates for the 2011-2012 Fund year. We note that by NECA's calculation, the rates based on actual, historical costs for the 2010-2011 Fund year would have been \$3.8963 for Tier III. *2010 TRS Rate Methodology Order*, 25 FCC Rcd at 8692, para. 6.

²³⁵ See *2010 TRS Rate Methodology Order*, 25 FCC Rcd at 8696, para. 13.

²³⁶ See *id.* at 8695, para. 12.

²³⁷ See *2010 TRS Rate Filing* at 23-24.

²³⁸ See *2007 TRS Rate Methodology Order*, 22 FCC Rcd at 20163, para. 52.

²³⁹ See *supra* section III.D.

²⁴⁰ See *2010 TRS Rate Methodology Order*, 25 FCC Rcd at 8695, para. 10.

the Administrator require VRS providers to file the requisite cost data? To what extent should the Administrator, or providers, obtain independent audits of the data to be submitted? Should the Commission accept late filed data, or simply calculate the rate based on data submitted by the deadline established by the Commission or the Administrator? What other steps must the Commission or the Administrator take to ensure that a per-minute rate based on providers' actual costs can be established in an expeditious fashion? Finally, we seek comment on whether there are other viable alternatives to adopting a per user or per minute rate methodology. We propose that ignoring the last ten years of experience with the TRS program, both good and bad, and the technological progress that has occurred over the same period, and simply continuing with the program as currently structured (perhaps with relatively minor tinkering around the margins) is simply not a viable option for the Commission in its duty to manage responsibly the contributions of millions of Americans to a program that disburses over half a billion dollars a year. We therefore discourage commenters from assuming a Panglossian stance with respect to a status quo that is increasingly failing to meet the needs and expectations of its stakeholders including, especially, actual and potential VRS users.

VII. LEGAL AUTHORITY

143. We seek comment on our legal authority to adopt each of the options and proposals discussed in this *Further Notice*. As noted above, section 225 of the Act requires the Commission "to make available to all individuals in the United States a rapid, efficient nationwide communication service, and to increase the utility of the telephone system of the Nation," and directs that "the Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States."²⁴¹ Section 225 further requires that the Commission, among other things, "establish functional requirements, guidelines, and operations procedures for telecommunications relay services,"²⁴² "establish minimum standards that shall be met in carrying out [the provision of TRS],"²⁴³ and "require that users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communication services."²⁴⁴ Does section 225, standing alone, provide sufficient authority for the options and proposals contemplated in this *Further Notice*? Do the Commission's grants of authority in the Act, including those in sections 1, 2, 4(i), 255, and 303(r), and section 706 of the Telecommunications Act of 1996,²⁴⁵ provide additional authority?²⁴⁶ Does section 254 of the Act, which sets forth the goal that "consumers in all regions of the nation, including low-income consumers, . . . should have access to telecommunications and information services," provide additional legal authority for proposals in this item targeted towards low-income consumers?²⁴⁷

144. We seek additional comment on our authority to establish the TRSBPP. Specifically, we seek comment on our authority to collect contributions to the TRS Fund to support broadband Internet access for low income VRS users and to disburse the relevant support.²⁴⁸ Section 225 of the Act provides

²⁴¹ *Id.* § 225(b)(1).

²⁴² *Id.* § 225(d)(1)(A).

²⁴³ *Id.* § 225(d)(1)(B).

²⁴⁴ *Id.* § 225(d)(1)(D).

²⁴⁵ *Id.* § 1302(b). Section 706 was originally codified as a note to section 157 of the Communications Act of 1934, as amended, but was later transferred to its current statutory section.

²⁴⁶ *See id.* §§ 154(i), 154(k), 218, and 403.

²⁴⁷ *See* 47 U.S.C. § 254(b)(1),(3).

²⁴⁸ *See supra* section IV.A.1.

that the Commission “shall ensure that interstate and intrastate telecommunications relay services are *available*, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.”²⁴⁹ We seek comment on whether VRS is not “available” to a potential user who is unable to afford broadband Internet access. Does section 225(b)(1), standing-alone, provide authority for the Commission to assess contributions and disburse support for broadband Internet access?

