

BRIEF FOR RESPONDENTS*Oral Argument Scheduled For March 17, 2014*

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1215

SORENSEN COMMUNICATIONS, INC.,

PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,

RESPONDENTS

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

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STATEMENT OF PARTIES, RULINGS AND RELATED CASES

1. Parties

All parties appearing in this Court are listed in petitioner's brief.

2. Ruling Under Review

Structure and Practices of the Video Relay Service Program, 28 FCC Rcd 8618 (2013) (JA 843)

3. Related Cases

The order on review has not previously been before this Court or any other court. We are not aware of any related case pending before this Court or any other court.

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GLOSSARY

ADA	Americans With Disabilities Act
CA	communications assistant
NECA	National Exchange Carrier Association – Administrator of the Interstate TRS Fund prior to July 2011
RLSA	Rolka Loube Saltzer Associates – Administrator of the Interstate TRS Fund
TRS	Telecommunications Relay Service
VRS	Video Relay Service

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BRIEF FOR RESPONDENTS

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

For years, the rates set by the Federal Communications Commission to reimburse providers of Video Relay Service (VRS), a telecommunications service for deaf people, have greatly exceeded the cost of providing service. The order on review, *Structure and Practices of the Video Relay Service Program*, 28 FCC Rcd 8618 (2013) (*Order*) (JA 843), implements the FCC’s latest steps in its ongoing efforts to reform and improve the service for users, reduce costs to the government fund that supports VRS and eliminate incentives for waste that have burdened VRS

and related services for years. The Commission established a VRS rate schedule to bring the rates closer to VRS providers' actual costs, which are phased in during a four-year transitional period. Objecting to the transitional rates, Sorenson Communications, Inc. petitions for review. The questions presented are:

1. Whether Sorenson's arguments are barred by the doctrine of issue preclusion in light of the holdings in *Sorenson Communications, Inc. v. FCC*, 659 F.3d 1035 (10th Cir. 2011).
2. Whether the rates adopted by the FCC in the *Order* for VRS are consistent with the governing statute, which requires that telecommunications services for the deaf be "functionally equivalent" to those available to hearing persons and that such services be "available, to the extent possible and in the most efficient manner," 47 U.S.C. §§ 225(a)(3), (b)(1).
3. Whether the agency abused its discretion in setting those rates.

JURISDICTION

This Court has jurisdiction to review the FCC's order in this case pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). The *Order* was released on June 10, 2013. A summary of the *Order* was published in the Federal Register on July 5, 2013, 78 Fed.Reg. 40582. The petition for review was filed within 60 days of that date, as required by 28 U.S.C. § 2344 and 47 C.F.R. § 1.4(b)(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Statutory Appendix to this brief.

COUNTERSTATEMENT OF THE CASE

A. BACKGROUND

1. *The Regulatory Setting*

a. *TRS and VRS.*

Telecommunications Relay Service (TRS) is a telephone transmission service that enables persons with hearing or speech disabilities to communicate with hearing individuals “in a manner that is functionally equivalent” to the ability of persons without such disabilities to communicate with each other. 47 U.S.C. § 225(a)(3). There are several different types of TRS. *See, e.g., Telecommunications Relay Services*, 19 FCC Rcd 12475, 12480 (2004) (*2004 TRS Order*). The one at issue here, which accounts for the majority of TRS-related costs, is known as Video Relay Service. VRS “allows people with hearing or speech disabilities who use sign language to communicate with voice telephone users through video equipment.” 47 C.F.R. § 64.601(a)(26). The user with a hearing or speech impairment communicates using sign language via an Internet-based video link with a third-party “communications assistant” (“CA”) who translates the sign language into speech, which is then relayed by the CA by telephone to the hearing person at the other end of the line. The other user communicates by using the process in reverse. *See Order* ¶4 (JA 846).

When Congress adopted Section 225 of the Communications Act, 47 U.S.C. § 225, as part of the Americans With Disabilities Act in 1990,¹ it directed the FCC to ensure that TRS is “available, to the extent possible and in the most efficient manner,” to persons with hearing and speech disabilities. 47 U.S.C. § 225(b)(1). Congress placed the burden of providing TRS directly on “common carrier[s] providing telephone voice transmission services,” 47 U.S.C. § 225(c) (*i.e.*, local and long distance telephone companies), but the FCC additionally authorized third parties that are not traditional telephone companies, such as Sorenson, to provide the service. *See Telecommunications Relay Services*, 20 FCC Rcd 20577, 20586-20589 (2005); 47 C.F.R. § 64.603. Now, most TRS is provided by such third parties.

b. TRS/VRS Funding

VRS users do not pay to use the service. *See Order* n.159 (JA 873). Instead of collecting money from users, VRS providers are reimbursed directly from a fund, known as the Interstate TRS Fund, which the FCC established pursuant to Section 225. *See* 47 U.S.C. § 225(d)(3)(B). Almost all providers of interstate telecommunications services must contribute a percentage of their revenues to this fund. 47 C.F.R. § 64.604(c)(5)(iii)(A).² Because telecommunications providers

¹ *See* Pub. L. No. 101-336, Title IV, 104 Stat. 327 (1990).

² The “Interstate” TRS Fund in fact pays for both interstate and intrastate VRS calls. *See Order* n.43 (JA 852). An independent entity administers the TRS Fund for the FCC. Until July 2011, the Fund Administrator was the National
(footnote continued on following page)

pass along to their users the costs of contributing to the TRS Fund, the Fund ultimately is financed by all consumers of covered telecommunications services, who pay more for the services they use so that VRS customers may receive VRS free of charge. *Telecommunications Relay Services*, 22 FCC Rcd 20140, 20161 (2007) (“2007 TRS Rate Order”).

Growth of the TRS Fund has been dramatic, driven largely by the increasing costs of VRS. Prior to the development of VRS, the Fund required \$38 million to pay for TRS programs. After VRS became available in 2002, the Fund grew rapidly, from \$115 million in 2003 to a projected \$995 million for the 2013-2014 fund year.³ Through June 2013, American ratepayers had paid a total of nearly \$6.7 billion to support TRS services. Of the nearly \$1 billion cost of TRS this year, VRS will account for approximately \$622 million – roughly 66 percent. *2013 TRS Rate Order*, 28 FCC Rcd at 9226 ¶30. Sorenson has at least an 80 percent share of the VRS market. Br. 13.

Congress directed that VRS providers be allowed to recover “costs caused by” the provision of TRS services and delegated to the Commission the authority to “prescribe regulations governing” the recovery of those costs. 47 U.S.C.

(footnote continued from preceding page)

Exchange Carrier Association (NECA). Since that time, the Administrator has been Rolka Loube Salzer Associates (RLSA).

³ See *Telecommunications Relay Services*, 28 FCC Rcd 9219, 9220 ¶3 (CGB 2013 (“2013 TRS Rate Order”)); see also historical Interstate TRS Status Reports available at <http://www.r-l-s-a.com/TRS/Reports.htm>.

§§ 225(d)(3)(A) & (B). Under the Commission's rules, VRS providers are paid by the Fund under per-minute rates established by the Commission. *See* 47 C.F.R. § 64.604(c)(5)(iii)(E); *2013 TRS Rate Order*, 28 FCC Rcd at 9219.

Congress thus created TRS as a ratepayer-funded service provided without charge to persons with hearing and speech disabilities in order to “remedy the discriminatory effects of a telephone system inaccessible to persons with disabilities,” *2007 TRS Rate Order*, 22 FCC Rcd at 20161. Reflecting principles of fiscal responsibility, accountability, and administrative efficiency, the Commission determined in 2004 that reimbursement rates should only “cover the *reasonable costs* incurred in providing the TRS services.” *2004 TRS Order*, 19 FCC Rcd at 12543 ¶179 (emphasis added); 47 C.F.R. § 64.604(c)(5)(iii)(E) (rates must be set to recover only “reasonable costs”). Through a series of orders, the Commission has fleshed out the meaning of “reasonable” costs. Collectively, the prior orders establish that reimbursable costs include only those costs directly incurred to provide TRS service, such as labor costs, directly attributable overhead, start-up expenses, executive compensation, and a fixed return of 11.25% on capital investment. *See, e.g., 2007 TRS Rate Order*, 22 FCC Rcd at 20172 ¶¶73-82.

By contrast, the Commission for years has excluded from reimbursement other, indirect costs, such as a profit mark-up on expenses, certain taxes, research and development costs, and the cost of providing video equipment, software, and technical assistance to VRS users. *See 2004 TRS Order*, 19 FCC Rcd at 12545-

12550; *Telecommunications Relay Services*, 21 FCC Rcd 8063, 8070 ¶¶15-16 & n.50 (2006) (“2006 MO&O”); *2007 TRS Rate Order*, 22 FCC Rcd at 20175 ¶¶73-82. In identifying the costs that may be reimbursed at ratepayer expense, the Commission has expressed concern that the TRS Fund should “not become an unbounded source of funding for enhancements that go beyond” the standard of functional equivalence established by the FCC, but which a particular provider nevertheless wishes to adopt. *Order* ¶18 (JA 853), *quoting 2004 TRS Order*, 19 FCC Rcd at 12548. Prior to 2010, no VRS provider challenged in court any of those determinations.

Until 2007, the Commission established VRS rates every year based on providers’ projections of their costs for the upcoming year. Under that regime, rates were unpredictable and swung widely, ranging from a low of \$5.14 to a high of \$17.04 per minute. *See 2007 TRS Rate Order*, 22 FCC Rcd at 20145 ¶6. In the *2007 TRS Rate Order*, the Commission sought to bring greater predictability to rates to facilitate planning by VRS providers, and accordingly set rates for three years. It also established a three-tiered rate structure under which a VRS provider was paid decreasing rates reflecting typically decreasing average costs as a provider’s service volume increases. *Id.* at 20163. Under the tiered system, “all providers are compensated at the same rate for the same number of minutes.” *Id.* at 20167. Again, prior to 2010, no VRS provider challenged those rates or the tier structure itself.

c. Overcompensation Problems Associated with VRS Funding

Soon after the new rates (based on providers' projected costs) became effective in 2007, it became apparent that VRS providers' recoveries from the TRS Fund could easily outstrip their actual costs. In 2008, a congressional committee staff report expressed concern that "consumers are being significantly overcharged to finance the TRS fund and TRS providers are being significantly overcompensated."⁴ A 2012 audit conducted by the FCC Inspector General concluded that during calendar year 2011 "TRS funds received by Sorenson for VRS did not compensate for only the reasonable costs of providing access to VRS."⁵ Sorenson disagreed with the conclusions of that audit.⁶ In addition, given the hundreds of millions of dollars at stake, the TRS Fund has been an unfortunate target of numerous instances of abuse and fraud.⁷

⁴ Majority Staff Report "*Deception and Distrust: The Federal Communications Commission Under Chairman Kevin J. Martin*," Prepared for the Use of the Committee on Energy and Commerce, U. S. House of Rep., 110th Congress at 7 (Dec. 2008).

⁵ See *Performance Audit Report of Sorenson Communications, Inc.'s Video Relay Service for the Year Ending December 31, 2011* at 1 (FCC OIG Sept. 27, 2012), public redacted version available at [http://transition.fcc.gov/oig/Sorenson Audit Report 09272012 Redacted.pdf](http://transition.fcc.gov/oig/Sorenson%20Audit%20Report%2009272012%20Redacted.pdf) .

⁶ See *id.* App. B, App. C.

⁷ See *2011 VRS FNPRM*, 26 FCC Rcd at 17373 n.19 (JA 151) (citing actions taken by the FCC Inspector General in collaboration with the U.S. Department of Justice); see also FCC NEWS *Sorenson to Pay \$15.75 Million to Settle FCC Investigation into Improper Billing of TRS Fund* (May 28, 2013); FCC NEWS *AT&T To Pay \$18.25 Million To Settle FCC Investigation of Improperly Billing* (footnote continued on following page)

d. The 2010 Interim Rate Order

In 2010, the Commission issued an order setting forth interim rates for the next Fund Year (July 1, 2010 through June 30, 2011). *Telecommunications Relay Services*, 25 FCC Rcd 8689 (2010) (“*Interim Rate Order*”). The rates were “interim” because they filled the gap until the Commission completed a review of the VRS program that it began at the same time.

Sorenson sought judicial review of the *Interim Rate Order* in the Tenth Circuit. In a 2011 decision, that court affirmed the Commission’s 2010 order in its entirety, rejecting Sorenson’s array of challenges to the Commission’s rate methodology for VRS and the rates themselves. The court held that the agency’s action was consistent with its statutory mandate in Section 225 and was not arbitrary and capricious. *Sorenson Communications, Inc. v. FCC*, 659 F.3d 1035.

e. The 2010 VRS Inquiry and the 2011 Rulemaking

At the same time as it adopted the 2010 interim rates, the Commission also began an inquiry to take a “fresh look” at VRS rates. *Structure and Practices of the Video Relay Service*, 25 FCC Rcd 8597, 8598 ¶1 (2010) (“*VRS NOI*”) (JA 1). “Over the past few years,” the Commission found, “the per-minute compensation rates have significantly exceeded the estimated average per-minute costs of providing VRS.” *Id.* ¶30 (JA 11). The entire VRS program, the agency observed, “is

(footnote continued from preceding page)

Fund That Supports Accessibility of Telecommunications Services to Persons With Disabilities (May 7, 2013).

fraught with inefficiencies (at best) and opportunities for fraud and abuse (at worst).” *Id.* ¶30 (JA 10). Review was therefore necessary to “ensure that this vital program is effective, efficient, and sustainable.” *Id.* ¶1 (JA 2). That inquiry proceeding ultimately led to the *Order* on review in this case. The Commission sought comment on “the most effective and efficient way to make VRS available” and in particular on “adjustments and modifications to improve the current [VRS] compensation methodology.” *Id.* at ¶¶9, 11 (JA 5).

Subsequently, the Commission issued a Notice of Proposed Rulemaking setting out a number of specific proposals to improve the structure and efficiency of the VRS program. *Structure and Practices of the Video Relay Service, Further Notice of Proposed Rulemaking*, 26 FCC Rcd 17367 (2011) (“*2011 VRS FNPRM*”) (JA 146). It explained that the goal of the proceeding was “to improve the VRS program so that it better promotes the goals Congress established in section 225 of the Act.” *Id.* ¶11 (JA 154).

B. THE ORDER ON REVIEW

In June 2013, the Commission adopted the *Order* on review in this case, describing it as “an important step in the Commission’s continuing effort to reform [VRS], which for many years has been beset by waste, fraud and abuse, and by compensation rates that have become inflated well above actual cost.” *Order* ¶1 (JA 843) (footnotes omitted). The Commission pointed to steps it had taken in other recent orders to improve the VRS program, noting that its reliance on compe-

tition in the provision of VRS services had been undermined by the fact that “multiple providers offer substantially similar services with no opportunity for price competition, as end users receive the service at no cost.” *Order* ¶5 (JA 847). The Commission also observed that “providers’ self interest in maximizing their compensation from the Fund may make them less effective at carrying out the Commission’s policies” and make the Fund more vulnerable to “waste, fraud and abuse by providers” *Id.* ¶6 (JA 848).

Although the Commission adopted a number of VRS structural reforms in the *Order* and initiated a further rulemaking proceeding looking towards the adoption of more far-reaching reforms in the VRS program, the only actions challenged by Sorenson in this case involve provisions of the *Order* related to rates and rate structure for VRS. The Commission proposed structural reforms that “will set VRS compensation rates based largely if not entirely on competitively established pricing, *i.e.*, prices set through a competitive bidding process.” *Order* ¶188 (JA 919). During this “transition to structural reforms,” however, the Commission concluded that it “should continue to move rates closer to actual cost using currently available ratemaking tools.” *Id.* Accordingly, employing essentially the same judicially approved methodology it had used in adopting the 2010 interim rates (relying on the fund administrator’s analysis of providers’ projected costs and actual historical costs), the Commission adopted a multi-year rate plan “that enables the VRS industry to transition towards cost-based rates.” *Id.* ¶191 (JA

920). In so doing, the Commission rejected Sorenson's urging that it "abandon any further effort to bring rates closer to costs, whether actual or projected, and instead to accept the current interim rates as the starting point for a new multi-year rate plan." *Id.* ¶190 (JA 920).

The TRS Fund administrator's 2012 filing with the Commission proposed an average VRS reimbursement rate of \$3.396 per minute, adjusted to reflect the established service tiers in which larger providers receive a lower rate.⁸ *Order* ¶209 (JA 927). The Commission found that although the administrator's cost data "would justify immediate adoption of RLSA's proposed cost-based rate of \$3.396 per minute, we concur with RLSA that taking a step-by step transition from existing, tiered rates toward a unitary cost-based rate is appropriate." *Id.* ¶212 (JA 928). Thus, the Commission adopted a "transitional rate plan" providing a "multi-year 'glide path' towards cost-based rates." *Id.* In contrast to the \$3.396 per minute rate that the Commission found would have been justifiable, the Commission adopted rates that ranged from \$5.98 per minute for Tier I rates at the beginning of the four-year transition period to \$3.49 per minute for Tier III rates at the end of the period in 2017. *See id.* ¶215 (JA 930). It added that it reserved "the

⁸ The Fund administrator's proposal would have resulted in per minute rate reductions of \$2.844 (\$6.24 – \$3.396) in the Tier I rate, \$2.834 (\$6.23 – \$3.396) in the Tier II rate, and \$1.674 (\$5.07 – \$3.396) in the Tier III rate. To avoid such dramatic immediate reductions, the administrator proposed that the reductions be phased in over a multi-year time period, with the rates restructured in two tiers instead of the existing three tiers. *Order* ¶209 (JA 927).

right to revisit the rates adopted in this Order if provider data shows that, notwithstanding our actions today, the rates remain substantially in excess of actual provider costs.” *Id.* ¶216 (JA 931).

In addition to revising the VRS reimbursement rate schedule, the Commission also addressed several issues regarding allowable categories of costs and the setting of rate tiers. For example, it turned aside Sorenson’s “continued urging that we should include user equipment as allowable costs” in determining VRS rates. *Order* ¶194 (JA 922). The Commission explained that it had “consistently held that costs attributable to the user’s relay hardware and software, including installation, maintenance, and testing, are not compensable from the Fund.” *Id.* at ¶193 (JA 921).⁹ Expenses for which providers are compensated, the Commission pointed out, “‘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.’” *Id.*¹⁰

The Commission concluded that the “better approach” to achieving Section 225’s goal of “ensuring that TRS is ‘available to the extent possible and in the

⁹ See *2011 VRS Reform FNPRM*, 26 FCC Rcd at 17393 ¶49 (JA 172); *2006 MO&O*, 21 FCC Rcd at 8071 ¶17; *2007 TRS Rate Order*, 22 FCC Rcd at 20170-71 ¶82.

