

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

In the Matter of)
)
)
Telecommunications Relay Services and) CG Docket No. 03-123
Speech-to-Speech Services for)
Individuals with Hearing and Speech)
Disabilities)

FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: July 13, 2006

Released: July 20, 2006

Comment Date: (45 days after publication in the Federal Register)

Reply Comment Date: (60 days after publication in the Federal Register)

By the Commission: Chairman Martin, and Commissioners Copps, Adelstein, Tate, and McDowell issuing separate statements.

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I. INTRODUCTION

1. In this *Further Notice of Proposed Rulemaking (Notice)*, we seek comment on a broad range of issues concerning the compensation of providers of telecommunications relay services (TRS) from the Interstate TRS Fund (Fund).¹ First, we seek comment on alternative cost recovery methodologies for interstate traditional TRS² and Speech-to-Speech (STS),³ including Hamilton Relay, Inc.’s (Hamilton) proposed “MARS” plan (“Multi-state Average Rate Structure”),⁴ and also whether traditional TRS and STS should be compensated at the same rate.

¹ TRS, created by Title IV of the Americans with Disabilities Act of 1990 (ADA), enables an individual with a hearing or speech disability to communicate by telephone or other device through the telephone system with a person without such a disability. See 47 U.S.C. § 225(a)(3) (defining TRS); 47 C.F.R. § 64.601(14). As discussed below, the Fund compensates providers of eligible interstate TRS services, and other TRS services not compensated by the states, for their reasonable costs of providing service. See generally *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket Nos. 90-571 & 98-67, CG Docket 03-123, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Rcd 12475, 12479-83, paras. 3-8 (June 30, 2004) (*2004 TRS Report & Order*).

² Traditional TRS is accomplished via text-to-voice or voice-to-text, with the text provided via a text telephone (TTY). See 47 C.F.R. § 64.601(14).

³ STS is a form of TRS that allows persons with speech disabilities to communicate with voice telephone users through the use of specially trained communications assistants (CAs) who understand the speech patterns of persons with disabilities and can repeat the words spoken by that person. See 47 C.F.R. § 64.601(12).

⁴ Hamilton raised this proposal, which would base the compensation rate paid by the Fund on the average of the *intrastate* TRS rates paid by the states, in its petition for reconsideration of the *2004 TRS Report & Order*. Hamilton Relay Service, Inc., Petition for Reconsideration (filed Oct. 1, 2004) (Hamilton Petition); see also Hamilton Reply to comments filed in response to its petition for reconsideration (filed Nov. 30, 2004). Hamilton also raised this issue in its application for review of the *2004 Bureau TRS Order*, which adopted the compensation rates for the various forms of TRS for the 2004-2005 Fund year. See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Order, 19 FCC Rcd 12224 (June 30, 2004) (*2004 Bureau TRS Order*), modified by *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Order, 19 FCC Rcd 24981 (Dec. 30, 2004) (*Modified 2004 Bureau TRS Order*). Because Hamilton is really seeking the adoption of a new cost recovery methodology for traditional TRS, we raise this issue in this *Notice*. See also *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Order on Reconsideration, FCC 06-87 (July 12, 2006) (resolving petitions for reconsideration of the *2004 TRS Report & Order*); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Memorandum Opinion and Order, FCC 06-88 (July 12, 2006) (resolving applications for review of the *2004 Bureau TRS Order*).

Second, this *Notice* seeks further comment on the appropriate cost recovery methodology for Video Relay Service (VRS)⁵ and the length of time the VRS rate should be in effect.⁶ Third, this *Notice* seeks comment on issues relating to the “reasonable” costs compensable under the present cost recovery methodology, including whether, and to what extent, marketing and outreach expenses, overhead costs, and executive compensation are compensable from the Fund. Finally, this *Notice* seeks comment on ways to improve the management and administration of the Fund, including adopting measures for assessing the performance and efficiency of the Fund and to deter waste, fraud, and abuse.

II. BACKGROUND

2. *TRS*. Title IV of the Americans with Disabilities Act of 1990 (ADA), which added Section 225 to the Communications Act of 1934, as amended,⁷ requires the Commission to ensure that TRS is available, to the extent possible and in the most efficient manner, to persons with hearing or speech disabilities in the United States.⁸ The statute requires that TRS offer persons with hearing and speech disabilities access to a telephone system that is “functionally equivalent” to voice telephone service.⁹ Congress recognized that persons with hearing and speech disabilities have long experienced barriers in their ability to access, utilize, and benefit from telecommunications services.¹⁰ Congress found TRS necessary to “bridge the gap between the communications-impaired telephone user and the community at large” and emphasized that to “participate actively in society, one must have the ability to call friends, family, business[es] and employers.”¹¹ Since the implementation of a uniform nationwide system of TRS in 1993, the Commission has addressed issues relating to its provision, regulation, and compensation.¹²

3. When Section 225 was enacted and implemented, TRS calls were placed using a TTY connected to the Public Switched Telephone Network (PSTN) (traditional TRS).¹³ In

⁵ VRS is a form of TRS that enables the VRS user and the CA to communicate via a video link in sign language, rather than through text. VRS presently requires a broadband Internet connection. See 47 C.F.R. § 64.601(17) (defining VRS).

⁶ The Commission sought comment on the appropriate cost recovery methodology for VRS and the rate period in the *2004 TRS Report & Order’s* Further Notice of Proposed Rulemaking (FNPRM), noting that the present average per minute cost methodology is currently being used on an interim basis for VRS. See *2004 TRS Report & Order*, 19 FCC Rcd at 12565-12567, 12569, paras. 234-240 (VRS cost recovery methodology), 247 (one or two year period for VRS).

⁷ Pub. L. No. 101-336, § 401, 104 Stat. 327, 336-69 (1990); 47 U.S.C. § 225.

⁸ 47 U.S.C. § 225(b)(1).

⁹ 47 U.S.C. § 225(a)(3).

¹⁰ See generally *2004 TRS Report & Order*, 19 FCC Rcd at 12479-12480, para. 3 (discussing legislative history of Title IV of the ADA).

¹¹ See H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. at 129 (1990) (House Report).

¹² See generally *2004 TRS Report & Order*, 19 FCC Rcd at 12479-12486, paras. 2-13 (overview of past TRS orders).

¹³ See *id.* at 12479, para. 3 n.18 (describing how a traditional TRS call works).

March 2000, the Commission recognized several new forms of TRS, including STS and VRS.¹⁴ STS is used by persons with a speech disability. Specially trained CAs who understand the speech patterns of persons with speech disabilities repeat the words spoken to the other party to the call.¹⁵ The Commission made STS a mandatory service, so that all states with a certified state TRS program must offer this service.¹⁶ VRS is an Internet-based form of TRS that allows the TRS user whose primary language is American Sign Language (ASL) to communicate with the CA in ASL, rather than text, through a video link.¹⁷ In April 2002, the Commission recognized a second Internet-based form of TRS – Internet Protocol (IP) Relay.¹⁸ Like traditional TRS, IP Relay uses text, but the user connects to the CA via the Internet and a personal computer or other web-enabled device. Most recently, in August 2003, the Commission recognized captioned telephone service as a form of TRS.¹⁹

4. *Compensation of TRS Providers.* Section 225 creates a cost recovery regime whereby providers of TRS are compensated for the costs caused by TRS.²⁰ This regime is based on the “jurisdictional separation of costs.”²¹ Section 225 provides that the costs caused by *interstate* TRS “shall be recovered from all subscribers for every interstate service,” and the costs caused by the provision of *intrastate* TRS “shall be recovered from the intrastate jurisdiction.”²² As a general matter, the costs caused by *intrastate* TRS are recovered by each state.²³ No

¹⁴ *Telecommunications Relay 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, 5148-5151, paras. 14-20 (STS), 5152-5154, paras. 21-27 (VRS) (March 6, 2000) (*Improved TRS Order*).

¹⁵ *Id.* at 5148, para. 14.

¹⁶ *Id.* at 5149, para. 15; *see generally* 47 C.F.R. § 64.605 (addressing state certification).

¹⁷ *2000 Improved TRS Order*, 15 FCC Rcd at 5152, para. 21. The issue of whether VRS should be a mandatory service was raised in the FNPRM in the *2004 TRS Report & Order*. *See 2004 TRS Report & Order*, 19 FCC Rcd at 12567-12568, paras. 243-245. That issue remains pending.

¹⁸ *See Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 7779 (April 22, 2002) (*IP Relay Declaratory Ruling*). The issue of whether IP Relay should be a mandatory service was raised in the FNPRM in the *2004 TRS Report & Order*. *See 2004 TRS Report & Order*, 19 FCC Rcd at 12564, paras. 231-232. That issue remains pending.

¹⁹ *See Telecommunications Relay Services, and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Declaratory Ruling, 18 FCC Rcd 1621 (Aug. 1, 2003). Captioned telephone is not a mandatory service, although a petition for rulemaking on this issue is pending. *See Petition for Rulemaking Filed Concerning Mandating Captioned Telephone Relay Service and Authorizing Internet Protocol (IP) Captioned Telephone Relay Service*, CG Docket No. 03-123, Public Notice (Nov. 14, 2005).

²⁰ 47 U.S.C. § 225(d)(3). Congress made clear that TRS users cannot be required to pay for the costs of TRS. 47 U.S.C. § 225(d)(1)(D).

²¹ 47 U.S.C. § 225(d)(3).

²² 47 U.S.C. § 225(d)(3)(B); *see also* 47 C.F.R. § 64.604(c)(5)(ii).

²³ On an interim basis, the costs of providing *intrastate* VRS and IP Relay are presently paid from the Interstate TRS Fund. *See Improved TRS Order*, 15 FCC Rcd at 5149, para. 15 (addressing VRS); *IP*

specific funding method is required for *intrastate* TRS or state TRS programs.²⁴ States generally recover the costs of intrastate TRS either through rate adjustments or surcharges assessed on all intrastate end users, and reimburse TRS providers directly for their intrastate TRS costs. Most states presently select one provider to offer TRS within the state.²⁵

5. With respect to *interstate* TRS, there are two aspects to the cost recovery framework set forth in the regulations: (1) collecting contributions from common carriers providing interstate telecommunications services to create a fund from which eligible TRS providers may be compensated; and (2) compensating eligible TRS providers from the Fund for the costs of providing eligible TRS services.²⁶ In creating the Interstate TRS Fund, the Commission enacted a shared funding mechanism based on contributions from all carriers who provide interstate telecommunications services. All contributions are placed in the Fund, which is administered by the TRS Fund administrator, currently the National Exchange Carrier Association, Inc. (NECA).²⁷ The Fund administrator uses these funds to compensate “eligible” TRS providers²⁸ for the costs of providing TRS. Compensation is based on per-minute rates

Relay Declaratory Ruling, 17 FCC Rcd at 7786, para. 20 (addressing IP Relay). The issue of separation of costs relating to the provision of IP Relay and VRS is pending pursuant to the FNPRM in the *2004 TRS Report & Order*. See *2004 TRS Report & Order*, 19 FCC Rcd at 12561-12564, paras. 221-230 (IP Relay), 12565-12567, paras. 234-242 (VRS).

