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

In the Matter of	)	
Structure and Practices of the Video Relay Service Program	)	CG Docket No. 10-51

DECLARATORY RULING, ORDER AND NOTICE OF PROPOSED RULEMAKING

Adopted: May 24, 2010 **Released: May 27, 2010**

Comment Date: 14 days after publication in the Federal Register for Issues V. A. , V.B., and V.E.5.; 21 days after publication in the Federal Register for all other issues.

Reply Comment Date: 10 days after the Comment Date for Issues V. A. , V.B., and V.E.5.; 14 days after the Comment Date for all other issues.

By the Commission:

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I. INTRODUCTION

1. In this Declaratory Ruling (*Declaratory Ruling*), we reiterate that Interstate Telecommunications Relay Service (TRS) Fund payments may be suspended to providers that do not submit to audits. In the accompanying Order (*Order*), we adopt an interim rule addressing the certification of provider information for Video Relay Service (VRS)[1] calls. Finally, in the Notice of Proposed Rulemaking (*Notice*), we seek comment on ways to amend our rules to detect and prevent fraud and misuse in the provision of VRS. Taken together, our actions today are strong steps toward ensuring that VRS will continue as a vibrant service for persons who are deaf or hard and hearing.

2. Today's actions follow the Consumer and Governmental Affairs Bureau's (Bureau) *VRS Declaratory Ruling* released on February 25, 2010, addressing the compensability from the Fund of certain types of calls using VRS.[2] We recognize that the use and availability of VRS has revolutionized TRS service and, in turn, the lives of many persons who are deaf and hard of hearing.[3] We are therefore committed to ensuring that it remains a sound and robust

[1] As discussed further below, VRS is a form of TRS that enables the VRS user to access the nation's telephone system and communicate in American Sign Language (ASL) by using a video-to-video link with a communications assistant (CA); the CA relays the call between a voice telephone user and the VRS user. See 47 C.F.R. § 64.601(17) (defining VRS). Although this item is being released in docket number CG 10-51, which specifically relates to VRS, sections III.B., IV., and many of the issues raised in the Notice of Proposed Rulemaking apply to all forms of TRS.

[2] *See Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51, Declaratory Ruling, DA 10-314 (CGB Feb. 25, 2010) (*VRS Declaratory Ruling*).

[3] As a result, VRS quickly became the most popular form of TRS; in 2008, for example, there were over three million more minutes of VRS use than the combined minutes of use of all five of the other Internet Protocol (IP)-based and interstate forms of TRS. *See* National Exchange Carrier Association, Inc. (NECA), *Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate*, CG Docket No. 03-123, at Ex. 2 (filed May 1, 2009) (*NECA 2009 TRS Rates Filing*).

service, consistent with Congress' mandate that TRS be made widely available and incorporate new technologies.[4] At the same time, VRS has been used by some to generate illegitimate minutes and seek reimbursement from the Fund for their personal gain. For example, in November 2009, 26 people were indicted for allegedly defrauding the Fund, many of whom have now pleaded guilty.[5] We therefore reiterate and adopt rules, and seek comment on a broad array of possible changes, in order to further detect and deter the misuse of VRS and the billing of illegitimate minutes to the Fund.

II. BACKGROUND

3. Title IV of the Americans with Disabilities Act, codified at section 225 of the Communications Act of 1934, as amended (Act), 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.[6] 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.[7] When section 225 was enacted and implemented, TRS calls were being placed using a TTY connected to the public switched telephone network (what we now call "traditional TRS").[8] In March 2000, the Commission recognized several new forms of TRS, including VRS.[9] VRS requires the use of a broadband Internet connection between the VRS user and the Communications Assistant (CA), which allows users to communicate in sign language via a video link. The CA, in turn, places an outbound telephone call to a hearing person. During the call, the CA communicates in American Sign Language (ASL) with the deaf person and by voice with the hearing person. As a result, the conversation between the deaf and hearing end users flows in near real time. VRS therefore provides a degree of "functional equivalency" that

[4] *See* 47 U.S.C. § 225 (b)(1) & (d)(2).

[5] *See Twenty-six Charged in Nationwide Scheme to Defraud the FCC's Video Relay Service Program*, United States Department of Justice (DOJ) (Nov. 19, 2009) at http://www.justice.gov/opa/pr/2009/November/09-crm-1258.html; *see also Two Former Executives of Indicted Relay Services Company Plead Guilty to Defrauding FCC Program,* DOJ (Jan. 13, 2010) at http://www.justice.gov/opa/pr/2010/January/10-crm-031.html; *Two Former Executives of Video Relay Services Company Plead Guilty to Defrauding FCC Program,* DOJ (Feb. 18, 2010) at http://www.justice.gov/opa/pr/2010/February/10-crm-157.html; *Four Former Owners and Employees of Three Video Relay Service Companies Plead Guilty to Defrauding FCC Program*, DOJ (March 5, 2010) at http://www.justice.gov/opa/pr/2010/March/10-crm-229.html; *Three Former Owners and Employees of Two Video Relay Service Companies Plead Guilty to Defrauding FCC Program*, DOJ (March 9, 2010) at http://www.justice.gov/opa/pr/2010/March/10-crm-237.html.

[6] 47 U.S.C. § 225(b)(1); *see* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 401, 104 Stat. 327, 336-69 (1990).

[7] 47 U.S.C. § 225(a)(3).

[8] See *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, para. 3 n.18 (June 30, 2004) (*2004 TRS Report & Order*) (describing how a traditional TRS call works).

[9] *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, 5152-54, paras. 21-27 (March 6, 2000) (*2000 TRS Order*).

is not attainable with text-based TRS by allowing those persons whose primary language is ASL to communicate in ASL, just as a hearing person does with, *e.g.,* spoken English.