¹⁰ Quoting *2006 MO&O*, 21 FCC Rcd at 8071 ¶17.

most efficient manner” was to fund the development of open source VRS access technology and to contract for the development and deployment of a VRS access technology reference platform. *Id.* ¶¶193-94 (JA 921-22); *see also id.* ¶¶40-61 (JA 864-72) (discussing VRS access technology initiatives). In this manner, the Commission believed, access to VRS would transition to personal computers, tablets and other devices that are not dependent on a specific provider’s technology. *Id.* ¶¶53-61 (JA 869-72). The Commission noted that its efforts “urg[ing] the [VRS] industry to develop interoperability and portability standards ... have proven ineffective.” *Id.* ¶52 (JA 869).

VRS providers, including Sorenson, had also argued in their comments that the 11.25% rate of return that the Commission’s rate methodology allowed on their capital investment did not adequately compensate them and failed to take into account differences between them and telecommunications carriers from which the Commission had derived the 11.25% rate. But none of these comments had suggested a “quantified, concrete alternative to the current approach used for calculating an allowable rate of return, other than to simply reimburse providers for their actual expenditures on interest and other capital costs,” and thus the Commission concluded that there was no justification for changing its “longstanding practice” at this stage when it expected rate of return regulation not to be a part of the restructured VRS. *Order* ¶195 (JA 922). It further noted that the Tenth Circuit had affirmed its 2010 VRS rate schedule that had been based on the same rate of

return methodology and 11.25% rate of return. *Id.* ¶196 (JA 923), *citing Sorenson*, 659 F.3d at 1045-48.

The 2011 *FNRPM* had sought comment on the justification for continuing to maintain a tiered rate structure in which smaller, less efficient VRS providers are reimbursed at a higher rate. The Commission found that regardless of the reasons for cost differences between the largest VRS provider, Sorenson, and its smaller competitors, there was no dispute that differences existed and were supported by historical data. *Id.* ¶203 (JA 925). The Commission concluded that there was no “valid reason why the TRS Fund should support indefinitely VRS operations that are substantially less efficient,” but that there was no “compelling reason” to completely eliminate the tiered structure at this time:

We conclude that it is worth tolerating some degree of additional inefficiency in the short term, in order to maximize the opportunity for successful participation of multiple efficient providers in the future, in the more competition-friendly environment that we expect to result from our structural reforms. Therefore, we will allow tiered rates to remain in effect during the transition to structural reforms, but with a gradually reduced gap between highest and lowest tiers, in order to allow smaller providers an opportunity to increase the efficiency of their operations so as to maximize their chances of success after structural reforms are implemented.

Order ¶200 (JA 924). In redrawing the tier boundaries, it concluded that it “should err on the side of setting the boundary too high” and established the new boun-

daries “to ensure that VRS competition is preserved pending the implementation of structural reform” *Id.* ¶¶205, 206 (JA 926).¹¹

SUMMARY OF ARGUMENT

In furtherance of its statutory mandate to ensure that VRS is “available, to the extent possible and in the most efficient manner,” 47 U.S.C. § 225(b)(1), the FCC in the *Order* on review continued its efforts to move VRS rates closer to the providers’ costs of providing the service. Representing the second step in a three-step process, the transitional rates adopted in the *Order* are designed to be in effect for no more than four years. Those transitional rates act as a bridge between the interim rates adopted in 2010 – affirmed by the Tenth Circuit in *Sorenson*, 659 F.3d 1035 – and the final goal of eliminating rate of return regulation and basing compensation to VRS providers primarily on marketplace competition. In further reducing overpayments to VRS providers in the *Order*, the FCC relied on essentially the same principles and rate methodologies as it did in adopting the judicially approved interim rates in 2010.

Claiming that the transitional rates will likely destroy the entire VRS industry, *Sorenson* – alone among VRS providers – petitions for review of the *Order*. But *Sorenson*’s challenge here is largely an attempt to reargue in another court many of the same issues it lost in the Tenth Circuit just two years ago when that

¹¹ A chart in the *Order* illustrates the reconfigured rate tiers. *See Order* ¶208 (JA 927).

court rejected its multiple challenges to the 2010 interim rates. Sorenson's repackaged and recycled arguments should fare no better in this Court. The doctrine of issue preclusion bars many of its core arguments in light of the Tenth Circuit's holdings in *Sorenson v. FCC*. And even as to issues in which preclusion may not apply, the Tenth Circuit's analysis is relevant and persuasive.

The *Order* is consistent with Section 225 of the Communications Act. In crafting Section 225, Congress qualified the objective of making VRS "available" by using the caveats "to the extent possible" and "in the most efficient manner." By including those flexible concepts in the statute, Congress vested considerable discretion in the federal agency that administers this highly technical statutory program. Consistent with the statutory scheme, the Commission's transitional rates will foster the "efficient" provision of services because they bear a closer correlation with the costs of providing service than the prior rates. The legislative command that service be provided "in the most efficient manner" allows the Commission to ensure that the TRS Fund is not depleted by wasteful spending. Indeed, it is difficult to imagine that Congress did not intend the Commission to police the costs of a billion-dollar fund that is ultimately paid for by the public. Under Sorenson's reading of the statute, there is no apparent end to the Government's funding obligation, but that is a statutory scheme of Sorenson's own devising – not the one Congress enacted.

Moreover, the transitional rates are reasonable under the Administrative Procedure Act. The Commission properly based the rates here on the existing interim rates adopted in 2010 and the cost-based rates suggested by the TRS Fund administrator, which annually collects cost data from VRS providers. Although that data reflected the FCC's exclusion of certain categories of costs (such as the cost of providing VRS users free equipment), those exclusions have been part of the Commission's rules for years. Indeed, the categories of allowable costs were never challenged until Sorenson's unsuccessful petition for review in the Tenth Circuit. The Commission also reasonably retained the existing 11.25% rate of return and properly applied it in establishing the transitional rates consistent with long-established rate making principles. In calculating the rates, the Commission reasonably sought to move VRS rates closer to, although still above, VRS provider costs while avoiding an abrupt and potentially disruptive change that could hamper providers' ability to offer service.

The Commission likewise properly retained the tier system during the transition to a restructured VRS. Data provided by the Fund Administrator showed that there remains a cost differential between smaller and larger VRS providers, and the graduated approach to reimbursement rates under the tier system appropriately reflects that differential. Moreover, contrary to Sorenson's claim, similarly situated providers are paid the same amounts for providing VRS minutes in a given tier, as the Tenth Circuit emphasized in 2011. Finally, Sorenson's challenge to the

revised speed-of-answer standard is waived under 47 U.S.C. § 405 and is baseless in any event.

ARGUMENT

I. THE ORDER IS SUBJECT TO DEFERENTIAL STANDARDS OF REVIEW

The Court reviews FCC orders “under the deferential standard mandated by section 706 of the Administrative Procedure Act, which provides that a court must uphold the Commission’s decision unless it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Achernar Broadcasting Co. v. FCC*, 62 F.3d 1441, 1445 (D.C. Cir. 1995) (quoting 5 U.S.C. § 706(2)(A)).

“Under this ‘highly deferential’ standard of review, the court presumes the validity of agency action ... and must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment.” *Cellco Partnership v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004). In conducting this review, the Court does not sit as “a panel of referees on a professional economics journal,” but rather a “panel of generalist judges obliged to defer to a reasonable judgment by an agency acting pursuant to congressionally delegated authority.” *Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 717 (D.C. Cir. 2011), quoting *City of Los Angeles v. United States Dept. of Transp.*, 165 F.3d 972, 977 (D.C. Cir. 1999).

This case also concerns questions of statutory interpretation under the Communications Act. Judicial review of the Commission’s interpretation of the Act is governed by *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467

U.S. 837 (1984). Under *Chevron*, if “the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843. Unless the statute “unambiguously forecloses the agency’s interpretation,” a reviewing court must “defer to that interpretation so long as it is reasonable.” *National Cable & Tel. Ass’n v. FCC*, 567 F.3d 659, 663 (D.C. Cir. 2009).

Congress has expressly delegated to the FCC authority to administer Section 225 of the Communications Act, 47 U.S.C. § 225, the statutory provision at issue here. Under *Chevron* the FCC has the authority to fill the statutory gap provided by Section 225’s ambiguous terms so long as its interpretation is based on a permissible construction of the statute. *Sorenson*, 659 F.3d at 1042, citing *Chevron*, 467 U.S. at 843; see also *City of Arlington, Texas v. FCC*, 133 S.Ct. 1863, 1868-73 (2013).

II. SORENSON IS PRECLUDED FROM RELITIGATING ISSUES THAT WERE DECIDED BY THE TENTH CIRCUIT.

Sorenson once again challenges the Commission’s continuing efforts to more closely align VRS reimbursement rates with providers’ costs. In doing so, Sorenson repackages and recycles many of the same failed arguments that the Tenth Circuit rejected little more than two years ago when the company attacked a prior FCC order in this same proceeding lowering rates for VRS service. *Sorenson*, 659 F.3d 1035. Sorenson mentions the Tenth Circuit’s opinion only in passing in two separate paragraphs of its brief. (Br. 11, 42). Yet the parallels between

the 2011 *Sorenson* case and this one are striking, and the *Sorenson* opinion has important ramifications for this case. As explained below, the Tenth Circuit's holdings in *Sorenson* preclude a number of fundamental arguments that the company tries to resurrect in this Court. And even where the doctrine of issue preclusion may not apply, the *Sorenson* decision provides a useful framework for analyzing the remaining issues in this case.

The doctrine of issue preclusion bars “‘successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,’ even if the issue recurs in the context of a different claim.” *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001)); see also *Gulf Power Co. v. FCC*, 669 F.3d 320, 323 (D.C. Cir. 2012) (same). “Under that doctrine, judgment in a prior suit can preclude relitigation of an issue actually litigated and necessary to the outcome of the first action so long as no unfairness results.” *Qwest Corp. v. FCC*, 252 F.3d 462, 466 (D.C. Cir. 2001). The doctrine protects against “the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.” *Montana v. United States*, 440 U.S. 147, 153-154 (1979).

Those requirements are satisfied in this case. The Commission's adoption of VRS rates here to govern the transition to a new approach to administering the

VRS program followed essentially the same methodology as the interim rates adopted in 2010 and upheld by the Tenth Circuit.

Indeed, the transitional rates are merely an extension of the approach that led to the interim rates, namely to create a glide path to a competitive market while safeguarding the Fund and the contributors to the Fund. Sorenson's arguments to this Court simply recast the same challenges that the Tenth Circuit rejected. For example, Sorenson's core argument to this Court is that the VRS rates adopted by the Commission in 2013 are arbitrary and capricious because they are "lower than the rates at which any provider can provide service." Br. 1. Sorenson argued to the Tenth Circuit that VRS rates adopted by the Commission generally were so low as to violate the requirements of Section 225 and specifically were arbitrary and capricious because they "result[ed] in Sorenson being 'compensated' for providing VRS at a rate well *below* its costs." Sorenson 10th Cir. Br. 3 (emphasis in original). There, as here, Sorenson's argument that the rates were unlawfully low was based on assertions that the Commission excluded costs from the rate calculation that should have been included and that it had adopted an improper rate of return. Compare, e.g., Sorenson 10th Cir. Br. 45-50 with its brief here at 36-37, 43-50. In both the *2010 Interim Rate Order* and in the *Order* here, however, the Commission relied on essentially the same cost factors and the same rate of return. Sorenson does not acknowledge that it is making the same arguments, much less claim that there are any changed circumstances since the Commission took action in 2010.

The case for preclusion is particularly strong as to Sorenson's reprise that reimbursement rates allegedly are unlawfully low because the Commission improperly excluded certain categories of costs from reimbursement from the TRS Fund, especially equipment costs. *See, e.g.*, Br. 27, 29, 31, 37, 43, 45-51. That fundamental assertion permeated Sorenson's Tenth Circuit brief and was presented in a number of different contexts, but the court repeatedly rejected it. *Sorenson*, 659 F.3d at 1044 (§ 225 "does not ... require that VRS users receive free equipment and training"); *id.* at 1045 ("such disallowances do not violate the statute"); *id.* ("Sorenson of course may provide free phones to its VRS users, but nothing in the statute requires it to be compensated for that expense. The 2010 Order does not violate § 225 by its refusal to treat such expenses as 'reasonable' costs of providing VRS."). The exclusion of equipment costs was "litigated and necessary to the outcome" in *Sorenson* and "no unfairness results" from applying issue preclusion in these circumstances. *Qwest Corp.*, 252 F.3d at 466. Hence, the doctrine of issue preclusion is "a fatal bar," *Gulf Power*, 669 F.3d at 322, to Sorenson's attempt to relitigate the exclusion of equipment costs from VRS rates.

Issue preclusion likewise bars Sorenson's argument (Br. 57) that the FCC acted arbitrarily and capriciously when it decided to maintain the three-tiered rate structure during the transition to a new approach to administering the VRS program. Sorenson made that same APA challenge when the Commission retained the three-tiered rate structure in 2011, but the court flatly rejected it. *Sorenson*,

659 F.3d at 1049 (“ample evidence” supports the FCC’s decision); *id.* (finding “sufficient evidence in the record to support the FCC’s determination that tiered rates continue to be workable and reliable during the interim period”).

In a two-sentence reference to the Tenth Circuit opinion (Br. 11), Sorenson seems to suggest that the earlier case has no bearing at all on this case because the Commission’s 2010 action involved “interim rates.” Although the Tenth Circuit acknowledged “the deference owed to the FCC when it engages in interim rate-making” (659 F.3d at 1046 n.6), there is no evidence that the interim nature of the rates there was a controlling factor.¹² The Tenth Circuit rejected Sorenson’s statutory arguments completely, describing them, among other things, as “folly” (659 F.3d at 1044). And the court’s rejection of Sorenson’s arbitrary and capricious arguments was based on the principle that courts “are particularly deferential when reviewing ratemaking orders because ‘agency ratemaking is far from an exact science and involves policy determinations in which the agency is acknowledged to have expertise.’” *Id.* at 1046.

In any event, similar to the 2010 rates, the rates adopted here were described repeatedly by the Commission as “transitional,” rates designed to be in place for four years or less, until the Commission completes this proceeding to adopt new market-based rates and other significant reforms to the VRS program. *Order* ¶188

¹² Indeed, Sorenson argued to the Tenth Circuit that the rates at issue there were “*not* interim in any meaningful sense.” Sorenson 10th Cir. Reply Br. 15 (emphasis added).

(JA 919) (“short-term rate methodology pending implementation of structural reforms”); *see also id.* ¶¶10, 107, 189-216 (JA 850, 886, 919-31). In fact, this is the second step of a three-step process and designed to serve the same purpose as the interim rates. There is thus no basis to decline to apply the doctrine of issue preclusion in this ratemaking context (nor to discount the relevance of the analysis of the court in *Sorenson* even as to issues that may not be precluded by the holdings in that case). The fact that different rate amounts are at issue here does not allow *Sorenson* to evade a preclusion bar because its arguments are directed at rate methodologies and structures, which did not change between 2010 and 2013.

III. THE ORDER IS CONSISTENT WITH SECTION 225.

Although *Sorenson*’s brief is couched largely in terms of alleged arbitrary and capricious agency action, portions of its argument are actually statutory and rely on assertions that the Commission’s actions in the *Order* are in conflict with its duties under Section 225 of the Act. *See, e.g.*, Br. 28, 36, 46, 48-51, 52. Contrary to *Sorenson*’s claims, the *Order* is consistent with Section 225 and, indeed, furthers the statute’s goals.

Congress expressly delegated to the FCC the authority to establish regulations governing the recovery of “costs caused by” the provision of TRS services, 47 U.S.C. § 225(d)(3)(B), and directed the Commission to ensure that TRS (including VRS) be “available, to the extent possible and in the most efficient manner.” 47 U.S.C. § 225(b)(1). That statutory language provides no specific

standards or methodologies; rather, it contemplates that the Commission will fill in the gaps in the legislative scheme to give concrete meaning to the undefined standards. “[W]here Congress leaves a statutory term undefined, it makes an implicit delegation of authority to the agency to elucidate a specific provision of the statute through reasonable interpretation.” *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 474 (D.C. Cir. 1998) (quotation marks omitted). Congress in Section 225 therefore granted the Commission substantial interpretive leeway.

A. The Commission Reasonably Harmonized Legislative Objectives In Setting The Transitional Rates

The Commission has consistently interpreted Section 225 as implicating a variety of statutory goals that need to be harmonized. The agency has recognized that the statute serves an important function in bringing communications services to persons with hearing and speech disabilities. *2004 TRS Order*, 19 FCC Rcd at 12479-12480; *Telecommunications Relay Services*, 15 FCC Rcd 5140, 5143-5144 (2000). At the same time, however, the Commission has recognized its responsibility under the statute’s “efficiency” mandate to ensure that compensation rates “do not overcompensate entities that provide TRS.” *Order* ¶17 (JA 853). Thus, the Commission has focused on finding the best way to reconcile these two goals; here by following its longstanding policy that VRS providers are entitled only to “reasonable” compensation and that expenses that represent indirect costs associated with providing service should be excluded from reimbursement. *See 2004 TRS Order*, 19 FCC Rcd at 12543; 47 C.F.R. § 64.604(c)(5)(iii)(E); *2007 TRS Rate*

Order, 22 FCC Rcd at 20170 ¶82. Otherwise, the Commission warned, the TRS Fund could “become an unbounded source of funding for enhancements that go beyond” the statute’s requirements. *Order* ¶18 (JA 853), *citing 2004 TRS Order*, 19 FCC Rcd at 12548 ¶190; *see Sorenson*, 659 F.3d at 1042 (quoting language from *2004 TRS Order*).

In establishing VRS reimbursement rates, the Commission thus properly “balance[d] the interests of contributors to the Fund ... with the interests of *users* of TRS.” *Order* ¶17 (JA 853). *See Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999) (“When an agency must balance a number of potentially conflicting [statutory] objectives ... judicial review is limited to determining whether the agency’s decision reasonably advances at least one of those objectives.”). As the Tenth Circuit concluded in *Sorenson*, “the FCC has discretion to balance the objectives of § 225 ... , and the interim rates reflect a reasonable balance of these competing objectives.” 659 F.3d at 1045. Here, the Commission reasonably considered the interests of all telephone users when setting rates that avoided overcompensation to VRS providers. *See Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) .

