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	)	

PUBLIC NOTICE AND NOTICE OF PROPOSED RULEMAKING

Adopted: May 12, 2009 **Released: May 14, 2009**

Comment Date: (14 days after publication in the Federal Register)
Reply Comment Date: (21 days after publication in the Federal Register)

By the Commission:

I. INTRODUCTION

1. On May 1, 2009, the National Exchange Carrier Association (NECA), the Interstate Telecommunications Relay Services (TRS) Fund Administrator, submitted its annual payment formula and fund size estimate for the Interstate TRS Fund (Fund) for the period July 1, 2009, through June 30, 2010.[1] NECA proposes per-minute compensation rates for the various forms of TRS based on the new rate calculation methodologies established in the *2007 TRS Rate Methodology Order*.[2] In the *Public Notice,* we seek comment on NECA's proposed compensation rates for the various forms of TRS, as well as the proposed funding requirement and carrier contribution factor, as reflected in the *2009 TRS Rate Filing*. In the *Notice of Proposed Rulemaking* (*NPRM*), we seek comment on whether, notwithstanding the rate methodology established in the *2007 TRS Rate Methodology Order*, we should modify the compensation rates for Video Relay Service (VRS)[3] for the 2009-2010 Fund year.

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[1] *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate (filed May 1, 2009) (*2009 TRS Rate Filing*). 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(21). 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 No. 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] *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Report and Order, and Declaratory Ruling, 22 FCC Rcd 20140 (Nov. 19, 2007) (*2007 TRS Rate Methodology Order*).

[3] VRS is a form of TRS that that enables the VRS user and the CA to communicate via a video link in sign language, rather than through text. *See* 47 C.F.R. § 64.601(26) (defining VRS).

II. BACKGROUND

2. Title IV of the Americans with Disabilities Act of 1990 (ADA), which added section 225 to the Communications Act of 1934, as amended,[4] 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.[5] To this end, section 225 creates a cost recovery regime whereby providers of TRS are compensated for the costs caused by TRS.[6] This regime is based on the "jurisdictional separation of costs."[7] Section 225 provides that the costs caused by *inter*state TRS "shall be recovered from all subscribers for every interstate service," and the costs caused by the provision of *intra*state TRS "shall be recovered from the intrastate jurisdiction."[8] As a general matter, the costs caused by *intra*state TRS are recovered by each state.[9] No specific funding method is required for *intra*state TRS or state TRS programs.[10]

3. With respect to *inter*state 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.[11] In creating the 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 NECA.[12] The Fund

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

[5] 47 U.S.C. § 225(b)(1).

[6] 47 U.S.C. § 225(d)(3). Congress made clear that TRS users cannot be required to pay for the additional costs of relay service that ensures their access to the telephone system. 47 U.S.C. § 225(d)(1)(D).

[7] 47 U.S.C. § 225(d)(3).

[8] 47 U.S.C. § 225(d)(3)(B); *see also* 47 C.F.R. § 64.604(c)(5)(ii).

[9] Presently, the costs of providing *intrastate* VRS and Internet Protocol (IP) Relay are paid from the Interstate TRS Fund. *See 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, at 5149, para. 15 (March 6, 2000) (*2000 TRS Order*) (addressing VRS); *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, at 7786, para. 20 (April 22, 2002) (*IP Relay Declaratory Ruling*) (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 12561-64, paras. 221-30 (IP Relay), 12565-67, paras. 234-42 (VRS).

[10] 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(d)(3)(B). 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.

[11] *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).

[12] 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).

administrator uses these funds to compensate "eligible" TRS providers[13] for the costs of providing TRS. Compensation is based on per-minute rates adopted each year by the Commission.[14] There are currently five different compensation rates for the different forms of TRS: traditional TRS, IP Relay, Speech-to-Speech (STS), captioned telephone service (CTS),[15] and VRS.

4. In the *2007 TRS Rate Methodology Order*, the Commission adopted new cost recovery methodologies for the various forms of TRS. For interstate traditional TRS and STS, the Commission adopted the Multi-state Average Rate Structure (MARS) Plan.[16] The Commission also adopted the MARS Plan for interstate CTS and intrastate and interstate IP CTS.[17] For intrastate and interstate IP Relay, the Commission adopted a price cap methodology.[18] For intrastate and interstate VRS, the Commission adopted a tiered rate methodology based on call volume.[19] Tier I includes the first 50,000 monthly VRS minutes; Tier II includes monthly minutes between 50,001 and 500,000; and Tier III includes monthly minutes above 500,000.[20] The Commission adopted different compensation rates for each tier, noting that because the record reflected that providers with a relatively small number of minutes generally have higher per-minute costs, a higher rate was appropriate for such minutes.[21] Conversely, larger providers are likely to achieve cost synergies that warrant a lower rate.[22]

5. For VRS and IP Relay, the Commission also concluded in the *2007 TRS Cost Recovery Methodology Order* that the compensation rates should be set for a three year period, subject to certain adjustments, concluding with the 2009-2010 Fund year.[23] In reaching this conclusion, the Commission indicated that the record of the proceeding reflected that a multi-year rate would provide consistency for budgetary and planning purposes.[24] At the same time, however, the Commission expressly required VRS and IP Relay providers to continue to file with the Fund administrator annual costs and demand data, as

[13] 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).