4. VRS, like all forms of TRS, is intended to operate so that when a VRS user wants to make a call, a CA is available to handle the call.[10] Therefore, "the obligation placed on TRS providers is to be available to handle calls consumers choose to make, when they choose to make them."[11] For this reason, our rules generally require, for example, that VRS be available 24 hours a day, seven days a week, and that CAs answer calls within a specific period of time.[12] Moreover, in describing a TRS call, the Commission has often explained that the CA serves as a "transparent conduit" between two people communicating in different ways (*e.g.,* text and voice, or ASL and voice).[13] It is because of this limited, transparent role of the CA that the Commission has frequently stated that completion of the call to the CA is the equivalent of receiving a dial tone.[14]

5. The statute and regulations provide that TRS users cannot be required to pay for the costs associated with relaying a call.[15] Therefore, TRS users are not strictly "consumers" or purchasers of a service; rather, they are the principal beneficiaries of a federal program that gives access to the telephone system. The cost of relay is imposed, in the first instance, on either the states[16] (for most *intra*state traditional TRS calls) or the Interstate TRS Fund (Fund) (for *inter*state traditional TRS calls and *all* calls made via Internet-based forms of TRS, including VRS).[17] These costs, in turn, are generally passed on to all consumers of telecommunications

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[10] *Federal Communications Commission Clarifies that Certain Telecommunications Relay Services (TRS) Marketing and Call Handling Practices are Improper and Reminds that Video Relay Service (VRS) May Not be Used as a Video Remote Interpreting Service,* CC Docket No. 98-67, CG Docket No. 03-123, Public Notice, 20 FCC Rcd 1471 (Jan. 26, 2005) (*2005 TRS Marketing Practices PN*).

[11] *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, Declaratory Ruling, 20 FCC Rcd 1466, at 1469, para. 8 (Jan. 26, 2005) (*2005 Financial Incentives Declaratory Ruling*).

[12] *See* 47 C.F.R. §§ 64.604(b)(2) ("speed of answer" requirements), & (b)(4) (requiring that certain TRS services, including VRS, be offered twenty four hours a day, seven days a week).

[13] *2004 TRS Report & Order*, 19 FCC Rcd at 12536, para. 160; *see also id.* at 12572, para. 256.

[14] *See, e.g., 2005 Financial Incentives Declaratory Ruling*, 20 FCC Rcd at 1469, para. 8.

[15] *See* 47 U.S.C. § 225(d)(1)(D) (regulations must "require that users of [TRS] pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination"); 47 C.F.R. § 64.604(c)(4) (same).

[16] No specific funding method is required for *intra*state TRS or state TRS programs. 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.

[17] *See* 47 C.F.R. § 64.604(c)(5)(iii)(E) (implementing 47 U.S.C. § 225(d)). There are two aspects to the cost recovery framework set forth in the regulations for interstate TRS service and, presently, all VRS calls: (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 reasonable costs of providing eligible TRS services. In creating the Fund, the Commission enacted a

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services as an extra charge on their monthly service bills. Providers of compensable TRS services are entitled to their reasonable costs of providing service in compliance with the Commission's service rules.[18] Providers submit to the Fund administrator on a monthly basis the number of minutes of service provided, and the Fund administrator compensates them based on per-minute compensation rates.[19] The compensation rates are a settlement mechanism to ensure that providers are reimbursed for their reasonable costs of providing service in compliance with our rules, and are presently set annually by the Commission.[20]

6. Although VRS has proven to be extremely popular, the service has also been subject to fraud and abuse. Thus, on several occasions we have addressed call handling and other practices by providers that generate minutes of use and are inconsistent with section 225 and our rules.[21] Further, in November 2009, 26 people were indicted for allegedly manufacturing and billing the Fund for illegitimate calls, and many of these individuals have now pleaded guilty.[22] In addition, VRS providers and others have filed various petitions and other documents seeking changes to the service rules, including rules addressing provider call handling practices and the legitimacy of certain kinds of calls.[23] Finally, in the recent Declaratory Ruling the Bureau addressed certain call practices or categories that are not compensable from the Fund.[24]

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shared funding mechanism based on contributions from all carriers (and now also all interconnected VoIP service providers) who provide interstate telecommunications services. All contributions are placed in the Fund, which is administered by the TRS Fund administrator, currently NECA. The Fund administrator uses these funds to compensate "eligible" TRS providers for their reasonable costs of providing TRS.

[18] *Id.*; *see also 2004 TRS Report & Order*, 19 FCC Rcd at 12543-45, paras. 179-82

[19] *See* 47 C.F.R. § 64.604(c)(5)(iii)(E).

[20] *See, e.g.*, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Order, 24 FCC Rcd 8628 (June 26, 2009) (*2009 TRS Rate Order*) (annual rate order adopting compensation rates for the various forms of TRS, the Fund size, and the carrier contribution factor).

[21] *See, e.g., 2005 TRS Marketing Practices PN*; *2005 Financial Incentives Declaratory Ruling*; *see also Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Order, 20 FCC Rcd 12503 (July 28, 2005) (stating that the offering of free or discount long distance service to TRS consumers as an incentive for a consumer to use a particular TRS provider's relay service, or as an incentive for a consumer to make more or longer TRS calls, constitutes an impermissible financial incentive in violation of Section 225 of the Act); *Telecommunications Relay Services (TRS) Providers Must Make all Outbound Calls Requested by TRS Users and May Not "Block" Calls to Certain Numbers at the Request of Consumers,* CG Docket No. 03-123, Public Notice, CG Docket No. 03-123, 20 FCC 14717 (Sept. 21, 2005).

[22] *See* note 5, *supra*. Those indicted include call center managers, paid callers, and VRS CAs. Two primary sources of fraud were illegitimate minutes to podcasts and calls ostensibly made for the purpose of marketing and outreach. This fraud resulted in tens of millions of dollars of payments from the Fund.