145. Section 225 does not explicitly describe how the Commission must ensure that TRS is available. The subsection that most nearly describes how TRS providers should be compensated is section 225(d)(3), which addresses recovery of costs in the context of jurisdictional separations. Section 225(d)(3)(A) requires the Commission to “prescribe regulations governing the jurisdictional separation of costs for the services provided pursuant to this section,” which we construe to mean that the Commission should specify how providers distinguish between interstate and intrastate costs.²⁵⁰ Subsection (B) further provides that the Commission’s regulations “shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service.”²⁵¹ The statute does not address how those costs are to be recovered from subscribers, nor how payments are to be disbursed to providers. In the absence of such guidance, the Commission chose to establish a shared funding mechanism – the TRS Fund – over other possible funding mechanisms.²⁵²

146. Does section 225(d)(3)(B) limit the Commission’s ability to disburse support only for “costs caused by interstate telecommunications relay services,” or does the Commission have authority to disburse additional funds to the extent necessary to ensure that the mandate of section 225(b)(1) – to make TRS “available” – is met? Would section 225(d)(3)(B) authorize the Commission to require contributions to the TRS Fund to support broadband Internet access if we find that broadband Internet access is necessary to meet our section 225(b)(1) mandate? Are there other considerations?

147. Does section 706(b) of the Telecommunications Act of 1996 provide additional support for the TRSBPP?²⁵³ The Commission found in the Seventh Broadband Progress Report that broadband is not “being deployed to all Americans in a reasonable and timely fashion.”²⁵⁴ Section 706(b) directs the Commission, in light of that determination, to “take immediate action to accelerate the deployment” of broadband.²⁵⁵ Does this directive provide the Commission with additional authorization to utilize the TRS Fund to promote broadband availability in conjunction with the goal of promoting the availability of TRS?²⁵⁶

148. We note another, more recent legislative development on this issue. Congress in the CVAA authorized the Commission to provide up to \$10 million support annually from the Fund for

²⁴⁹ 47 U.S.C. § 225(b)(1) (emphasis added).

²⁵⁰ *Id.* § 225(d)(3)(A).

²⁵¹ *Id.* § 225(d)(3)(B).

²⁵² See *TRS II*, 8 FCC Rcd 1802; *Telecommunications Relay Services, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, 8 FCC Rcd 5300 (1993) (*TRS III*); see also *supra* para. 4.

²⁵³ See 47 U.S.C. § 1302(b).

²⁵⁴ See *Seventh Broadband Progress Report*, 26 FCC Rcd at 8035, para. 52.

²⁵⁵ See 47 U.S.C. § 1302(b).

²⁵⁶ See *Seventh Broadband Progress Report* at paras. 18-20; see also *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Americans With Disabilities Act of 1990*, Second Report and Order, Order on Reconsideration, and Notice of Proposed Rulemaking, 18 FCC Rcd 12379, 12383-84, para. 4 (2003) (noting that VRS, for example, “fosters greater access to and use of broadband.”).

programs for “the distribution of specialized customer premises equipment designed to make telecommunications service, Internet access service, and advanced communications, including interexchange services and advanced telecommunications and information services, accessible by low-income individuals who are deaf-blind.”²⁵⁷ Does this explicit authorization to utilize the TRS Fund to pay for equipment used to make non-TRS services available to Americans with disabilities limit the Commission’s authority to utilize the TRS Fund to effectuate the availability mandate in section 225(b)(1) or other mandates in the Act?

