

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

In the Matter of)	
)	
Structure and Practices of the Video Relay Service Program)	CG Docket No. 10-51
)	
Purple Communications, Inc.)	
)	
Request for Review of the Decision of the TRS Administrator to Withhold TRS Payments)	
)	

ORDER
{Public Version}

Adopted: July 13, 2012

Released: July 13, 2012

By the Acting Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. In this Order, the Consumer and Governmental Affairs Bureau (Bureau), acting on delegated authority,¹ grants in part and denies in part Purple Communications, Inc.’s (Purple) request for review² of a decision by the Telecommunications Relay Service (TRS) Fund administrator, Rolka Loube Saltzer Associates (Administrator, or RLSA). In that decision, RLSA withheld payment to Purple from the Interstate TRS Fund (TRS Fund) for the provision of Internet Protocol Relay Service (IP Relay) based on its determination that Purple did not comply with the Commission’s speed-of-answer (SOA) rule³ on {REDACTED} occasions during the four-month period of July-October 2011.⁴ We find that Purple failed to comply with the Commission’s mandatory minimum standard governing speed of answer for TRS calls. Specifically, we reject Purple’s assertion that compliance with our SOA rule should be determined using a legal standard of “substantial compliance.” We also deny Purple’s alternative request for waiver of that rule. Although, consistent with past practice, we direct RLSA to remit to Purple some of the amounts heretofore withheld from reimbursement from the TRS Fund for Purple’s provision of IP Relay, we emphasize that, for violations of the SOA rule occurring after the date of release of this order, the Administrator is authorized to withhold payment for the full day’s service when the provider fails to meet the minimum SOA threshold on that day.

¹ See generally 47 C.F.R. §§ 0.141, 0.361.

² Purple, Request for Review of the Decision by the TRS Administrator, CG Docket No. 10-51 (filed Jan. 17, 2012) (Request for Review).

³ 47 C.F.R. § 64.604(b)(2) (the SOA rule).

⁴ See *id.* § 64.604(c)(5)(iii)(E), (L).

II. BACKGROUND

2. Under the Commission's SOA rule, IP Relay providers must answer at least 85% of all calls within 10 seconds (the 85/10 standard), with compliance measured on a daily basis.⁵ A provider's compliance with the SOA rule and other mandatory minimum standards set forth in Section 64.604 is a condition precedent for disbursement of TRS Fund payments.⁶ In order to enable the Administrator to determine compliance with the SOA rule, IP Relay providers and other Internet-based TRS providers must submit SOA compliance data with their monthly claims for payment.⁷

3. After reviewing the payment claims and SOA compliance data submitted by Purple for each month of a four-month period from July 2011 through October 2011, RLSA determined that on numerous days of each month Purple did not comply with the SOA rule. Therefore, the Administrator withheld all payment for service for each day on which it found Purple had violated the rule.⁸ Overall, RLSA found that Purple had violated the SOA requirement on {REDACTED} out of the 123 days in the July-October 2011 period. According to Purple, the total TRS Fund compensation withheld from Purple for those {REDACTED} days was \${REDACTED}.⁹

4. On November 7, 2011, Purple sent a letter to RLSA seeking a modification of RLSA's determination that payment must be withheld in full for each day on which there was a violation.¹⁰ On December 22, 2011, after consultation with Commission staff, RLSA denied Purple's request, stating that it had no discretion to modify or waive the rule.¹¹ On January 17, 2012, Purple filed the Request for Review, in which it asks the Commission to overrule the RLSA Letter and reimburse Purple some or all of the total amount withheld for July, August, September, and October 2011.¹²

⁵ 47 C.F.R. § 64.604(b)(2)(ii). A different SOA standard applies to video relay service (VRS) providers. *See id.* § 64.604(b)(2)(iii).

⁶ *See id.* § 64.604(c)(5)(iii)(E) ("The TRS Fund administrator shall make payments only to eligible TRS providers operating pursuant to the mandatory minimum standards as required in § 64.604"). *See also id.* § 64.604(c)(5)(iii)(L).

⁷ *Id.* § 64.604(c)(5)(iii)(D)(3). Prior to September 26, 2011, providers submitted SOA compliance data at the request of the Administrator. *Structure and Practices of the Video Relay Service Program*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 5545, 5580, ¶ 74 (2011) (*VRS Practices Order*). Effective September 26, 2011, the Commission codified this obligation in its rules "to make clear that VRS and IP Relay providers must submit such data in order to be compensated from the Fund." *Id.* *See also* 76 FR 59269 (Sept. 26, 2011) (establishing effective date).