[23] *See, e.g.,* National Association of the Deaf, *et al., Petition to Initiate a Notice and Comment Rulemaking Proceeding,* CG Docket No. 03-123, CC Docket No. 98-67 (filed Jan. 27, 2010) (requesting that the Commission initiate a rulemaking proceeding on the restriction of certain types of VRS calls); CSDVRS, LLC, *Petition for Rulemaking on Internal VRS Calls and VRS Conference Calls*, CG Docket No. 03-123, WC Docket No. 05-196 (filed Nov. 17, 2009) (requesting that the Commission seek comment on rules addressing VRS calls, including

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7. In this *Declaratory Ruling*, we clarify that that Fund payments may be suspended to providers that do not submit to audits. In the *Order* we take the next steps to ensure that the Fund compensates only VRS calls that are consistent with section 225 and conform to the TRS rules. To this end, we adopt an interim rule requiring the Chief Executive Officer (CEO), Chief Financial Officer (CFO), or other senior executive of a provider submitting minutes to the Fund administrator for compensation to certify, under penalty of perjury, that the minutes were handled in compliance with section 225 and the Commission's rules and orders, and to certify under penalty of perjury that cost and demand data submitted to the Fund administrator are true and correct. As discussed below, we find good cause to adopt this emergency interim rule without notice and comment, and to make it effective upon publication in the Federal Register rather than 30 days afterwards subject to approval by the Office of Management and Budget (OMB).[25] In the accompanying *Notice*, we seek comment on making this requirement a permanent rule.

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conference calls, by VRS provider employees); *Ex Parte* Notice of Snap Telecommunications, Inc., CG Docket No. 03-123 (Oct. 30, 2009) (urging the Commission to take enforcement actions against illegitimate call practices); Sorenson Communications, Inc., *Petition for Rulemaking*, CG Docket No. 03-123 (filed Oct. 1, 2009) (*Sorenson VRS Call Practices Petition*) (requesting that the Commission propose and seek comment on rules that will ensure that the Fund compensates only legitimate VRS calls); CSDVRS, LLC, *Request for Expedited Clarification on Marketing Practices,* CG Docket No. 03-123 (filed Sept. 1, 2009) (seeking clarification on the compensability of VRS calls placed by VRS providers for marketing and outreach); CSDVRS, LLC, *Petition for Rulemaking or Regulation of Provider Representations*, CG Docket No. 03-123 (filed Aug. 24, 2009) (seeking rulemaking to adopt rules that provide for monetary penalties for VRS provider misrepresentations); Purple Communications, Inc., *Petition for Rulemaking to Clarify Relay Rules* (filed Aug. 12, 2009) (seeking rules that make clear that multi-party deaf-to-deaf calls are compensable VRS calls and that address other provider marketing and call handling practices); *Reply Comments of the United States Telecom Association*, CG Docket No. 03-123 (filed July 20, 2009) (arguing that the Commission must increase efforts to stop waste, fraud, and abuse, and clarify all practices that are not reimbursable); Letter to Acting Chairman Copps from Ed Bosson, CG Docket No. 03-123 (filed May 28, 2009) (suggesting FCC enforcement action for certain call practices, including manufactured minutes); CSDVRS, LLC, *Petition for Clarification or Rulemaking on Automated Data Collection*, CG Docket No. 03-123 (filed May 22, 2009) (*Automated Call Data Petition*) (seeking clarification that the TRS rules require automated record keeping of TRS minutes submitted to the Fund for reimbursement); *Ex Parte* Notice of Snap Telecommunications, Inc., CG Docket No. 03-123 (May 12, 2009) (urging the Commission to take enforcement actions against illegitimate call practices*; Ex Parte* Notice of Sorenson Communications, Inc. (Sorenson), CG Docket No. 03-123 (filed May 12, 2009) (requesting that the Commission identify certain call practices as impermissible); Sorenson., *Comments and Petition for Declaratory Ruling of Sorenson Communications, Inc.,* CG Docket No. 03-123 (Filed April 24, 2009) (addressing provider revenue sharing agreements and possible revisions to the provider certification rules); GoAmerica, Inc., *Petition for Rule Making*, CG Docket No. 03-1234 (filed Jan. 26, 2009) (seeking rulemaking to revise the provider certification rules and prohibit "white label" providers) (*GoAmerica VRS Certification Petition)*; CC Docket No. 98-67 (filed May 27, 2004) (requesting that VRS be made a "mandatory" form of TRS); *Ex Parte* Comments of the National Association for State Relay Administration (NASRA), CG Docket No. 03-123 (filed Nov. 10, 2008) (seeking clarification on the permissibility of certain call practices).

[24] *See VRS Declaratory Ruling; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Order, 24 FCC Rcd 11985 (2009) (reiterating that calls not involving a hearing person are not compensable from the Fund).

[25] *See* 5 U.S.C. §§ 553(b)(3)(B) (notice and comment not required "when the agency for good cause finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest"), 553(d)(1)
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8. Further, in the *Notice* we seek comment on a range of other issues affecting the provision of VRS and ways to detect and prevent fraud and misuse. Our goal is to ensure that VRS continues to thrive as a highly functionally equivalent form of TRS, that it remains readily available to consumers (deaf and hearing alike), and that it continues to offer consumers high quality service. To reach this goal, however, we must also ensure the integrity of the program. To that end, we must make sure that our service and compensation rules do not result in or perpetuate unjustifiable payments to providers at American ratepayers' expense, the provision and billing of illegitimate calls, and the provision of service by unqualified providers or that is not in compliance with the service rules.

III. DECLARATORY RULING

9. The TRS mandatory minimum standards expressly provide that the "Commission shall have the authority to audit providers and have access to all data, including carrier specific data, collected by the Fund administrator."[26] The rules also state that the "[F]und administrator shall have authority to audit TRS providers reporting data to the administrator."[27] Further, the rules state that "the administrator shall establish procedures to verify payment claims, and may suspend or delay payments to a TRS provider if the TRS provider fails to provide adequate verification of payment upon reasonable request, or if directed by the Commission to do so."[28] Finally, the rules state that the "Fund administrator shall make payments only to eligible TRS providers operating pursuant to the mandatory minimum standards as required in [section] 64.604."[29] These rules are intended to protect the integrity of the Fund and to deter and detect waste, fraud, and abuse.[30]

10. We note that the Commission and the TRS Fund administrator have conducted some audits, but that not all providers have submitted to the auditing process. Therefore, we take this opportunity to remind providers that the above-cited rules, which provide for the suspension or delay of payments to TRS providers who do not provide verification of payment upon reasonable request, authorize the Commission to withhold payment from providers who do not submit to audits, whether requested by the Commission or the Fund administrator.