149. The CVAA also directs the Chairman to create an Emergency Access Advisory Committee “[f]or the purpose of achieving equal access to emergency services by individuals with disabilities.”²⁵⁸ The Committee is charged, among other things, with making recommendations about “what actions are necessary as a part of the migration to a national Internet protocol-enabled network . . . that will ensure access to emergency services by individuals with disabilities,”²⁵⁹ and “for the possible phase out of the use of current-generation TTY technology to the extent that this technology is replaced with more effective and efficiency technologies and methods to enable access to emergency services by individuals with disabilities.”²⁶⁰ The Commission has authority to implement the recommendations of the Committee, and to promulgate “any other regulations . . . as are necessary to achieve reliable, interoperable communication that ensures access by individuals with disabilities to an Internet protocol-enabled emergency network, where achievable and technically feasible.”²⁶¹ Ensuring that individuals with hearing and speech disabilities who use ASL have access to VRS would, by definition, ensure that those people would have access to an “Internet protocol-enabled emergency network,” as (i) VRS providers must afford their users access to 911 service and (ii) VRS requires that the user obtain a high speed internet connection to access the service.²⁶² Ensuring access to VRS also would facilitate the phase out of TTY technology to the extent that the cost of broadband Internet access is preventing current TTY users from transitioning to VRS or other forms of Internet-based TRS. We seek comment on whether these provisions provide the Commission with authority, to the extent recommendations of the Committee are consistent, to create the TRSBPP. We seek comment also on any other sources of authority that would enable the Commission to require contributions to the TRS Fund and disburse funds from the TRS Fund for the purpose of supporting broadband Internet access for low-income individuals who are deaf, hard of hearing, have a speech disability, or are deaf-blind and use ASL as their primary form of communication.

150. We also seek comment on our authority to collect contributions to the TRS Fund to provide reimbursements for relay hardware and software used by the consumer, including installation, maintenance costs, and testing.²⁶³ Does the “availability” mandate in section 225(b)(1) discussed in the preceding paragraphs provide authority for such reimbursements?²⁶⁴ Does section 706(b) of the Act or the CVAA provide additional authority?²⁶⁵

²⁵⁷ CVAA § 105; 47 U.S.C. § 719.

²⁵⁸ 47 U.S.C. § 615c.

²⁵⁹ *Id.* § 615c(c)(1).

²⁶⁰ *Id.* § 615c(c)(6).

²⁶¹ *Id.* § 615c(g).

²⁶² 47 C.F.R. § 64.605 (emergency calling requirements for Internet-based TRS providers).

²⁶³ *See supra* section IV.B.4.

²⁶⁴ *See* 47 U.S.C. § 225(b)(1).

²⁶⁵ *See id.* § 1302(b); CVAA.

VIII. OTHER ISSUES

151. We seek comment on other issues related to the issues addressed in this *Further Notice*.

A. Data Security and Privacy

152. We note that the privacy-based limitations on the government's access to customer information in Title II of Electronic Communications Privacy Act (ECPA), section 222 of the Communications Act, and our implementing rules and the privacy provisions of the Cable Act, may be implicated by the collection of the data discussed in this *Further Notice*.²⁶⁶ We seek comment on whether any of these pre-existing regulatory or statutory requirements create any concerns with respect to our ability to adopt the proposals discussed in this *Further Notice*, including the storage by a database administrator of customer data discussed in Appendix D. We seek comment on how best to address these concerns. Would it be appropriate or necessary to require VRS users to consent to certain disclosures as a condition of receiving service in order to ensure that the VRS program is operated efficiently and the Commission and the Fund Administrator can fulfill their auditing and management functions effectively? What would be the appropriate extent of such a consent requirement, and what other regulatory privacy protections, if any, would be necessary if such a requirement were adopted?

B. Request for Data

153. We request that providers and other interested parties provide such data as is necessary to support their comments in response to this *Further Notice*. We note that we may find factual information supported by affidavit or certification to be more persuasive than information that is not so supported. In that regard, we further note that any submissions containing knowing or willful misrepresentations, whether or not supported by affidavit or certification, are punishable by fine or imprisonment.²⁶⁷