⁸ Letter from David Rolka, President, RLSA, to John Goodman, Chief Legal Officer, Purple (December 22, 2011) (RLSA Letter) (attached to the Request for Review as Exhibit D). RLSA initially withheld Purple's entire IP Relay payment for the month of July. Subsequently, RLSA determined that, because compliance is calculated on a daily basis, it would withhold payment for only those days on which Purple failed to meet the 85/10 benchmark. RLSA therefore released payment for those days in July on which the 85/10 standard was met, and it applied the same approach to Purple's August, September, and October payments going forward. *See* Request for Review at 6-7.

⁹ *Id.* at 7. The Bureau's calculation of the amount withheld is \${REDACTED}. *See* ¶ 28 and Appx. B, *infra*.

¹⁰ Request for Review at 8, Exhibit E.

¹¹ RLSA Letter at 2-3.

¹² Request for Review at 21.

III. PURPLE'S REQUEST FOR REVIEW

5. In its Request for Review, Purple argues that RLSA improperly departed from precedent by applying a “strict compliance” standard rather than a “substantial compliance” standard, which Purple asserts has previously governed determinations of SOA compliance.¹³ Purple claims that its July-October 2011 SOA performance substantially complied with the SOA rule and that, accordingly, under a substantial compliance standard, it should have been paid in full.¹⁴ In the alternative, Purple requests that any violations of the SOA requirement be waived for numerous days on which, according to Purple, it experienced unusual, unforeseen “spikes” in call activity.¹⁵ As a further alternative, Purple contends that any withholding of payments should be calculated under the “sliding scale” approach applied by the Consumer and Governmental Affairs Bureau for IP Relay SOA violations in letter rulings issued in January 2008.¹⁶

IV. DISCUSSION

A. Standard of Compliance

1. Applicability of a substantial compliance standard

6. We find Purple’s assertion that the Commission has previously applied a “substantial compliance” standard in assessing SOA compliance to be misplaced.¹⁷ As discussed below, the substantial compliance standard cited by Purple was found applicable in *Publix* to an overall eligibility determination made by the Commission under Section 64.604(c)(5)(iii)(F) of the rules.¹⁸ This case, however, involves the quite different context of specific compliance determinations made by the Administrator in deciding whether to grant or withhold payment for specific compensation claims under Section 64.604(c)(5)(iii)(E) and (L).¹⁹ Contrary to Purple’s assertions, the Commission has never applied a substantial compliance standard to specific compliance and payment determinations under Section

¹³ *Id.* at 9-15, citing *Publix Network Corp.; Customer Attendants, LLC; Revenue Controls Corp.; Revenue Controls Corp.; SignTel, Inc.; and Focus Group, LLC*, Order to Show Cause and Notice of Opportunity for Hearing, 17 FCC Rcd 11487, 11495, ¶ 19 (2002) (*Publix*).

¹⁴ Request for Review at 9-15.

¹⁵ *Id.* at 15-19.

¹⁶ *Id.* at 19-21, citing Letter from Catherine W. Seidel, Chief, Consumer and Governmental Affairs Bureau, to Martin Beaulac, Nordia, Inc. (Jan. 23, 2008) (*Nordia Letter Ruling*) (attached to the Request for Review as Exhibit A); Letter from Catherine W. Seidel, Chief, Consumer and Governmental Affairs Bureau, to Davida Grant, Senior Counsel, AT&T Services, Inc. (Jan. 23, 2008) (*AT&T Letter Ruling*) (attached to the Request for Review as Exhibit B).

¹⁷ Purple begins its argument with a review of appellate law regarding the “manifest injustice” standard for applying a new or changed rule to prior conduct. Request for Review at 9-11. Under this standard, adjudicatory decisions are generally applied retroactively, but prospective-only application may be appropriate if retroactive application of a new or changed rule would result in manifest injustice. See *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc); *Consolidated Freightways v. NLRB*, 892 F.2d 1052, 1058 (D.C. Cir. 1989); *Verizon Telephone Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001). We need not address this argument with respect to the standard of compliance, because, as explained in the text, it is based on the incorrect premise that in requiring full compliance, the Administrator is now applying a “new interpretation of the SOA rule.” Request for Review at 13.

¹⁸ 47 C.F.R. § 64.604(c)(5)(iii)(F).

¹⁹ *Id.* § 64.604(c)(5)(iii)(E), (L).

64.604(c)(5)(iii)(E) or (L). Moreover, the Commission has never found that a substantial compliance standard is applicable to determinations of SOA compliance. In any case, even if such a standard were applicable, we find that Purple has not substantially complied with the SOA rule.