²⁴ In a state with a certified TRS program, the state “shall permit a common carrier to recover the costs incurred in providing intrastate telecommunications relay services by a method consistent with the requirements of [Section 225].” 47 U.S.C. § 225(c)(3)(B).

²⁵ The Commission’s rules provide that common carriers can meet their obligation to provide TRS within their service areas “individually, through designees, through a competitively selected vendor, or in concert with other carriers.” 47 C.F.R. § 64.603. A few states, *e.g.*, California, use more than one provider for intrastate service, an arrangement known as “multivendoring.” See *Improved TRS Order*, 15 FCC Rcd at 5157, para. 35.

²⁶ See 47 U.S.C. § 225(d)(3); 47 C.F.R. § 64.604(c)(5). The regulations, addressing these matters separately, characterize the former as “cost recovery,” see 47 C.F.R. §§ 64.604(c)(5)(ii) & (iii)(A)-(D), and the latter as “payments to TRS providers,” 47 C.F.R. §§ 64.604(c)(5)(iii)(E) & (F).

²⁷ The amount of each carrier’s contribution is the product of the carrier’s interstate end-user telecommunications revenue and a contribution factor determined annually by the Commission. 47 C.F.R. § 64.604(c)(5)(iii).

²⁸ 47 C.F.R. § 64.604(c)(5)(iii)(E) & (F) (setting forth the eligibility requirements for TRS providers seeking to receive compensation from the Interstate TRS Fund). Recently the Commission released an order providing for Commission certification of IP Relay and VRS providers eligible for compensation from the Fund. See *Telecommunications Relay Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Report and Order and Order on Reconsideration, 20 FCC Rcd 20577 (Dec. 12, 2005) (*2006 TRS Certification Order*) (adopting new VRS and IP Relay provider eligibility rules).

adopted each year by the Commission.²⁹ There are currently four different compensation rates for the different forms of TRS: traditional TRS, IP Relay, STS, and VRS.³⁰

6. To determine the annual per-minute compensation rates under the present cost recovery methodology, TRS providers are required to submit to the Fund administrator *projected* cost and minutes of use data for a two-year period. Specifically, TRS providers must supply the administrator with “total TRS minutes of use, total interstate TRS minutes of use, total TRS operating expenses and total TRS investment,” as well as “other historical or projected information reasonably requested by the administrator for purposes of computing payments and revenue requirements.”³¹ Using this data, the Fund administrator determines the average per-minute compensation rate for the various forms of TRS, and submits the rates to the Commission for approval. The Commission issues a rate order each year by June 30, either approving or modifying these rates.³²

III. DISCUSSION

7. In recent years, the annual determination of the TRS compensation rates – and particularly the VRS rate – under the present methodology has presented a variety of regulatory and administrative challenges.³³ Further, comments filed in response to NECA’s filing of proposed compensation rates for the 2006-2007 Fund year³⁴ reflect dissatisfaction with the rate setting *process*, as well as with the proposed rates.³⁵ For these reasons, in this *Notice* we seek

²⁹ The Fund year runs from July 1 to June 30. See, e.g., *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Order, DA 06-1345 (June 29, 2006) (*2006 Bureau TRS Rate Order*).

³⁰ See *id.* (adopting separate rates for traditional TRS and IP Relay). The traditional TRS rate also applies to Spanish Relay service and captioned telephone service.

³¹ 47 C.F.R. § 64.604(c)(5)(iii)(C).

³² *Id.*; see, e.g., *2006 Bureau TRS Rate Order* (most recent order adopting annual per-minute compensation rates based on providers’ projected costs and minutes of use).

³³ See *2006 Bureau TRS Rate Order*, at paras 28-29 (freezing the 2005-2006 VRS rate for the 2006-2007 Fund year because, in part, of the providers’ difficulty in accurately predicting minutes of use); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, CG Docket No. 03-123, Order, 20 FCC Rcd 12237, at 12246-12248, paras. 23-28 (June 28, 2005) (*2005 TRS Rate Order*) (adopting 2005-2006 VRS rate based on median rate of the providers because record reflected that the average rate would unfairly penalize most providers and providers’ cost projections may have been based on various levels of service quality); *2004 TRS Report & Order*, 19 FCC Rcd at 12537-12552, paras. 163-200 (addressing challenges to the 2003-2004 compensation rates, including disallowances for profit, engineering costs, and labor costs); *2004 Bureau TRS Order*, 19 FCC Rcd at 12237-12241 paras. 35-46 (addressing cost disallowances and challenges to the adoption of the 2004-2005 compensation rates).

³⁴ See NECA, *Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate*, CG Docket No. 03-123, filed May 1, 2006 (*2006 NECA Filing*).

³⁵ See, e.g., Sprint Nextel Corporation (Sprint Nextel) Comments (May 17, 2006) at 1-2; Communication Services for the Deaf, Inc. (CSD) Comments (May 17, 2006) at 6-8; Hamilton Comments (May 17, 2006) at 2-6; Hands On Video Relay Services, Inc. (Hands On) Reply Comments (May 24, 2006); Telecommunications for the Deaf, Inc., National Association of the Deaf, Deaf and Hard of Hearing

comment on numerous issues relating to the cost recovery methodology used for determining the TRS compensation rates paid by the Fund, as well as the scope of the costs properly compensable under Section 225 and the TRS regime as intended by Congress.

8. In so doing, we are mindful of the role of TRS as an accommodation under the ADA for persons with disabilities. As the Commission has stated, “because Title IV places the obligation on carriers providing voice telephone services to *also* offer TRS to, in effect, remedy the discriminatory effects of a telephone system inaccessible to persons with disabilities, the costs of providing TRS are really just another cost of doing business generally, *i.e.*, of providing voice telephone service.”³⁶ For this reason, “the annual determination of the TRS compensation rates is not akin to a rate-making process that determines the charges a regulated entity may charge its customers,” but rather “it is a determination of a per-minute compensation rate that will cover the reasonable costs incurred in providing the TRS services mandated by Congress and our regulations.”³⁷ As the Commission has stated in the context of disallowing research and development expenses, the Fund is not intended to be “an unbounded source of funding for enhancements that go beyond [the mandatory minimum] standards.”³⁸ It follows that the use of TRS cost recovery methodologies and procedures that fairly and predictably compensate providers for the reasonable costs of providing service will not only be faithful to the intent of the ADA, but will also benefit all consumers.

A. Cost Recovery Methodology for Traditional TRS, STS, and IP Relay

1. Hamilton’s MARS Plan

9. *Background.* Hamilton requests that the Commission initiate a proceeding to adopt a proposed alternative cost recovery methodology – the “MARS” Plan – for determining the per-minute compensation rate for traditional TRS.³⁹ Under the proposed MARS plan, the interstate traditional TRS rate would be calculated based on a weighted average of the *intrastate* TRS rates paid by the states.⁴⁰ In addition, because some states base their TRS rate on “session minutes,” rather than “conversation minutes,”⁴¹ Hamilton proposes using a factor to convert

Consumer Advocacy Network, and California Coalition of Agencies Serving the Deaf and Hard of Hearing (collectively, Consumer Groups) Reply Comments (May 24, 2006); CSD Reply Comments (May 24, 2006).

³⁶ 2004 TRS Report & Order, 19 FCC Rcd at 12543, para. 179.

³⁷ *Id.*

³⁸ *Id.* at 12547-12548, para. 189. The size of the Fund has increased from approximately \$70 million in 2001 to over \$460 million in 2006. See 2006 Bureau TRS Rate Order, at para. 30 n.91.

³⁹ Hamilton Petition at iii, 1-4.

⁴⁰ *Id.* at 9. Hamilton proposes using a *weighted* average because, otherwise, states with a relatively high per minute intrastate rate, but a very small number of minutes, would skew the multi-state per minute rate higher than it should be. *Id.* at 11.

⁴¹ *Id.* at 10 & Exh. 1 (column E). Presently, the Fund compensates providers for conversation minutes (or completed minutes), which are measured by conversation time between the calling and called party. Conversation minutes do not include time for call set-up, ringing, waiting for the called party to answer, or call wrap-up, and do not encompass calls that reach a busy signal or are not answered. Session minutes

session minutes to conversation minutes.⁴² Hamilton bases its proposal on the intrastate TRS data from twenty-three states for which information was readily available.⁴³

10. According to Hamilton, the MARS plan is a superior approach to the current cost recovery methodology for traditional interstate TRS because it is grounded in competition, as most states select an intrastate TRS provider through a competitive bidding process.⁴⁴ Hamilton also asserts that this approach would be easier and less costly to administer and will benefit consumers “by lowering interstate TRS rates to the competitively-based market value.”⁴⁵

11. Hamilton also notes that under the present cost recovery methodology – what it calls “rate of return regulation”⁴⁶ – the Fund administrator and the Commission have “to examine the minutiae of each TRS providers’ costs and capital investments,” and review all costs submitted by each provider to determine whether to allow or disallow each individual cost.⁴⁷ Hamilton adds that this “complicated rate-making process ... will only get more complicated as providers seek to include ever more of their costs in the rate base.”⁴⁸ Hamilton also asserts that the present methodology “fails to replicate the competitive market and instead discourages efficiency and encourages the ‘padding’ of investment.”⁴⁹

include all the time the CA spends on a call to the relay center, *i.e.*, from the time the call is connected to the CA, regardless of whether the called party answers the call. *See generally* Hamilton Petition at 10 n.21.

⁴² *Id.* at 10. Hamilton would use a factor of 1.46 to convert session minutes to conversation minutes based on historical data available to the Commission and Fund administrator. Using this method, one conversation minute equals 1.46 session minutes. *Id.*

⁴³ The twenty-three states are: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Iowa, Maine, Maryland, Minnesota, Montana, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Tennessee, Wisconsin, and Wyoming. *See* Hamilton Petition, at 11, Ex. 1. Hamilton notes that some state information is not publicly available, but that the Commission could obtain such information from states that have certified TRS programs. Hamilton Petition at 9 & n.19.

⁴⁴ *Id.* at iii.

⁴⁵ *Id.* at 2-3.