IV. ORDER

11. The TRS Fund administrator had projected that the Fund would have reached a funding requirement of $891 million for the 2009-2010 Fund year, of which VRS comprised

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(exception to 30-day waiting period for a rule's effectiveness where agency finds good cause and publishes finding with the rule).

[26] 47 C.F.R. § 64.604(c)(5)(iii)(E).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *See also* 47 C.F.R. § 64.604(c)(5)(iii)(C) ("The administrator and the Commission shall have the authority to examine, verify and audit data received from TRS providers as necessary to ensure the accuracy and integrity of TRS Fund payments").

$780 million, or approximately 88 percent.[31] Further, the Fund's explosive growth in recent years has been driven largely by VRS. The TRS Fund administrator reported that VRS minutes of use were 27.2 million in calendar year 2005 and would grow to an estimated 123.8 million for the 2009-2010 Fund year,[32] a demand increase over that period in excess of 350 percent. Although the TRS Fund administrator subsequently proposed revised VRS demand and fund size projections based on actual demand data for the 2009-10 fund year in the wake of the indictments referenced above, these revised projections would nevertheless yield a 173 percent increase in VRS demand over the same period.[33] Similarly, the TRS Fund administrator recently proposed VRS demand and fund size projections for the 2010-11 Fund year, which would yield a 261 percent increase in VRS demand as compared to 2005.[34] This rapid growth within a five year span requires the Commission to take immediate steps in preserving the Fund to ensure the continued availability of TRS. Indeed, we have a fiduciary duty to ensure that the Fund operates efficiently, and to guard against waste, fraud, and abuse. We take steps in this *Order* to uphold that duty.

12. Section 553 of the Administrative Procedure Act requires that agencies provide notice of and an opportunity for public comment on their proposed rules except, *inter alia*, "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[35] Notice and comment have been excused in emergency situations or where delay could result in serious harm.[36] Additionally, agencies, including this Commission, have been afforded "substantial deference" when imposing interim regulations with or without prior notice and comment, particularly where such regulations have

[31] *See NECA 2009 TRS Rates Filing* Exh. 2.

[32] *Id.* at Exh. 3-7. We use calendar year for 2005 and Fund year for 2009-2010 because the administrator reports minutes on those bases. Both reflect twelve month periods, and are thus comparable for purposes of measuring growth in VRS minutes.

[33] *See* NECA, *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990,* CG Docket Nos. 03-123 & 10-51, Interstate Telecommunications Relay Service Fund Supplement to Annual Filing for TRS Contribution Factor Decrease (filed March 30, 2010). The administrator proposed revised funding requirements from $891 million to approximately $702 million, and revised VRS minutes from 123.8 million to 74.2 million. *Id.* at 1, 4.

[34] *See* NECA, *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, CG Docket No. 03-123, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, at Exh. 2 (filed April 30, 2010). The administrator projects 2010-11 VRS demand of 98.2 million minutes, and proposes funding requirement projections ranging from $280.8 million to $673.3 million, depending on the VRS rates that the Commission ultimately adopts for the 2010-11 Fund year. *Id.*

[35] 5 U.S.C. § 553(b)(3)(B).

[36] *Chamber of Commerce of the U.S. v. S.E.C.*, 443 F.3d 890, 908 (D.C. Cir. 2006) (also stating that the exception excuses notice and comment "when the very announcement of a proposed rule itself could be expected to precipitate activity by affected parties that would harm the public welfare") (internal citations omitted).

been shown to be necessary to prevent irreparable harm and the agency is seeking comment on the matter in a rulemaking proceeding.[37]

13. In this case, we find good cause to adopt the interim rule below to make providers more accountable by requiring senior executives to certify compliance with our regulations under penalty of perjury. By requiring providers to be more accountable for their submissions, we take necessary, affirmative steps to preserve the TRS Fund. We adopt an interim rule to require the Chief Executive Officer (CEO), Chief Financial Officer (CFO), or other senior executive of a relay service provider to certify, under penalty of perjury, that: (1) minutes submitted to the Fund administrator for compensation were handled in compliance with section 225 and the Commission's rules and orders, and are not the result of impermissible financial incentives, or payments or kickbacks, to generate calls, and (2) cost and demand data submitted to the Fund administrator related to the determination of compensation rates or methodologies are true and correct.[38] In the *Notice* below, we seek additional comment on whether we should make this rule permanent.

14. The TRS rules currently require providers to "submit reports of … TRS minutes of use to the [Fund] administrator in order to receive payments."[39] The rules further require providers to submit minutes on a form fashioned by the Fund administrator and the administrator to "establish procedures to verify payment claims."[40] Additionally, providers are required to certify on their monthly minutes of use submissions that the data being reported are "true and accurate."[41] Therefore, providers are already required to certify as to the truth and accuracy of the monthly data they submit to the administrator. Accurate call data are essential to ensuring the integrity of the Fund; thus, to ensure that we can adequately detect fraud against the Fund, we conclude that additional safeguards are necessary to ensure that minutes billed to the Fund are legitimate. Although both the Commission and the Fund administrator have the authority to audit providers,[42] we believe that we can ensure greater accountability by requiring CEOs, CFOs, or other senior executives of providers to submit minutes of use for payment and to certify under penalty of perjury the legitimacy of the minutes. We also expect that this interim rule will lead

[37] *See, e.g., Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105-06, para. 10 (2009) (acknowledging that "the FCC should be given 'substantial deference' when acting to impose interim regulations," and that courts "have deferred to the Commission's decisions to enact interim rules based on its predictive judgment that such rules were necessary to preserve universal service") (citations omitted).

[38] *See* Appendix B, *infra.* This rule constitutes a new information collection subject to the Paperwork Reduction Act of 1995, and approval by the Office of Management and Budget (OMB). It will become effective upon the Commission's publication in the Federal Register of a notice announcing approval of the collection by OMB.

[39] 47 C.F.R. § 64.604(c)(5)(iii)(E).

[40] *Id.*

[41] *See* NECA form at https://www.neca.org/cms400min/NECA_Templates/TRSInterior.aspx?id=1265 (visited April 16, 2010).