By contrast, *Sorenson*’s reading of the statute would compel the Commission to accept essentially whatever rates VRS providers claim are needed to cover the “actual costs” of providing service in whatever manner of service they choose to offer – regardless of the ensuing burden on the TRS Fund and the contributors

thereto. Indeed, it is difficult to discern from Sorenson's brief what limit it contemplates on the "actual costs" of providing VRS that it should be reimbursed from the TRS Fund.¹³ But the statute directs the Commission to reimburse providers for the "costs caused by" the provision of TRS. The statute does not say that TRS services should be available without regard to the expense incurred to all telephone users who pay into the Fund. Rather, Congress specified that TRS be available "to the extent possible and in the most efficient manner," 47 U.S.C. § 225(b)(1). The balancing of interests of VRS users and the separate group of people who pay for the service is obviously contemplated by Congress's use of an efficiency test that takes costs into account. Otherwise, as Sorenson apparently would have it, the TRS fund would be a blank check for whatever VRS providers wished to spend on their services. The Commission has properly rejected that theory, explaining that "providers are not entitled to *unlimited* financing," even if "a relatively higher VRS compensation rate ... would be more beneficial to the providers' ability ... to offer VRS." *2004 TRS Order*, 19 FCC Rcd at 12551 (emphasis added); *see also Order* ¶¶190-191 (JA 920). The Tenth Circuit agreed with that approach. *See Sorenson*,

¹³ *See, e.g.*, Br. 8, asserting that the Commission historically had improperly omitted costs that should have been included in VRS providers' allowable costs and suggesting that this had been acceptable in the past because the VRS rates had been set high enough that providers, who "have always been free to spend their money any way they choose," could incur whatever costs they deemed necessary and still "remain profitable."

659 F.3d at 1044 (“folly to suggest that § 225 requires VRS to operate at any cost or entitles VRS providers to unlimited compensation”).

What the Commission did here is entirely consistent with its actions – upheld on judicial review – in Sorenson’s unsuccessful challenge to the *2010 Interim Rate Order*. The Tenth Circuit held that “[d]espite Sorenson’s suggestions to the contrary, [Section 225] does not entitle Sorenson to compensation for whatever VRS-related service it would like to provide to its current or potential customers. Instead, the FCC has sensibly adopted an approach that compensates only the reasonable costs of providing access to VRS, by limiting compensation to certain ‘allowable costs.’” *Sorenson*, 659 F.3d at 1043. It is noteworthy that Sorenson argued to the Tenth Circuit that “the FCC fundamentally misunderstands Section 225.” *Sorenson* 10th Cir. Reply Br. 19. In Sorenson’s view, the FCC lacked authority to engage in *any* balancing of interests in enforcing Section 225 and Sorenson suggested no limits on what costs the Commission was obligated to pay to VRS providers to “achieve universal service” for deaf and hearing-impaired persons under Section 225. *See id.* 19-29. Despite the Tenth Circuit’s complete rejection of that view of the statute, Sorenson continues to pursue that approach before this Court.

Ensuring that reimbursement rates are tied to cost of service is especially important in setting the rates during the transition period while the Commission is developing new approaches to the provision of VRS. Record evidence demon-

strated that in recent years VRS providers had been overcompensated by hundreds of millions of dollars at the expense of the general public and in violation of the statutory mandate to provide service “in the most efficient manner.” *See, e.g.*, pp. 7-8 above. At the same time, the Commission took steps to ensure that the reimbursement rate would enable VRS providers to continue to provide service by establishing a “multi-year ‘glide path’ towards cost-based rates” with six month rate adjustments over a four-year transition period to minimize disruption. *Order* ¶212 (JA 929). The Commission’s approach was well within the considerable discretion that Congress granted it in Section 225.

B. Consistent With Section 225, The Order Ensures That VRS Will Be “Available” To Provide “Functionally Equivalent” Service In The “Most Efficient Manner.”

Sorenson’s claim that the Commission has adopted rates for VRS that are so low that it “would degrade VRS in the short run and drive every provider out of business or into bankruptcy in the long run” (Br. 28) is simply a recasting of its arguments two years ago to the Tenth Circuit. It argued there that, in adopting interim rates for VRS at the outset of the proceeding that led to the *Order* here, the Commission had violated its mandate under the statute to ensure that deaf and hard of hearing users have “available” to them telephone service that is “functionally equivalent” to that available to hearing individuals “to the extent possible and in the most efficient manner.” 47 U.S.C. § 225(a)(3), (b)(1). The Tenth Circuit rejected those arguments in 2011, and this Court should reject them as well.

Sorenson contends (Br. 28) that the data on which the Commission relied in adopting the new VRS rates, supplied by RLSA from historical and projected costs submitted to it by VRS providers, was “unmoored from reality” because it included “only a subset of the real-world costs of providing service.” Br. 32. However, the Commission relied on the same methodology it had used when it adopted the 2010 interim rates upheld in *Sorenson*. The court there held that the statute “does not entitle Sorenson to compensation for whatever VRS-related service it would like to provide to its current or potential customers. Instead, the FCC has sensibly adopted an approach that compensates only the reasonable costs of providing access to VRS, by limiting compensation to certain ‘allowable costs.’” *Sorenson*, 659 F.3d at 1043.

Section 225 requires the FCC to ensure that TRS services be available “in the most efficient manner.” That language contemplates that the Commission will exercise its discretion and expertise in setting rates that balance cognizable benefits against costs. *Sorenson*, by contrast, appears to read Section 225 as limiting the Commission to improving the efficiency of services, but leaving the providers with the unreviewable right to establish whatever service enhancements they deem to further the statutory objective. That Congress intended a firm with an 80% market share, in a market where users receive the service for free and in which costs are levied on third parties, to have unreviewable power is not even a plausible, much less required, reading of the statute.

In fact, the Commission properly interpreted and applied the efficiency clause. *See, e.g., Order ¶¶15-18* (JA 852-53). The “efficient manner” of delivering a “functionally equivalent” service necessarily requires the Commission to determine the appropriate basis for compensation. It follows that the Commission may take into account program costs in setting reimbursement rates. Indeed, it is difficult to imagine that Congress did not intend the Commission to take account of costs in administering a publicly financed fund that has recently grown to nearly \$1 billion annually. *Cf. Rural Cellular Ass’n*, 588 F.3d at 1095 (it was “entirely reasonable” for the FCC “to consider its interest in avoiding excessive funding from consumers” and limit the costs of a universal service fund “in the face of evidence showing providers were receiving subsidies in excess of what is needed to allow them to remain in the market.”)

IV. THE COMMISSION ACTED REASONABLY IN SETTING TRANSITIONAL VRS RATES IN THE ORDER.

Sorenson argues that the *Order* is arbitrary and capricious because the transitional rates that the Commission adopted relied on cost data submitted by the TRS Fund Administrator, RLSA, that were “unmoored from reality,” and that the rate methodology used was “irrational” because it failed to take into account all of the “real world costs” of providing VRS (*e.g.*, Br. 32, 27). Sorenson also asserts that the FCC unreasonably imposed more demanding “speed of answer” duties on VRS providers while requiring them to reduce costs, failed to consider the cumulative impact of rate reductions, and retained an unjustified tiered rate system in which

most of its reimbursements from the TRS Fund will be at a lower level than its competitors. Br. 52, 55, 57. To the extent that these arguments survive the Tenth Circuit's decision, they fail to demonstrate that the Commission's action in this case was arbitrary and capricious.

A. The FCC's Longstanding Determinations As To What Constitutes Allowable VRS Provider Costs To Be Reimbursed From the TRS Fund Are Reasonable.

The Commission set the transitional VRS rates based on cost data provided by TRS Fund Administrator RLSA. *Order* ¶¶188-91 (JA 919-20). Sorenson complains that the Commission erred by relying to any extent on RLSA's proposed rates. *E.g.*, Br. 27, 32. Just as it argued unsuccessfully to the Tenth Circuit that the prior fund administrator, NECA, had improperly excluded some of the "real" costs of providing VRS, "including developing and providing videophones, providing technical assistance, and taxes and debt service" (Sorenson 10th Cir. Br. 45), Sorenson argues here that the RLSA data upon which the Commission relied failed to consider the "real world costs" of providing VRS by omitting the same categories of costs. *See* Br. 27, 31, 32, 36.

In fact, the exclusions from the RLSA-proposed rates reflect the very same costs that the Commission has excluded from VRS reimbursement since at least 2004. For years, the FCC has excluded, for example, certain taxes, research and development costs, and the cost of providing video equipment, software, and technical assistance to users. *See 2004 TRS Order*, 19 FCC Rcd at 12545-12550;

2006 *MO&O*, 21 FCC Rcd at 8070 ¶¶15-16 & n.50; 2007 *TRS Rate Order* ¶¶73-82. Sorenson and other VRS providers did not challenge any of those exclusions at the time. The Commission explained that reimbursement rates are intended to cover the reasonable costs a TRS provider incurs in providing a level of service that complies with the Commission's minimum standards for VRS. Thus, the Commission noted, a VRS provider "cannot determine for itself that it is going to provide something different from or beyond the Commission's rules, and still expect compensation from the Fund." *Declaratory Ruling and NPRM*, 21 FCC Rcd 5442, 5457-5458 ¶39 (2006).

Because the Commission reasonably has excluded those matters from reimbursement – and has done so for years without challenge by Sorenson – the Commission did not exceed its discretion when it based its rates in part upon the data compiled and submitted to it by RLSA that reflected the same longstanding exclusions. The Tenth Circuit's decision rejecting Sorenson's challenges to the *2010 Interim Rate Order*, even if not preclusive, further bolsters the reasonableness of these longstanding agency determinations. *See Sorenson*, 659 F.3d at 1043 (FCC "sensibly adopted an approach that compensates only the reasonable costs of providing access to VRS, by limiting compensation to certain 'allowable costs.'").

Sorenson dismisses any reliance on the fact that the FCC's VRS rate determinations reflected "longstanding practice that was affirmed by a federal court of appeals" (*Order* ¶196 (JA 923)), with the observation that just because "a practice

is ‘longstanding’ does not make it correct.” Br. 42. That is no doubt true, but even before *Chevron* the fact that an agency practice was consistent and longstanding was nevertheless entitled to “great weight” in assessing its reasonableness. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1973) (“A court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration.”); *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997) (holding that longstanding agency interpretation of a regulation acquires a status that likely will require notice and comment rulemaking to modify).

Sorenson’s complaint that RLSA’s proposed rates improperly failed to reflect debt, or “the cost of obtaining capital” (Br. 45), was made to the Tenth Circuit and necessarily rejected by that court’s holding that the 2010 interim rates were not arbitrary and capricious despite excluding cost of debt as an allowable cost as Sorenson argued. *See Sorenson*, 659 F.3d at 1046 (noting Sorenson’s argument that NECA’s proposed rates were flawed because, in addition to other things, they did not reflect “debt service payments”); *Sorenson* 10th Cir. Br. 45 (allowable costs “do not include many ‘real’ costs of providing VRS, including ... debt service”). That court found that the “allowable costs” upon which the Commission relied were reasonable, thus rejecting Sorenson’s claims that the 2010 order was arbitrary and capricious because it omitted categories of costs such as debt service.

In any event, Sorenson's contentions with respect to inclusion of the cost of debt are misleading and premature. Under long-established rate of return regulation, the cost of debt is a key component of the weighted cost of capital. The authorized rate of return applies to all capital reasonably invested. *See* 47 C.F.R. § 65.300-65.305, 65.800. The Commission reiterated here that the cost of debt, like other costs, must be "necessary to the provision of reimbursable services." *Order* ¶195 (JA 922). Sorenson raises no question regarding the RLSA calculations based on those premises. Compare *Sorenson*, 659 F.3d at 1047 (Sorenson "offers no reason to question the accuracy of NECA's computation of the allowable costs incurred by VRS providers").

What is fatal to its contention here, therefore, is that Sorenson does not address the reasonableness of the debt it has incurred and the relationship of that debt to reimbursable expenses, a not insignificant omission when in the recent past it has taken on as much as \$1.5 billion in debt, a large portion of which went to pay dividends to a private equity fund that has an ownership interest in Sorenson. *See Telecommunications Relay Services*, 25 FCC Rcd 9115, 9121 ¶21 (CGB 2010) ("2010 Stay Order"); Richard Morgan, "A Failure Of Communication," *The Deal Magazine*, Oct. 1, 2010 (available at <http://deaftimes.com/usa-1/a-failure-of-communication-great-summary-of-vrs-fcc-and-neca/>). It also does not address how much of its debt, for example, represents an investment in customer equipment, which the Commission and the Tenth Circuit have held is not required to be

reimbursed. A claim of that magnitude requires more justification than the argument that the Fund should reimburse it because Sorenson paid it. It requires evidence that the payment was reasonable and for a reimbursable expense. Or, as the Commission staff observed in denying Sorenson's request for stay of the 2010 Interim Rate Order, "Sorenson has not shown that its claimed costs, which include interest and dividend payments, are the result of sound business decisions ... We discern no legal or policy basis for setting rates at a level that is designed to ensure that Sorenson can profitably maintain its particular financial structure." 25 FCC Rcd at 9121 ¶21.

Sorenson cites no instance in the *Order* or elsewhere in which VRS providers have claimed that specific debt costs "necessary to the provision of reimbursable services" have been incurred and in which either the Fund Administrator or the Commission has refused to include those costs as allowable costs for the purpose of calculating reimbursement for providing VRS. The Commission's long-established position requiring that debt, like other costs, must be necessary to the provision of VRS is surely a permissible construction of the language of Section 225 that the TRS Fund reimburse only the "costs caused by interstate telecommunications relay services." 47 U.S.C. § 225(d)(3)(B). In the absence of any specific showing that the Commission has declined to include specific debt costs that were so necessary, Sorenson's generic argument regarding the FCC's treatment of debt costs in calculating VRS rates is without merit or at least premature.

The TRS Fund is intended to reimburse the costs of providing an accommodation to persons with hearing or speech disabilities; it was never meant to support a lucrative investment vehicle at public expense by a corporation that controls 80% of the VRS business that is paid out of the TRS Fund. Contrary to Sorenson's apparent view, providers of VRS services are not just like "plumbing businesses [or] law firms" (Br. 38), and they do not compete in the same kind of market where, by and large, users pay for the services they use and therefore exert direct control of the prices being charged. Moreover, there is no good reason why the Commission should establish rates that provide undue incentives to raise capital through debt rather than equity. As the Commission held here, it would be "irresponsible and contrary to our mandate to ensure the efficient provision of TRS ... to simply reimburse VRS providers for all capital costs they have chosen to incur – such as high levels of debt – where there is no reason to believe that those costs are necessary to the provision of reimbursable services." *Order* ¶195 (JA 922).

Further, it is not correct that, as Sorenson asserts, the Commission "believed ... that borrowing was not a legitimate way to obtain . . . capital." Br. 45. Rather, the Commission's rate methodology simply limits recoverable interest on long-term debt, along with other capital costs, to an amount that does not exceed the

allowable return on investment, calculated based on the Commission-prescribed 11.25% rate of return.¹⁴

The Commission also was unpersuaded by the arguments of Sorenson and other VRS providers that the 11.25% rate of return allowed on capital investment, which had been employed in VRS rate calculations for many years, was not appropriate because it was based on rate making for telecommunications carriers. They argued that VRS providers operated in a different manner and the 11.25% return “does not adequately compensate VRS providers for their capital costs.” *Order* ¶195 (JA 922). Critically, however, none of the commenters showed that the 11.25% return was inadequate or suggested a “quantified, concrete alternative to the current approach for calculating an allowable rate of return, other than to simply reimburse providers for their actual expenditures on interest and other capital costs.” *Id.* Sorenson cites no other alternatives, and the Commission’s conclusion that “simply reimburs[ing] VRS providers for all capital costs they have chosen to incur” would have been an “irresponsible” approach still holds true. Again, Sorenson’s quarrel here is with the methodology (upheld by the Tenth Circuit) and not the application of that methodology to a specific set of facts.¹⁵

¹⁴ See generally *Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, 5 FCC Rcd 7507 (1990) (prescribing an 11.25% rate of return based on a weighted average of debt and equity costs).

¹⁵ Sorenson’s claim (Br. 39-40), that using “simple arithmetic,” it is receiving less than a 2% rate of return is based on a flawed understanding of rate regulation. It (footnote continued on following page)

Moreover, the fact that employing the traditional 11.25% rate of return was a “longstanding practice that was affirmed by a federal court of appeals” and that the Commission expected that “a capital cost methodology will become unnecessary” as it transitions to a new VRS structure was a reasonable justification for rejecting the calls to modify this approach during the transition. *Order* ¶196 (JA 923).

While Sorenson complains that the 11.25% authorized rate of return is too low, the FCC tentatively has concluded that it is too high as applied to local exchange carriers. Accordingly, it has instituted a proceeding to reexamine and lower the authorized rate of return as part of its comprehensive reform of the universal service fund. *See Connect America Fund*, 26 FCC Rcd 17663 ¶¶1044-1060 (2011), *pets. for review pending*, *In re: FCC 11-161*, No. 11-9900 (10th Cir., argued Nov. 19, 2013). Noting that it last prescribed the authorized rate of return for local exchange carriers more than 20 years ago, the Commission has stated its tentative belief that “fundamental changes in the cost of debt and equity since 1990 no longer allow us to conclude that a rate of return of 11.25 percent is necessarily ‘just and reasonable’ as required by section 201(b)” of the Communications Act. *Id.* at ¶1046

(footnote continued from preceding page)

produces its asserted 2% result by calculating its return on both capital costs *and* expenses. However, it is well established that rate of return regulated entities do not receive a return on expenses, such as labor costs, which apparently constitute a large portion of Sorenson’s costs. Expenses are reimbursed dollar for dollar. *See* n.15 above.

Contrary to Sorenson's argument, the Commission explained why it chose to "continue to move rates closer to actual cost using currently available ratemaking tools." *Order* ¶188 (JA 919). As an initial matter, the Commission pointed out that although the 2010 interim rates "began to close the gap between rates and costs," while those rates have remained in effect "provider costs have declined significantly." *Id.* & n. 497 (JA 919) (citing data submitted by RLSA). The Commission concluded that it was necessary to reduce rates further to "bring them closer to average provider costs." *Id.* Although Sorenson argued in favor of continuing existing rates as a base for a new multi-year plan, the Commission concluded that it could no longer justify maintaining rates at the existing 2010 interim rate levels in view of the record evidence of declining provider costs. *Id.* ¶190 (JA 920). However, as it had done in 2010, the FCC did not lower rates to the actual costs set out in the RLSA submissions, which averaged \$3.39 per minute based on 2013 projected costs. *Id.* ¶211 (JA 928). Rather, it adopted a "glide path" that would adopt new VRS rates well above providers' projected costs for 2013 and reduce the rates every six months to reach approximately \$3.49 per minute at the end of the transition, assuming its structural reforms of VRS take the full four-year period. *Id.* ¶¶212-215 (JA 928-30); *see also id.* nn.560-562 (JA 930) (noting that later years of rate schedule are "pending implementation of market-based rates"). Thus by Sorenson's own statements, its provision of VRS would not become

“unsustainable” for Tier I and Tier II minutes until 2017 and for Tier III minutes until 2016.¹⁶

The courts have recognized that the FCC “has broad discretion in selecting methods for the exercise of its powers to make and oversee rates.” *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1228 (D.C. Cir. 1980). Thus, the Commission’s rate-setting decisions are “appropriately treated as policy determinations in which the agency is acknowledged to have expertise.” *United States v. FCC*, 707 F.2d 610, 618 (D.C. Cir. 1983); accord *Sorenson*, 659 F.3d at 1045. “The relevant question is whether the agency’s numbers are within a zone of reasonableness, not whether its numbers are precisely right.” *WorldCom, Inc. v. FCC*, 238 F.3d 449, 461-462 (D.C. Cir. 2001) (internal quotation marks omitted). And, “[a]s long as the Commission makes a ‘reasonable selection from the available alternatives,’ its selection of methods will be upheld ‘even if the court thinks [that] a different decision would have been more reasonable or desirable.’” *Southwestern Bell Telephone Co. v. FCC*, 168 F.3d 1344, 1352 (D.C. Cir. 1999), quoting *MCI Telecommunications Corp. v. FCC*, 675 F.2d 408, 413 (D.C. Cir. 1982). Applying that deferential standard, the Court should affirm the FCC’s decision.