⁴⁶ *See, e.g., id.* at iii. Under the present cost recovery methodology, TRS providers are entitled to compensation for the reasonable costs of providing service, which includes a rate or return on capital investment but not profit or a mark-up on expenses. *See, e.g., 2004 TRS Report & Order*, 19 FCC Rcd at 12542-12544, paras. 177-182; *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Order, 18 FCC Rcd 12823, 12835, para. 35 (June 30, 2003) (*2003 Bureau TRS Order*). We note that traditional rate of return regulation would provide for the refund of over earnings, or some other true-up mechanism, neither of which is present in the current TRS regime.

⁴⁷ Hamilton Petition at 12.

⁴⁸ *Id.*

⁴⁹ *Id.* at 7.

12. Hamilton asserts that, by contrast, the MARS plan would eliminate the need to examine any carrier data. Under the plan, the Fund administrator would simply collect the per-minute rate and minutes of use for each state, which are “presumptively competitive rates ... because they have been subject to a state contract competitive bidding process,” and determine the interstate rate by averaging those rates, adjusted for minutes of use.⁵⁰ Hamilton notes that this plan would avoid the costs associated with collecting, evaluating, correcting, and re-evaluating TRS provider data.”⁵¹

13. *Use of the MARS Plan.* We seek comment on whether we should adopt the MARS plan, in whole or in part (such as in a hybrid approach in which the MARS plan is used to set a rate cap), as the cost recovery methodology for traditional interstate TRS and possibly other forms of TRS, such as STS. As noted above, under the MARS Plan the compensation rate for traditional interstate TRS is based on an average of state rates for intrastate traditional TRS. In contrast, the present methodology is based on *projected* cost and demand data submitted by the providers. We seek comment generally on whether the MARS plan, because it is based on competitively bid state rates, will result in a fairer, more reasonable compensation rate. We urge commenters to address the advantages and disadvantages of the present methodology, the MARS plan, and any alternative approach based, in whole or in part, on either.⁵²

14. We also seek comment on the fact that some states compensate for session minutes, rather than conversation minutes. As noted above, the Fund presently compensates providers for conversation minutes (*i.e.*, actual conversation time between the calling and called party), not session minutes (*i.e.*, time the CA spends on a call).⁵³ Because some state rates are based on session minutes, Hamilton proposed calculating a conversion factor to convert the session minute rates to conversation minute rates.⁵⁴ We seek comment on the appropriateness of converting session minutes to conversation minutes, and specifically on how the factor should be calculated and applied. We also seek comment on whether it would be more appropriate to use session minutes instead of conversation minutes.⁵⁵ Further, we seek comment on whether some

⁵⁰ *Id.* at 12-13.

⁵¹ Hamilton Reply Comments at 3 (Nov. 30, 2004). In response to Hamilton’s petition for reconsideration, comments were filed by MCI, Inc. (MCI Comments) (Nov. 15, 2004); the United States Telecom Association (USTA Comments) (Nov. 15, 2004); and Hands On Video Relay Services, Inc. (Hands On) (Nov. 15, 2004). The commenters generally support Hamilton’s request. USTA Comments at 1-4; MCI Comments at 2-4; Hands On Comments at 3.

⁵² We note, for example, that MCI asserts that this methodology would permit providers to receive a return on expenses, which it maintains should be approximately twenty percent, which the Commission presently does not allow. MCI Comments at 2-3. USTA asserts that when “pricing is based on competition rather than regulation, the cost o[f] providing the service and the resulting price at which it is offered generally decreases, thereby reducing the amount that carriers must contribute through end user assessments in order to support TRS.” USTA Comments at 3.

⁵³ *See* note 41, *supra*.

⁵⁴ Hamilton Petition at 10.

⁵⁵ MCI asserts that the Commission should use session rather than conversation minutes. MCI Comments at 3.

states' practice of rounding call minutes to the nearest full minute might affect the use of the MARS plan, and if so, how.⁵⁶

15. We also seek comment on how the MARS plan might be implemented. For example, if a state rate has been based on the interstate rate, inclusion of that state's rate into the MARS plan calculation may not be appropriate.⁵⁷ We seek comment on whether any other factors that might warrant excluding a particular state's rate from the calculation. We also seek comment on how often states adopt TRS compensation rates. We also seek comment on what data would be required from the states and the extent to which this data is readily available. In addition, we ask parties to comment on any other issues relating to the implementation of the MARS plan and the calculation of rates under that approach, including the costs and benefits of implementing this plan.

16. In addition, Hamilton proposes to weight the individual state rates by that states' total minutes of use so that states with relatively high rates and low minutes of use do not skew the average.⁵⁸ We seek comment on whether it would be appropriate to weight the states' rates, and, if so, how a weighted rate should be calculated.

2. Application of MARS Plan to STS

17. We recognize that the MARS Plan is specifically proposed as a methodology for developing the compensation rate for interstate traditional TRS.⁵⁹ Because intrastate STS is also a mandatory form of TRS, we seek comment on whether the MARS plan (or a similar plan based on state STS rates) could also be used to determine the interstate STS compensation rate.⁶⁰ We also seek comment on the other issues noted above concerning implementation of the MARS plan as applied to STS, including the exclusion of particular states' rates, the effect of using session minutes rather than conversation minutes, using a weighted average, and whether the rate period should be one year or some longer period.

3. Same Compensation Rate for Traditional TRS, STS, and IP Relay

18. We understand that many states compensate intrastate traditional TRS and intrastate STS at the same rate.⁶¹ In addition, NECA has noted that in recent years, given the

⁵⁶ Presently, the actual conversation time of each completed call is recorded in minutes and seconds, or seconds and tenths of seconds (for calls less than a minute), and the conversation times for all calls are totaled each month. If the conversation time of each call were rounded to the fullest minute, the total monthly conversation time would be substantially greater than under the current approach. MCI asserts that if the MARS plan were adopted the Commission should adopt the state practices of rounding calls to the nearest full minute. MCI Comments at 3.

⁵⁷ See, e.g., Hamilton Petition at 11 n.23 (noting that the intrastate rate paid by California "is determined by the interstate rate, so the inclusion of California's rate in the MARS Plan may be circuitous").

⁵⁸ See Hamilton Petition at 11 & Exh.1.

⁵⁹ As noted above (note 30), however, the compensation rate for traditional TRS presently also applies to Spanish relay and captioned telephone service.

⁶⁰ We recognize that because presently all VRS and IP Relay calls are paid by the Fund, and not by the states, the MARS plan could not apply to those forms of TRS because there is not state data upon which to base a rate calculation.

⁶¹ See generally 2006 NECA TRS Rate Filing.

small demand for this service, the STS compensation rate has not been stable.⁶² For these reasons, NECA recommends in its filing for the 2006-2007 Fund year that the Commission consider adopting one rate that would apply to both STS and traditional TRS, based on consolidating the providers' data for these services.⁶³ We therefore seek comment on whether the same rate should apply to both traditional TRS and STS, under the existing cost recovery methodology, the MARS plan (or a similar type of plan based on state rates), or any other methodology, including modified versions of the existing cost recovery methodology and/or the MARS plan. We further seek comment on any other matters relating to whether traditional TRS and STS should be compensated at the same rate.

19. In addition, although in the *2005 TRS Rate Order* the Commission adopted separate compensation rates for traditional TRS and IP Relay given the then-apparent cost disparity between the two services,⁶⁴ we seek comment on whether IP Relay calls should also be compensated at the same rate as traditional TRS. We understand that in many instances the same CAs working at the same TRS facility handle traditional TRS and IP Relay calls interchangeably, and that the only difference between the calls is how they reach the relay center (*i.e.*, via the PSTN or via the Internet). We seek comment generally on this assumption, and on any cost differences between providing traditional TRS and providing IP Relay. We also seek comment on any other issues relating to whether IP Relay should be compensated at the same rate as traditional TRS.

4. Alternative Cost Recovery Methodologies for Traditional TRS, STS, and IP Relay

20. We also seek comment on whether other cost recovery methodologies might be appropriate for traditional TRS, STS, and IP Relay, and easier to administer and result in more predictable rates than the current methodology. For example, we seek comment on whether the interstate traditional TRS and STS rates should simply be the same as the intrastate rate paid for a similar call coming into the relay center and handled by the same provider. Under this approach, an interstate traditional TRS or STS call originating in Maryland would be compensated at the intrastate rate for intrastate calls in the state of Maryland. Because the actual cost of providing a traditional TRS or STS call should be the same regardless of its jurisdictional nature, the intrastate rate may provide a reasonable and fair recovery for interstate calls as well.

21. We seek comment on this proposal and any related issues, including whether this methodology may be burdensome or overcomplicated, or whether there might need to be an adjustment to the compensation for interstate calls if, for example, the intrastate rate is impacted by requirements different from the interstate requirements. In these circumstances, for example, the compensation rate might appropriately be based on the *lesser* of the rate resulting from the MARS plan or the rate the particular state pays for intrastate calls. We also seek comment on this alternative.

⁶² *Id.* For example, since 2002 the STS rate has ranged from \$1.440 to \$4.045.

⁶³ *Id.*

⁶⁴ *2005 TRS Rate Order*, 20 FCC Rcd at 12245, paras. 21–22. The data submitted for the 2005-2006 Fund year reflected that IP Relay costs were approximately 11 percent less than traditional TRS costs, and therefore a combined rate significantly over-compensated IP Relay providers and under-compensated traditional TRS providers. *Id.*

5. Use of a “True-up” or Transition to Actual Costs

22. We also seek comment on whether, under the MARS plan or any other cost recovery methodology for traditional TRS, STS, and IP Relay, there should be a “true-up” at the end of the Fund-year based on actual reasonable costs. Under a true-up, providers would be required to reimburse the Fund for any amount by which their payments exceed actual reasonable costs. As a result, providers’ ultimate compensation would not be contingent on estimates of costs or minutes of use. Providers would receive periodic payments of estimated actual reasonable costs based on a particular cost methodology, and at the end of the Fund year the true-up would reconcile the providers’ actual reasonable costs for providing service in compliance with the Commission’s rules and the payments received. We seek comment generally on any issues relating to the use of a true-up, including how a true-up could be implemented, what record keeping requirements might be required, and when and how often the true-up should occur. We also seek comment on whether, and how, to transition to a cost recovery methodology under which rates are set based on actual reasonable historical costs, thus eliminating any need for a true-up in most, if not all, cases.

6. Rate Period for Traditional TRS, STS, and IP Relay

23. Finally, we seek comment on whether the interstate traditional TRS rate, the interstate STS rate, and the IP Relay rate should continue to be set for a one-year period or whether a longer rate period is appropriate.⁶⁵ We seek comment on the advantages and disadvantages of using either a one-year rate period or some longer or shorter period of time for these services.