[14] The Fund year runs from July 1 to June 30.

[15] *See generally 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 16121 (Aug. 1, 2003) (*Captioned Telephone Declaratory Ruling*) (recognizing captioned telephone service as a form of TRS eligible for compensation from the Fund); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Declaratory Ruling, FCC 06-182 (Jan. 11, 2007) (*IP CTS Declaratory Ruling*) (recognizing IP captioned telephone service (IP CTS) as a form of TRS eligible for compensation from the Fund).

[16] *See 2007 TRS Cost Recovery Methodology Order*, 22 FCC Rcd at 20153-57, paras. 26-35.

[17] *See id.* at 20157-58, paras. 36-38.

[18] *See id.* at 20158-60, paras. 39-46; *see also 2009 TRS Rate Filing* at 11-12.

[19] *See 2007 TRS Cost Recovery Methodology Order*, 22 FCC Rcd at 20160-65, paras. 47-56; *see also 2009 TRS Rate Filing* at 12-16.

[20] *See 2007 TRS Cost Recovery Methodology Order*, 22 FCC Rcd at 20160-65, paras. 47-56.

[21] *See id.* at 20163, para. 52.

[22] *See id.* at 20163, para. 53.

[23] *Id.* at 20159-60, paras. 43-45 (IP Relay), 20164-65, para. 56 (VRS). The Commission did not, however, amend its rules to provide for three-year rates, stating that it was unnecessary to do so given the regulations requiring the Fund administrator to file its payment formulas and revenue requirements on May 1 of each year. *Id.* at 20160, para. 45 n.140 (citing 47 C.F.R. § 64.604(c)(5)(iii)(H)).

[24] *Id.,* 22 FCC Rcd at 20160, para. 45 (IP Relay), 20164-65, para. 56 (VRS).

they have in the past.[25] The Commission stated that "this information, which includes actual costs for prior years, will be helpful in reviewing the compensation rates … [adopted] and whether they reasonably correlate with projected costs and prior actual costs."[26]

6. On May 1, 2009, pursuant to 47 C.F.R. § 64.604(c)(5)(iii)(H), NECA submitted its annual payment formula and proposed funding requirement for the Interstate TRS Fund for the period July 1, 2009, through June 30, 2010.[27] NECA proposes per-minute compensation rates for the various forms of TRS based on the rate calculation methodologies established in the *2007 TRS Rate Methodology Order*.

III. PUBLIC NOTICE

7. In its *2009 TRS Rate Filing*, NECA proposes the following TRS per-minute compensation rates for the 2009-2010 Fund year: $1.8311 for interstate traditional TRS based on the MARS plan;[28] $2.9621 for interstate Speech-to-Speech (STS) based on the MARS plan;[29] $1.6778 for interstate captioned telephone service (CTS) and interstate and intrastate Internet Protocol (IP) captioned telephone service (IP CTS) based on the MARS plan;[30] and $1.2801 for interstate and intrastate IP Relay.[31]

8. For interstate and intrastate VRS, NECA proposes the following tiered rates: $6.7025 for the first 50,000 monthly minutes, $6.4352 for monthly minutes between 50,001 and 500,000, and $6.2372 for minutes above 500,000.[32]

9. Finally, based on these rates, NECA proposes a funding requirement of $890,992,075[33] million and a carrier contribution factor of 0.01137.[34]

10. We seek comment on NECA's proposed compensation rates for traditional TRS, STS, CTS and IP CTS, IP Relay, and VRS for the period of July 1, 2009, through June 30, 2010, as well as the proposed funding requirement and carrier contribution factor.

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[25] *Id.,* 22 FCC Rcd at 20160, para. 46 n.141 (IP Relay), 20165, para. 56 n.170 (VRS).

[26] *Id.,* 22 FCC Rcd at 20160, para. 46 n.141 (IP Relay), 20165, para. 56 n.170 (VRS).

[27] *2009 TRS Rate Filing*.

[28] *See 2009 TRS Rate Filing* at 9, Exb. 1-1, and App. C.