¹⁶ *Sorenson*, relying on its own financial information, asserted to the Commission that its VRS business would become “unsustainable” when rates reach less than \$4.37 per minute. See [5-2-13 ex parte] JA 1472. Even crediting *Sorenson*’s characterization of its financial situation, however, under the schedule adopted by the Commission, rates will not go below that level until January 2017 for the higher Tier I and II rates and July 2016 for Tier III rates. See Order ¶215 Table II (JA 930).

Much of Sorenson's brief is taken up with the theme that the Commission failed to respond to complaints from it and other providers that continuing to reduce rates would not allow them to recover what they considered allowable costs and drive them to insolvency and bankruptcy. *E.g.*, Br. 36. But these were not fundamentally new arguments. Sorenson unsuccessfully raised much the same "doomsday scenario" about VRS rate levels, allowable costs and rate of return in the Tenth Circuit. *Sorenson*, 659 F.3d at 1043. Sorenson does not claim that there are any substantial changed circumstances that warranted the Commission reconsidering any aspect of its VRS rate methodology or the VRS rate structure since it adopted the interim rates in 2010 or indeed in earlier proceedings. Having repeatedly addressed these issues in other related proceedings, the agency "need not repeat itself incessantly." *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993).

Similarly, the Commission has consistently held with respect to VRS and other forms of TRS that "costs attributable to the user's relay hardware and software, including installation, maintenance, and testing are not compensable from the Fund" because the expenses for which providers are compensated "must be *the providers'* expenses in making the service available and not the customer's costs of receiving the equipment." *Order* ¶193 (JA 921), *quoting 2006 MO&O*, 21 FCC Rcd at 8071 ¶17; *see also FNPRM* ¶49 (JA 172); *2007 TRS Order*, 22 FCC Rcd at 20170-71 ¶82. Sorenson's extended argument to the contrary (Br. 45-51) acknowledges the Commission's longstanding practice, but simply repeats its

arguments against it without citing any changed circumstances that would warrant the Commission's re-examination of this issue.

Although Sorenson contends (Br. 47) that the record in this proceeding “established a number of important facts,” none of those facts were in any way new. Where, as here, “a party attacks a policy on grounds that the agency already has dispatched in prior proceedings, the agency can simply refer to those proceedings if their reasoning remains applicable and adequately refutes the challenge.” *Bechtel*, 10 F.3d at 878; *see also Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1442 (8th Cir. 1993) (the court “will not require the [Commission] to reinvent the wheel in each case and engage in endless repetitions of its reasoning,” such that the FCC’s citation of a prior judicial decision “sufficed to identify the reasoning behind its decision”). No changed circumstances rendered the Commission’s previous reasoning on the reimbursement of VRS users’ equipment costs inapplicable in the proceeding below.

Sorenson ignores as well the Tenth Circuit’s rejection of its argument that Section 225 required that the Fund reimburse VRS providers for supplying customer equipment. The court said that “the suggestion that the statute is violated by Sorenson’s inability to provide free phones to new users has no merit. The statute only requires that VRS be made ‘available’ and that users pay no higher rates for calls than others pay for traditional phone services. ... It does not require that VRS users receive free equipment and training.” *Sorenson*, 659 F.3d at 1044. The court

added that “[j]ust as users of traditional telephone service do not receive their telephones for free, § 225 does not require that VRS users receive free videophones.” *Id.* at 1045.

It is true that commenters “argued that the cost of providing videophones was one of the necessary” costs of TRS and that the “Commission had a statutory duty to fund [those costs] from the TRS Fund.” Br. 48. However, to the extent that commenters made those arguments, they are inconsistent with the Tenth Circuit’s holding. Sorenson’s brief offers no explanation as to how its argument that it must be reimbursed by the TRS Fund for the cost of equipment survives the court’s holding that Section 225 does not require that the Commission reimburse providers’ costs of supplying equipment. Indeed, Sorenson’s brief here simply expands the same arguments it presented in the earlier case, repeating the references to the high costs of VRS phones, and the labor-intensive and costly nature of the training it claims users must be provided. Compare Br. 45-51 with Sorenson 10th Cir. Br. 43-44.

Sorenson also complains that it was “arbitrary and capricious for the FCC to ignore the cumulative effect of rate cuts.” Br. 55. However, that argument would have force only if there were some basis for Sorenson’s claims that the rates adopted by the Commission here are inconsistent with the statute or unreasonable because they do not allow it to recover its costs or for some other reasons. As we have discussed above, Sorenson has failed to demonstrate that the VRS rates at

issue here are in any way unlawful. Thus the cumulative effect of rate cuts is irrelevant where the rates adopted for reimbursement of VRS providers cover their properly allowable costs even when the rates are reduced to the lowest point at the end of the four-year transition period. The only “cumulative effect” that may be relevant here is the cumulative effect of the past rates paid to VRS providers that have far exceeded their costs of providing VRS and have been shouldered by general ratepayers.

Not only did the Commission fully explain its approach, but its methodology was entirely sensible and supported by substantial evidence. It made sense to harmonize the existing 2010 interim rates and RLSA’s proposed cost-based rates, thereby reducing overpayments by the TRS Fund while ensuring that the new transitional rates would permit service providers to continue offering service in accordance with the Commission’s rules. Indeed, the FCC’s action here to find a “reasonable balance” closely tracks the agency’s 2010 approach that the Tenth Circuit upheld against an arbitrary and capricious challenge. *Sorenson*, 659 F.3d at 1048. And, given the Commission’s twin purposes of moving reimbursement rates closer toward costs while avoiding a sudden change that could hamper providers’ ability to offer service, it was reasonable to adopt a “glide path” in which rates would begin well above providers’ actual costs and be reduced in increments over a four-year period from the existing rates to rates that will be closer to, but still above, providers’ allowable costs.

The Commission's decision fell easily within a "zone of reasonableness." *WorldCom, Inc.*, 238 F.3d at 461-62. To be sure, in setting such rates, "an agency may not pluck a number out of thin air," but "[w]hen a line has to be drawn . . . , the Commission is authorized to make a 'rational legislative-type judgment.'" *WJG Telephone Co. v. FCC*, 675 F.2d 386, 388-89 (D.C. Cir. 1982) (citations omitted). So long as "the figure selected by the agency reflects its informed discretion, and is neither patently unreasonable nor 'a dictate of unbridled whim,' then the agency's decision adequately satisfies the standard of review," *WJG Telephone Co.*, 675 F.2d at 388-89 (citations omitted). That is the case here.

B. The Commission Properly Retained A Tier Structure With Reasonable Payment Differentials.

In 2007, the Commission adopted a tiered VRS reimbursement structure based on data showing that different VRS providers "are not similarly situated with respect to their market share and their costs of providing service." *2007 TRS Rate Order*, 22 FCC Rcd at 20163 ¶52. The evidence before the Commission demonstrated that "providers that handle a relatively small amount of minutes . . . have relatively higher per-minute costs" and that "providers that handle a larger number of minutes . . . have lower per-minute costs." *Id.* ¶54. The Commission therefore explained that its tiered approach allowed providers to be reimbursed at a rate "that likely more accurately correlates to their actual costs." *Id.* The tiers were structured on a "cascading" basis so that "providers would be compensated at the same rate for the minutes falling within a specific tier." *Id.* Thus, all providers received

the same rate, regardless of cost, for the first 50,000 minutes of service provided; all received the same rate for the next 450,000 minutes; and all received the same rate beyond that point. *Id.* at 20163-20164. At the time, Sorenson supported the use of payment tiers. *See 2007 TRS Rate Order*, 22 FCC Rcd at 20164 n.160.

In the *Interim Rate Order*, the Commission retained the tier structure. The cost-based data showed that Tier III providers had dramatically lower costs than Tier I and Tier II providers. *See Interim Rate Order*, 25 FCC Rcd at 8694 Table 1. Relying on that data, the Commission found that “the current tier structure remains a workable, reliable way to account for the different costs incurred by carriers based on their size and volume of TRS minutes relayed” and that “[t]he rationale for adopting the tiers ... remains applicable.” *Id.* ¶17. The Tenth Circuit rejected Sorenson’s arbitrary and capricious challenge to the FCC’s retention of the three-tiered rate structure, finding “ample evidence” to support that decision. *Sorenson*, 659 F.3d at 1048.

Sorenson once again argues that the Commission was wrong in retaining that tier system in the *Order* on a transitional basis. First, Sorenson claims that the Commission did not justify its conclusion that the tiers reflect cost differentials based on economies of scale. Br. 59. However, as the Commission held, regardless of whether the cost differences are a result of economies of scale or exist for other reasons, the “actual existence [of cost differentials] is undisputed and is supported by historical data” contained in RLSA’s submissions. *Order* ¶ 203 (JA

925). That alone justifies the Commission's retention of tiers. It was thus also reasonable for the Commission to conclude that during this transition period, as it moved to structural reforms in which it expects that the tier classification will ultimately be eliminated, it should maintain a tier structure because it was important as a matter of policy to "maintain effective competition in the provision of VRS." *Id.* ¶204 (JA 925). Given the Commission's longstanding policy that rates should reflect costs, it made sense that higher-cost providers should be reimbursed at a higher rate.

Sorenson also contends that the record "did not support the Commission's speculation about lock-in," *i.e.*, that problems with interoperability and portability of VRS equipment "locked-in" VRS users to one provider, typically Sorenson as a result of its 80% market share, thus effectively limiting competition in the provision of VRS service. Br. 61. What the Commission concluded was that prior to the restructuring of VRS that it was undertaking in this proceeding, "there are good reasons to retain rate tiers and no compelling reasons to eliminate them." *Order* ¶200 (JA 924). One of the reasons it cited was that "eliminating the rate tiers immediately could force out some of the smallest remaining [VRS] providers" and thus limit consumer choice prior to structural reform under which, the Commission believed, smaller providers "may be able to operate more efficiently and compete more effectively" *Id.* Although Sorenson describes the VRS industry as "highly competitive" (Br. 22) and claims that it has "numerous competitors" (Br.

42), it also acknowledges that “almost all service is currently provided by three VRS providers” and that Sorenson’s share of the VRS market is at least 80%. Br. 12.

In this context, the Commission said that “current conditions” have created “technical barriers to interoperability [that] continue to inhibit the full development of competition.” *Order* ¶200 (JA 924). Contrary to Sorenson’s argument, the record, in fact, supports that conclusion. Indeed, in the report cited by Sorenson, a study found that “[t]he Sorenson nTouch VP is compatible with many non-Sorenson products. The nTouch PC, iPhone, iPad, and Evo clients [Sorenson’s newer VRS products] *do not work with non-Sorenson products*. The nTouch VP can leave video mails on most non-Sorenson products, but not vice versa.” [TAG Video Quality & Interoperability Study, Summary] JA 462 (emphasis added). Where customers of smaller providers cannot fully interoperate with the newest technology provided by Sorenson, the market leader with at least 80% of VRS users, it was reasonable for the Commission to conclude that “it is worth tolerating some degree of inefficiency in the short term, in order to maximize the opportunity for successful participation of multiple efficient providers in the future” *Order* ¶200 (JA 924). Sorenson also fails to note that the transitional rate plan gradually reduces the gap between the highest and lowest tier rates over the four-year or less course of the plan. *Id.*

Sorenson further asserts that the tier system is inconsistent with the statutory requirement that VRS be provided “in the most efficient manner.” Br. 65. Once again, this is simply a recasting of its unsuccessful argument to the Tenth Circuit that the tier system “makes no sense” because “it is unclear why the FCC would choose to pay any other provider more” than it pays the lowest cost provider. Sorenson 10th Cir. Br. 55. In 2007, when the Commission adopted tiers, it explained that new entrants to the VRS market typically have higher costs. A tier system thus would “ensure ... that in furtherance of promoting competition, the newer providers will cover their costs, and the larger and more established providers are not overcompensated ...” *2007 TRS Rate Order*, 22 FCC Rcd at 20163. That policy remains valid. In any event, the Commission’s pending review of the entire VRS program specifically anticipates that tier classifications ultimately will be eliminated in the proposed structural reform. *Order* ¶204 (JA 925).

Finally, Sorenson claims that the tier structure places it at a tremendous disadvantage compared to all of its competitors because it will be the only provider with any significant number of minutes reimbursed at Tier III rates, the lowest rates. Br. 57. But that claim fails because it ignores the cascading nature of the tier regime, under which every similarly situated VRS provider is paid the same per-minute rate. Thus, under the transitional rate plan, Sorenson (like all other providers) is paid at the Tier I rate for its first 500,000 minutes of VRS service and at the Tier II rate for the next 500,000 minutes. And any other provider that pro-

vides more than 1,000,000 minutes per month will be paid exactly what Sorenson earns for those Tier III minutes. The Tenth Circuit “easily dispense[d]” with this argument in *Sorenson*, holding that the tiered rate structure “treats all providers equally.” 659 F.3d at 1049.

Sorenson arrives at allegedly inequitable payment disparities only by comparing apples (providers principally covered by Tiers I and II) with oranges (Sorenson itself, given that its minutes largely fall within Tier III). Payment disparities that correspond to differences in service are inherent in any tier system and fairly reflect the established cost differentials. Moreover, Sorenson has little reason to complain: even though it has lower than average provider costs, it is compensated at Tier I and II rates for calls that fall within those tiers and therefore is *overcompensated* relative to smaller providers for those calls. *See 2010 Stay Order*, 25 FCC Rcd at 9119 ¶14.

C. Sorenson’s Challenge To The Commission’s Modifications To The Speed Of Answer Rule Is Not Properly Before The Court And, In Any Event, Is Meritless.

In the *Further Notice* in this proceeding, the Commission sought comment on whether it should modify the “speed of answer” requirement in its rules which, at the time, required VRS providers to answer 80% of all calls made to their call centers by VRS users within 120 seconds measured on a monthly basis. *FNPRM*, ¶87 (JA 184). Noting that the record showed that VRS providers already achieved a speed of answer time of 30 seconds for the majority of calls, the Commission in

the *Order* found it reasonable to reduce the permissible wait time for VRS calls to 30 seconds for 85% of calls measured on a daily basis. *Order* ¶137 (JA 896); *see* 47 C.F.R. § 64.404(b)(2). The Commission pointed out that this would more closely align VRS with other forms of TRS that are subject to a 10 second speed of answer requirement for 85% of calls measured on a daily basis. *Order* ¶135 (JA 895).

Sorenson states that it “warned the FCC” that the rates proposed by RLSA “would lead to ‘severe degradation in the quality of service provided’ to VRS users” and in particular “would cause longer wait times for VRS users,” thus “violat[ing] the Commission’s statutory duty to ensure that VRS users receive service that is ‘functionally equivalent’ to the service received by hearing users.” Br. 52. Sorenson made the identical argument to the Tenth Circuit, stating there that it had “warned the Commission that the rates in the *2010 Order* would lead to a doubling of average wait times ... undermining the progress toward functional equivalency” Sorenson 10th Cir. Br. 38. The Tenth Circuit rejected Sorenson’s argument (659 F.3d at 1043), and even if the Court finds that Sorenson’s repetition of the argument here is not precluded, it should reject it just as well.

First, Sorenson’s argument regarding wait times, based on the Commission’s speed of answer requirement, should be dismissed for want of jurisdiction insofar as it asserts that the Commission unreasonably reduced the speed of answer measurement period from monthly to daily. *See* Br. 52-55. That argument was

never presented to the Commission. Sorenson intimates that the FCC failed to provide adequate notice of a possible change in the measurement period, but it raises no specific APA notice issue. *See* Br. 54 (“[H]ad the Commission actually *proposed* to measure speed of answer on a daily basis before adopting the requirement, providers would have told the Commission that they do *not* currently meet such a standard and that it would be difficult if not impossible to do so.”) The Court has made clear that “even when a petitioner has no reason to raise an argument until the FCC issues an order that makes the issue relevant, the petitioner must file ‘a petition for reconsideration’ with the Commission before it may seek judicial review. 47 U.S.C. § 405(a).” *In re Core Communications, Inc.*, 455 F.3d 267, 276-77 (D.C. Cir. 2006), *citing AT&T Corp. v. FCC*, 86 F.3d 242, 246 (D.C. Cir. 1996). No party has sought reconsideration of the *Order*. Sorenson’s citation to comments it submitted to the Commission *after* the *Order* was adopted to support its claims (Br. 54, n.161) highlights that this is an issue that should have been presented first to the FCC and that Section 405 of the Communications Act prohibits it from being raised first in this case.

The Commission observed that the majority of VRS providers were already meeting a 30-second speed of answer requirement despite being subject only to a 120-second requirement. It was reasonable for the Commission to conclude that modifying the rule to align it with what most VRS providers were already doing was “feasible” and that modifying the requirement in this manner would further the

functional equivalency mandate of the statute. Such a modification was especially reasonable in view of the fact that other forms of TRS are subject to a 10-second speed of answer requirement. *See Order* ¶¶136-37 (JA 896).

The Commission did not have before it any comments suggesting that reducing the measurement period from monthly to daily was not feasible. That is the standard that applies to other forms of TRS, and it was reasonable for the Commission to conclude that since VRS is no longer a nascent service there is no longer any basis to deviate from the measurement period applied to other services. *Id* ¶139 (JA 897). Indeed, Sorenson concedes that the most providers would have said, if they had addressed the issue in comments, is that meeting such “a standard ... would be difficult if not impossible” Br. 54. That meeting a new standard would be “difficult” fails to demonstrate that it was arbitrary and capricious for the Commission to adopt it. That is particularly true here since the FCC’s action on speed of service was designed to help move VRS closer to the statutory goal of functional equivalence. *See Order* ¶136 (JA 896).