B. Cost Recovery Methodology for VRS

1. Appropriate Cost Recovery Methodology for VRS

24. *Background.* Since the recognition of VRS in 2000, the Commission has sought comment on the appropriate cost recovery methodology on several occasions.⁶⁶ Most recently, in 2004, the Commission sought comment on whether to adopt permanently the per-minute

⁶⁵ MCI asserts that the Commission should seek comment on whether the TRS rate should apply for a two-year period, rather than the present one-year period. MCI Comments at 4. We note that in the FNPRM in the *2004 TRS Report & Order*, the Commission sought comment on whether the compensation rate for VRS should be set for a one-year or two-year period. See *2004 TRS Report & Order*, 19 FCC Rcd at 12569, para. 247. We seek further comment on that issue below (paras. 30-31).

⁶⁶ See *Improved TRS Order*, 15 FCC Rcd at 5152-5156, paras. 22, 26-27, 32-33 (directing the TRS Advisory Council to develop cost recovery guidelines for VRS); *Telecommunications Services for Individuals with Hearing and Speech Disabilities, Recommended TRS Cost Recovery Guidelines, Request by Hamilton Telephone Company for Clarification and Temporary Waivers*, CC Docket No. 98-67, Memorandum Opinion and Order (continued) (continued from previous page) and Further Notice of Proposed Rulemaking, 16 FCC Rcd 22,948, 22958-22960, paras. 30-36 (Dec. 21, 2001) (declining to adopt a permanent cost recovery methodology for VRS and seeking additional comment on this issue); *2004 TRS Report & Order*, 19 FCC Rcd at 12487-12490, paras. 17-24 (declining to adopt a permanent cost recovery methodology for VRS), at 12565-12567, paras. 234-240 (FNPRM seeking additional comments and noting that although the Commission had previously sought comment on this issue, the relative infancy and unique characteristics of VRS made it difficult to determine what the appropriate cost recovery methodology should be).

methodology, and, if so, what safeguards might be necessary to ensure that such a system would provide fair and reasonable compensation in the face of difficult to predict demand levels.⁶⁷ The Commission also sought comment on whether, as an alternative, providers should be compensated with lump-sum or periodic payments of predicted costs, with a “true-up” at the end of the Fund-year.⁶⁸ The Commission noted that similar procedures had been employed to account for differences between predicted and actual costs in a carrier’s per-line Interstate Common Line Support payments.⁶⁹

25. In addition, the Commission sought comment on the data collection guidelines for the usage data that providers gave the Fund administrator.⁷⁰ Specifically, it sought comment on whether additional or different guidelines from those used for other forms of TRS are necessary due to the unique aspects of VRS.⁷¹ The Commission also noted that because VRS CAs must be highly trained, the labor costs for VRS constituted a much higher proportion of overall costs than for other forms of TRS. Therefore, the Commission sought comment on how such costs should be accounted for and fairly compensated to provide for the efficient utilization of labor and functionally equivalent VRS.⁷² The FNPRM sought comment on other cost elements that pertain to the provision of VRS and how to determine reasonable levels of those costs.

26. Six VRS providers filed comments in response to the 2004 FNPRM.⁷³ Four providers supported the use of the compensation methodology currently in use for VRS and all other forms of TRS.⁷⁴ Commenters generally opposed NECA’s method of reviewing the providers’ projected cost and demand data, including the disallowance of certain expenses.⁷⁵

⁶⁷ 2004 TRS Report & Order, 19 FCC Rcd at 12565, para. 235.

⁶⁸ *Id.* at 12565-12566, para. 236.

⁶⁹ *Id.* (citing *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent LEC and IXCs*, CC Docket No. 00-256, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket Nos. 98-77 & 98-166, Fifteenth Report and Order, 16 FCC Rcd 19613, 19665-19689, paras. 120-178 (Nov. 8, 2001)).

⁷⁰ *Id.* at 12566, para. 237; *see generally Telecommunications Relay Services and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Third Report and Order, 8 FCC Rcd 5300, 5305, para. 30 (July 20, 1993) (*TRS III*) (instructing the Fund administrator to fashion a form for the submission of projected costs).

⁷¹ 2004 TRS Report & Order, 19 FCC Rcd at 12566, para. 237.

⁷² *Id.* at 12566, para. 238

⁷³ CSD Comments (October 18, 2004); Hamilton Comments (October 18, 2004); Hands On Comments (October 15, 2004); MCI Comments (October 18, 2004); Sorenson Comments (October 18, 2004); Sprint Comments (October 18, 2004); *see 2004 TRS Report & Order*, 19 FCC Rcd at 12565-12567, paras. 234-240.

⁷⁴ CSD Comments at 19 (recommended using the per minute compensation methodology based on *session* minutes instead of *conversation* minutes currently in use); Hands On Comments at 29; Sorenson Comments at 12; Sprint Comments at 8. No individuals or non-providers filed comments on this issue.

⁷⁵ *See, e.g.*, Hands On Comments at 28-40; MCI Comments at 1-8.

27. *The Appropriate Cost Recovery Methodology.* Because of the continued sharp growth in the use of VRS, open issues concerning what costs may appropriately be included in determining the compensation rate under the current methodology,⁷⁶ and the providers' demonstrated inability to accurately forecast demand,⁷⁷ we seek additional comment on the issues raised in 2004 (and summarized above).⁷⁸ We also note that since 2004 the Commission has adopted VRS speed of answer and interoperability requirements,⁷⁹ which may also affect cost recovery issues. In addition, recently the Commission has permitted entities desiring to offer VRS to be certified by the Commission.⁸⁰ As a result, we expect additional VRS providers to enter the market. Many of these providers, like some of the existing providers, will not be traditional telephone companies and therefore may present unique cost issues. For these reasons, we believe that it is important to refresh the record on what the appropriate cost recovery methodology for VRS should be.

28. We are particularly interested in adopting a methodology that would result in more predictability for the providers, and be consistent with the principle that TRS is intended to be an accommodation for persons with disabilities, entitling providers to their "reasonable" costs of providing this service.⁸¹ We therefore seek comment on whether modifications should be made to the current methodology or whether there is a methodology other than the current compensation scheme that is more appropriate. For example, should the Commission adopt a compensation methodology for VRS where funds are disbursed based on each individual provider's actual, reasonable costs? Should the Commission treat VRS as a national service, seek competitive bids, and thereby permit the two or three lowest bidders to provide service at the lowest bid rate, or set compensation rates based on the lowest bid, with some sort of incentive or disincentive built into the auction process to ensure competitive bidding without limiting the number of ultimate providers at that rate?⁸² We seek comment on these proposals and any other issues relevant to adopting an appropriate cost recovery methodology for VRS.

⁷⁶ See, e.g., paras. 32-42, *infra*.

⁷⁷ See Reply Comments of the National Exchange Carrier Association, Inc. to 2006 NECA TRS Rate Filing (filed May 24, 2006) at 5-6 & Ex. 4 (noting that "[s]ince the inception of the service, providers' forecasts have been significantly lower than actual demand").

⁷⁸ See 2004 TRS Report & Order, 19 FCC Rcd at 12565-12567, paras. 234-240; see paras. 24-26, *supra*.

⁷⁹ See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, CC Docket No. 98-67, Report and Order, 20 FCC Rcd 13168 (July 19, 2005) (*VRS Speed of Answer Order*); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket 03-123, Declaratory Ruling and Further Notice of Proposed Rulemaking, FCC 06-57 (May 9, 2006) (*VRS Interoperability Order*).

⁸⁰ See 2006 TRS Certification Order.

⁸¹ See 2004 TRS Report & Order, 19 FCC Rcd at 12543, para. 179.

⁸² As noted above, many states award contracts for the provision of intrastate TRS to a single provider through a competitive bidding process.

2. Use of a “True-up” or Transition to Actual Costs

29. We also seek comment on whether, under whatever methodology is used, providers should be required to reimburse the Fund for any amount by which their payments exceed reasonable actual costs.⁸³ As noted above, the providers’ demand forecasts for VRS have generally been significantly lower than actual demand, and under the current cost recovery methodology, when demand is underestimated the compensation rate will be higher, resulting in overcompensation for actual minutes submitted.⁸⁴ A true-up based on reasonable actual costs might both minimize incentives for providers to underestimate projected minutes of use and overstate projected costs, and ensure that providers are not over-compensated. Indeed, a comparison of projected costs and minutes of use and actual compensation suggests that some VRS providers have been compensated above their actual costs by millions of dollars. We seek comment on whether any such over-compensation from the Fund can be reconciled with Section 225. We also seek comment on any other issues relating to the use of a true-up, including how a true-up could be implemented, what record keeping requirements might be required, and when and how often the true-up should occur.⁸⁵ We also seek comment on whether, and how, to transition to a cost recovery methodology under which rates are set based on actual reasonable historical costs, thus eliminating any need for a true-up in most, if not all, cases.

3. Rate Period for VRS

30. The Commission also previously raised the issue of whether the VRS rate should continue to be set for a one year period or some longer period.⁸⁶ As the Commission noted, currently the rules provide that the compensation rates for the various forms of TRS will be effective for a one-year period beginning July 1 of each year.⁸⁷ Because, however, the VRS rate had varied sharply from year to year (*e.g.*, beginning at \$5.143 in July 2000, jumping to \$17.044 in July 2002, and falling to \$7.751 in 2003), the Commission sought comment on whether this lack of consistency may make it difficult for VRS providers to plan and budget for the provision of this service, particularly with regard to labor costs and staffing.⁸⁸ The Commission also recognized that, as a general matter, the operating expenses for VRS are more complex than with the other forms of TRS, and overall the costs are higher.⁸⁹ The Commission therefore sought comment on whether the VRS compensation rate should be set for a two-year period, rather than a one-year period.⁹⁰

⁸³ We note that in 2004 the Commission sought comment on whether the cost recovery methodology might include “a lump sum payment or periodic payments of estimated actual costs with a ‘true-up’ at the end of the fund year.” *Id.* at 12565-12566, para. 236.

⁸⁴ *See* para 27, *supra*.

⁸⁵ *See generally* para. 22, *supra*, addressing use of a true-up for traditional TRS, STS, and IP Relay.

⁸⁶ *2004 TRS Report & Order*, 19 FCC Rcd at 12569, para. 247.

⁸⁷ *Id.*; *see* 47 C.F.R § 64.604(c)(5)(iii)(H).

⁸⁸ *2004 TRS Report & Order*, 19 FCC Rcd at 12569, para. 247.