[29] *See 2009 TRS Rate Filing* at 10, Exb. 1-1, and App. C. The traditional TRS MARS rate also applies to interstate STS. *See 2007 TRS Rate Methodology Order*, 22 FCC Rcd 20140 at 20156, para. 34. Consistent with the *2007 TRS Rate Methodology Order*, however, NECA's proposed STS rate includes an additional per-minute amount of $1.131 to be used for STS outreach. *See id.*; *2007 TRS Rate Methodology Order*, 22 FCC Rcd at 20165, para. 57.

[30] *See 2009 TRS Rate Filing* at 10-11 and Exb. 1-2.

[31] *See 2009 TRS Rate Filing* at 11-12 and Exb. 1-3.

[32] *See 2009 TRS Rate Filing* at 13 and Exb. 1-4.

[33] *See 2009 TRS Rate Filing* at 19 and Exb. 2.

[34] *See 2009 TRS Rate Filing* at 19 and Exb. 2.

IV. NOTICE OF PROPOSED RULEMAKING

11. Notwithstanding the adoption of VRS rates for a three-year period in the *2007 TRS Rate Methodology Order,* in this *NPRM* we seek comment on whether we should recalculate the VRS rates for each tier for the 2009-2010 Fund year based on data reflecting the actual costs of providing this service. We note that the funding requirement has grown from approximately $64 million for the 2002-2003 Fund year (the first year VRS was widely offered) to a proposed $890,992,075[35] for the 2009-2010 Fund year, and that VRS continues to represent an increasingly large percentage of the total Fund size (for 2009-2010, 123,844,666 projected minutes of use, with payments totaling approximately $779,873,811, or 87 percent of the total funding requirement).[36] We also note that the Fund administrator has indicated that VRS providers' average actual cost per minute was $4.5568 in 2006,[37] $3.9950 in 2007,[38] and $4.1393 in 2008 (as reflected in NECA's May 1st filing).[39] The Commission now has the benefit of experience with two VRS rate cycles since the adoption of the *2007 TRS Rate Methodology Order,* and the VRS rates adopted in that order may not accurately reflect the providers' reasonable actual costs of providing service in compliance with our rules. As a result, we seek comment on whether, for the 2009-2010 Fund year, we should adopt new VRS rates for each tier that correlate to providers' cost data, as reflected in NECA's May 1st filing, rather than continue to base rates on the *2007 TRS Rate Methodology Order.*[40] If the Commission were to modify the VRS rates, we also seek comment on whether the rates should be based on NECA's actual cost data, adjusted for inflation or other appropriate factors, or some other analysis of this cost data.

V. CONCLUSION

12. In the *Public Notice* we seek comment on the proposed TRS compensation rates, funding requirement, and carrier contribution factor for the 2009-2010 Fund year submitted by NECA on May 1, 2009. In addition, because of concerns that the VRS rates, calculated pursuant to the *2007 TRS Rate Methodology Order*, may not fairly reflect providers' reasonable actual costs of providing service, and therefore, may result in considerable excess payments from the Fund, in the *NPRM* we seek comment on

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[35] Note that the overall proposed Fund size for 2009-2010 is $980,992,075. NECA anticipates requiring $905,992,075 to cover predicted expenses, and proposes a $75,000,000 safety net, which together total $980,992,075. Because NECA anticipates a $90,000,000 carry-over surplus from the 2008-2009 Fund year, the total amount of new funding required for 2009-2010 Fund year is $890,992,075. *See 2009 TRS Rate Filing* at Exb. 2.

[36] *See id.*

[37] *See Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate at App. 1-4b (filed May 1, 2007) (*2007 TRS Rate Filing*). *See also 2009 TRS Rate Filing* at 14.

[38] *See Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate at 11 n.27 (filed May 1, 2008) (*2008 TRS Rate Filing*). *See also 2009 TRS Rate Filing* at 14 and n.28 stating, "[t]he data for calendar year 2007 was initially reported as $4.00 in the Administrator's May 1, 2008 filing in CG Docket No. 03-123 at n.27, but has been updated here to reflect additional information provided to the Administrator since that filing."

[39] *2009 TRS Rate Filing* at 14.

[40] *See Telecator Network of America v. FCC*, 691 F.2d 525, 550 n.191 (D.C. Cir. 1982) ("The Commission has an ongoing obligation to monitor its regulatory programs and make adjustments in light of actual experience. … This duty to finetune its regulatory approach as more information becomes available is necessarily the price of leeway the courts accord the Commission to pursue plans and policies bottomed on informed prediction").

whether we should adopt new VRS rates for each tier for the 2009-2010 Fund year that better correlate to the providers' cost data.

VI. PROCEDURAL MATTERS

13. *Comments and Reply Comments*. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.[41] For additional information on this proceeding, please contact Thomas Chandler in the Consumer & Governmental Affairs Bureau, at (202) 418-1475 or Thomas.Chandler@fcc.gov.