7. In contrast to this case, where we are assessing whether a TRS provider has justified specific claims for TRS payments, the Commission in *Publix* was considering the much broader question of whether certain entities were eligible to receive *any* compensation from the TRS Fund given their record of apparent noncompliance, over time, with numerous applicable provisions of Section 64.604.²⁰ Under the Commission's TRS regulations, in order for a service provider to receive *any* payments from the TRS Fund, the provider must be "eligible."²¹ In *Publix*, the Commission proposed to address the global issue of whether the Publix Companies were "eligible" *at all* for TRS funding, *i.e.*, whether they were "entitled to *any* of the [TRS] fund monies that they requested or received from the TRS Fund."²² In that context, where the Commission was assessing a company's overall record of compliance, over time, with Section 64.604 as a whole, in order to determine whether the carrier should be declared ineligible for TRS funding, the Commission found that a substantial compliance standard should apply because "an insignificant violation" of one provision should not render a provider wholly ineligible to participate in the TRS program.²³

8. The Commission in *Publix*, however, indicated that the substantial compliance standard applied *only* to the global assessment by the administrative law judge (ALJ) of the Publix companies' overall compliance with Section 64.604, *not* to the individual compliance determinations underlying that assessment. For example, the Commission directed the ALJ to examine, as part of its overall eligibility determination, whether the Publix Companies had complied with the requirements to make TRS available 24 hours a day and 7 days a week, met the requirement to have an adequate back-up power source, adhered to the restrictions against recording a telephone call, met the standards governing qualifications and training of communications assistants (CAs), provided equal access to interexchange carriers, and advertised the availability of its facilities to consumers – as well as whether the Companies provided accurate information to the Administrator in support of their payment claims.²⁴ The Commission stated:

The ALJ should determine, using the foregoing principles, whether the Publix Companies' operations were in substantial compliance with the requirements of Section 64.604. To do so, the ALJ should *first make findings on the specific issues* raised below regarding whether and to what extent the Publix Companies met the operational, technical, and functional standards of Section 64.604. *In light of those findings*, the ALJ should *then* determine whether the Publix Companies *substantially complied with Section 64.604*²⁵

²⁰ See *Publix*, 17 FCC Rcd at 11494, ¶ 18.

²¹ 47 C.F.R. § 64.604(c)(5)(iii)(F).

²² *Publix*, 17 FCC Rcd at 11487, ¶ 1 (emphasis added). In this show-cause proceeding, the Commission also addressed the similarly global issues of whether the Publix Companies' operating authority as common carriers should be revoked and whether they and their principals should be ordered to cease and desist from further common carrier activities. *Id.*

²³ *Id.* at 11494-95, ¶ 19.

²⁴ *Id.* at 11495-99, ¶¶ 20-26.

²⁵ *Id.* at 11495-96, ¶ 20 (emphasis added).

In its instructions to the ALJ regarding the individual compliance determinations, the Commission made no mention of requiring the ALJ to apply a substantial compliance standard to those determinations.

9. In the instant case, the Administrator made a series of *individual* compliance determinations—precisely the type of decision to which the *Publix* substantial compliance standard did *not* apply. That is, the Administrator assessed Purple’s compliance, *measured on a daily basis*,²⁶ with a specific provision of Section 64.604, the SOA rule, in order to determine whether to disburse or withhold payment for specific calls for which Purple had submitted a monthly claim for payment. In making such specific determinations, moreover, the Administrator acted pursuant to other provisions of the rules, namely Sections 64.604(c)(5)(iii)(E) and (L), which were not addressed in *Publix*.²⁷ Accordingly, we conclude that there is no conflict with the holding of *Publix*.

10. We also disagree with Purple’s assertion that the Commission has previously applied a substantial compliance standard to monthly TRS payment claim determinations. Although Purple contends that the Administrator’s payment claim determinations for IP Relay have been governed by a substantial compliance standard “since [IP Relay’s] inception,”²⁸ Purple fails to identify a single case in which such a standard was applied to such payment claim determinations. To the contrary, in a letter ruling that Purple itself cites as governing this case (and that Purple attaches to its Request for Review), the Bureau explicitly rejected the provider’s “argument that eighty percent or better constitutes ‘substantial compliance’ with the rule, stating that “[t]he 85/10 rule is specific to the percentage for which compliance can be found.”²⁹

11. Thus, even if a substantial compliance standard were relevant in some circumstances, applying such a standard to withholdings for SOA violations would depart from the Bureau’s prior decisions. Moreover, such application would be inconsistent with the *Publix* ruling. Although “absolute compliance with each component of the rules may not *always* be necessary to fulfill the purposes of the statute,”³⁰ the requirements at issue in this case are clearly central to the statutory purpose. As the Commission has often stated, the SOA requirements are “a cornerstone of the Commission’s TRS rules.”³¹ Because “[t]he ability to make a telephone call without delay . . . is fundamental to our concept of a rapid,

²⁶ The SOA rule expressly states that “a TRS provider’s compliance with this rule shall be measured on a daily basis,” an instruction that is obviously inconsistent with gauging compliance based on a provider’s overall performance history. 47 C.F.R. § 64.604(b)(2)(ii).

²⁷ *Id.* § 64.604(c)(5)(iii)(E), (L).

²⁸ Request for Review at 12.

²⁹ *Nordia Letter Ruling* at 4.