⁸⁹ *Id.*

⁹⁰ *Id.* In response to this issue, four comments were filed. Two providers agreed that a two-year period rate would allow them to provide this service more effectively. Sorensen Comments at 14; CSD

31. In view of the other issues raised in this *Notice*, as well as the recent interoperability and speed of answer requirements for VRS,⁹¹ we seek to refresh the record on this issue. We seek comment on whether a longer rate period would be appropriate for VRS. We seek comment on what the rate period should be, and why such a rate period would enable VRS providers to offer this service more effectively and efficiently over time. Further, given the general trend of decreasing compensation rates over time,⁹² we seek comment on how, particularly with a longer rate period, we might ensure that the compensation rate reasonably correlates to actual costs throughout the rate period. We also seek comment on the advantages and disadvantages of using either a one-year rate period or some longer or shorter period of time for VRS. Finally, we seek comment on whether the rate period for all forms of TRS should be the same, or whether they may differ.⁹³

C. “Reasonable” Costs and Confidentiality of Provider Data

32. NECA’s Data Collection Form sets forth several categories of costs related to the provision of TRS for which providers may seek compensation.⁹⁴ These categories apply to all forms of TRS. As discussed below, in some instances these categories of costs may not be defined with sufficient clarity, and therefore providers may have been submitting costs that should not be included in the compensation rates as reasonable costs of providing service. For this reason, with regard to certain types of costs we seek comment on the nature and extent of such costs that are reasonable and consistent with Section 225.

1. Marketing and Outreach Expenses

33. We seek comment on the extent to which marketing and outreach should continue to be compensated by the Fund. To the extent these activities should be covered, we seek comment on the types of expenses that should be covered and whether there is a distinction between a marketing and outreach, and if so, how each should be defined.

34. The Commission’s rules require TRS providers to engage in outreach activities to ensure that “callers in their service area are aware of the availability and use of all forms of TRS.”⁹⁵ In 2004, the Commission addressed a proposal that the Fund should finance a national outreach campaign.⁹⁶ Although the Commission recognized the importance of outreach, it

Comments at 27. Two other providers recommended that the Commission maintain a one-year reporting period. Hamilton Comments at 7; Hands On Comments at 31.

⁹¹ See *VRS Interoperability Order*; *VRS Speed of Answer Order*.

⁹² See <http://www.neca.org/media/0605RELAYRATESHISTORY.xls> (NECA’s chart of TRS rate history).

⁹³ See para. 23, *supra*, addressing rate period for traditional TRS, STS, and IP Relay.

⁹⁴ See 2006 NECA Filing at Appendix A.

⁹⁵ 47 C.F.R. § 64.604(c)(3).

⁹⁶ 2004 TRS Report & Order, 19 FCC Rcd at 12512–12513, para. 90. This issue had previously been addressed by the Commission in the *Second Improved TRS Order & NPRM*. See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Second Report and Order, Order on Reconsideration, and Notice of Proposed Rulemaking*, CC Docket No. 98-67, CG Docket No. 03-123, FCC 03-112, 18 FCC Rcd 12379, at 12441-12442, paras. 128-133 (June 17, 2003) (*Second Improved TRS Order & NPRM*).

concluded that the Fund could not finance the type of national campaign at issue.⁹⁷ Noting that providers have an obligation to make the public aware of the availability of TRS, the Commission stated:

We decline to permit or require the Interstate TRS Fund to fund a national outreach campaign. . . . [W]e conclude that the cost of an effective *national* outreach campaign would be prohibitive, with uncertain outcomes. Further, the amount of money that the Interstate TRS Fund might devote to an outreach campaign would have to be balanced with our efforts in other parts of this *Order* (and other recent orders) to more precisely define and manage the costs that determine the compensation rates from the Interstate TRS Fund in an effort to safeguard the integrity of the fund. These costs, as we have noted, may include costs attributable to reasonable outreach efforts, and in this way some of the costs for outreach are already supported by the Interstate TRS Fund. We also note that the majority of TRS calls are local and intrastate, which suggests that the state TRS providers and state TRS programs should be taking the lead in providing meaningful outreach.⁹⁸

We continue to recognize the importance of outreach. We also recognize that it is important for the Commission to define with sufficient clarity the nature of outreach expenses that may appropriately be included in providers' cost submissions.

35. We acknowledge that in the context of the 2006-2007 ratemaking proceeding⁹⁹ commenters requested further Commission guidance on the issue of outreach and marketing.¹⁰⁰ Uncertainty regarding this issue may also be compounded by the Fund's administrator's Data Collection Form and Instructions.¹⁰¹ We note that the instructions separately include "Outreach" and "Marketing/Advertising" as "Other TRS Expenses" that may be included on providers' cost submissions.¹⁰² Moreover, "Outreach" is defined in the Data Collection Form as "[e]xpenses of programs to educate the public on TRS," and "Marketing/Advertising" is defined as "[e]xpenses associated with promoting TRS within the community."¹⁰³ These similar definitions may have lead to confusion concerning the nature of outreach expenses that may appropriately be submitted to the Fund administrator.

36. We therefore seek comment on the nature of outreach and marketing expenses that may properly be compensable under Section 225, and how these expenses may be more precisely defined. We also seek comment on whether *any* marketing expenses are properly includable in the rates. We note that, as a general matter, the Commission's rules address outreach and are directed at making the public aware of the use and availability of TRS generally

⁹⁷ 2004 TRS Report & Order, 19 FCC Rcd at 12515, para. 97.

⁹⁸ *Id.*

⁹⁹ See 2006 NECA Filing.

¹⁰⁰ See, e.g., Sorenson Comments at 17-25; Verizon Comments at 2-9; CSD Comments at 6-11; Hamilton Comments at 1-8; Hands On Comments at 11-18.

¹⁰¹ See 2006 NECA Filing at Appendix A.

¹⁰² *Id.*

¹⁰³ *Id.*

and encouraging hearing persons and merchants to stay on the line and accept relay calls.¹⁰⁴ Therefore, we seek comment on whether anything more than non-branded educational outreach should be compensated by the Fund. We tentatively conclude that provider-specific “branded” marketing is inappropriate for compensation from the Fund, and that the Fund should not be used to promote any particular provider’s service over the service of competing providers, or to encourage consumers to switch providers. Commenters disagreeing with this tentative conclusion should explain what benefits persons with hearing or speech disabilities may derive from branded marketing that would be different from more generalized outreach efforts, and why the public should pay for competitive marketing efforts, particularly where such expenses cannot be linked to lower costs. We also seek comment on whether it is consistent with the statute to fund marketing or outreach campaigns by *each* provider, since they may largely be duplicative and directed at the same audience. Finally, we seek comment generally on the nature and cost of outreach and marketing activities providers have funded in the past, as well as amount and nature of the providers’ current outreach and marketing efforts that are geared toward hearing persons and merchants, so that they do not hang up on relay calls.

37. We also seek comment on whether, as NECA has suggested,¹⁰⁵ the amount of outreach and marketing expenses compensated from the Fund should be based on a given percentage of the compensation rate. Analogously, in compensating providers for an allowance for working capital (*i.e.*, for the time they are out of pocket money due them for services rendered), the Commission has applied a factor of 1.4 percent to the per-minute compensation rates.¹⁰⁶ If a similar approach were applied to outreach and marketing, all providers would receive compensation for the costs of outreach, and NECA and the Commission may not have to scrutinize the individual outreach plan of each provider. As a result, this approach might be a simpler and more predictable approach to compensating providers for the reasonable costs of outreach. We seek comment on these assumptions and, if this approach were adopted, what a reasonable percentage would be.¹⁰⁷

2. Overhead Costs

38. We seek comment on whether, consistent with Section 225, any general overhead costs (*i.e.*, those indirect costs that are neither cost-causative nor definable¹⁰⁸) should be

¹⁰⁴ 47 C.F.R. § 64.604(c)(3) (“Public access to information”).

¹⁰⁵ NECA Reply Comments at 4-5 n.13.

¹⁰⁶ See 2004 Bureau TRS Order, 19 FCC Rcd at 12231, para. 16 & n.53.

¹⁰⁷ We note that Sorenson opposes this approach, stating, in part, that VRS is still in its “infancy” and needs to be more “robustly funded” than traditional TRS. Sorenson *Ex Parte* comments to the 2006 NECA Filing (June 7, 2006) at 5-6.

¹⁰⁸ Cost-causative indirect costs would include, for example, the fringe benefits paid to an employee who, as part of his or her job, works on the provision of TRS. If 40 percent of such person’s salary is attributable to TRS, then 40 percent of the fringe benefits would be attributable to TRS. Other indirect costs may be allocated on a definable basis. For example, if 30 percent of a provider’s office space was used for CAs, then 30 percent of the rent expenses should be attributable to TRS. Our concern here is with generally allocable indirect (overhead) costs that do not fall within either of these categories.

compensable by the Fund as a reasonable cost of providing TRS.¹⁰⁹ We note that under the statute, TRS was intended to be a service offered by common carriers because they already offer voice telephone service. Further, the cost recovery mechanism was intended to ensure that carriers recover the costs of providing this service, since consumers who use the service cannot be required to pay more than the rates paid for functionally equivalent voice communication services.¹¹⁰ In this light, we seek comment on whether providers' reasonable costs should be limited to their *marginal costs* of providing TRS, which would not include an allocation of general overhead costs.¹¹¹ In other words, we seek comment on whether, consistent with the statute, the reasonable costs of providing TRS include only categories of costs actually incurred by providing TRS. We note that in the *2004 TRS Report & Order* the Commission stated that providers may recover reasonable overhead costs "directly attributable to the provision of TRS."¹¹² We now seek to clarify whether such costs should be considered as reasonable costs of providing TRS and, if so, what costs are reasonably considered recoverable overhead costs.

39. Assuming compensation of some overhead costs is consistent with the statute, we seek comment on the appropriate approach to allocating general overhead costs to the provision of TRS. Are there alternatives to allocating overhead costs as a percentage of total revenues? What limits should be placed on the recovery of such costs? We are concerned, for example, that allocating overhead costs on the basis of revenues may result in a provider submitting indirect costs that are grossly disproportionate to its direct TRS costs. Commenters supporting a percentage approach should also comment on what percentage is appropriate and why. We also seek comment on any other issues relating to the appropriateness of the recovery of overhead costs under Section 225 and, if recoverable, how the amount of such costs should be determined.

3. Legal and Lobbying Expenses

40. We seek comment on limits to the nature and amount of legal and lobbying expenses compensable under the "reasonableness" standard applicable to the compensation of all TRS costs, particularly with regard to such costs that are attributable to lobbying and not to compliance with the existing TRS rules.¹¹³ For example, for some providers these expenses have recently grown considerably, exceeding more than \$2 million a year. Commenters supporting the use of the TRS Fund for lobbying should explain what types of lobbying activities or expenses are appropriate for compensation from the Fund, and whether providers seeking reimbursement for such expenses should be required to disclose such activities apart from the Commission's *ex parte* rules or other applicable regulations.¹¹⁴ For example, is it lawful and

¹⁰⁹ NECA's Data Collection Form and Instructions lists "Other Corporate Overheads" as a compensable expense. See *2006 NECA Filing* at Appendix A. This appears to be catch-all category for other administrative TRS expenses not listed in the instructions. *Id.*

¹¹⁰ 47 U.S.C. § 225(d)(1)(D).