In addition, the Commission emphasized that it “will monitor VRS providers’ compliance with these new standards, and re-visit this issue in the future if necessary.” *Order* ¶141 (JA 898). If specific evidence becomes available that demonstrates the infeasibility of complying with the revised speed of answer standards there is thus a clear avenue to seek modification of the standard. In the absence of such evidence, the Commission’s judgment concerning a highly

technical issue like this is entitled to deference. *See, e.g., MCI Cellular Tel. Co. v. FCC*, 738 F.2d 1322, 1333 (D.C. Cir. 1984) (where a “highly technical question” is involved, “courts necessarily must show considerable deference to an agency's expertise”).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

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January 28, 2014

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7)(B), I hereby certify that the accompanying “Brief for Respondents” was prepared using a proportionally spaced 14 point typeface and contains 13915 words as measured by the word count function of Microsoft Office Word 2010.

/s/ C. Grey Pash, Jr.

C. Grey Pash, Jr.

January 28, 2014

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UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

§ 225. Telecommunications services for hearing-impaired and speech-impaired individuals

(a) Definitions

As used in this section--

(1) Common carrier or carrier

The term “common carrier” or “carrier” includes any common carrier engaged in interstate communication by wire or radio as defined in section 153 of this title and any common carrier engaged in intrastate communication by wire or radio, notwithstanding sections 152(b) and 221(b) of this title.

(2) TDD

The term “TDD” means a Telecommunications Device for the Deaf, which is a machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system.

(3) Telecommunications relay services

The term “telecommunications relay services” means telephone transmission services that provide the ability for an individual who is deaf, hard of hearing, deaf-blind, or who has a speech disability to engage in communication by wire or radio with one or more individuals, in a manner that is functionally equivalent to the ability of a hearing individual who does not have a speech disability to communicate using voice communication services by wire or radio.

(b) Availability of telecommunications relay services

(1) In general

In order to carry out the purposes established under section 151 of this title, 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, 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.

(2) Use of general authority and remedies

For the purposes of administering and enforcing the provisions of this section and the regulations prescribed thereunder, the Commission shall have the same authority, power, and functions with respect to common carriers engaged in intrastate communication as the Commission has in administering and enforcing the provisions of this subchapter with respect to any common carrier engaged in interstate communication. Any violation of this section by any common carrier engaged in intrastate communication shall be subject to the same remedies, penalties, and procedures as are applicable to a violation of this chapter by a common carrier engaged in interstate communication.

(c) Provision of services

Each common carrier providing telephone voice transmission services shall, not later than 3 years after July 26, 1990, provide in compliance with the regulations prescribed under this section, throughout the area in which it offers service, telecommunications relay services, individually, through designees, through a competitively selected vendor, or in concert with other carriers. A common carrier shall be considered to be in compliance with such regulations--

(1) with respect to intrastate telecommunications relay services in any State that does not have a certified program under subsection (f) of this section and with respect to interstate telecommunications relay services, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the Commission's regulations under subsection (d) of this section; or

(2) with respect to intrastate telecommunications relay services in any State that has a certified program under subsection (f) of this section for such State, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the program certified under subsection (f) of this section for such State.

(d) Regulations

(1) In general

The Commission shall, not later than 1 year after July 26, 1990, prescribe regulations to implement this section, including regulations that--

(A) establish functional requirements, guidelines, and operations procedures for telecommunications relay services;

(B) establish minimum standards that shall be met in carrying out subsection (c) of this section;

(C) require that telecommunications relay services operate every day for 24 hours per day;

(D) require that users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the

duration of the call, the time of day, and the distance from point of origination to point of termination;

(E) 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;

(F) prohibit relay operators from disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of the call; and

(G) prohibit relay operators from intentionally altering a relayed conversation.

(2) Technology

The Commission shall ensure that regulations prescribed to implement this section encourage, consistent with section 157(a) of this title, the use of existing technology and do not discourage or impair the development of improved technology.

(3) Jurisdictional separation of costs

(A) In general

Consistent with the provisions of section 410 of this title, the Commission shall prescribe regulations governing the jurisdictional separation of costs for the services provided pursuant to this section.

(B) Recovering costs

Such regulations shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction. In a State that has a certified program under subsection (f) of this section, a State commission shall permit a common carrier to recover the costs incurred in providing intrastate telecommunications relay services by a method consistent with the requirements of this section.

(e) Enforcement

(1) In general

Subject to subsections (f) and (g) of this section, the Commission shall enforce this section.

(2) Complaint

The Commission shall resolve, by final order, a complaint alleging a violation of this section within 180 days after the date such complaint is filed.

(f) Certification

(1) State documentation

Any State desiring to establish a State program under this section shall submit documentation to the Commission that describes the program of such State for implementing intrastate telecommunications relay services and the procedures and remedies available for enforcing any requirements imposed by the State program.

(2) Requirements for certification

After review of such documentation, the Commission shall certify the State program if the Commission determines that--

(A) the program makes available to hearing-impaired and speech-impaired individuals, either directly, through designees, through a competitively selected vendor, or through regulation of intrastate common carriers, intrastate telecommunications relay services in such State in a manner that meets or exceeds the requirements of regulations prescribed by the Commission under subsection (d) of this section; and

(B) the program makes available adequate procedures and remedies for enforcing the requirements of the State program.

(3) Method of funding

Except as provided in subsection (d) of this section, the Commission shall not refuse to certify a State program based solely on the method such State will implement for funding intrastate telecommunication relay services.

(4) Suspension or revocation of certification

The Commission may suspend or revoke such certification if, after notice and opportunity for hearing, the Commission determines that such certification is no longer warranted. In a State whose program has been suspended or revoked, the Commission shall take such steps as may be necessary, consistent with this section, to ensure continuity of telecommunications relay services.

(g) Complaint

(1) Referral of complaint

If a complaint to the Commission alleges a violation of this section with respect to intrastate telecommunications relay services within a State and certification of the program of such State under subsection (f) of this section is in effect, the Commission shall refer such complaint to such State.

(2) Jurisdiction of Commission

After referring a complaint to a State under paragraph (1), the Commission shall exercise jurisdiction over such complaint only if--

(A) final action under such State program has not been taken on such complaint by such State--

(i) within 180 days after the complaint is filed with such State; or

(ii) within a shorter period as prescribed by the regulations of such State; or

(B) the Commission determines that such State program is no longer qualified for certification under subsection (f) of this section.

47 U.S.C. § 405(a)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV. PROCEDURAL AND ADMINISTRATIVE
PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

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47 C.F.R. § 64.601

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 64. MISCELLANEOUS RULES RELATING TO COMMON CARRIERS
SUBPART F. TELECOMMUNICATIONS RELAY SERVICES AND RELATED
CUSTOMER PREMISES EQUIPMENT FOR PERSONS WITH DISABILITIES

§ 64.601 Definitions and provisions of general applicability.

(a) For purposes of this subpart, the terms Public Safety Answering Point (PSAP), statewide default answering point, and appropriate local emergency authority are defined in 47 CFR 64.3000; the terms pseudo-ANI and Wireline E911 Network are defined in 47 CFR 9.3; the term affiliate is defined in 47 CFR 52.12(a)(1)(i), and the terms majority and debt are defined in 47 CFR 52.12(a)(1)(ii).

(1) 711. The abbreviated dialing code for accessing relay services anywhere in the United States.

(2) ACD platform. The hardware and/or software that comprise the essential call center function of call distribution, and that are a necessary core component of Internet-based TRS.

(3) American Sign Language (ASL). A visual language based on hand shape, position, movement, and orientation of the hands in relation to each other and the body.

(4) ANI. For 911 systems, the Automatic Number Identification (ANI) identifies the calling party and may be used as the callback number.

(5) ASCII. An acronym for American Standard Code for Information Interexchange which employs an eight bit code and can operate at any standard transmission baud rate including 300, 1200, 2400, and higher.

(6) Authorized provider. An iTRS provider that becomes the iTRS user's new default provider, having obtained the user's authorization verified in accordance with the procedures specified in this part.

(7) Baudot. A seven bit code, only five of which are information bits. Baudot is used by some text telephones to communicate with each other at a 45.5 baud rate.

(8) Call release. A TRS feature that allows the CA to sign-off or be "released" from the telephone line after the CA has set up a telephone call between the originating TTY caller and a called TTY party, such as when a TTY user must go through a TRS facility to contact another TTY user because the called TTY party can only be reached through a voice-only interface, such as a switchboard.

(9) Common carrier or carrier. Any common carrier engaged in interstate Communication by wire or radio as defined in section 3(h) of the Communications Act of 1934, as amended (the Act), and any common carrier engaged in intrastate communication by wire or radio, notwithstanding sections 2(b) and 221(b) of the Act.

(10) Communications assistant (CA). A person who transliterates or interprets conversation between two or more end users of TRS. CA supersedes the term “TDD operator.”

(11) Default provider. The iTRS provider that registers and assigns a ten-digit telephone number to an iTRS user pursuant to § 64.611.

(12) Default provider change order. A request by an iTRS user to an iTRS provider to change the user's default provider.

(13) Hearing carry over (HCO). A form of TRS where the person with the speech disability is able to listen to the other end user and, in reply, the CA speaks the text as typed by the person with the speech disability. The CA does not type any conversation. Two-line HCO is an HCO service that allows TRS users to use one telephone line for hearing and the other for sending TTY messages. HCO-to-TTY allows a relay conversation to take place between an HCO user and a TTY user. HCO-to-HCO allows a relay conversation to take place between two HCO users.

(14) Interconnected VoIP service. The term “interconnected VoIP service” has the meaning given such term under § 9.3 of this chapter, as such section may be amended from time to time.

(15) Internet-based TRS (iTRS). A telecommunications relay service (TRS) in which an individual with a hearing or a speech disability connects to a TRS communications assistant using an Internet Protocol-enabled device via the Internet, rather than the public switched telephone network. Internet-based TRS does not include the use of a text telephone (TTY) over an interconnected voice over Internet Protocol service.

(16) Internet Protocol Captioned Telephone Service (IP CTS). A telecommunications relay service that permits an individual who can speak but who has difficulty hearing over the telephone to use a telephone and an Internet Protocol-enabled device via the Internet to simultaneously listen to the other party and read captions of what the other party is saying. With IP CTS, the connection carrying the captions between the relay service provider and the relay service user is via the Internet, rather than the public switched telephone network.

(17) Internet Protocol Relay Service (IP Relay). A telecommunications relay service that permits an individual with a hearing or a speech disability to communicate in text using an Internet Protocol-enabled device via the Internet, rather than using a text telephone (TTY) and the public switched telephone network.

(18) IP Relay access technology. Any equipment, software, or other technology issued, leased, or provided by an Internet-based TRS provider that can be used to make and receive an IP Relay call.

(19) iTRS access technology. Any equipment, software, or other technology issued, leased, or provided by an Internet-based TRS provider that can be used to make and receive an Internet-based TRS call.

(20) Neutral Video Communication Service Platform. The service platform that allows a registered Internet-based VRS user to use VRS access technology to make and receive VRS and point-to-point calls through a VRS CA service provider. The functions provided by the Neutral Video Communication Service Platform include the provision of a video link, user registration and validation, authentication, authorization, ACD platform functions, routing (including emergency call routing), call setup, mapping, call features (such as call forwarding and video mail), and such other features and functions not provided by the VRS CA service provider.

(21) New default provider. An iTRS provider that, either directly or through its numbering partner, initiates or implements the process to become the iTRS user's default provider by replacing the iTRS user's original default provider.

(22) Non-English language relay service. A telecommunications relay service that allows persons with hearing or speech disabilities who use languages other than English to communicate with voice telephone users in a shared language other than English, through a CA who is fluent in that language.

(23) Non-interconnected VoIP service. The term “non-interconnected VoIP service”--

(i) Means a service that--

(A) Enables real-time voice communications that originate from or terminate to the user's location using Internet protocol or any successor protocol; and

(B) Requires Internet protocol compatible customer premises equipment; and

(ii) Does not include any service that is an interconnected VoIP service.

(24) Numbering partner. Any entity with which an Internet-based TRS provider has entered into a commercial arrangement to obtain North American Numbering Plan telephone numbers.

(25) Original default provider. An iTRS provider that is the iTRS user's default provider immediately before that iTRS user's default provider is changed.

(26) Qualified interpreter. An interpreter who is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

(27) Registered Internet-based TRS user. An individual that has registered with a VRS or IP Relay provider as described in § 64.611.

(28) Registered Location. The most recent information obtained by a VRS or IP Relay provider that identifies the physical location of an end user.

(29) Sign language. A language which uses manual communication and body language to convey meaning, including but not limited to American Sign Language.

(30) Speech-to-speech relay service (STS). A telecommunications relay service that allows individuals with speech disabilities to communicate with voice telephone users through the use of specially trained CAs who understand the speech patterns of persons with speech disabilities and can repeat the words spoken by that person.

(31) Speed dialing. A TRS feature that allows a TRS user to place a call using a stored number maintained by the TRS facility. In the context of TRS, speed dialing allows a TRS user to give the CA a short-hand" name or number for the user's most frequently called telephone numbers.

(32) Telecommunications relay services (TRS). Telephone transmission services that provide the ability for an individual who has a hearing or speech disability to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing or speech disability to communicate using voice communication services by wire or radio. Such term includes services that enable two-way communication between an individual who uses a text telephone or other nonvoice terminal device and an individual who does not use such a device, speech-to-speech services, video relay services and non-English relay services. TRS supersedes the terms "dual party relay system," "message relay services," and "TDD Relay."

(33) Text telephone (TTY). A machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system. TTY supersedes the term "TDD" or "telecommunications device for the deaf," and TT.

(34) Three-way calling feature. A TRS feature that allows more than two parties to be on the telephone line at the same time with the CA.

(35) TRS Numbering Administrator. The neutral administrator of the TRS Numbering Directory selected based on a competitive bidding process.

(36) TRS Numbering Directory. The database administered by the TRS Numbering Administrator, the purpose of which is to map each registered Internet-based TRS user's NANP telephone number to his or her end device.

(37) TRS User Registration Database. A system of records containing TRS user identification data capable of:

(i) Receiving and processing subscriber information sufficient to identify unique TRS users and to ensure that each has a single default provider;

(ii) Assigning each VRS user a unique identifier;

(iii) Allowing VRS providers and other authorized entities to query the TRS User Registration Database to determine if a prospective user already has a default provider;

- (iv) Allowing VRS providers to indicate that a VRS user has used the service; and
- (v) Maintaining the confidentiality of proprietary data housed in the database by protecting it from theft, loss or disclosure to unauthorized persons. The purpose of this database is to ensure accurate registration and verification of VRS users and improve the efficiency of the TRS program.
- (38) Unauthorized provider. An iTRS provider that becomes the iTRS user's new default provider without having obtained the user's authorization verified in accordance with the procedures specified in this part.
- (39) Unauthorized change. A change in an iTRS user's selection of a default provider that was made without authorization verified in accordance with the verification procedures specified in this part.
- (40) Video relay service (VRS). A telecommunications relay service that allows people with hearing or speech disabilities who use sign language to communicate with voice telephone users through video equipment. The video link allows the CA to view and interpret the party's signed conversation and relay the conversation back and forth with a voice caller.
- (41) Visual privacy screen. A screen or any other feature that is designed to prevent one party or both parties on the video leg of a VRS call from viewing the other party during a call.
- (42) Voice carry over (VCO). A form of TRS where the person with the hearing disability is able to speak directly to the other end user. The CA types the response back to the person with the hearing disability. The CA does not voice the conversation. Two-line VCO is a VCO service that allows TRS users to use one telephone line for voicing and the other for receiving TTY messages. A VCO-to-TTY TRS call allows a relay conversation to take place between a VCO user and a TTY user. VCO-to-VCO allows a relay conversation to take place between two VCO users.
- (43) VRS access technology. Any equipment, software, or other technology issued, leased, or provided by an Internet-based TRS provider that can be used to make and receive a VRS call.
- (44) VRS Access Technology Reference Platform. A software product procured by or on behalf of the Commission that provides VRS functionality, including the ability to make and receive VRS and point-to-point calls, dial-around functionality, and the ability to update user registration location, and against which providers may test their own VRS access technology and platforms for compliance with the Commission's interoperability and portability rules.
- (45) VRS CA service provider. A VRS provider that uses the Neutral Video Communication Service Platform for the video communication service components of VRS.
- (b) For purposes of this subpart, all regulations and requirements applicable to common carriers shall also be applicable to providers of interconnected VoIP service.

47 C.F.R. § 64.602

§ 64.602 Jurisdiction.

Any violation of this subpart F by any common carrier engaged in intrastate communication shall be subject to the same remedies, penalties, and procedures as are applicable to a violation of the Act by a common carrier engaged in interstate communication.

47 C.F.R. § 64.603

§ 64.603 Provision of services.

Each common carrier providing telephone voice transmission services shall provide, not later than July 26, 1993, in compliance with the regulations prescribed herein, throughout the area in which it offers services, telecommunications relay services, individually, through designees, through a competitively selected vendor, or in concert with other carriers. Speech-to-speech relay service and interstate Spanish language relay service shall be provided by March 1, 2001. In addition, each common carrier providing telephone voice transmission services shall provide, not later than October 1, 2001, access via the 711 dialing code to all relay services as a toll free call. A common carrier shall be considered to be in compliance with these regulations:

(a) With respect to intrastate telecommunications relay services in any state that does not have a certified program under § 64.606 and with respect to interstate telecommunications relay services, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with § 64.604; or

(b) With respect to intrastate telecommunications relay services in any state that has a certified program under § 64.606 for such state, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the program certified under § 64.606 for such state.

47 C.F.R. § 64.604

§ 64.604 Mandatory minimum standards.

The standards in this section are applicable December 18, 2000, except as stated in paragraphs (c)(2) and (c)(7) of this section.

(a) Operational standards--

(1) Communications assistant (CA).

(i) TRS providers are responsible for requiring that all CAs be sufficiently trained to effectively meet the specialized communications needs of individuals with hearing and speech disabilities.

(ii) CAs must have competent skills in typing, grammar, spelling, interpretation of typewritten ASL, and familiarity with hearing and speech disability cultures, languages and etiquette. CAs must possess clear and articulate voice communications.

(iii) CAs must provide a typing speed of a minimum of 60 words per minute. Technological aids may be used to reach the required typing speed. Providers must give oral-to-type tests of CA speed.

(iv) TRS providers are responsible for requiring that VRS CAs are qualified interpreters. A "qualified interpreter" is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

(v) CAs answering and placing a TTY-based TRS or VRS call shall stay with the call for a minimum of ten minutes. CAs answering and placing an STS call shall stay with the call for a minimum of twenty minutes. The minimum time period shall begin to run when the CA reaches the called party. The obligation of the CA to stay with the call shall terminate upon the earlier of:

(A) The termination of the call by one of the parties to the call; or

(B) The completion of the minimum time period.

(vi) TRS providers must make best efforts to accommodate a TRS user's requested CA gender when a call is initiated and, if a transfer occurs, at the time the call is transferred to another CA.

(vii) TRS shall transmit conversations between TTY and voice callers in real time.