³⁰ *Publix*, 17 FCC Rcd at 11495, ¶ 19 (emphasis added).

³¹ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Declaratory Ruling and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5442, 5444, ¶ 6 (2006) (*VRS Declaratory Ruling*), quoting *Telecommunications Services for Hearing-Impaired and Speech Impaired Individuals, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Notice of Proposed Rulemaking, 13 FCC Rcd 14187, 14207, ¶ 49 (1998) (*1998 TRS NPRM*); see also *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Report and Order, 20 FCC Rcd 13165, 13174, ¶ 17 (2005) (*VRS Report and Order*) (stating that speed-of-answer is “one of the fundamental components of ensuring that TRS users have functionally equivalent access to the telephone system”).

efficient, Nationwide communications system,”³² the “ability of a TRS user to reach a CA prepared to place his or her call, without experiencing delays that a voice telephone user would not experience in placing a telephone call, is fundamental to the concept of ‘functional equivalence.’”³³ Therefore, “[a]ny interpretation of our [SOA] rule that delays a customer's ability to place a call through the relay center clearly compromises the functional equivalence of relay service.”³⁴ In short, full compliance with the SOA rule is indisputably “necessary to fulfill the purposes of the statute.”³⁵

12. Indeed, to interpret the SOA rule as permitting performance below the prescribed 85/10 standard would be at odds with the Commission’s express characterization of this standard as a *mandatory minimum* standard.³⁶ Built into this minimum standard, which allows as few as 85 percent of calls daily to be answered within 10 seconds, is a performance cushion that allows providers ample margin for error in meeting the functional equivalence mandate of Section 225.³⁷ In this regard, in mandating that abandoned calls be included in calculations of whether providers meet the 85/10 standard, the Commission justified that mandate in part by stating that the 85 percent threshold allows for instances where the call is abandoned for reasons other than SOA.³⁸ Similarly, in requiring that compliance with the 85/10 standard be measured on a daily basis, the Commission specifically rejected the argument that providers needed more leeway “to account for wide daily variations in traffic loads”;³⁹ rather, the Commission concluded that “[t]he burden should be on relay services to manage staffing needs based on

³² *VRS Declaratory Ruling*, 21 FCC Rcd at 5444, quoting *1998 TRS NPRM* at 14189, ¶ 3. See also 47 U.S.C. § 225(b)(1) (In order 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 [TRS] are available, to the extent possible and in the most efficient manner,” to individuals in the United States with hearing disabilities or speech disabilities).

³³ *VRS Declaratory Ruling*, 21 FCC Rcd at 5444, quoting *1998 TRS NPRM*, 13 FCC Rcd at 14207, ¶ 49. See 47 U.S.C. § 225(a)(3) (defining TRS as telephone transmission services that enable individuals with hearing or speech disabilities “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”) (emphasis added).

³⁴ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, 5165, ¶ 60 (2000) (*2000 TRS Report and Order*).

³⁵ *Publix*, 17 FCC Rcd at 11495, ¶ 19. Further underscoring the importance of full compliance with the SOA rule is the Commission’s requirement that VRS and IP Relay providers submit SOA data with their monthly claims for payment. 47 C.F.R. § 64.604(c)(5)(iii)(C). The Commission adopted this requirement “to ensure compliance with this mandatory minimum standard, which is critical to ensuring that [relay] providers promptly answer the calls that come into their centers.” *Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 5545, 5580, ¶ 74 (2011).

³⁶ Section 64.604 of the Commission’s rules, which contains the 85/10 standard, see 47 C.F.R. § 64.604(b)(2)(ii), is entitled “Mandatory minimum standards”. If a lower level of performance were permissible, then 85/10 would be neither “mandatory” nor “minimum.”

³⁷ Wireline voice users, by contrast, virtually *always* get an *immediate* dial tone; they do not get a dial tone only 85 percent of the time, nor do they have to wait up to 10 seconds for a dial tone. See, e.g., Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, *Quality of Service of Incumbent Local Exchange Carriers*, Tables 1(b), (Dec. 2009) <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295377A1.pdf> (showing that in 2008, mandatory price cap telephone companies had, at most, negligible amounts of switch downtime).

³⁸ See *2000 TRS Report and Order*, 15 FCC Rcd at 5167, ¶ 64.

³⁹ *Id.* at 5166, ¶ 63.

the fluctuations in traffic, not on consumers to tolerate delays in reaching a CA when traffic is high.”⁴⁰ Therefore, to use a “substantial compliance” principle to move the daily compliance threshold *below* the 85/10 standard set by the SOA rule, as Purple advocates, would be inconsistent with the Commission’s clear intent that 85/10 be a *minimum* standard.