[42] *See* 47 C.F.R. § 64.604(c)(5)(iii)(E) & (I).

to greater scrutiny by providers of their minutes before they submit them to the Fund administrator for payment.[43]

15. The TRS rules also require providers to "provide the administrator with true and adequate data, and other historical, projected and state rate related information reasonably requested by the administrator, necessary to determine TRS Fund revenue requirements and payments."[44] Providers are also required to certify on their yearly submission forms as to the truth and accuracy of the data being submitted.[45] We similarly believe that to ensure that accuracy of this information, including, the information requested on the Relay Services Data Request (RSDR) Form submitted annually, our rules should require CEOs, CFOs, or other senior executives of providers to certify under penalty of perjury that this information is true and correct.

16. We adopt this interim rule without notice and comment, pursuant to 5 U.S.C. § 553(b)(3)(B). In light of the explosive growth in the TRS Fund in recent years and evidence of fraud against the Fund, as evidenced by the recent indictments and guilty pleas from call center managers and employees admitting to defrauding the Fund of tens of millions of dollars, the fact that minutes are submitted for payment on a monthly basis, and the expectation that providers seeking compensation from the Fund are doing so in compliance with our rules, we find that it is unnecessary and contrary to the public interest to delay adoption of this interim rule. We find that an immediate interim rule is necessary and consistent with the public interest. In this case, we find good cause to adopt an interim rule to make providers more accountable by requiring senior executives to certify compliance with our regulations under penalty of perjury. By requiring providers to be more accountable for their submissions, we take necessary, affirmative steps to preserve the TRS Fund.

V. NOTICE OF PROPOSED RULEMAKING

A. Location of VRS Call Centers

17. We recognize that some providers have established VRS call centers that are located outside the United States. ASL is generally not the primary form of sign language used in countries outside North America. We are concerned, therefore, that VRS providers may not be able to find qualified ASL interpreters[46] to staff these call centers. For instance, of the over 15,000 members of the Registry of Interpreters for the Deaf, the national membership organization for professional sign language interpreters in the United States, only 188 members are located outside the United States and its territories.[47] Moreover, there are approximately 600

[43] We note that the Commission's rules require similar certifications in other contexts. *See, e.g.,* 47 C.F.R. § 43.11(b) (filing of local exchange competition data); *id.* § 51.333(c)(5) (related to objections to network changes).

[44] 47 C.F.R. § 64.604(c)(5)(iii)(C).

[45] *See* NECA form at https://www.neca.org/cms400min/NECA_Templates/TRSInterior.aspx?id=1265 (visited April 16, 2010).

[46] 64.601(a)(16) (A VRS CA must be a qualified interpreter "who is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary").

[47] 2009 Annual Report of the Registry of Interpreters for the Deaf (RID), at 53 (http://www.rid.org/UserFiles/File/2009RIDAnnualReport.pdf.

members of the Association of Visual Language Interpreters of Canada (AVLIC), which is Canada's national professional association representing interpreters whose working languages are English and ASL.[48] We are also concerned that VRS call centers outside the United States may lack appropriate supervision and otherwise not operate in compliance with our rules, and that these call centers may be (or have been) a source of fraud and or otherwise may not be handling legitimate VRS calls.

18. For these reasons, we tentatively conclude that we will amend our rules to require that all VRS call centers be located in the United States.[49] Because of our concerns about fraud, we also tentatively conclude that this rule should become effective immediately upon publication of the summary of the order adopting it in the Federal Register. We seek comment on these tentative conclusions and any other issues relating to this issue.

B. VRS CAs Working from Home and Compensation

19. We recognize that some VRS providers allow their CAs to work from home, and recognize the benefits that come with the flexibility of these arrangements. At the same time, we note that both the Act[50] and the Commission's rules,[51] specifically safeguard the confidentiality of calls, and the practice of CAs working from home raises concerns about whether the confidentiality of calls can be guaranteed under that arrangement. This practice also raises concerns about whether CAs working from home can meet other mandatory minimum standards applicable to the provision of relay. Specifically, it is unclear whether VRS CAs working from home have the ability to handle emergency calls in accordance with our rules,[52] or to transfer a call to another CA if the CA cannot continue to handle the call.[53]

20. We seek comment on how we can balance the goals of allowing CAs the convenience and flexibility that comes with working from home with the need to ensure the confidentiality of calls and that our mandatory minimum standards are met. Are there new technologies that would allow for appropriate supervision of CAs who work from home? Are there other solutions that would advance both our goals in this area? We ask commenters to provide any specific examples of successful solutions that could serve as a model for any future rules. We also seek comment on whether, if CAs may work from home, providers should be required to treat the homes of CAs who work from home as "call centers" for purposes of TRS administration, as discussed in section V.E.3., below.

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[48] AVLIC Mission Statement found at http://www.avlic.ca/index.php (visited April 13, 2010); AVLIC News Fall/Winter 2009 at 14, http://www.avlic.ca/files/pdf/newsletters/2009_avlic_fall_winter.pdf.

[49] *See* Appendix C, *infra.*

[50] 47 U.S.C. § 225(d)(1)(F).

[51] 47 C.F.R. § 64.604(a)(2).

[52] *See* 47 C.F.R. § 64.605(b)(ii) (requiring a VRS providers to transmit all 911 calls to "the PSAP, designated statewide default answering point, or appropriate local emergency authority").

[53] *See* 47 C.F.R. § 64.604(a)(v)(2) (requiring a VRS CA to stay with a call for a minimum of ten minutes before transferring).

21. Relatedly, we seek comment on CA compensation schemes that could provide incentives to place calls for the purpose of generating minutes for the employer provider. We believe that most VRS CAs are salaried or paid by the hour and thus will get paid an amount irrespective of the number of minutes they relay. We understand, however that some CAs have in the past been paid bonuses for working through scheduled breaks or working overtime in order to relay more minutes. We understand that this may have resulted in schemes by CAs to initiate or participate in fraudulent VRS calls in order to receive such bonuses while still receiving necessary breaks. While we believe the vast majority of CAs do not engage in this type of minute-pumping, we seek comment on whether such bonus schemes or any other type of compensation arrangement exist, and, if so, whether they incent CAs to arrange or cause to be arranged calls that would not otherwise be made. If such arrangements do exist, what types of safeguards can be adopted to deter and prevent use of them? We seek comment on how VRS CAs are typically compensated. We seek comment on whether working from home makes any such arrangements easier to carry out and, if so, possible solutions to prevent this type of abuse.