C. Support Of Certification Applications And Annual Reports By Certification Under Penalty Of Perjury

154. In the *2011 VRS Certification Order*, we adopted interim rules requiring that providers certify, under penalty of perjury, that their certification applications and annual compliance filings required under section 64.606(g) of the Commission's rules are truthful, accurate, and complete.²⁶⁸ We found good cause to adopt these interim rules to ensure that providers seeking certification and providers holding certifications may be held accountable for their submissions as they seek to secure or retain certification under the rules adopted in the *2011 VRS Certification Order*.²⁶⁹ We concluded that interim rules requiring certification by a Chief Executive Officer, Chief Financial Officer, or other senior executive of an iTRS provider, under penalty of perjury, to the truthfulness, accuracy, and completeness of certification applications and annual compliance filings were a necessary and critical component of our efforts to curtail fraud and abuse. In particular, we found that these interim rules would help to ensure that the Commission has true and complete information, thereby ensuring that only qualified providers are eligible for compensation from the Fund.²⁷⁰

155. Specifically, we adopted the following interim rules:

²⁶⁶ See, e.g., Electronic Communications Act (ECPA), tit. II (Stored Communications Act (SCA)), 18 U.S.C. §§ 2701-12 (2006); 47 U.S.C. § 551 (2006); 47 U.S.C. § 222.

²⁶⁷ See 18 U.S.C. § 1001(a).

²⁶⁸ *2011 VRS Certification Order* at paras. 62-67.

²⁶⁹ *Id.* at para. 62.

²⁷⁰ *Id.* at para. 64 (citing *VRS Call Practices R&O*, 26 FCC Rcd at 5586, para. 90).

The chief executive officer (CEO), chief financial officer (CFO), or other senior executive of an applicant for Internet-based TRS certification under this section with first hand knowledge of the accuracy and completeness of the information provided, when submitting an application for certification under paragraph (a)(2) of this section, must certify as follows: I swear under penalty of perjury that I am __ (name and title), _an officer of the above-named applicant, and that I have examined the foregoing submissions, and that all information required under the Commission's rules and orders has been provided and all statements of fact, as well as all documentation contained in this submission, are true, accurate, and complete.²⁷¹

The chief executive officer (CEO), chief financial officer (CFO), or other senior executive of an Internet-based TRS provider under this section with first hand knowledge of the accuracy and completeness of the information provided, when submitting an annual report under paragraph (g) of this section, must, with each such submission, certify as follows: I swear under penalty of perjury that I am __ (name and title), _an officer of the above-named reporting entity, and that I have examined the foregoing submissions, and that all information required under the Commission's rules and orders has been provided and all statements of fact, as well as all documentation contained in this submission, are true, accurate, and complete.²⁷²

We tentatively conclude that we should adopt these rules permanently, and seek comment on this tentative conclusion. We also seek comment on whether there are any additional elements that should be covered by these proposed certifications, and, in general, whether there are any additional safeguards that we should adopt as rules to ensure the veracity and completeness of provider submissions, and to help ensure that providers comply with the Commission's TRS rules and policies.

IX. PROCEDURAL MATTERS

156. *Comments and Reply Comments.* Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- **Paper Filers:** Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325,

²⁷¹ See *VRS Call Practices Second Report and Order* at App. C (adding new interim 47 C.F.R. § 64.606(a)(2)(v)).

²⁷² See *id.* (adding new interim 47 C.F.R. § 64.606(g)(2)).

Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

157. **People with Disabilities:** To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

158. **Ex Parte Rules.** The proceeding this *Further Notice* initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.²⁷³ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

159. **Initial Regulatory Flexibility Analysis.** With respect to this *Further Notice*, an Initial Regulatory Flexibility Certification (IRFA) is contained in Appendix F. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an IRFA of the expected impact on small entities of the proposals contained in the *Further Notice*. Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Further Notice*. The Commission will send a copy of the *Further Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.²⁷⁴

160. **Initial Paperwork Reduction Act of 1995.** This *Further Notice* seeks comment on potential new or revised information collection requirements or may result in new or revised information collection requirements. If the Commission adopts any new or revised information collection requirement, the Commission will publish a separate notice in the Federal Register inviting the public to

²⁷³ 47 C.F.R. §§ 1.1200 *et seq.*

²⁷⁴ See 5 U.S.C. § 603(a). In addition, the *Further Notice* and IRFC (or summaries thereof) will be published in the *Federal Register*.