13. Finally, even if a substantial compliance standard were applicable to SOA compliance, we do not characterize Purple’s violations in this case as “minor” or “insignificant” deviations.⁴¹ As Purple concedes, it failed to meet the 85/10 benchmark on {REDACTED} out of the 123 days in the July-October 2011 period.⁴² Such pervasive noncompliance cannot reasonably be deemed substantially compliant with the rule.

14. In summary, because the application of a substantial compliance standard to Purple’s SOA violations would depart from the Bureau’s prior decisions, is not compelled by the authority Purple cites to support use of such a standard, and would conflict with the Commission’s own characterization of the SOA rule, we reject Purple’s argument that we should apply such a standard. Moreover, even if a substantial compliance standard did apply, we find that Purple’s pervasive noncompliance in the July-October 2011 period would not satisfy such a standard.

2. Actual vs. Projected Call Volume

15. We also reject Purple’s argument that its compliance with the SOA rule should be assessed with respect to *projected* rather than *actual* call volumes. Pointing out that under the Commission’s rule governing the permissible level of blocked calls, compliance is assessed in relation to projected call volumes, Purple argues that the same approach should apply to measuring compliance with the 85/10 SOA standard.⁴³

16. The 85/10 and blocked call standards are distinct, however. The blocked call provision cited by Purple states:

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.⁴⁴

This blocked call standard does indeed speak in terms of projections and probabilities, rather than actual performance. By contrast, however, the 85/10 SOA standard states that “TRS facilities *shall*, except during network failure, *answer* 85% of all calls within 10 seconds . . .”⁴⁵ Furthermore, as discussed

⁴⁰ *Id.*

⁴¹ *Publix*, 17 FCC Rcd at 11494-95, ¶ 19.

⁴² Request for Review at 6-7.

⁴³ *Id.* at 5-6, 12-14.

⁴⁴ 47 C.F.R. § 64.604(b)(2)(i) (emphasis added). A virtually identical provision governs the permissible level of call blocking due to congestion of network facilities. *Id.* § 64.604(b)(2)(ii).

⁴⁵ *Id.* § 64.604(b)(2)(ii) (emphasis added). Indeed, the blocked call and 85/10 standards have been separate and distinct since their initial adoption in 1991, and, unlike the blocked call standard, the 85/10 standard has never been expressed as a function of projected call volumes. See *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Report and Order

above,⁴⁶ in requiring daily measurement of compliance, the Commission rejected the argument that its compliance measurement should “account for wide daily variations in traffic loads,”⁴⁷ stating that “[j]ust like voice calls, TRS calls should be answered within a reasonable time period, regardless of the traffic load.”⁴⁸ In summary, compliance with the 85/10 SOA standard is clearly based on actual daily performance, as opposed to projected traffic loads and probabilities.

B. Waiver of SOA Requirement

17. Purple also argues that the SOA rule should be waived for {REDACTED} days on which, Purple states, the actual call volume exceeded 110% of its forecasted call volume based on a seven-week rolling average of daily call volume.⁴⁹ Purple states that on these days, it “experienced such pronounced and unforeseen call volume as to render it impossible” to comply fully with the SOA rule.⁵⁰

18. Generally, the Commission’s rules may be waived for good cause shown.⁵¹ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.⁵² In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.⁵³ Waiver of the Commission’s rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.⁵⁴ The Commission must take a “hard look” at applications for waiver and must consider all relevant factors when determining if good cause exists.⁵⁵

19. Moreover, in demonstrating whether a waiver is warranted, the burden of proof rests with the petitioner.⁵⁶ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.⁵⁷

20. We find that Purple has failed to meet its burden of proof that a waiver is warranted. As discussed in greater detail below, Purple has failed to demonstrate, or even plead with particularity, facts that would show (1) the actual cause of the variations in call volume that Purple claims rendered it unable

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and Request for Comments, 6 FCC Rcd 4657, 4669 (1991) (*TRS First Report and Order*) (adopting 47 C.F.R. § 64.604(b)(2)).

⁴⁶ See ¶ [12], *supra*.

⁴⁷ 2000 *TRS Report and Order*, 15 FCC Rcd at 5166, ¶ 63.

⁴⁸ *Id.*

⁴⁹ Request for Review at 19.

⁵⁰ *Id.* at 18.

⁵¹ 47 C.F.R. § 1.3.

⁵² *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

⁵³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

⁵⁴ *Id.*

⁵⁵ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

⁵⁶ *Tucson Radio, Inc. v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971).

⁵⁷ *WAIT Radio*, 418 F.2d at 1157 (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); *Birach Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 1414, 1415 (2003).

to comply, (2) why such variations could not have been reasonably projected and addressed through staffing, (3) why fraudulent calling constitutes a special circumstance warranting a waiver of the SOA rule, and (4) why Purple alone, among the IP Relay providers, was unable to avoid pervasive SOA violations.