C. Procedures for the Suspension of Payment

22. In the past year, the Fund administrator, in consultation with the Bureau, has suspended payments to various VRS providers for certain minutes pending further review of the legitimacy of the minutes. These actions follow the Fund administrator's increased scrutiny of the providers' call data records, in coordination with the Commission, that support the minutes submitted for payment, and the revision of the dates for the submission of minutes and payment to give the Fund administrator more time to review the call data records before making payment. The Fund administrator has noted that providers do not always provide sufficient support to justify compensability in their initial submissions to NECA.

23. Delay or suspension of payment is expressly authorized by the TRS rules, which state that the Fund administrator "may suspend or delay payments to a TRS provider if the TRS provider fails to provide adequate verification of payment upon reasonable request, or if directed by the Commission to do so."[54] The rules do not, however, set forth in greater detail procedures for the suspension of payment and the resolution of whether certain minutes are legitimate and should be paid. We therefore seek comment on the adoption of new rules addressing the procedures for the suspension or withholding of payments to providers in circumstances where the Fund administrator reasonably believes that the minutes may not be legitimate or otherwise were not submitted in compliance with the TRS rules.

24. As a general matter, such rules must afford the providers due process. Therefore, we tentatively conclude that the rules must, at a minimum: (1) give timely notice to the providers of the minutes for which payment is being withheld, as well as the reason(s) for the withholding; (2) afford providers an opportunity to show why they believe the withheld minutes are in fact compensable; and (3) require that providers be given, in a timely fashion, a final determination of whether payment will be made for the disputed minutes with a supporting explanation. We also tentatively conclude that the rules should place the burden on the provider

[54] 47 C.F.R. 64.604(c)(5)(iii)(E).

to show that the minutes in question are compensable and were handled in accordance with our rules.

25. We seek comment on these tentative conclusions. We also seek comment on the nature of the showing providers should be required to make to establish that minutes submitted for payment are legitimate. Further, we seek comment on the contents and scope of rules the Commission might adopt in this regard, taking into consideration the providers' reasonable expectation that they will be paid for the compensable minutes they provide and the Commission's obligation to ensure the integrity of payments from the Fund. Commenters should also address the timing of this process that would both ensure prompt resolution of disputed minutes and give the Fund administrator and/or Commission reasonable time to analyze the underlying call record data and make its final determination. Finally, we seek comment on any other issues relating to the adoption of specific rules setting forth the procedures for the withholding of payment for minutes submitted to the Fund administrator and the resolution of whether such minutes are compensable and should be paid.

26. Relatedly, we seek comment on whether we should adopt new rules or modify existing rules to provide the TRS Fund administrator with the tools necessary to execute its administrative and auditing responsibilities, and if so, what rules. For example, are there additional duties and responsibilities the TRS Fund administrator should be given to ensure the integrity of the Fund and Fund payments? Are there other types of information that providers should be required to submit to the TRS Fund administrator so that the administrator can efficiently and effectively oversee the Fund?

D. Specific Call Practices

1. International VRS Calls

27. In the *VRS Declaratory Ruling*, the Bureau confirmed that, consistent with section 225, VRS calls compensable from the Fund must involve at least one endpoint located in the United States.[55] In other words, VRS calls that both originate *and* terminate outside the United States are not compensable.[56]

28. Based on our review of VRS providers' monthly call data records, we are aware that some providers submit a large volume of calls each month that terminate overseas. We are concerned that, notwithstanding the new registered location requirements, some of these calls may both originate and terminate overseas, and therefore be non-compensable.[57] We are also

[55] *VRS Declaratory Ruling* at para. 9; *see also* 47 U.S.C. 225(b)(1) (TRS is to be available to persons with hearing and speech disabilities in the United States and is intended to provide access to the United States' telephone system).

[56] Given the ten-digit numbering and registered location rules that became effective for VRS on November 12, 2009, providers should now be able to determine the geographic location of both parties to a VRS call. *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123; *E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, Second Report and Order and Order on Reconsideration, 24 FCC Rcd 791 (June 24, 2008).

[57] As the Consumer and Governmental Affairs Bureau noted in the *VRS Declaratory Ruling,* analysis of the iTRS Numbering Directory suggests that some ten-digit numbers appear to have been assigned to non-United States

(continued…)

concerned that, in light of the evidence of VRS fraud and misuse noted above,[58] the large volume of calls terminating overseas may reflect schemes to create calls for the purpose of receiving payment from the Fund. Finally, we are concerned that some such calls may be VCO VRS calls involving two voice telephone users that are made to avoid the long distance charges associate with overseas calls.[59]

29. For these reasons, we seek comment on ways to address fraud and misuse associated with international VRS calls. At the same time, we seek comment from VRS consumers on how to do so without undermining the use of VRS to make legitimate international calls. We note that the Fund does not currently compensate IP Relay calls that terminate overseas.[60] Nevertheless, we also seek comment on the role of ten-digit numbering, registered locations, or other potential solutions (*e.g.,* particular software) to help ensure that VRS calls that terminate overseas are, in fact, legitimate TRS calls. In this regard, if VRS calls that originate or terminate overseas continue to be compensable from the Fund, we seek comment on other ways in which we can ensure that only legitimate VRS calls that originate or terminate overseas are compensated.

2. VRS Calls in Which the Caller's Face Does not Appear on the Screen; Use of Privacy Screens; Idle calls

30. Some VRS providers and VRS equipment permit a deaf or hard of hearing VRS caller to use a "privacy screen" during a call that will prevent the VRS CA from viewing the caller during the call. We recognize that a VRS user may have a legitimate need for a privacy screen in certain circumstances, analogous to a voice telephone caller using a speakerphone and pressing the mute button. In some instances, however, a privacy screen is in use for an extended period of time. In these circumstances, it is possible that the call has been terminated, but the CA does not know that and continues to accrue call minutes that are billed to the Fund, or that the caller never intended to make a legitimate relay call and instead is simply facilitating a provider in generating minutes that can be billed to the Fund. Some VRS provider platforms also allow the VRS CA to use a privacy screen so that they cannot be seen.[61] Although there may be legitimate reasons for a VRS CA to briefly use a privacy screen, in some instances it may be used to facilitate a call solely intended to generate minutes.