¹¹¹ In recent years, some providers have submitted costs to NECA that reflect a percentage of total company overhead costs based on the percentage of company revenues attributable to TRS.

¹¹² *2004 TRS Report & Order*, 19 FCC Rcd at 12544, para. 182 & n.520.

¹¹³ NECA's Data Collection Form and Instructions includes a category for "[e]xpenses incurred for legal and regulatory services. See *2006 NECA Filing* at Appendix A.

¹¹⁴ See, e.g., 47 C.F.R. § 1.1200 *et seq.* (the Commission's *ex parte* rules).

reasonable under Section 225 to reimburse travel, hotel, and meal costs associated with lobbying?¹¹⁵ Are costs associated with setting up web sites and mail campaigns to encourage the general public to lobby the Commission to raise VRS rates appropriate for public funding? Is it reasonable under Section 225 to reimburse legal expenses associated with petitioning for rule changes? Should amounts allowed for legal and lobbying expenses be uniform for all providers, or be tied to the number or minutes of service provided? We also seek comment on any other issues relating to the appropriate compensation of legal, lobbying, and related expenses.

41. We also seek comment on whether it is appropriate and consistent with the statutory meaning of costs caused by the service for the Fund to reimburse the “start up” expenses of new entities seeking to offer TRS. For example, should the Fund reimburse the legal and related organizational expenses of multiple new companies that desire to offer TRS, particularly when there are already numerous providers offering service?

4. Executive Compensation

42. We seek comment concerning the amount of executive compensation that is included in the providers’ cost data, and on whether the number of executives for whom compensation is sought should be tied to, or limited by, the overall size of certain providers.¹¹⁶ Should reimbursement of such costs be limited and, if so, how? We seek comment, for example, on how we might clarify the scope and nature of such costs that should be considered “reasonable” costs compensable by the Fund, and whether they should be limited to some percentage of other costs or in some other way.

5. Making Provider Cost and Demand Data Public

43. Historically, the Commission has honored requests by providers submitting projected cost and demand data to treat that information as confidential. As a result, the Commission addresses such data only in the aggregate or in some other way that does not reveal the individual data of a particular provider.¹¹⁷ We recognize, however, that this approach makes it difficult for providers and the public (including entities that pay into the Fund) to comment on the reasonableness of the rates. We note, for example, that in comments to NECA’s 2006-2007 rate filing, Hamilton urges the Commission to provide greater transparency to the rate setting process, including by sharing summaries of provider cost and demand data with the Interstate TRS Advisory Council.¹¹⁸

¹¹⁵ We assume, for example, that for any such costs to be compensable at a minimum there would have to be a showing that the lobbying benefited consumers, rather than the providers.

¹¹⁶ In the *2004 TRS Report & Order*, the Commission stated that it was “concerned about the extent to which some salaries of corporate officers and executives have been included in submitted costs,” and instructed providers to “delineate the percentage of such persons’ salaries that the provider maintains is attributable to the provision of TRS.” *Id.*

¹¹⁷ See, e.g., *2004 Bureau TRS Order*, 19 FCC Rcd at 12232, para. 18 n.57 (noting that because “the providers’ cost data submissions are confidential, [the order does] not discuss in detail the adjustments made to individual submissions or particular categories of costs”).

¹¹⁸ Hamilton Comments (May 17, 2006) at 8-9; see also Hands On Reply Comments at 1 (noting that the rate setting process is not transparent). Sorenson supports the provision of data to the Interstate TRS

44. As a result, we seek comment generally on whether the providers' projected (and/or actual) cost and demand data, or particular categories of the cost and demand data, should be made public. Conversely, we seek comment on whether there are categories of data that in particular should be given confidential treatment, and if so, why. We also seek comment on how keeping the data confidential or allowing a more open process may impact the evaluation of costs, public comment regarding the rates, and the rate setting process generally. We also seek comment on other ways to make the rate setting process under the current methodology more transparent. Finally, we seek comment on whether making this data publicly available would be consistent with Commission rules in other contexts.

D. Management and Administration of the Fund

45. The Fund has grown from approximately \$40 million to over \$460 million since 2000.¹¹⁹ In addition, the number of providers offering service continues to grow, particularly with regard to IP Relay and VRS.¹²⁰ Further, as noted above, new issues continue to arise concerning the nature and extent of certain costs that may be appropriately compensated from the Fund. For these reasons, we seek comment generally on steps we may take to ensure the integrity of the Fund and to ensure that compensation is consistent with the statute.

46. *Fund Administrator.* We seek comment generally on measures the Commission might adopt to improve the management and administration of the Fund. Presently, the Commission's rules provide for the appointment of a Fund administrator, currently NECA.¹²¹

Advisor Council if it can be done without revealing competitively sensitive information. Sorenson Relay Comments (May 24, 2006) at 8-9.

¹¹⁹ See <http://www.neca.org/media/0605RELAYRATESHISTORY.xls> (chart of rate and Fund size history).

¹²⁰ See *Notice of Certification of Snap Telecommunications, Inc. as a Provider of Video Relay Service (VRS) Eligible for Compensation from the Interstate Telecommunications Relay Service (TRS) Fund*, CG Docket No. 03-123, Public Notice, FCC 06-67 (May 8, 2006); *ERRATUM - Notice of Certification of Snap Telecommunications, Inc. as a Provider of Video Relay Service (VRS) Eligible for Compensation from the Interstate Telecommunications Relay Service (TRS) Fund*, CG Docket No. 03-123, Public Notice (May 9, 2006); *Notice of Certification of Healinc Telecom, LLC as a Provider of Video Relay Service (VRS) Eligible for Compensation from the Interstate Telecommunications Relay Service (TRS) Fund*, CG Docket No. 03-123, Public Notice, DA 06-1243 (June 9, 2006); *Notice of Certification of GoAmerica, Inc. as a Provider of Internet Protocol Relay (IP Relay) and Video Relay Service (VRS) Eligible for Compensation from the Interstate Telecommunications Relay Service (TRS) Fund*, CG Docket No. 03-123, Public Notice, DA 06-1244 (June 9, 2006).

¹²¹ 47 C.F.R. § 64.604(c)(5)(iii); *TRS III*, 8 FCC Rcd at 5301, para. 7 (appointing NECA as the initial Fund administrator for a two-year term, after which time the Commission will entertain proposals by other parties interested in becoming the administrator and solicit alternate proposals); *Appointment of the Telecommunications Relay Services (TRS) Fund Administrator and Composition of the TRS Advisory Committee*, CC Docket No. 90-571, Memorandum Opinion and Order, 10 FCC Rcd 7223, at 7224, paras. 8-9 (June 29, 1995) (reappointing NECA as Fund administrator, and adopting a four-year term ending July 25, 1999); *Appointment of the Telecommunications Relay Services (TRS) Fund Administrator and Composition of the Interstate TRS Advisory Council*, CC Docket No. 90-571, Memorandum Opinion and Order, 14 FCC Rcd 10553, at 10555-10557, paras. 6-11 (July 1, 1999) (reappointing NECA to another four-year term as Fund administrator). By letter dated July 11, 2003, the Commission extended the term of NECA as the Fund administrator to a month-to-month basis, which presently continues.

The administrator collects funds from all interstate carriers to create the Fund from which TRS providers are compensated. The administrator also proposes to the Commission, based on data submitted to it each year by the providers, the TRS compensation rates and the resulting Fund size and carrier contribution factor. We seek comment on how administration of the Fund could be improved, and whether the rules that govern the activities of the administrator should be modified, including those addressing both the billing and collection process and the disbursement of funds to providers. We seek input from providers, users, and others, including government agencies, that may have experience with this and similar programs.

47. We further seek comment on ways in which the Commission might better assess the effectiveness and efficiency of the administrator's management of the Fund. We seek comment, for example, on whether there are performance measures the Commission might implement to assess the effectiveness of the TRS program and the Fund administrator. We also seek comment on whether the Fund administrator should be subject to additional reporting requirements and, if so, what they should be. In addition, we seek comment on whether such measures should mimic those used in the Universal Service Fund context. We also seek comment on any other changes that might be made to the Fund administrator's role in initially calculating the compensation rates proposed to the Commission. Finally, we seek comment on whether to adopt rules to implement ethical standards and address conflicts of interest for officers and employees of the administrator.

48. *Oversight of Providers.* We also seek comment on ways to ensure that the compensation paid to providers is legitimate and proper under the Commission's rules. We note that presently the providers submit several types of data to the Fund administrator and the Commission then determines the compensation paid by the Fund, including projected cost and demand data that is used to determine the compensation rates, monthly minutes of use that are submitted to the Fund administrator for payment, and data indicating compliance with certain rules (e.g., the speed of answer rule for IP Relay and VRS providers). We seek comment on whether there are other types of information that providers should be required to provide to ensure the integrity of Fund payments, such as financial statements, earning reports, and information related to any parent or affiliate. We also seek comment on the efficacy of the auditing powers presently granted the Fund administrator and the Commission under the Commission's rules,¹²² as well as the scope and frequency of such audits. Should, for example, the Commission adopt more specifically targeted auditing requirements to ensure program integrity? We also seek comment on any other issues relating how we might ensure the accuracy of the data submitted to determine the rates, and the accuracy of the monthly minutes of use data submitted to NECA.

49. *Deterring Waste, Fraud, and Abuse.* Finally, we invite comment on any other ways to achieve more fair and efficient administration and management, as well as to deter and detect waste, fraud, and abuse. We seek to ensure that with the number of providers and number of minutes of use continuing to increase, particularly with respect to VRS and IP Relay, the Fund is compensating providers only for legitimate minutes of use provided in compliance with the mandatory minimum standards, and that the compensation rates are based on accurate demand and cost data.

¹²² 47 C.F.R. § 64.604(c)(5)(iii)(E).

IV. PROCEDURAL MATTERS

50. *Comments and Reply Comments.* Pursuant to Sections 1.415, 1.419, and 1.430 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, 1.430, interested parties may file comments on or before 45 days after publication of this *Notice* in the Federal Register, and reply comments on or before 60 days after publication of this *Notice* in the Federal Register. All filings should refer to CG Docket No. 03-123. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.¹²³ For additional information on this proceeding, please contact Thomas Chandler in the Consumer & Governmental Affairs Bureau, at (202) 418-1475.

51. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, postal service mailing address, and the applicable docket number: CG Docket No. 03-123. Parties may also submit an electronic comment by Internet e-mail. To obtain filing instructions for e-mail comments, commenters should send an e-mail to ecfshelp@fcc.gov, and should include the following words in the body of the message: "get form <your e-mail address>." A sample form and instructions will be sent in reply. You also may obtain a copy of the ASCII Electronic Transmittal Form (FORM-ET) at <http://www.fcc.gov/e-file/email.html>. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail).