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.
  - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and instructions will be sent in response.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

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

- The Commission's contractor 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, Express, and Priority mail must be addressed to 445 12th Street SW, Washington, D.C. 20554.

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

14. Comments and reply comments must include a short and concise summary of the substantive discussion and questions raised in the *Notices*. 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.[42]

15. *Ex Parte Rules*. This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[43] 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.[44] Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.

16. *Initial Regulatory Flexibility Analysis*. With respect to the *NPRM* portion of this item, 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 *NPRM* specified in paragraph 14 above. The Commission will send a copy of the *NPRM*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[45]

17. *Paperwork Reduction Act of 1995.* This document does not contain proposed or modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of, Public Law 107-198, see 44 U.S.C. 3506 (c)(4).

VII. ORDERING CLAUSES

18. 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, 154(i) and (o), 225, 303(r), 403, 554(g), and 606, this *Public Notice and Notice of Proposed Rulemaking* IS ADOPTED.

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

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[42] *See* 47 C.F.R. § 1.48.

[43] 47 C.F.R. §§ 1.200 *et seq*.

[44] *See* 47 C.F.R. § 1.1206(b)(2).

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

20. 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 and Notice of Proposed Rulemaking* can also be downloaded in Word and Portable Document Format at <http://www.fcc.gov/cgb/dro>.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Initial Regulatory Flexibility Certification

1. The Regulatory Flexibility Act of 1980, as amended (RFA),[1] requires that an initial regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[2] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[3] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[4] 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).[5]

2. The *NPRM* portion of this item seeks comment on a proposal for recalculating the VRS rates for the 2009-2010 Fund year based on recent data reflecting the actual costs of providing this service. The Commission notes that the funding requirement has grown from approximately $64 million for the 2002-2003 Fund year to a proposed $890,992,075 for the 2009-2010 Fund year, and that VRS continues to represent an increasingly large percentage of the total Fund size (for 2009-2010, 123,844,666 projected minutes of use, with payments totaling approximately $779,873,811, or 87 percent).

3. The Commission also notes that the Fund administrator has indicated that VRS providers' average actual cost per minute was $4.5568 in 2006, $3.9950 in 2007, and $4.1393 in 2008.[6] The Commission now has the benefit of experience with two VRS rate cycles since the adoption of the *2007 TRS Rate Methodology Order,* and the VRS rates adopted in that order may not accurately reflect the providers' reasonable actual costs of providing service in compliance with our rules. The Commission therefore seeks comment on whether to adopt new VRS rates that reflect providers' cost data, rather than continue to base rates on the *2007 TRS Rate Methodology Order* that may result in the overpayment of providers contrary to section 225 and our rules. The Commission believes this action is consistent with its duty to protect the integrity of the Fund and American consumers who pay into the Fund, and with the statutory mandate to ensure that TRS is offered "in the most efficient manner" to persons with hearing and speech disabilities.[7]

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[1] *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).

[2] 5 U.S.C. § 605(b).

[3] 5 U.S.C. § 601(6).

[4] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 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*."

[5] 15 U.S.C. § 632.

[6] *See NPRM,* para. 11, *supra*.

[7] 47 U.S.C. § 225(b)(1); *see also Telecator Network of America* v. *FCC* , 691 F.2d 525, 550 n. 191 (D.C. Cir. 1982) ("The Commission has an ongoing obligation to monitor its regulatory programs and make adjustments in light of actual experience. … This duty to finetune its regulatory approach as more information becomes available is necessarily the price of leeway the courts accord the Commission to pursue plans and policies bottomed on informed prediction.").

4. The changes the Commission proposes are of an administrative nature, and for the reasons stated below will not have a substantial economic impact on small entities. The Commission concludes that the proposed changes will not impose a financial burden on entities, including small businesses, because these entities will continue to be promptly reimbursed from the Interstate TRS Fund at a fair and reasonable rate. If there is an economic impact on small entities as a result of these proposals, however, we expect the impact will be reasonably fair and justified, because consistent with the Commission's rules, rates that reflect actual costs will end excessive profits or surplus payments.

5. The Commission therefore certifies, pursuant to the RFA, that the proposals in this *NPRM*, if adopted, will not have a significant economic impact on a substantial number of small entities. If commenters believe that the proposals discussed in the *NPRM* require additional RFA analysis, they should include a discussion of these issues in their comments and additionally label them as RFA comments. The Commission will send a copy of the *NPRM*, including a copy of this initial certification, to the Chief Counsel for Advocacy of the SBA. In addition, a copy of the *NPRM* and this initial certification will be published in the *Federal Register*.[8]

[8] *See* 5 U.S.C. § 605(b).