21. Purple advances a number of factors that, as a general matter, *may* cause unforeseen “spikes” in call volume, including aberrant weather patterns, significant national or global events, and questionable calls.⁵⁸ Purple does not, however, attempt to pinpoint the specific factors that caused the particular call-volume variations for which it requests waivers, other than to state that these so-called “spikes” occurred during a period when Purple’s staffing reflected only projected call volumes, without spikes, because Purple did not realize that the Commission expected full compliance with the SOA rule.⁵⁹ As we have explained above, there has been no change in the standard of compliance, and Purple had no reasonable basis for its assumption that full compliance with the SOA rule was not required.

22. Moreover, we find that Purple has failed to demonstrate that the call volume variations that it experienced in July, August, September, and October 2011 went beyond levels that could have been reasonably projected. Based on historical trends, in which call volume typically fluctuates from month to month, even substantial variations from the average would appear to be foreseeable. As the Commission has previously explained, TRS providers who engage in intelligent planning for network design and CA staffing, consistent with the Commission’s blocked-call standard, should not have difficulty meeting the minimum SOA standard, absent extraordinary circumstances.⁶⁰ Similarly, the Bureau found that “there are providers that operate their IP Relay offerings in a manner such that the 85/10 rule is met despite variations in call volumes.”⁶¹ Yet Purple states, without support, that it was unable to foresee call volume variations a mere 10% higher than the seven-week rolling average.⁶² As the record provides no basis to conclude that the call variations experienced by Purple represent unforeseeable “spikes” exceeding what could be reasonably anticipated, we are not persuaded that such call variations constitute a “special circumstance” weighing in favor of a waiver.

23. As for Purple’s speculation that IP Relay fraud calls may have played a role in the call volume “spikes,”⁶³ the existence of such calls does not in itself present a “special circumstance”

⁵⁸ Request for Review at 16.

⁵⁹ *See id.* at 19; *see also id.* at 18.

⁶⁰ 2000 TRS Report and Order, 15 FCC Rcd at 5167-68, ¶ 65.

⁶¹ Nordia Letter Ruling at 4.

⁶² Purple requests that the SOA rule be waived for any call volume “spike” exceeding 110% of its seven-week rolling average call volume. Purple also provides no explanation or documentation supporting the use of a seven-week rolling average, other than the bald assertions that a seven-week rolling average call volume {REDACTED}. Request for Review at 13 n.29. Purple also does not explain why more than half of the days on which it committed SOA violations were more than seven weeks from the initial date of violation during the period in question, *See* Table, *infra* ({REDACTED} days of SOA violations from July through October 2011 occurred after {REDACTED}, 2011, which date is seven weeks after {REDACTED}, 2011, the 1st day of violation).

⁶³ Request for Review at 16-17. Apart from the other deficiencies in its request for waiver, Purple failed to provide relevant data regarding the role that it suggests IP relay fraud may have played in Purple’s SOA violations. Although an exhibit prepared by Purple indicates that, during the July-October 2011 period, Purple had a high number of customers whose registrations could not be verified (Request for Review, Exhibit C at 13th unnumbered page), Purple failed to show either the number of minutes used by these unverified customers or how long they were allowed to continue making calls. As the Commission recently explained, even prior to the elimination of the guest user procedure, “providers that have processed calls by unverified users with suspicious names, addresses or

(continued....)

warranting waiver of the SOA rule. All providers of IP Relay have experienced IP Relay fraud, over a period of many years. Fraudulent calls, for example, were cited as a cause of the SOA violations addressed in the 2008 letter rulings attached to Purple's Request for Review, but the Bureau did not deem them sufficient grounds for waiver of the SOA rule.⁶⁴ In the *Nordia Letter Ruling*, the Bureau stated that "IP Relay fraud calls in and of themselves do not present a 'special circumstance' because all providers of IP Relay Service receive 'attacks' of IP Relay fraud. In fact . . . we determined that several [IP Relay] providers were able to meet the 85/10 requirement despite attacks from fraudulent calls."⁶⁵ Similarly, from reviewing the SOA data for all providers of IP Relay, we determined that during the July-October 2011 period for which Purple seeks a waiver of the IP Relay SOA rule, in part based on its handling of fraudulent IP Relay calls, none of the other six IP Relay providers committed pervasive violations of the SOA rule, despite the likely presence of fraudulent calls.⁶⁶

24. Furthermore, granting a waiver in these circumstances would undermine the purpose of the SOA rule, which is to ensure functional equivalence.⁶⁷ As the Commission has explained: "For a TRS user, reaching a CA to place a relay call is the equivalent of picking up a phone and getting a dial tone."⁶⁸ The 85/10 standard, therefore, is not a merely aspirational goal, or a rough benchmark to help providers make staffing decisions. It is a *minimum* standard defining the minimum acceptable level of SOA performance in accordance with the functional equivalence provisions of the Act.⁶⁹

25. In summary, we find no good cause for granting Purple a waiver in these circumstances, and to do so would undermine the purpose of the SOA rule and be contrary to the public interest. Therefore, we deny Purple's request for waiver of the SOA rule.