(viii) STS providers shall offer STS users the option to have their voices muted so that the other party to the call will hear only the CA and will not hear the STS user's voice.

(2) Confidentiality and conversation content.

(i) Except as authorized by section 705 of the Communications Act, 47 U.S.C. 605, CAs are prohibited from disclosing the content of any relayed conversation regardless of content, and

with a limited exception for STS CAs, from keeping records of the content of any conversation beyond the duration of a call, even if to do so would be inconsistent with state or local law. STS CAs may retain information from a particular call in order to facilitate the completion of consecutive calls, at the request of the user. The caller may request the STS CA to retain such information, or the CA may ask the caller if he wants the CA to repeat the same information during subsequent calls. The CA may retain the information only for as long as it takes to complete the subsequent calls.

(ii) CAs are prohibited from intentionally altering a relayed conversation and, to the extent that it is not inconsistent with federal, state or local law regarding use of telephone company facilities for illegal purposes, must relay all conversation verbatim unless the relay user specifically requests summarization, or if the user requests interpretation of an ASL call. An STS CA may facilitate the call of an STS user with a speech disability so long as the CA does not interfere with the independence of the user, the user maintains control of the conversation, and the user does not object. Appropriate measures must be taken by relay providers to ensure that confidentiality of VRS users is maintained.

(3) Types of calls.

(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.

(ii) Relay services shall be capable of handling any type of call normally provided by telecommunications carriers unless the Commission determines that it is not technologically feasible to do so. Relay service providers have the burden of proving the infeasibility of handling any type of call.

(iii) Relay service providers are permitted to decline to complete a call because credit authorization is denied.

(iv) Relay services shall be capable of handling pay-per-call calls.

(v) TRS providers are required to provide the following types of TRS calls: (1) Text-to-voice and voice-to-text; (2) VCO, two-line VCO, VCO-to-TTY, and VCO-to-VCO; (3) HCO, two-line HCO, HCO-to-TTY, HCO-to-HCO.

(vi) TRS providers are required to provide the following features: (1) Call release functionality; (2) speed dialing functionality; and (3) three-way calling functionality.

(vii) Voice mail and interactive menus. CAs must alert the TRS user to the presence of a recorded message and interactive menu through a hot key on the CA's terminal. The hot key will send text from the CA to the consumer's TTY indicating that a recording or interactive menu has been encountered. Relay providers shall electronically capture recorded messages and retain them for the length of the call. Relay providers may not impose any charges for additional calls, which must be made by the relay user in order to complete calls involving recorded or interactive messages.

(viii) TRS providers shall provide, as TRS features, answering machine and voice mail retrieval.

(4) Emergency call handling requirements for TTY-based TRS providers. TTY-based TRS providers must use a system for incoming emergency calls that, at a minimum, automatically and immediately transfers the caller to an appropriate Public Safety Answering Point (PSAP). An appropriate PSAP is either a PSAP that the caller would have reached if he had dialed 911 directly, or a PSAP that is capable of enabling the dispatch of emergency services to the caller in an expeditious manner.

(5) STS called numbers. Relay providers must offer STS users the option to maintain at the relay center a list of names and telephone numbers which the STS user calls. When the STS user requests one of these names, the CA must repeat the name and state the telephone number to the STS user. This information must be transferred to any new STS provider.

(6) Visual privacy screens/idle calls. A VRS CA may not enable a visual privacy screen or similar feature during a VRS call. A VRS CA must disconnect a VRS call if the caller or the called party to a VRS call enables a privacy screen or similar feature for more than five minutes or is otherwise unresponsive or unengaged for more than five minutes, unless the call is a 9-1-1 emergency call or the caller or called party is legitimately placed on hold and is present and waiting for active communications to commence. Prior to disconnecting the call, the CA must announce to both parties the intent to terminate the call and may reverse the decision to disconnect if one of the parties indicates continued engagement with the call.

(7) International calls. VRS calls that originate from an international IP address will not be compensated, with the exception of calls made by a U.S. resident who has pre-registered with his or her default provider prior to leaving the country, during specified periods of time while on travel and from specified regions of travel, for which there is an accurate means of verifying the identity and location of such callers. For purposes of this section, an international IP address is defined as one that indicates that the individual initiating the call is located outside the United States.

(b) Technical standards--

(1) ASCII and Baudot. TRS shall be capable of communicating with ASCII and Baudot format, at any speed generally in use.

(2) Speed of answer.

(i) TRS providers shall ensure adequate TRS facility staffing to provide callers with efficient access under projected calling volumes, so that the probability of a busy response due to CA unavailability shall be functionally equivalent to what a voice caller would experience in attempting to reach a party through the voice telephone network.

(ii) TRS facilities shall, except during network failure, answer 85% of all calls within 10 seconds by any method which results in the caller's call immediately being placed, not put in a queue or on hold. The ten seconds begins at the time the call is delivered to the TRS facility's network. A TRS facility shall ensure that adequate network facilities shall be used in conjunction with TRS

so that under projected calling volume the probability of a busy response due to loop trunk congestion shall be functionally equivalent to what a voice caller would experience in attempting to reach a party through the voice telephone network.

(A) The call is considered delivered when the TRS facility's equipment accepts the call from the local exchange carrier (LEC) and the public switched network actually delivers the call to the TRS facility.

(B) Abandoned calls shall be included in the speed-of-answer calculation.

(C) A TRS provider's compliance with this rule shall be measured on a daily basis.

(D) The system shall be designed to a P.01 standard.

(E) A LEC shall provide the call attempt rates and the rates of calls blocked between the LEC and the TRS facility to relay administrators and TRS providers upon request.

(iii) Speed of answer requirements for VRS providers.

(A) Speed of answer requirements for VRS providers are phased-in as follows:

(1) By January 1, 2007, VRS providers must answer 80% of all VRS calls within 120 seconds, measured on a monthly basis;

(2) By January 1, 2014, VRS providers must answer 85% of all VRS calls within 60 seconds, measured on a daily basis; and

(3) By July 1, 2014, VRS providers must answer 85% of all VRS calls within 30 seconds, measured on a daily basis. Abandoned calls shall be included in the VRS speed of answer calculation.

(B) VRS CA service providers must meet the speed of answer requirements for VRS providers as measured from the time a VRS call reaches facilities operated by the VRS CA service provider.

(3) Equal access to interexchange carriers. TRS users shall have access to their chosen interexchange carrier through the TRS, and to all other operator services, to the same extent that such access is provided to voice users.

(4) TRS facilities.

(i) TRS shall operate every day, 24 hours a day. Relay services that are not mandated by this Commission need not be provided every day, 24 hours a day, except VRS.

(ii) TRS shall have redundancy features functionally equivalent to the equipment in normal central offices, including uninterruptible power for emergency use.

(iii) A VRS CA may not relay calls from a location primarily used as his or her home.

(iv) A VRS provider leasing or licensing an automatic call distribution (ACD) platform must have a written lease or license agreement. Such lease or license agreement may not include any revenue sharing agreement or compensation based upon minutes of use. In addition, if any such lease is between two eligible VRS providers, the lessee or licensee must locate the ACD platform on its own premises and must utilize its own employees to manage the ACD platform. VRS CA service providers are not required to have a written lease or licensing agreement for an ACD if they obtain that function from the Neutral Video Communication Service Platform.

(5) Technology. No regulation set forth in this subpart is intended to discourage or impair the development of improved technology that fosters the availability of telecommunications to person with disabilities. TRS facilities are permitted to use SS7 technology or any other type of similar technology to enhance the functional equivalency and quality of TRS. TRS facilities that utilize SS7 technology shall be subject to the Calling Party Telephone Number rules set forth at 47 CFR 64.1600 et seq.

(6) Caller ID. When a TRS facility is able to transmit any calling party identifying information to the public network, the TRS facility must pass through, to the called party, at least one of the following: the number of the TRS facility, 711, or the 10–digit number of the calling party.

(7) STS 711 Calls. An STS provider shall, at a minimum, employ the same means of enabling an STS user to connect to a CA when dialing 711 that the provider uses for all other forms of TRS. When a CA directly answers an incoming 711 call, the CA shall transfer the STS user to an STS CA without requiring the STS user to take any additional steps. When an interactive voice response (IVR) system answers an incoming 711 call, the IVR system shall allow for an STS user to connect directly to an STS CA using the same level of prompts as the IVR system uses for all other forms of TRS.

(c) Functional standards--

(1) Consumer complaint logs.

(i) States and interstate providers must maintain a log of consumer complaints including all complaints about TRS in the state, whether filed with the TRS provider or the State, and must retain the log until the next application for certification is granted. The log shall include, at a minimum, the date the complaint was filed, the nature of the complaint, the date of resolution, and an explanation of the resolution.

(ii) Beginning July 1, 2002, states and TRS providers shall submit summaries of logs indicating the number of complaints received for the 12–month period ending May 31 to the Commission by July 1 of each year. Summaries of logs submitted to the Commission on July 1, 2001 shall indicate the number of complaints received from the date of OMB approval through May 31, 2001.

(2) Contact persons. Beginning on June 30, 2000, State TRS Programs, interstate TRS providers, and TRS providers that have state contracts must submit to the Commission a contact person

and/or office for TRS consumer information and complaints about a certified State TRS Program's provision of intrastate TRS, or, as appropriate, about the TRS provider's service. This submission must include, at a minimum, the following:

(i) The name and address of the office that receives complaints, grievances, inquiries, and suggestions;

(ii) Voice and TTY telephone numbers, fax number, e-mail address, and web address; and

(iii) The physical address to which correspondence should be sent.

(3) Public access to information. Carriers, through publication in their directories, periodic billing inserts, placement of TRS instructions in telephone directories, through directory assistance services, and incorporation of TTY numbers in telephone directories, shall assure that callers in their service areas are aware of the availability and use of all forms of TRS. Efforts to educate the public about TRS should extend to all segments of the public, including individuals who are hard of hearing, speech disabled, and senior citizens as well as members of the general population. In addition, each common carrier providing telephone voice transmission services shall conduct, not later than October 1, 2001, ongoing education and outreach programs that publicize the availability of 711 access to TRS in a manner reasonably designed to reach the largest number of consumers possible.

(4) Rates. TRS users shall pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from the point of origination to the point of termination.

(5) Jurisdictional separation of costs--

(i) General. Where appropriate, costs of providing TRS shall be separated in accordance with the jurisdictional separation procedures and standards set forth in the Commission's regulations adopted pursuant to section 410 of the Communications Act of 1934, as amended.

(ii) Cost recovery. Costs caused by interstate TRS shall be recovered from all subscribers for every interstate service, utilizing a shared-funding cost recovery mechanism. Except as noted in this paragraph, with respect to VRS, costs caused by intrastate TRS shall be recovered from the intrastate jurisdiction. In a state that has a certified program under § 64.606, the state agency providing TRS shall, through the state's regulatory agency, permit a common carrier to recover costs incurred in providing TRS by a method consistent with the requirements of this section. Costs caused by the provision of interstate and intrastate VRS shall be recovered from all subscribers for every interstate service, utilizing a shared-funding cost recovery mechanism.

(iii) Telecommunications Relay Services Fund. Effective July 26, 1993, an Interstate Cost Recovery Plan, hereinafter referred to as the TRS Fund, shall be administered by an entity selected by the Commission (administrator). The initial administrator, for an interim period, will be the National Exchange Carrier Association, Inc.

(A) Contributions. Every carrier providing interstate telecommunications services (including interconnected VoIP service providers pursuant to § 64.601(b)) and every provider of non-interconnected VoIP service shall contribute to the TRS Fund on the basis of interstate end-user revenues as described herein. Contributions shall be made by all carriers who provide interstate services, including, but not limited to, cellular telephone and paging, mobile radio, operator services, personal communications service (PCS), access (including subscriber line charges), alternative access and special access, packet-switched, WATS, 800, 900, message telephone service (MTS), private line, telex, telegraph, video, satellite, intraLATA, international and resale services.

(B) Contribution computations. Contributors' contributions to the TRS fund shall be the product of their subject revenues for the prior calendar year and a contribution factor determined annually by the Commission. The contribution factor shall be based on the ratio between expected TRS Fund expenses to the contributors' revenues subject to contribution. In the event that contributions exceed TRS payments and administrative costs, the contribution factor for the following year will be adjusted by an appropriate amount, taking into consideration projected cost and usage changes. In the event that contributions are inadequate, the fund administrator may request authority from the Commission to borrow funds commercially, with such debt secured by future years' contributions. Each subject contributor that has revenues subject to contribution must contribute at least \$25 per year. Contributors whose annual contributions total less than \$1,200 must pay the entire contribution at the beginning of the contribution period. Contributors whose contributions total \$1,200 or more may divide their contributions into equal monthly payments. Contributors shall complete and submit, and contributions shall be based on, a "Telecommunications Reporting Worksheet" (as published by the Commission in the Federal Register). The worksheet shall be certified to by an officer of the contributor, and subject to verification by the Commission or the administrator at the discretion of the Commission. Contributors' statements in the worksheet shall be subject to the provisions of section 220 of the Communications Act of 1934, as amended. The fund administrator may bill contributors a separate assessment for reasonable administrative expenses and interest resulting from improper filing or overdue contributions. The Chief of the Consumer and Governmental Affairs Bureau may waive, reduce, modify or eliminate contributor reporting requirements that prove unnecessary and require additional reporting requirements that the Bureau deems necessary to the sound and efficient administration of the TRS Fund.

(C) Registration Requirements for Providers of Non-Interconnected VoIP Service.

(1) Applicability. A non-interconnected VoIP service provider that will provide interstate service that generates interstate end-user revenue that is subject to contribution to the Telecommunications Relay Service Fund shall file the registration information described in paragraph (c)(5)(iii)(C)(2) of this section in accordance with the procedures described in paragraphs (c)(5)(iii)(C)(3) and (c)(5)(iii)(C)(4) of this section. Any non-interconnected VoIP service provider already providing interstate service that generates interstate end-user revenue that is subject to contribution to the Telecommunications Relay Service Fund on the effective date of these rules shall submit the relevant portion of its FCC Form 499-A in accordance with paragraphs (c)(5)(iii)(C)(2) and (3) of this section.

(2) Information required for purposes of TRS Fund contributions. A non-interconnected VoIP service provider that is subject to the registration requirement pursuant to paragraph (c)(5)(iii)(C)(1) of this section shall provide the following information:

- (i) The provider's business name(s) and primary address;
- (ii) The names and business addresses of the provider's chief executive officer, chairman, and president, or, in the event that a provider does not have such executives, three similarly senior-level officials of the provider;
- (iii) The provider's regulatory contact and/or designated agent;
- (iv) All names that the provider has used in the past; and
- (v) The state(s) in which the provider provides such service.

(3) Submission of registration. A provider that is subject to the registration requirement pursuant to paragraph (c)(5)(iii)(C)(1) of this section shall submit the information described in paragraph (c)(5)(iii)(C)(2) of this section in accordance with the Instructions to FCC Form 499–A. FCC Form 499–A must be submitted under oath and penalty of perjury.

(4) Changes in information. A provider must notify the Commission of any changes to the information provided pursuant to paragraph (c)(5)(iii)(C)(2) of this section within no more than one week of the change. Providers may satisfy this requirement by filing the relevant portion of FCC Form 499–A in accordance with the Instructions to such form.

(D) Data Collection and Audits.

(1) TRS providers seeking compensation from the TRS Fund shall provide the administrator with true and adequate data, and other historical, projected and state rate related information reasonably requested to determine the TRS Fund revenue requirements and payments. TRS providers shall provide the administrator with the following: total TRS minutes of use, total interstate TRS minutes of use, total TRS investment in general in accordance with part 32 of this chapter, and other historical or projected information reasonably requested by the administrator for purposes of computing payments and revenue requirements.

(2) Call data required from all TRS providers. In addition to the data requested by paragraph (c)(5)(iii)(C)(1) of this section, TRS providers seeking compensation from the TRS Fund shall submit the following specific data associated with each TRS call for which compensation is sought:

- (i) The call record ID sequence;
- (ii) CA ID number;
- (iii) Session start and end times noted at a minimum to the nearest second;

- (iv) Conversation start and end times noted at a minimum to the nearest second;
- (v) Incoming telephone number and IP address (if call originates with an IP-based device) at the time of the call;
- (vi) Outbound telephone number (if call terminates to a telephone) and IP address (if call terminates to an IP-based device) at the time of call;
- (vii) Total conversation minutes;
- (viii) Total session minutes;
- (ix) The call center (by assigned center ID number) that handled the call; and
- (x) The URL address through which the call is initiated.

(3) Additional call data required from Internet-based Relay Providers. In addition to the data required by paragraph (c)(5)(iii)(C)(2) of this section, Internet-based Relay Providers seeking compensation from the Fund shall submit speed of answer compliance data.

(4) Providers submitting call record and speed of answer data in compliance with paragraphs (c)(5)(iii)(C)(2) and (c)(5)(iii)(C)(3) of this section shall:

(i) Employ an automated record keeping system to capture such data required pursuant to paragraph (c)(5)(iii)(C)(2) of this section for each TRS call for which minutes are submitted to the fund administrator for compensation; and

(ii) Submit such data electronically, in a standardized format. For purposes of this subparagraph, an automated record keeping system is a system that captures data in a computerized and electronic format that does not allow human intervention during the call session for either conversation or session time.

(5) Certification. The chief executive officer (CEO), chief financial officer (CFO), or other senior executive of a TRS provider with first hand knowledge of the accuracy and completeness of the information provided, when submitting a request for compensation from the TRS Fund must, with each such request, certify as follows:

I swear under penalty of perjury that:

(i) I am ---- (name and title), --an officer of the above-named reporting entity and that I have examined the foregoing reports and that all requested information has been provided and all statements of fact, as well as all cost and demand data contained in this Relay Services Data Request, are true and accurate; and

(ii) The TRS calls for which compensation is sought were handled in compliance with Section 225 of the Communications Act and the Commission's rules and orders, and are not the result of impermissible financial incentives or payments to generate calls.

(6) Audits. The fund administrator and the Commission, including the Office of Inspector General, shall have the authority to examine and verify TRS provider data as necessary to assure the accuracy and integrity of TRS Fund payments. TRS providers must submit to audits annually or at times determined appropriate by the Commission, the fund administrator, or by an entity approved by the Commission for such purpose. A TRS provider that fails to submit to a requested audit, or fails to provide documentation necessary for verification upon reasonable request, will be subject to an automatic suspension of payment until it submits to the requested audit or provides sufficient documentation.

(7) Call data record retention. Internet-based TRS providers shall retain the data required to be submitted by this section, and all other call detail records, other records that support their claims for payment from the TRS Fund, and records used to substantiate the costs and expense data submitted in the annual relay service data request form, in an electronic format that is easily retrievable, for a minimum of five years.

(E) Payments to TRS providers.