52. For hand deliveries, the Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

53. Comments and reply comments must include a short and concise summary of the substantive discussion and questions raised in the *Notice*. We further direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. We strongly encourage that parties track the organization set forth in this *Notice* in order to facilitate our internal review process. Comments and reply comments must otherwise comply with Section 1.48 and all other applicable sections of the Commission's rules.¹²⁴

¹²³ See *Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322, 11326, para. 8 (April 6, 1998).

¹²⁴ See 47 C.F.R. § 1.48.

54. To request materials in accessible formats (such as Braille, large print, electronic files, or audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY). This Public Notice can also be downloaded in Word and Portable Document Format at <http://www.fcc.gov/cgb.dro>.

55. *Ex Parte Rules.* This matter shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.¹²⁵ Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.¹²⁶ Other requirements pertaining to oral and written presentations are set forth in Section 1.1206(b) of the Commission’s rules.

56. *Initial Regulatory Flexibility Analysis.* With respect to this *Notice*, an Initial Regulatory Flexibility Analysis (IRFA) is contained in the Appendix. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an IRFA of the expected impact on small entities of the proposals contained in the *Notice*. Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice* specified in paragraph 50 above. The Commission will send a copy of the *Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.¹²⁷

57. *Initial Paperwork Reduction Act of 1995 Analysis.* This document contains proposed or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due 60 days after date of publication of this Notice in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

V. ORDERING CLAUSES

58. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i) and (o), 225, 303(r), 403, 624(g), and 706 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151,

¹²⁵ 47 C.F.R. §§ 1.200 *et seq.*

¹²⁶ *See* 47 C.F.R. § 1.1206(b)(2).

¹²⁷ *See* 5 U.S.C. § 603(a). In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.

154(i) and (o), 225, 303(r), 403, 554(g), and 606, this Further Notice of Proposed Rulemaking IS ADOPTED.

59. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

Appendix

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act (RFA),¹²⁸ the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *FNPRM*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *FNPRM* provided in paragraph 50 of the item. The Commission will send a copy of the *FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).¹²⁹ In addition, the *FNPRM* and IRFA (or summaries thereof) will be published in the *Federal Register*.¹³⁰

A. Need for, and Objectives of, the Proposed Rule

2. In recent years, the annual determination of the TRS compensation rates – and particularly the VRS rate – under the present methodology has presented a variety of regulatory and administrative challenges, such as the appropriateness of the current per-minute compensation methodology and the reasonableness of expenses related to outreach, marketing, overhead, and legal and lobbying services. Further, comments filed in response to NECA’s filing of proposed compensation rates for the 2006-2007 Fund year reflect dissatisfaction with the rate setting *process*, as well as with the proposed rates and certain cost disallowances.¹³¹ For these reasons, in this *FNPRM* we seek comment on numerous issues relating to the cost recovery methodology used for determining the TRS compensation rates paid the Fund, as well as the scope of the costs properly compensable under Section 225 and the TRS regime as intended by Congress.

3. This *FNPRM* addresses alternative cost recovery methodologies for interstate traditional TRS. The present methodology for compensating traditional TRS providers for the cost of providing interstate service is based a per-minute compensation rate. Each year the Fund administrator collects projected cost and demand data from the providers, and determines an average per-minute compensation rate, which it submits to the Commission for approval or modification. Each provider is compensated for its minutes of use at this “pooled” rate based on the projected cost and demand data submitted by the providers. Therefore, providers do not receive reimbursement for their actual costs; their reimbursements are based on the pooled rate applied to their actual minutes of use.

¹²⁸ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

¹²⁹ See 5 U.S.C. § 603(a).

¹³⁰ See *id.*

¹³¹ See para. 7, *supra*.

4. Hamilton Relay, Inc. has proposed an alternative methodology to determine the compensation rate for interstate traditional TRS. Under Hamilton’s proposal – called the “MARS plan” (Multi-state Average Rate Structure) – the compensation rate would be calculated based on an average of the intrastate TRS rates paid by the states. The state rates, under Hamilton’s proposal, would be weighted based on the total minutes of use for each state. Hamilton proposes using a weighted average because otherwise states with a relatively high per minute intrastate rate, but a very small number of minutes, would skew the multi-state per minute rate higher than it should be.

5. Hamilton asserts that its proposed plan would be superior to the current methodology because state rates are set by a competitive bidding process. Hamilton also asserts that its proposal would be easier and less costly to administer. Hamilton further asserts that its proposal would benefit consumers ‘by lowering interstate TRS rates to the competitively based market value.’¹³²

6. Hamilton also notes that under the present cost recovery methodology – what it calls “rate of return regulation”¹³³ – the Fund administrator and the Commission have “to examine the minutiae of each TRS providers’ costs and capital investments,” and review all costs submitted by each provider to determine whether to allow or disallow each individual cost.¹³⁴ Hamilton adds that this “complicated rate-making process ... will only get more complicated as providers seek to include ever more of their costs in the rate base.”¹³⁵ Hamilton also asserts that the present methodology “fails to replicate the competitive market and instead discourages efficiency and encourages the ‘padding’ of investment.”¹³⁶

7. Hamilton asserts that, by contrast, the MARS plan would eliminate the need to examine any carrier data. Hamilton states that the Fund administrator would simply collect the per-minute rate and minutes of use for each state, which are “presumptively competitive rates ... because they have been subject to a state contract competitive bidding process,” and would determine the interstate rate by averaging those rates, adjusted for minutes of use.¹³⁷ Hamilton notes that this plan would avoid the costs associated with collecting, evaluating, correcting, and re-evaluating TRS provider data.¹³⁸

8. Given our underlying regulatory concerns, the *NRPM* seeks comment on Hamilton’s proposal. Comments are sought on the advantages and disadvantages of this proposal compared to the current methodology, how the proposal would be implemented, how state minutes would be measured, and whether the rates would be set for a one year period or a longer time. This *FNPRM* also seeks comment on whether the MARS plan would be easier to administer and result in administrative cost. This *NRPM* also seeks comment on whether the

¹³² See para. 10, *supra*.

¹³³ See para. 11, *supra*.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See para. 12, *supra*.

¹³⁸ *Id.*

rate for interstate traditional TRS should be compensated at the same rate as Speech to Speech (STS) service.

9. This *FNPRM* also addresses the issue of the appropriate cost recovery methodology for VRS and the appropriate data reporting period for VRS. Because of the continued sharp growth in the use of VRS, open issues concerning what costs may appropriately be included in determining the compensation rate under the current methodology, and also because of the providers' demonstrated inability to accurately forecast demand,¹³⁹ the *FNPRM* seeks additional comment on the issues raised in 2004 (and summarized above).¹⁴⁰ We also note that recently the Commission has permitted entities desiring to offer VRS to be certified by the Commission.¹⁴¹ As a result, we expect additional VRS providers to enter the market. Many of these providers, like some of the existing providers, will not be traditional telephone companies and therefore may present unique cost issues. For this reason, we believe that it is important to refresh the record on what the appropriate cost recovery methodology for VRS should be.

10. We are particularly interested in adopting a methodology that would result in more predictability for the providers, and that would be consistent with the principle that TRS is intended to be an accommodation for persons with disabilities, entitling providers to their "reasonable" costs of providing this service.¹⁴² We therefore anticipate developing rules concerning a methodology other than the current compensation scheme that is more appropriate. For example, should the Commission adopt a compensation methodology for VRS where funds are disbursed based on each individual provider's actual, reasonable costs? Should the Commission treat VRS as a national service, seek competitive bids, and thereby permit the two or three lowest bidders to provide service at the lowest bid rate? The *FNPRM* seeks comment on these proposals and any other issues relevant to adopting an appropriate cost recovery methodology for VRS.

11. The *FNPRM* also addresses certain categories of provider costs. First, although the Commission continues to recognize the importance of outreach, the Commission seeks ways to define with sufficient clarity the nature of outreach and marketing expenses that may appropriately be included in providers' cost submissions. Second, with regard to overhead costs, the Commission notes that some providers have submitted costs that reflect a percentage of total company overhead costs based on the percentage of company revenues attributable to TRS.¹⁴³ The Commission also notes that some providers' expenses for legal and lobbying have recently grown to more than \$2 million a year for each provider.¹⁴⁴ Finally, the Commission expresses its concern about the extent to which some salaries of corporate officers and executives have been included in submitted costs.¹⁴⁵ This *FNPRM* therefore seeks to resolve the extent of

¹³⁹ See para. 27, *supra*.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See para. 28, *supra*.

¹⁴³ See para. 38, *supra*.

¹⁴⁴ See para. 40, *supra*.

¹⁴⁵ See para. 42, *supra*.

such costs that are “reasonable” costs of providing TRS, including whether, and to what extent, marketing and outreach expenses, overhead costs, and executive compensation are compensable from the Fund.

12. In addition, this *FNPRM* addresses whether the providers’ cost and demand data submitted to the Fund administrator should be made public. It also seeks comment on ways to improve the management and administration of the Fund, including adopting measures for assessing the performance and efficiency of the Fund and to deter waste, fraud, and abuse.

B. Legal Basis

13. The authority for actions proposed in this *FNPRM* may be found in sections 1, 4(i) and (j), 201-205, 218 and 225 of the Communications Act of 1934, as amended, 47 U.S.C. sections 151, 154(i), 154(j), 201-205, 218 and 225.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

14. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of, small entities that may be affected by the proposed rules, if adopted.¹⁴⁶ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹⁴⁷ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹⁴⁸ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹⁴⁹

13. The Commission believes that the entities that may be affected by the proposed rules are TRS providers that offer interstate traditional TRS, interstate STS, interstate Captioned Telephone Service, IP Relay and VRS. Neither the Commission nor the SBA has developed a definition of “small entity” specifically directed toward TRS providers. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers, for which the small business size standard is all such forms having 1,500 or fewer employees.¹⁵⁰ Currently, there are eleven TRS providers that offer interstate traditional TRS, interstate STS, interstate Captioned Telephone Service, IP Relay and VRS. These providers consist of interexchange carriers, local exchange carriers, state-managed entities, and non-profit organizations. Approximately three or fewer of these entities are small businesses.

¹⁴⁶ 5 U.S.C. § 603(b)(3).

¹⁴⁷ 5 U.S.C. § 601(6).

¹⁴⁸ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. 632). Pursuant to the 5 U.S.C. 601 (3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

¹⁴⁹ 15 U.S.C. § 632.