C. Reimbursement Calculation

26. Purple also requests, in the alternative, that it be partially reimbursed for the days on which it failed to comply with the 85/10 standard, based on the sliding scale approach that the Bureau applied in the *Nordia Letter Ruling* and *AT&T Letter Ruling*.⁷⁰ In those two rulings, as well as in others that the

(...continued from previous page)

questionable calling practices over extended periods of time may be in violation of [their verification obligations]." See *Misuse of Internet Protocol (IP) Relay Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 12-38 and 03-123, FCC 12-71, ¶ 11 n.42 (rel. June 29, 2012). A waiver clearly cannot be justified if the provider's violations are of its own making.

⁶⁴ *Nordia Letter Ruling* at 3-4; *AT&T Letter Ruling* at 4.

⁶⁵ *Nordia Letter Ruling* at 3-4 (footnote omitted).

⁶⁶ See RLSA, *IP Year to Date Speed of Answer Report*, January-December 2011. Three of the other six IP Relay providers were able to avoid any violations of the SOA rule. A fourth provider violated the SOA rule on only two days during the four-month July-October 2011 period. No IP Relay provider, other than Purple, reported any violations of the SOA rule in September or October 2011. *Id.* Nevertheless, like other IP Relay providers, Purple should not have handled, and billed the TRS Fund for, IP Relay calls it knew to be fraudulent.

⁶⁷ *TRS First Report and Order*, 6 FCC Rcd at 4661, ¶ 21 (The 85/10 rule "best meet[s] our goal of providing relay services which are functionally equivalent to voice telephone services"). See also note [33], *supra*.

⁶⁸ *2000 TRS Report and Order*, 15 FCC Rcd at 5165, ¶ 60.

⁶⁹ As noted earlier, Section 64.604 of the Commission's rules, which contains the 85/10 standard, see 47 C.F.R. § 64.604(b)(2)(ii), governs the "mandatory *minimum* standards" (emphasis added) for the provision of the various forms of TRS, including IP Relay.

⁷⁰ Request for Review at 19-21.

Bureau rendered at the same time, the Bureau imposed a graduated, or sliding scale, formula for the subject IP Relay provider to return portions of the TRS Fund reimbursements it had received for days that it missed compliance with the 85/10 standard.⁷¹ The amount that the provider was required to return in those cases increased commensurate with the degree of its noncompliance, and would double for each day after the fifth day of violation in a calendar month.⁷² Moreover, for days on which performance fell below certain SOA thresholds, the percentage of TRS Fund reimbursements that the provider had to return to the TRS Fund doubled no matter how many violations the provider had already had that month, or the provider had to return all of the reimbursements it had received for that day.⁷³

27. Because of the 2008 letter rulings, Purple may not have been on notice that a different approach than the sliding scale would apply in the event of future IP Relay SOA violations. As a result, we will also apply the same formula to the SOA violations at issue here, as well as to any SOA violations that pre-date the effective date of this order. We place all providers on notice, however, that, for violations occurring after the date of this order, the Bureau does not intend to utilize a sliding scale approach with respect to any SOA violations. We conclude that further application of a sliding scale approach to SOA violations that occur after the effective date of this order would no longer serve the public interest. As noted above, the SOA requirements are “a cornerstone of the Commission’s TRS rules.”⁷⁴ The 85/10 standard is a *minimum* standard defining the minimum acceptable level of SOA performance. Service that falls below this standard is not functionally equivalent to voice service pursuant to the Act; such service is tantamount to service not having been provided at all, and does not merit any reimbursement from the TRS Fund.⁷⁵ We also emphasize that providers committing multiple and/or egregious SOA violations additionally risk incurring penalties and forfeitures in enforcement proceedings pursuant to Section 503 of the Act,⁷⁶ and the Commission may take such violations into account when evaluating a TRS provider’s application for Commission certification or re-certification for eligibility for payment from the TRS Fund for the provision of TRS, or whether to suspend or revoke a certification.⁷⁷ Thus, upon further consideration, we no longer believe that it is prudent or necessary to apply a sliding scale in order to maintain a provider’s incentive to provide adequate service for the remainder of a day, after failing to meet SOA parameters early that day.⁷⁸

28. Consistent with the above, and, as set forth in Appendix B pursuant to the sliding scale formula described in Appendix A, we calculate that Purple shall be denied reimbursement in the amount

⁷¹ See, e.g., *AT&T Letter Ruling* at 4-5, 8 (Appendix) (showing table of percentages of reimbursements that providers would be required to return).

⁷² See, e.g., *id.* at 5, 8 (Appendix).

⁷³ See, e.g., *id.* at 8 (Appendix).

⁷⁴ See note [31], *supra*.