(Continued from previous page)
residents. *See VRS Declaratory Ruling* at para. 9 n.24. Furthermore, in its October 2009 petition suggesting rules and policies that the Commission could adopt to combat malfeasance related to IP-based relay services, Sorenson suggests that the registered location requirements, even coupled with verification requirements, still may be insufficient to combat the efforts of some users to cloak their true identities or locations. *Sorenson VRS Call Practices Petition* at note 43.

[58] *See* note 5, *supra.*

[59] *See VRS Declaratory Ruling* at paras. 7-8.

[60] *See, e.g., Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Order, 19 FCC Rcd 12224, 12242, at para 48, n.121 (June 30, 2004).

[61] We note that when both parties communicating via video use a privacy screen (*i.e.,* the CA and the caller using ASL), communication is no longer possible, and therefore the call is no longer a TRS call and should be terminated.

31. We therefore seek comment on how we might amend the TRS rules to address the use and misuse of privacy screens. We note that Sorenson has proposed that "[w]hen the CA is confronted with only a blank screen, or a screen that otherwise does not display the face of the video caller (including when the caller is using a privacy screen), the CA may disconnect the call if the caller's face does not reappear on the screen within two minutes."[62] We tentatively conclude a requirement to this effect is appropriate, consistent with section 225 and the TRS rules, and is warranted to prevent the creation of illegitimate calls. We seek comment on this tentative conclusion and, specifically, the appropriate time period a privacy screen may be used before the call is terminated. We also seek comment generally on any other issues relevant to the use and misuse of privacy screens, including ways to ensure that VRS users or providers, including CAs do not use privacy screens to perpetuate illegitimate calls.

32. Relatedly, we also tentatively conclude that this rule should apply in situations where a party to the call leaves the call or becomes unavailable or unresponsive so that the call is "idle" for more than two minutes. Therefore, if either party to the call is away from the call or unresponsive for longer than two minutes, the CA should disconnect the call.[63] We seek comment on this tentative conclusion and, specifically, the appropriate time period a call may be idle before the call is disconnected.[64]

3. Calls Involving Remote Training

33. A significant number of VRS minutes submitted for compensation in recent months are attributable to remote training. According to the TRS Fund administrator, TRS providers sought compensation for approximately 232,000 minutes for remote training for the six month period from July 2009 through December 2009. These minutes represent nearly $1.4 million in compensation from the Fund, using the lowest applicable per-minute compensation rate.[65] We emphasize that these totals represent only those remote training calls the administrator has been able to identify to date, without additional scrutiny.

34. To the extent that VRS calls that enable a person to participate in remote training using a VRS communications assistant are, in fact, being used as a substitute for in-person interpreting or Video Remote Interpreting (VRI)[66] services, the Commission has already made

[62] *Sorenson VRS Call Practices Petition* at App. A, page 17; *see also id.* at 21.

[63] A VRS call placed on hold by a business, such as an insurance company or computer technical support, would not be considered "idle," even if the hold time exceeds two minutes.

[64] *See* Appendix C for proposed rule.

[65] That rate is $6.23. *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Order, 24 FCC Rcd 8628, 8632, para. 11. (CGB June 26, 2009).

[66] Video Remote Interpreting (VRI) is a service that is used when an interpreter cannot be physically present to interpret for two or more persons who are together at the same location. This service uses a video connection to provide access to an interpreter who is at a remote location. As with "in-person" interpreters, VRI services are generally contracted and paid for on a fee-for-service basis.

clear that this would be an improper use of VRS.[67] Moreover, in the *VRS Declaratory Ruling,* the Consumer and Governmental Affairs Bureau emphasized that "VRS calls made or arranged, in whole or in part, for the purpose of generating compensable minutes of use as a source of revenue for the providers, because they do not support or further the purposes of TRS, are not and have never been compensable from the TRS Fund."[68] Thus, to the extent that providers are themselves initiating or promoting the use of VRS for remote training or otherwise generating minutes, the Commission has already determined that such calls are not compensable.

35. We seek comment on whether the Commission should establish a rule specifically providing that provider-involved VRS calls that enable a person to participate in remote training using a VRS communications assistant are not compensable from the Fund. We tentatively conclude that, despite the Commission's prior finding that calls made for the purpose of generating compensable minutes as a source of provider revenue are not compensable from the Fund, a rule specifically barring compensation for remote training calls initiated or promoted by or on behalf of a provider would serve as an additional deterrent against fraud and misuse of the fund. We seek comment on this tentative conclusion.

E. Detecting and Stopping the Billing of Illegitimate Calls

1. Automated Call Data Collection

36. On May 22, 2009, CSDVRS filed a petition for clarification requesting that the Commission clarify that the TRS rules require automated record keeping of TRS minutes submitted to the Fund for payment or, in the alternative, that the Commission initiate a rulemaking proceeding to ensure that TRS minutes are tracked through automated systems.[69]

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[67] TRS (including VRS) is intended to give persons with a hearing or speech disability access to the telephone system to call voice telephone users (or *vice versa*). VRS, therefore, is not properly used in *any* situation as a substitute for an in-person interpreter or VRI. *See Reminder that Video Relay Service (VRS) Provides Access to the Telephone System Only and Cannot Be Used As A Substitute For "In-Person" Interpreting Services or Video Remote Interpreting (VRI)*, Public Notice, 20 FCC Rcd 14528 (Sept. 7, 2005) (internal footnote omitted) (*2005 VRS Public Notice*); *see also Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Order on Reconsideration, 16 FCC Rcd 4054, at 4058, para. 10 (June 5, 2000); *See 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, at 12537 n.466 (June 30, 2004); *Federal Communications Commission Clarifies That Certain Telecommunications Relay Services (TRS) Marketing and Call Handling Practices are Improper and Reminds That Video Relay Service (VRS) May Not Be Used As A Video Remote Interpreting Service*, CC Docket No. 98-67, CG Docket No. 03-123, Public Notice, 20 FCC Rcd 1471 (Jan. 26, 2005); *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 on Reconsideration, 20 FCC Rcd 13140, at 13154, n.109 (July 19, 2005); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Misuse of Internet Protocol (IP) Relay Service and Video Relay Service*, Further Notice of Proposed Rulemaking, 21 FCC Rcd 5478, 5482-83, para. 10 (May 8, 2006). *See also 2005 VRS Public Notice,* 20 FCC Rcd at 14529 ("VRS cannot be used as a substitute for using an in-person interpreter or VRI in situations that would not, absent one of the parties' hearing disability, entail the use of the telephone").