¹⁵⁰ 13 C.F.R. § 121.201, NAICS Code 517110.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

14. The proposed methodology for setting the interstate compensation rate for traditional TRS service may require the providers to submit rate data to the Commission, either annually or for a multi-year period, for the states in which they provide service. Further, adoption of a cost recovery methodology for VRS other than the current per-minute compensation methodology may require VRS providers to maintain different records, although there would be no new reporting requirements. Presently, VRS providers report their costs annually, and their minutes of use monthly, to the Interstate TRS Fund Administrator. In addition, the *FNPRM* contemplates adoption of a means of documenting the “reasonable” costs compensable under the present cost recovery methodology for all forms of TRS.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

15. The RFA requires an agency to describe any significant alternatives, specific to small businesses, that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.”¹⁵¹

16. Adoption of Hamilton’s proposed methodology for setting the interstate traditional TRS rate would eliminate the need to file the much more voluminous cost and demand data that providers presently must submit to the Fund administrator. Further, if the rate period is extended for more than one year, reporting requirements would be lessened by less frequent data filings with the Fund administrator. Therefore, the effect of the adoption of Hamilton’s proposed methodology would be to lessen the reporting burden on small business.

17. In addition, adoption of a cost recovery methodology for VRS other than the current per minute compensation methodology could eliminate apparent dissatisfaction among the providers about the rate setting process and improve the predictability and efficiency in reporting the cost data and receiving the compensation for the provision of VRS. A seamless and efficient cost recovery methodology, including clear cost data submission guidelines, would lessen the reporting burden on small business.

18. Further, setting a standard of what and how the “reasonable” costs should be compensable under the present cost recovery methodology for all forms of TRS, including whether, and to what extent, marketing and outreach expenses, overhead costs, and executive compensation are compensable from the Fund, would provide guidance for the providers that may improve the predictability in the cost of providing TRS. It would also eliminate uncertainties with whether the costs submitted would be compensable or not. Eliminating uncertainties would lessen the reporting burden on small business.

¹⁵¹ 5 U.S.C. § 603(c)(1)-(4).

19. The majority of TRS service is provided by large interexchange carriers and large incumbent local exchange carriers. Because we believe that few small business entities would be impacted by these proposals, and that the impact, if any, would be minor, it is premature to propose specific alternatives that would minimize significant economic impact on small businesses. Further, since we believe the rules we may adopt pursuant to this proceeding would result in a more streamlined approach to administering TRS for all entities, including small entities, we are further persuaded that it would be premature to consider alternatives to the conferral of such benefits. However, we invite comment on specific alternatives that may minimize the economic impact of the proposed rules on small businesses.

F. Federal Rules That May Duplicate, Overlap, or Conflict with the Proposed Rules

20. None.

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

Re: *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123

The Commission has taken a number of important actions relating to Telecommunications Relay Services (TRS) over the past year. All of these actions have been aimed at fulfilling our statutory goal of ensuring that every person has equal access to this nation's communications services. The proceeding we initiate today, however, may prove to be the most important. It is appropriate, therefore, that we begin it on the cusp of the 16th anniversary of the passage of the Americans with Disabilities Act.

Similar to the comprehensive review proceeding that we began last summer with respect to the Universal Service Fund, today we begin a far-reaching inquiry into the TRS Fund. Specifically, by seeking comment on the appropriate cost methodology, what costs should be compensable, and on ways to improve the management and administration of the Fund, we are seeking to protect and maintain its integrity.

We are well aware that there are many Americans with hearing or speech disabilities that depend on TRS services for their daily communication needs. The Fund has seen dramatic growth over the past few years as more and more individuals with disabilities tap into all the benefits that these services offer. And, at the same time, there are an increasing number of TRS providers. Given these circumstances, it is an appropriate time for us to take stock of the operation of this Fund. Indeed, it is our responsibility.

I am pleased that the Commission is undertaking this inquiry and urge all of those that have experience with the TRS program – particularly its providers and users – to participate in this proceeding. I, along with my colleagues, remain committed to improving the quality of life for individuals with disabilities by ensuring that they have the same access to communication technologies as people without such disabilities. To this end, we will take all necessary actions

to ensure that the TRS program, upon which they rely, is operated as efficiently and effectively as possible.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Further Notice of Proposed Rulemaking, CG Docket No. 03-123

Less than two weeks from now we will celebrate the 16th anniversary of the Americans with Disabilities Act which has done so much to ensure that those with disabilities can access the tools they need to lead prosperous, productive and fulfilling lives. Today we take another step along the path by helping to ensure that the deaf and hard of hearing receive the Telecommunications Relay Services they are entitled to, that providers are fairly compensated for their services, and that the Commission is enabled to administer the program.

Before going forward with this rulemaking, it is important that we take a moment to take stock and review where we have been. While improvements have been made over time, sometimes in the past we have tended to address the squeakiest wheels without fixing more of the systemic problems associated with the TRS-reimbursement program. These include the need for better outreach to the deaf and hard of hearing communities, the need to quickly take into account the potential and the challenges presented by new technologies, and the need to make the TRS rules more transparent.

A hero to many in both the hearing and deaf communities, Dr. I. King Jordan, the President of Gallaudet University, told me recently that while VRS by all accounts has revolutionized how the hearing disabled communicate, he was astonished to find that there are still people who just don't know about the service. Imagine living your life with a disability for years and then learning that there was a technology readily available that could have eased many of the challenges you faced, if only you had known about it. That's just not acceptable and it underscores why it is so important that we have the right rules in place to guide our VRS program into the future.

One thing is for sure, we cannot have déjà vu all over again whereby we are sitting in this building a year from now without a well-oiled TRS machine. That is why I am so encouraged by today's item, which seeks comments on a wide range of difficult issues and looks to tackle them head-on. I am looking forward to constructive and creative input from both the provider and our disability communities because we have a real opportunity here to build a TRS system that can truly meet the needs of these communities as well as those of the FCC.

So my thanks go out to Monica Desai, the Bureau and the Disability Rights Office for working tirelessly not only on this item but also on the Commission's obligations to the deaf and hard of hearing. Good job and I look forward to bringing it all home!

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Further Notice of Proposed Rulemaking, CG Docket No. 03-123

With this Notice, the Commission seeks comment on ways to improve our administration of the Telecommunications Relay Service (TRS) Fund. The relay services supported by the TRS Fund serve as vital connections for and to millions of Americans with hearing and speech disabilities. Without federal and state TRS services, these citizens would be left out of the vital communications networks that link our economy. The Americans with Disabilities Act (ADA) requires that telecommunications services for those with hearing and speech disabilities be “functionally equivalent” to those services provided to hearing individuals, and I remain committed to the goals of the ADA.

As communications technologies continue to play a greater role in all of our lives, relay services are an increasingly important tool, and the disability community has been unanimous in its support of these services. Even as use of revolutionary technologies like Video Relay Service (VRS) has surged, the Commission’s compensation rate-setting process for our relay services has presented a variety of open questions and controversy among providers and consumers. I have heard from providers and consumers alike that the Commission can do more to improve its administration of the Fund and to increase awareness of these critical services. So, I commend the Chairman, my colleagues, and the Consumer and Governmental Affairs Bureau for opening this comprehensive proceeding, and I encourage commenters to think creatively about how we can improve the administration of this valuable program. Working together, the Commission can raise the bar and improve our relay services for providers, contributors, and the many consumers with and without hearing disabilities who rely on VRS.

I look forward to working with my colleagues, our CGB staff, members of the TRS Advisory Committee, and the many members of the disabilities community on these issues as we move forward.

**STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE**

Re: *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket No. 03-123.*

In 1990, Congress passed the Americans with Disabilities Act, which entrusted the Federal Communications Commission with the task of ensuring that individuals with speech and hearing disabilities have the same ability to communicate through the telephone system as any other individual. As a result, the Commission created the Interstate Telecommunications Relay Service (TRS) Fund to compensate providers of eligible TRS services. TRS enables persons with hearing and speech disabilities to access the telephone system to make calls to, and receive calls from, voice telephone users and is now available nationwide, twenty-four hours a day, seven days a week. The TRS Fund also supports innovative new relay services like IP relay and video relay service that offer significant progress toward reaching the goal of providing truly functionally equivalent services. I am pleased to support today's item in which we seek comment on how the Commission can improve the administration of the Fund.

Through this Further Notice of Proposed Rulemaking, I hope we can simplify and clarify the compensation of costs associated with providing TRS services. Greater transparency will provide everyone with the opportunity to ascertain whether TRS compensation rates are reasonable and appropriate.

I want to thank all those who have taken time to discuss these issues with me. It is critically important that we understand directly from persons with hearing and speech disabilities how these services enable them to more effectively participate as citizens and consumers – from interaction with loved one to seeking a loan with a bank. We need to know how to ensure that our programs can be more widely used and consumer friendly. At the same time, we must continue to improve the efficiency of the TRS compensation system to maximize the effectiveness and long-term sustainability of this invaluable program to those who depend upon it.

The Interstate TRS Fund brings telecommunications services to individuals who would not otherwise have access to the telephone network. I remain committed to encouraging the deployment of new services to all Americans.

**STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL**

Re: Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Further Notice of Proposed Rulemaking, CG Docket No. 03-123

Our Consumer and Governmental Affairs Bureau has made great strides under the leadership of Chairman Martin to improve the availability and choices of important services that allow individuals with hearing and speech disabilities to obtain “functionally equivalent” communications services. I support this Order as an important first step toward comprehensive review of the Telecommunications Relay Services (TRS) rate-setting process and the ultimate establishment of clear, rational rules that allow providers to recover the reasonable costs caused by TRS, as was envisioned by Congress when it created TRS in Title IV of the Americans with Disabilities Act of 1990.¹⁵²

The goal of comprehensive reform of the TRS compensation rules cannot simply be eliminating economic uncertainty for providers seeking to provide TRS. We must balance the need for economic certainty with our obligation to see that rates are set and funds dispersed in a responsible manner, and that a program under which a provider is entitled only to cost recovery doesn’t fall prey to waste, fraud, or abuse. The need for such balance is of particular concern when the costs of a government program increase dramatically, as those of the TRS program have.¹⁵³ Hopefully, at the end of the day, we find that the growth in the program comes from increasing and improving services to those with hearing and speech disabilities, rather than from waste or misuse. Requiring a more transparent process will help us to make that determination.

I thank Monica Desai and the staff of the Consumer and Governmental Affairs Bureau for all their hard work on these issues. I look forward to working with my colleagues, bureau staff, the TRS Advisory Committee, TRS providers and users, and consumer groups who support the TRS fund as we address these issues so critical to providing access to functionally equivalent communications services for Americans with hearing and speech disabilities.

¹⁵² See 47 U.S.C. § 225.

¹⁵³ See Relay Services’ Reimbursement Rate, Contribution Factor & Fund Size History at www.neca.org, tracking TRS fund growth from roughly \$40 million in 1999 to more than \$440 million in 2005.