(1) TRS Fund payments shall be distributed to TRS providers based on formulas approved or modified by the Commission. The administrator shall file schedules of payment formulas with the Commission. Such formulas shall be designed to compensate TRS providers for reasonable costs of providing interstate TRS, and shall be subject to Commission approval. Such formulas shall be based on total monthly interstate TRS minutes of use. The formulas should appropriately compensate interstate providers for the provision of TRS, whether intrastate or interstate.

(2) TRS minutes of use for purposes of interstate cost recovery under the TRS Fund are defined as the minutes of use for completed interstate TRS calls placed through the TRS center beginning after call set-up and concluding after the last message call unit.

(3) In addition to the data required under paragraph (c)(5)(iii)(C) of this section, all TRS providers, including providers who are not interexchange carriers, local exchange carriers, or certified state relay providers, must submit reports of interstate TRS minutes of use to the administrator in order to receive payments.

(4) The administrator shall establish procedures to verify payment claims, and may suspend or delay payments to a TRS provider if the TRS provider fails to provide adequate verification of payment upon reasonable request, or if directed by the Commission to do so. The TRS Fund administrator shall make payments only to eligible TRS providers operating pursuant to the mandatory minimum standards as required in this section, and after disbursements to the administrator for reasonable expenses incurred by it in connection with TRS Fund administration. TRS providers receiving payments shall file a form prescribed by the administrator. The administrator shall fashion a form that is consistent with 47 CFR parts 32 and 36 procedures reasonably tailored to meet the needs of TRS providers.

(5) The Commission shall have authority to audit providers and have access to all data, including carrier specific data, collected by the fund administrator. The fund administrator shall have authority to audit TRS providers reporting data to the administrator.

(6) The administrator shall not be obligated to pay any request for compensation until it has been established as compensable. A request shall be established as compensable only after the administrator, in consultation with the Commission, or the Commission determines that the provider has met its burden to demonstrate that the claim is compensable under applicable Commission rules and the procedures established by the administrator. Any request for compensation for which payment has been suspended or withheld in accordance with paragraph (c)(5)(iii)(L) of this section shall not be established as compensable until the administrator, in consultation with the Commission, or the Commission determines that the request is compensable in accordance with paragraph (c)(5)(iii)(L)(4) of this section.

(F) Eligibility for payment from the TRS Fund.

(1) TRS providers, except Internet-based TRS providers, eligible for receiving payments from the TRS Fund must be:

(i) TRS facilities operated under contract with and/or by certified state TRS programs pursuant to § 64.606; or

(ii) TRS facilities owned or operated under contract with a common carrier providing interstate services operated pursuant to this section; or

(iii) Interstate common carriers offering TRS pursuant to this section.

(2) Internet-based TRS providers eligible for receiving payments from the TRS fund must be certified by the Commission pursuant to § 64.606.

(G) Any eligible TRS provider as defined in paragraph (c)(5)(iii)(F) of this section shall notify the administrator of its intent to participate in the TRS Fund thirty (30) days prior to submitting reports of TRS interstate minutes of use in order to receive payment settlements for interstate TRS, and failure to file may exclude the TRS provider from eligibility for the year.

(H) Administrator reporting, monitoring, and filing requirements. The administrator shall perform all filing and reporting functions required in paragraphs (c)(5)(iii)(A) through (c)(5)(iii)(J) of this section. TRS payment formulas and revenue requirements shall be filed with the Commission on May 1 of each year, to be effective the following July 1. The administrator shall report annually to the Commission an itemization of monthly administrative costs which shall consist of all expenses, receipts, and payments associated with the administration of the TRS Fund. The administrator is required to keep the TRS Fund separate from all other funds administered by the administrator, shall file a cost allocation manual (CAM) and shall provide the Commission full access to all data collected pursuant to the administration of the TRS Fund. The administrator shall account for the financial transactions of the TRS Fund in accordance with generally accepted accounting principles for federal agencies and maintain the accounts of the TRS Fund in accordance with the United States Government Standard General Ledger. When the administrator, or any independent auditor hired by the administrator, conducts audits of providers of services under the TRS program or contributors to the TRS Fund, such audits shall be conducted in accordance with generally accepted government auditing standards. In

administering the TRS Fund, the administrator shall also comply with all relevant and applicable federal financial management and reporting statutes. The administrator shall establish a non-paid voluntary advisory committee of persons from the hearing and speech disability community, TRS users (voice and text telephone), interstate service providers, state representatives, and TRS providers, which will meet at reasonable intervals (at least semi-annually) in order to monitor TRS cost recovery matters. Each group shall select its own representative to the committee. The administrator's annual report shall include a discussion of the advisory committee deliberations.

(I) Information filed with the administrator. The Chief Executive Officer (CEO), Chief Financial Officer (CFO), or other senior executive of a provider submitting minutes to the Fund for compensation must, in each instance, certify, under penalty of perjury, that the minutes were handled in compliance with section 225 and the Commission's rules and orders, and are not the result of impermissible financial incentives or payments to generate calls. The CEO, CFO, or other senior executive of a provider submitting cost and demand data to the TRS Fund administrator shall certify under penalty of perjury that such information is true and correct. The administrator shall keep all data obtained from contributors and TRS providers confidential and shall not disclose such data in company-specific form unless directed to do so by the Commission. Subject to any restrictions imposed by the Chief of the Consumer and Governmental Affairs Bureau, the TRS Fund administrator may share data obtained from carriers with the administrators of the universal support mechanisms (see § 54.701 of this chapter), the North American Numbering Plan administration cost recovery (see § 52.16 of this chapter), and the long-term local number portability cost recovery (see § 52.32 of this chapter). The TRS Fund administrator shall keep confidential all data obtained from other administrators. The administrator shall not use such data except for purposes of administering the TRS Fund, calculating the regulatory fees of interstate common carriers, and aggregating such fee payments for submission to the Commission. The Commission shall have access to all data reported to the administrator, and authority to audit TRS providers. Contributors may make requests for Commission nondisclosure of company-specific revenue information under § 0.459 of this chapter by so indicating on the Telecommunications Reporting Worksheet at the time that the subject data are submitted. The Commission shall make all decisions regarding nondisclosure of company-specific information.

(J) [Reserved by 76 FR 63563]

(K) All parties providing services or contributions or receiving payments under this section are subject to the enforcement provisions specified in the Communications Act, the Americans with Disabilities Act, and the Commission's rules.

(L) Procedures for the suspension/withholding of payment.

(1) The Fund administrator will continue the current practice of reviewing monthly requests for compensation of TRS minutes of use within two months after they are filed with the Fund administrator.

(2) If the Fund administrator in consultation with the Commission, or the Commission on its own accord, determines that payments for certain minutes should be withheld, a TRS provider will be notified within two months from the date for the request for compensation was filed, as to why

its claim for compensation has been withheld in whole or in part. TRS providers then will be given two additional months from the date of notification to provide additional justification for payment of such minutes of use. Such justification should be sufficiently detailed to provide the Fund administrator and the Commission the information needed to evaluate whether the minutes of use in dispute are compensable. If a TRS provider does not respond, or does not respond with sufficiently detailed information within two months after notification that payment for minutes of use is being withheld, payment for the minutes of use in dispute will be denied permanently.

(3) If the VRS provider submits additional justification for payment of the minutes of use in dispute within two months after being notified that its initial justification was insufficient, the Fund administrator or the Commission will review such additional justification documentation, and may ask further questions or conduct further investigation to evaluate whether to pay the TRS provider for the minutes of use in dispute, within eight months after submission of such additional justification.

(4) If the provider meets its burden to establish that the minutes in question are compensable under the Commission's rules, the Fund administrator will compensate the provider for such minutes of use. Any payment by the Commission will not preclude any future action by either the Commission or the U.S. Department of Justice to recover past payments (regardless of whether the payment was the subject of withholding) if it is determined at any time that such payment was for minutes billed to the Commission in violation of the Commission's rules or any other civil or criminal law.

(5) If the Commission determines that the provider has not met its burden to demonstrate that the minutes of use in dispute are compensable under the Commission's rules, payment will be permanently denied. The Fund administrator or the Commission will notify the provider of this decision within one year of the initial request for payment.

(M) Whistleblower protections. Providers shall not take any reprisal in the form of a personnel action against any current or former employee or contractor who discloses to a designated manager of the provider, the Commission, the TRS Fund administrator or to any Federal or state law enforcement entity, any information that the reporting person reasonably believes evidences known or suspected violations of the Communications Act or TRS regulations, or any other activity that the reporting person reasonably believes constitutes waste, fraud, or abuse, or that otherwise could result in the improper billing of minutes of use to the TRS Fund and discloses that information to a designated manager of the provider, the Commission, the TRS Fund administrator or to any Federal or state law enforcement entity. Providers shall provide an accurate and complete description of these TRS whistleblower protections, including the right to notify the FCC's Office of Inspector General or its Enforcement Bureau, to all employees and contractors, in writing. Providers that already disseminate their internal business policies to its employees in writing (e.g. in employee handbooks, policies and procedures manuals, or bulletin board postings--either online or in hard copy) must include an accurate and complete description of these TRS whistleblower protections in those written materials.

(N) In addition to the provisions set forth above, VRS providers shall be subject to the following provisions:

(1) Eligibility for reimbursement from the TRS Fund.

(i) Only an eligible VRS provider, as defined in paragraph (c)(5)(iii)(F) of this section, may hold itself out to the general public as providing VRS.

(ii) VRS service must be offered under the name by which the eligible VRS provider offering such service became certified and in a manner that clearly identifies that provider of the service. Where a TRS provider also utilizes sub-brands to identify its VRS, each sub-brand must clearly identify the eligible VRS provider. Providers must route all VRS calls through a single URL address used for each name or sub-brand used.

(iii) An eligible VRS provider may not contract with or otherwise authorize any third party to provide interpretation services or call center functions (including call distribution, call routing, call setup, mapping, call features, billing, and registration) on its behalf, unless that authorized third party also is an eligible provider, or the eligible VRS provider is a VRS CA service provider and the authorized third party is the provider of the Neutral Video Communication Service Platform, except that a VRS CA service provider may not contract with or otherwise authorize the provider of the Neutral Video Communication Service Platform to perform billing on its behalf.

(iv) To the extent that an eligible VRS provider contracts with or otherwise authorizes a third party to provide any other services or functions related to the provision of VRS other than interpretation services or call center functions, that third party must not hold itself out as a provider of VRS, and must clearly identify the eligible VRS provider to the public. To the extent an eligible VRS provider contracts with or authorizes a third party to provide any services or functions related to marketing or outreach, and such services utilize VRS, those VRS minutes are not compensable on a per minute basis from the TRS fund.

(v) All third-party contracts or agreements entered into by an eligible provider must be in writing. Copies of such agreements shall be made available to the Commission and to the TRS Fund administrator upon request.

(2) Call center reports. VRS providers shall file a written report with the Commission and the TRS Fund administrator, on April 1st and October 1st of each year for each call center that handles VRS calls that the provider owns or controls, including centers located outside of the United States, that includes:

(i) The complete street address of the center;

(ii) The number of individual CAs and CA managers; and

(iii) The name and contact information (phone number and e-mail address) of the manager(s) at the center. VRS providers shall also file written notification with the Commission and the TRS Fund administrator of any change in a center's location, including the opening, closing, or relocation of any center, at least 30 days prior to any such change.

(3) Compensation of CAs. VRS providers may not compensate, give a preferential work schedule or otherwise benefit a CA in any manner that is based upon the number of VRS minutes or calls that the CA relays, either individually or as part of a group.

(4) Remote training session calls. VRS calls to a remote training session or a comparable activity will not be compensable from the TRS Fund when the provider submitting minutes for such a call has been involved, in any manner, with such a training session. Such prohibited involvement includes training programs or comparable activities in which the provider or any affiliate or related party thereto, including but not limited to its subcontractors, partners, employees or sponsoring organizations or entities, has any role in arranging, scheduling, sponsoring, hosting, conducting or promoting such programs or activities.

(6) Complaints--

(i) Referral of complaint. If a complaint to the Commission alleges a violation of this subpart with respect to intrastate TRS within a state and certification of the program of such state under § 64.606 is in effect, the Commission shall refer such complaint to such state expeditiously.

(ii) Intrastate complaints shall be resolved by the state within 180 days after the complaint is first filed with a state entity, regardless of whether it is filed with the state relay administrator, a state PUC, the relay provider, or with any other state entity.

(iii) Jurisdiction of Commission. After referring a complaint to a state entity under paragraph (c)(6)(i) of this section, or if a complaint is filed directly with a state entity, the Commission shall exercise jurisdiction over such complaint only if:

(A) Final action under such state program has not been taken within:

(1) 180 days after the complaint is filed with such state entity; or

(2) A shorter period as prescribed by the regulations of such state; or

(B) The Commission determines that such state program is no longer qualified for certification under § 64.606.

(iv) The Commission shall resolve within 180 days after the complaint is filed with the Commission any interstate TRS complaint alleging a violation of section 225 of the Act or any complaint involving intrastate relay services in states without a certified program. The Commission shall resolve intrastate complaints over which it exercises jurisdiction under paragraph (c)(6)(iii) of this section within 180 days.

(v) Complaint procedures. Complaints against TRS providers for alleged violations of this subpart may be either informal or formal.

(A) Informal complaints--

(1) Form. An informal complaint may be transmitted to the Consumer & Governmental Affairs Bureau by any reasonable means, such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, or some other method that would best accommodate a complainant's hearing or speech disability.

(2) Content. An informal complaint shall include the name and address of the complainant; the name and address of the TRS provider against whom the complaint is made; a statement of facts supporting the complainant's allegation that the TRS provided it has violated or is violating section 225 of the Act and/or requirements under the Commission's rules; the specific relief or satisfaction sought by the complainant; and the complainant's preferred format or method of response to the complaint by the Commission and the defendant TRS provider (such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, or some other method that would best accommodate the complainant's hearing or speech disability).

(3) Service; designation of agents. The Commission shall promptly forward any complaint meeting the requirements of this subsection to the TRS provider named in the complaint. Such TRS provider shall be called upon to satisfy or answer the complaint within the time specified by the Commission. Every TRS provider shall file with the Commission a statement designating an agent or agents whose principal responsibility will be to receive all complaints, inquiries, orders, decisions, and notices and other pronouncements forwarded by the Commission. Such designation shall include a name or department designation, business address, telephone number (voice and TTY), facsimile number and, if available, internet e-mail address.

(B) Review and disposition of informal complaints.

(1) Where it appears from the TRS provider's answer, or from other communications with the parties, that an informal complaint has been satisfied, the Commission may, in its discretion, consider the matter closed without response to the complainant or defendant. In all other cases, the Commission shall inform the parties of its review and disposition of a complaint filed under this subpart. Where practicable, this information shall be transmitted to the complainant and defendant in the manner requested by the complainant (e.g., letter, facsimile transmission, telephone (voice/TRS/TTY) or Internet e-mail).

(2) A complainant unsatisfied with the defendant's response to the informal complaint and the staff's decision to terminate action on the informal complaint may file a formal complaint with the Commission pursuant to paragraph (c)(6)(v)(C) of this section.

(C) Formal complaints. A formal complaint shall be in writing, addressed to the Federal Communications Commission, Enforcement Bureau, Telecommunications Consumer Division, Washington, DC 20554 and shall contain:

(1) The name and address of the complainant,

(2) The name and address of the defendant against whom the complaint is made,

(3) A complete statement of the facts, including supporting data, where available, showing that such defendant did or omitted to do anything in contravention of this subpart, and

(4) The relief sought.

(D) Amended complaints. An amended complaint setting forth transactions, occurrences or events which have happened since the filing of the original complaint and which relate to the original cause of action may be filed with the Commission.

(E) Number of copies. An original and two copies of all pleadings shall be filed.

(F) Service.

(1) Except where a complaint is referred to a state pursuant to § 64.604(c)(6)(i), or where a complaint is filed directly with a state entity, the Commission will serve on the named party a copy of any complaint or amended complaint filed with it, together with a notice of the filing of the complaint. Such notice shall call upon the defendant to satisfy or answer the complaint in writing within the time specified in said notice of complaint.

(2) All subsequent pleadings and briefs shall be served by the filing party on all other parties to the proceeding in accordance with the requirements of § 1.47 of this chapter. Proof of such service shall also be made in accordance with the requirements of said section.

(G) Answers to complaints and amended complaints. Any party upon whom a copy of a complaint or amended complaint is served under this subpart shall serve an answer within the time specified by the Commission in its notice of complaint. The answer shall advise the parties and the Commission fully and completely of the nature of the defense and shall respond specifically to all material allegations of the complaint. In cases involving allegations of harm, the answer shall indicate what action has been taken or is proposed to be taken to stop the occurrence of such harm. Collateral or immaterial issues shall be avoided in answers and every effort should be made to narrow the issues. Matters alleged as affirmative defenses shall be separately stated and numbered. Any defendant failing to file and serve an answer within the time and in the manner prescribed may be deemed in default.

(H) Replies to answers or amended answers. Within 10 days after service of an answer or an amended answer, a complainant may file and serve a reply which shall be responsive to matters contained in such answer or amended answer and shall not contain new matter. Failure to reply will not be deemed an admission of any allegation contained in such answer or amended answer.

(I) Defective pleadings. Any pleading filed in a complaint proceeding that is not in substantial conformity with the requirements of the applicable rules in this subpart may be dismissed.

(7) Treatment of TRS customer information. Beginning on July 21, 2000, all future contracts between the TRS administrator and the TRS vendor shall provide for the transfer of TRS customer profile data from the outgoing TRS vendor to the incoming TRS vendor. Such data must be disclosed in usable form at least 60 days prior to the provider's last day of service provision. Such data may not be used for any purpose other than to connect the TRS user with the called parties desired by that TRS user. Such information shall not be sold, distributed,

shared or revealed in any other way by the relay center or its employees, unless compelled to do so by lawful order.

(8) Incentives for use of IP CTS.

(i) An IP CTS provider shall not offer or provide to any person or entity that registers to use IP CTS any form of direct or indirect incentives, financial or otherwise, to register for or use IP CTS.

(ii) An IP CTS provider shall not offer or provide to a hearing health professional any direct or indirect incentives, financial or otherwise, that are tied to a consumer's decision to register for or use IP CTS. Where an IP CTS provider offers or provides IP CTS equipment, directly or indirectly, to a hearing health professional, and such professional makes or has the opportunity to make a profit on the sale of the equipment to consumers, such IP CTS provider shall be deemed to be offering or providing a form of incentive tied to a consumer's decision to register for or use IP CTS.

(iii) Joint marketing arrangements between IP CTS providers and hearing health professionals shall be prohibited.

(iv) For the purpose of this paragraph (c)(8), a hearing health professional is any medical or non-medical professional who advises consumers with regard to hearing disabilities.

(v) Any IP CTS provider that does not comply with this paragraph (c)(8) shall be ineligible for compensation for such IP CTS from the TRS Fund.