⁷⁵ Even the sliding scale approach that Purple urges we apply in the alternative recognizes that SOA below a certain threshold is tantamount to no service at all and is not reimbursable from the TRS Fund. See, e.g., *Nordia Letter Ruling* at 5. Whereas, pursuant to the sliding scale approach, 65 percent (or below) of a particular day’s call volume being answered within 10 seconds is the threshold for a complete denial of payment from the TRS Fund for that day, as we discuss in the text, going forward we will strictly adhere to the 85 percent SOA performance threshold established by the Commission as the *minimum* standard. See ¶¶ [12, 24], *supra*.

⁷⁶ 47 U.S.C. § 503.

⁷⁷ See, e.g., 47 C.F.R. § 64.606(b)(2) (To be certified as eligible for payment from the TRS Fund, an Internet-based TRS provider must establish that it will meet all non-waived minimum standards); *id.* § 64.606(e)(2) (certification may be suspended or revoked if an Internet-based TRS provider is not in compliance with the minimum standards).

⁷⁸ Cf. Request for Review at 20, quoting *Nordia Letter Ruling* at 5.

of **§{REDACTED}** for IP Relay service rendered in violation of the Commission's SOA rules during the July-October 2011 time frame. Accordingly, Purple is entitled to a net credit for **§{REDACTED}**, the difference between **§{REDACTED}** and the **§{REDACTED}** withheld by the TRS Fund administrator. Below, we order RLSA, the TRS Fund administrator, to remit to Purple **§{REDACTED}** out of amounts heretofore withheld from reimbursement from the TRS Fund due to violations of 47 C.F.R. § 64.604(b)(2)(ii). The amount remitted is subject to any rights of offset the Commission may have or may assert in the future.⁷⁹ The denial of reimbursement that we order here is separate and apart from any potential action that the Commission, the Bureau, or the Commission's Enforcement Bureau may take against Purple for failure to comply with the Commission's rules.

V. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 5 and 225 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 155 and 225, and Sections 0.141, 0.361 and 64.604 of the Commission's rules, 47 C.F.R. §§ 0.141, 0.361, 64.604, that the Request for Review filed by Purple Communications, Inc. IS GRANTED IN PART AND DENIED IN PART, as provided above.

30. IT IS FURTHER ORDERED that, pursuant Sections 1, 4(i), 4(j), 5, and 225 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 155 and 225, and pursuant to the authority delegated in Sections 0.141, 0.361, and 64.604 of the Commission's rules, 47 C.F.R. §§ 0.141, 0.361, and 64.604, Rolka Loube Saltzer Associates, the TRS Fund administrator, SHALL REMIT **§{REDACTED}** to Purple Communications, Inc., out of amounts heretofore withheld from reimbursement from the TRS Fund due to violations of 47 C.F.R. § 64.604(b)(2)(ii), the IP Relay speed of answer rule.

31. IT IS FURTHER ORDERED that, aside from the amounts that we order Rolka Loube Saltzer Associates, the TRS Fund administrator, to remit to Purple Communications, Inc., out of amounts heretofore withheld from reimbursement from the TRS Fund due to violations of 47 C.F.R. § 64.604(b)(2)(ii), Purple Communications, Inc.'s request for remittance by Rolka Loube Saltzer Associates of any other amounts heretofore withheld from reimbursement from the TRS Fund due to violations of 47 C.F.R. § 64.604(b)(2)(ii) IS DENIED.

32. This Order shall be effective upon release, in accordance with Section 1.102(b) of the Commission's rules, 47 C.F.R. § 1.102(b).

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Acting Chief
Consumer and Governmental Affairs Bureau

⁷⁹ See 31 U.S.C. § 3716; 47 C.F.R. § 1.1912.

APPENDIX A

Percentage of Reimbursements to be Denied Purple for IP Relay SOA Violations Through [insert date of release]

<u>% Calls Answered Within 10 Seconds</u>	<u>Cumulative Days Missed Per Month</u>	
	<u>1st – 5th Day Missed</u>	<u>Greater than 5 Days Missed</u>
84%	1%	2%
83%	2%	4%
82%	3%	6%
81%	4%	8%
80%	5%	10%
79%	6%	12%
78%	7%	14%
77%	8%	16%
76%	9%	18%
75%	10%	20%
74%	11%	22%
73%	12%	24%
72%	13%	26%
71%	14%	28%
70%	30%	30%
69%	32%	32%
68%	34%	34%
67%	36%	36%
66%	38%	38%
65%	40%	40%
<65%	ALL	ALL

APPENDIX B

Calculation of Reimbursements To Be Denied

<u>Month</u>	<u>Date</u>	<u>Number of Minutes</u>	<u>Amount of Compensation</u>	<u>SOA Performance</u>	<u>% Denied</u>	<u>Amount Denied</u>
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{TABLE REDACTED}