(9) IP CTS registration and certification requirements.

(i) IP CTS providers must first obtain the following registration information from each consumer prior to requesting compensation from the TRS Fund for service provided to the consumer. The consumer's full name, date of birth, last four digits of the consumer's social security number, address and telephone number.

(ii) Self-certification prior to demarcation date. IP CTS providers, in order to be eligible to receive compensation from the TRS Fund for providing IP CTS, also must first obtain a written certification from the consumer, and if obtained prior to the demarcation date, such written certification shall attest that the consumer needs IP CTS to communicate in a manner that is functionally equivalent to the ability of a hearing individual to communicate using voice communication services. The certification must include the consumer's certification that:

(A) The consumer has a hearing loss that necessitates IP CTS to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users;

(B) The consumer understands that the captioning service is provided by a live communications assistant; and

(C) The consumer understands that the cost of IP CTS is funded by the TRS Fund.

(iii) Self-certification on or after demarcation date. IP CTS providers must also first obtain from each consumer prior to requesting compensation from the TRS Fund for the consumer, a written certification from the consumer, and if obtained on or after the demarcation date, such certification shall state that:

(A) The consumer has a hearing loss that necessitates use of captioned telephone service;

(B) The consumer understands that the captioning on captioned telephone service is provided by a live communications assistant who listens to the other party on the line and provides the text on the captioned phone;

(C) The consumer understands that the cost of captioning each Internet protocol captioned telephone call is funded through a federal program; and

(D) The consumer will not permit, to the best of the consumer's ability, persons who have not registered to use Internet protocol captioned telephone service to make captioned telephone calls on the consumer's registered IP captioned telephone service or device.

(iv) The certification required by paragraphs (c)(9)(ii) and (iii) of this section must be made on a form separate from any other agreement or form, and must include a separate consumer signature specific to the certification. Beginning on the demarcation date, such certification shall be made under penalty of perjury. For purposes of this section, an electronic signature, defined by the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq., as an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record, has the same legal effect as a written signature.

(v) Third-party certification prior to demarcation date. Where IP CTS equipment is or has been obtained by a consumer from an IP CTS provider, directly or indirectly, at no charge or for less than \$75 and the consumer was registered in accordance with the requirements of paragraph (c)(9) of this section prior to the demarcation date, the IP CTS provider must also obtain from each consumer prior to requesting compensation from the TRS Fund for the consumer, written certification provided and signed by an independent third-party professional, except as provided in paragraph (c)(9)(xi) of this section.

(vi) To comply with paragraph (c)(9)(v) of this section, the independent professional providing certification must:

(A) Be qualified to evaluate an individual's hearing loss in accordance with applicable professional standards, and may include, but are not limited to, community-based social service providers, hearing related professionals, vocational rehabilitation counselors, occupational therapists, social workers, educators, audiologists, speech pathologists, hearing instrument specialists, and doctors, nurses and other medical or health professionals;

(B) Provide his or her name, title, and contact information, including address, telephone number, and email address; and

(C) Certify in writing that the IP CTS user is an individual with hearing loss who needs IP CTS to communicate in a manner that is functionally equivalent to telephone service experienced by individuals without hearing disabilities.

(vii) Third-party certification on or after demarcation date. Where IP CTS equipment is or has been obtained by a consumer from an IP CTS provider, directly or indirectly, at no charge or for less than \$75, the consumer (in cases where the equipment was obtained directly from the IP CTS provider) has not subsequently paid \$75 to the IP CTS provider for the equipment prior to the date the consumer is registered to use IP CTS, and the consumer is registered in accordance with the requirements of this paragraph (c)(9) on or after the demarcation date, the IP CTS provider must also, prior to requesting compensation from the TRS Fund for service to the consumer, obtain from each consumer written certification provided and signed by an independent third-party professional, except as provided in paragraph (c)(9)(xi) of this section.

NOTE to paragraphs (c)(9)(ii), (iii), (iv), (v) and (vii): The date demarking which certification obligations apply to which consumers shall be the date when notice of OMB approval of the amendments to the registration and certification requirements is published. The FCC will publish a notice of the effective date along with a corrective amendment to specify the demarcation date.

(viii) To comply with paragraph (c)(9)(vii) of this section, the independent third-party professional providing certification must:

(A) Be qualified to evaluate an individual's hearing loss in accordance with applicable professional standards, and must be either a physician, audiologist, or other hearing related professional. Such professional shall not have been referred to the IP CTS user, either directly or indirectly, by any provider of TRS or any officer, director, partner, employee, agent, subcontractor, or sponsoring organization or entity (collectively "affiliate") of any TRS provider. Nor shall the third party professional making such certification have any business, family or social relationship with the TRS provider or any affiliate of the TRS provider from which the consumer is receiving or will receive service.

(B) Provide his or her name, title, and contact information, including address, telephone number, and email address.

(C) Certify in writing, under penalty of perjury, that the IP CTS user is an individual with hearing loss that necessitates use of captioned telephone service and that the third party professional understands that the captioning on captioned telephone service is provided by a live communications assistant and is funded through a federal program.

(ix) In instances where the consumer has obtained IP CTS equipment from a local, state, or federal governmental program, the consumer may present documentation to the IP CTS provider demonstrating that the equipment was obtained through one of these programs, in lieu of providing an independent, third-party certification under paragraphs (c)(9)(v) and (vii) of this section.

(x) Each IP CTS provider shall maintain records of any registration and certification information for a period of at least five years after the consumer ceases to obtain service from the provider and shall maintain the confidentiality of such registration and certification information, and may not disclose such registration and certification information or the content of such registration and certification information except as required by law or regulation.

(xi) IP CTS providers must obtain registration information and certification of hearing loss from all IP CTS users who began receiving service prior to March 7, 2013. Notwithstanding any other provision of paragraph (c)(9) of this section, IP CTS providers shall be compensated for compensable minutes of use generated prior to the registration deadline by any such users, but shall not receive compensation for minutes of IP CTS use generated on or after the registration deadline by any IP CTS user who has not been registered.

NOTE to paragraph (c)(9)(xi): The deadline for compliance with the requirement for IP CTS providers to register consumers who began service prior to March 7, 2013 shall be 180 days after OMB approval has been obtained, and IP CTS providers shall be permitted to receive compensation for minutes of use generated by such consumers prior to the registration deadline. The FCC will publish a notice of the effective date along with a corrective amendment to specify the deadline for compliance.

(10) IP CTS default settings.

(i) IP CTS providers must ensure that their equipment and software applications used in conjunction with their service have a default setting of captions off, so that all IP CTS users must affirmatively turn on captioning for each telephone call initiated or received before captioning is provided.

(ii) Each IP CTS provider shall ensure that each IP CTS telephone they distribute, directly or indirectly, shall include a button, icon, or other comparable feature that is easily operable and requires only one step for the consumer to turn on captioning.

(iii) For software applications on mobile phones, laptops, tablets, computers or other similar devices, the requirements of this paragraph (c)(10) are satisfied so long as:

(A) Consumers must log in to access the IP CTS software feature with a unique ID and password, and

(B) The default setting switches to captions on only while the consumer is logged in, and does not remain on indefinitely.

(iv) Hardship exception. If a consumer has a cognitive or physical disability that significantly impedes the ability of the consumer to turn on captioning at the start of each call, the IP CTS provider may set that consumer's IP CTS telephone to have a default of captions on, provided that the consumer submits, in addition to the self-certification required under paragraphs (c)(9)(ii) or (iii) of this section, the following to the IP CTS provider:

(A) A self-certification, dated and made under penalty of perjury, that the requirement to turn on captioning at the start of each call significantly impedes the consumer's ability to make use of captioned telephone service, provided that such certification shall be made by the consumer's spouse or legal guardian or a person with power of attorney where the consumer is not competent to provide the required self-certification; and

(B) A certification from a licensed, independent, third party physician in good standing, dated and made under penalty of perjury, that the consumer has a physical or mental disability or functional limitation that significantly impedes the consumer's ability to activate captioning at the start of each call, including a brief description of the basis for such statement. Such physician shall be the consumer's primary care physician or a physician whose specialty is such that the physician is qualified to make such certification and shall provide his or her name, title, area of specialty or expertise, and contact information, including address, telephone number, and email address on such certification. Providers shall not accept a certification from any physician referred to the IP CTS user, either directly or indirectly, by any provider of TRS or any officer, director, partner, employee, agent, subcontractor, or sponsoring organization or entity (collectively "affiliate") of any TRS provider. Nor shall the physician making such certification have any business, family or social relationship with and shall not have received any payment, referral, or other thing of value from the TRS provider or any affiliate of the TRS provider from which the consumer is receiving service.

(C) Each IP CTS provider shall maintain detailed records of all consumers, who, because of a showing of hardship under this section, have been permitted to receive IP CTS equipment with a setting of default captions on, including the dated and signed consumer and physician certifications submitted by each such consumer pursuant to this paragraph (c)(10)(iv), for a period of at least five years after the consumer ceases to obtain service from the provider. Each IP CTS provider shall maintain the confidentiality of such certification information, and may not disclose such certification information or the content of such certification information except as required by law or regulation.

(D) Each IP CTS provider shall submit, on a monthly basis and subject to confidentiality requirements, a report to the Commission on the consumers who have received a hardship exception pursuant to this paragraph (c)(10)(iv), which shall include a list of such newly excepted individuals (with names redacted), including the dates on which each individual registered for IP CTS with the provider and was provided with IP CTS equipment with a default setting of captions on, the area of specialty or expertise of the certifying physician accompanying each hardship certification, and the basis for granting each hardship exception.

(v) 911 Calling. Each IP CTS provider may turn captions on automatically for 911 calls so long as the provider remains in compliance with the provisions of this paragraph (c)(10) for all other types of calls.

(11) IP CTS Equipment.

(i) Any IP CTS provider, including its officers, directors, partners, employees, agents, subcontractors, and sponsoring organizations and entities, that provides equipment, software or applications to consumers, directly or indirectly, at no charge or for less than \$75, whether

through giveaway, sale, loan, or otherwise, on or after September 30, 2013 shall be ineligible to receive compensation for minutes of IP CTS use generated by consumers using such equipment. An IP CTS provider may provide software or applications at no charge or for less than \$75 to a consumer who has already paid a minimum of \$75 for equipment, software or applications to that IP CTS provider without affecting the IP CTS provider's eligibility to receive compensation for minutes of IP CTS use generated by that consumer. This paragraph (c)(11)(i) of this section shall not apply in instances where the consumer has obtained IP CTS equipment from a local, state, or federal governmental program.

(ii) No person shall use IP CTS equipment or software with the captioning on, unless:

(A) Such person is registered to use IP CTS pursuant to paragraph (c)(9) of this section; or

(B) Such person was an existing IP CTS user as of March 7, 2013, and either paragraph (c)(9)(xi) of this section is not yet in effect or the registration deadline in paragraph (c)(9)(xi) of this section has not yet passed.

(iii) IP CTS providers shall ensure that any newly distributed IP CTS equipment has a label on its face in a conspicuous location with the following language in a clearly legible font: "FEDERAL LAW PROHIBITS ANYONE BUT REGISTERED USERS WITH HEARING LOSS FROM USING THIS DEVICE WITH THE CAPTIONS ON." For IP CTS equipment already distributed to consumers by any IP CTS provider as of the effective date of this paragraph, such provider shall distribute to consumers equipment labels with the same language as mandated by this paragraph for newly distributed equipment, along with clear and specific instructions directing the consumer to attach such labels to the face of their IP CTS equipment in a conspicuous location. For software applications on mobile phones, laptops, tablets, computers or other similar devices, IP CTS providers shall ensure that, each time the consumer logs into the application, the notification language required by this paragraph appears in a conspicuous location on the device screen immediately after log-in.

NOTE to paragraph (c)(11)(iii): The deadline for compliance with the requirement for IP CTS providers to distribute to consumers equipment labels along with instructions for applying the labels to equipment already distributed to consumers shall be thirty days after OMB approval has been obtained. The FCC will publish a notice of the effective date along with a corrective amendment to specify the deadline for compliance.

(iv) IP CTS providers shall maintain, with each consumer's registration records, records describing any IP CTS equipment provided, directly or indirectly, to such consumer, stating the amount paid for such equipment, and stating whether the label required by paragraph (c)(11)(iii) of this section was affixed to such equipment prior to its provision to the consumer. For consumers to whom IP CTS equipment was provided directly or indirectly prior to the effective date of this paragraph (c)(11), such records shall state whether and when the label required by paragraph (c)(11)(iii) of this section was distributed to such consumer. Such records shall be maintained for a minimum period of five years after the consumer ceases to obtain service from the provider.

(12) Discrimination and preferences. A VRS provider shall not:

(i) Directly or indirectly, by any means or device, engage in any unjust or unreasonable discrimination related to practices, facilities, or services for or in connection with like relay service,

(ii) [FN1] Engage in or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or

¹ So in original; there are two subsections (c)(12)(ii). See 78 FR 40608.

(ii) [FN1] Subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

¹ So in original; there are two subsections (c)(12)(ii). See 78 FR 40608.

(13) Unauthorized and unnecessary use of VRS. A VRS provider shall not engage in any practice that causes or encourages, or that the provider knows or has reason to know will cause or encourage:

(i) False or unverified claims for TRS Fund compensation,

(ii) Unauthorized use of VRS,

(iii) The making of VRS calls that would not otherwise be made, or

(iv) The use of VRS by persons who do not need the service in order to communicate in a functionally equivalent manner. A VRS provider shall not seek payment from the TRS Fund for any minutes of service it knows or has reason to know are resulting from such practices. Any VRS provider that becomes aware of such practices being or having been committed by any person shall as soon as practicable report such practices to the Commission or the TRS Fund administrator.

(d) Other standards. The applicable requirements of §§ 64.605, 64.611, 64.615, 64.617, 64.621, 64.631, 64.632, 64.5105, 64.5107, 64.5108, 64.5109, and 64.5110 of this part are to be considered mandatory minimum standards.

47 C.F.R. § 65.300

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 65. INTERSTATE RATE OF RETURN PRESCRIPTION PROCEDURES AND
METHODOLOGIES
SUBPART C. EXCHANGE CARRIERS

§ 65.300 Calculations of the components and weights of the cost of capital.

(a) Sections 65.301 through 65.303 specify the calculations that are to be performed in computing cost of debt, cost of preferred stock, and financial structure weights for prescription proceedings. The calculations shall determine, where applicable, a composite cost of debt, a composite cost of preferred stock, and a composite financial structure for all local exchange carriers with annual revenues equal to or above the indexed revenue threshold as defined in § 32.9000. The calculations shall be based on data reported to the Commission in FCC Report 43–02. (See 47 CFR 43.21). The results of the calculations shall be used in the represcription proceeding to which they relate unless the record in that proceeding shows that their use would be unreasonable.

(b) Excluded from cost of capital calculations made pursuant to § 65.300 shall be those sources of financing that are not investor supplied, or that are otherwise subtracted from a carrier's rate base pursuant to Commission orders governing the calculation of net rate base amounts in tariff filings that are made pursuant to section 203 of the Communications Act of 1934, 47 U.S.C. 203, or that were treated as “zero cost” sources of financing in section 450 and subpart G of this Part 65. Specifically excluded are: accounts payable, accrued taxes, accrued interest, dividends payable, deferred credits and operating reserves, deferred taxes and deferred tax credits.

47 C.F.R. § 65.301

§ 65.301 Cost of equity.

The cost of equity shall be determined in represcription proceedings after giving full consideration to the evidence in the record, including such evidence as the Commission may officially notice.

47 C.F.R. § 65.302

§ 65.302 Cost of debt.

The formula for determining the cost of debt is equal to:

$$\text{Embedded Cost of Debt} = \frac{\text{Total Annual Interest Expense}}{\text{Average Outstanding Debt}}$$

Where:

“Total Annual Interest Expense” is the total interest expense for the most recent two years for all local exchange carriers with annual revenues equal to or above the indexed revenue threshold as defined in § 32.9000.

“Average Outstanding Debt” is the average of the total debt for the most recent two years for all local exchange carriers with annual revenues equal to or above the indexed revenue threshold as defined in § 32.9000.

47 C.F.R. § 65.303

§ 65.303 Cost of preferred stock.

The formula for determining the cost of preferred stock is:

$$\text{Cost of Preferred Stock} = \frac{\text{Total Annual Preferred Dividends}}{\text{Proceeds from the Issuance of Preferred Stock}}$$

Where:

“Total Annual Preferred Dividends” is the total dividends on preferred stock for the most recent two years for all local exchange carriers with annual revenues equal to or above the indexed revenue threshold as defined in § 32.9000. “Proceeds from the Issuance of Preferred Stock” is the average of the total net proceeds from the issuance of preferred stock for the most recent two years for all local exchange carriers with annual revenues equal to or above the indexed revenue threshold as defined in § 32.9000.

47 C.F.R. § 65.304

§ 65.304 Capital structure.

The proportion of each cost of capital component in the capital structure is equal to:

Proportion in the capital structure =

Book Value of particular component

Book Value of Debt + Book Value of Preferred Stock + Book Value of Equity

Where:

“Book Value of particular component” is the total of the book values of that component for all local exchange carriers with annual revenues equal to or above the indexed revenue threshold as defined in § 32.9000.

“Book Value of Debt+Book Value of Preferred Stock+Book Value of Equity” is the total of the book values of all the components for all local exchange carriers with annual revenues equal to or above the indexed revenue threshold as defined in § 32.9000.

The total of all proportions shall equal 1.00.

47 C.F.R. § 65.305

§ 65.305 Calculation of the weighted average cost of capital.

(a) The composite weighted average cost of capital is the sum of the cost of debt, the cost of preferred stock, and the cost of equity, each weighted by its proportion in the capital structure of the telephone companies.

(b) Unless the Commission determines to the contrary in a prescription proceeding, the composite weighted average cost of debt and cost of preferred stock is the composite weight computed in accordance with § 65.304 multiplied by the composite cost of the component computed in accordance with § 65.301 or § 65.302, as applicable. The composite weighted average cost of equity will be determined in each prescription proceeding.

47 C.F.R. § 65.800

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 65. INTERSTATE RATE OF RETURN PRESCRIPTION PROCEDURES AND
METHODOLOGIES
SUBPART G. RATE BASE

§ 65.800 Rate base.

The rate base shall consist of the interstate portion of the accounts listed in § 65.820 that has been invested in plant used and useful in the efficient provision of interstate telecommunications services regulated by this Commission, minus any deducted items computed in accordance with § 65.830.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**SORENSEN COMMUNICATIONS, INC.
AND CAPTIONCALL, LLC, PETITIONER**

v.

**FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, RESPONDENTS.**

CERTIFICATE OF SERVICE

I, C. Grey Pash, Jr., hereby certify that on January 28, 2014, I electronically filed the foregoing Final Brief For Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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