[68] *VRS Declaratory Ruling* at 4.

[69] *See Automated Call Data Petition* at 2.

CSDVRS asserts that some TRS providers permit their CAs to manually record the session and conversation times of TRS calls, which leads to inaccurate record keeping and billing of minutes.[70] CSDVRS notes that our current rule, 47 C.F.R. §64.604(c)(5)(iii)(c),[71] requires "true and adequate data," and asserts that such data can only be collected through an automated process.[72] CSDVRS further asserts that the Commission should either issue the requested clarification, or initiate a rulemaking, to "preserve the integrity of the Fund.[73] Sorenson similarly asserts that we should adopt a rule that requires "[f]or each Internet-based TRS call, providers must automatically record compensable conversation time to at least the nearest second, with more accurate recordings permitted."[74]

37. We tentatively conclude that the TRS rules should be modified to make clear that providers must automatically capture the conversation time, to the nearest second, for each call submitted for payment from the Fund.[75] We expect that automated call data collection reduces opportunities for fraud and the erroneous submission of minutes for payment. We seek comment on this tentative conclusion. In this regard, we also seek comment generally on how TRS providers (particularly VRS providers) presently record session and conversation times, and other call data that they report to the administrator, for the TRS calls they handle. For those providers who do not use an automated system to track their minutes, we seek comment on why they do not and what impediments, if any, may have prevented them from doing so. We also seek comment on any other issues relating to the recording of compensable conversation time for minutes submitted to the Fund for payment.

2. Data Filed with the Fund Administrator to Support Payment Claims

38. In 2008, the Fund administrator, at the direction of the Bureau, instructed VRS providers that, beginning with the May 2008 minutes, monthly minutes of use submitted for payment must be supported by call data records that include the following information: (1) the call record ID sequence; (2) Communications Assistant ID; (3) session start and end times; (4) conversation start and end times; (5) incoming telephone number or IP address; (6) outbound

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[70] *See id.* at 1-2.

[71] The rule states: "*Data collection from TRS providers.* TRS providers shall provide the administrator with true and adequate data, and other historical, projected and state rate related information reasonably requested by the administrator, necessary to determine TRS Fund revenue requirements and payments. TRS providers shall provide the administrator with the following: total TRS minutes of use, total interstate TRS minutes of use, total TRS operating expenses and total TRS investment in general accordance with part 32 of this chapter, and other historical or projected information reasonably requested by the administrator for purposes of computing payments and revenue requirements. The administrator and the Commission shall have the authority to examine, verify and audit data received from TRS providers as necessary to assure the accuracy and integrity of TRS Fund payments." 47 C.F.R. §64.604(c)(5)(iii)(c).

[72] *See Automated Call Data Collection Petition* at 2.

[73] *See id.* at 3-4.

[74] *Sorenson VRS Call Practices Petition* at App. A., page 5; *see also id.* at 18.

[75] *See* Appendix C for proposed rule.

telephone number or IP address; (7) total conversation minutes; and (8) total session minutes.[76] This information was requested as part of the Commission's and Fund administrator's efforts to detect and deter fraud and the billing of illegitimate minutes. Previously, VRS and IP Relay providers were required to submit to the Fund administrator speed of answer[77] compliance data with their monthly requests for payment.

39. We tentatively conclude that we should amend the TRS rules to specifically require the filing of the call data information noted above as a functional TRS mandatory minimum standard[78] that providers must meet to be eligible for compensation from the Fund.[79] We believe that review of this information is essential to detecting and deterring fraud and the billing of illegitimate calls. We seek comment on this tentative conclusion. We also seek comment on any other call record information we should require providers to submit to the Fund administrator to support their claims for payment.

40. We also tentatively conclude that we will amend the functional TRS mandatory minimum rules to require to VRS and IP Relay providers to submit speed of answer compliance data. Although the providers have been submitting such data for the past several years, we believe that this obligation should be reflected in our rules to make clear that such data must be submitted to be compensated from the Fund. We seek comment on this tentative conclusion and any other issues relating to the filing of speed of answer compliance data to support claims for payment from the Fund.

41. Finally, we tentatively conclude that our rules should be amended to require that the call record and speed of answer data discussed above be submitted electronically and in a standardized format. We seek comment on that tentative conclusion and, specifically, on what the standardized format should be. Our goal is both to lessen the burden on providers associated with compiling and filing this data, and to ensure that the Commission and the Fund administrator can efficiently and meaningfully analyze the data.

3. Requiring Providers to Submit Information about New and Existing Call Centers

42. We recognize that most VRS providers operate numerous call centers (*i.e.,* the physical locations at which CAs receive and handle TRS calls). We also recognize that many VRS providers subcontract call handling to other entities, which may in turn hire other entities to run call centers. Although some of this information is reported to the Fund administrator in the providers' annual rate filings, or pursuant to periodic requests from the Fund administrator, we are concerned that we may not always have up to date information on those entities actually handling relay calls for the providers that are compensated from the Fund. This information will enable the Commission and Fund administrator to better oversee compliance with Commission

[76] *See generally* Letter from Cathy Seidel and Kris Monteith to NECA (Nov. 26, 2008) (providers were also directed to submit this information for the period January 2008 through April 2008).

[77] *See* 47 C.F.R. § 64.604(b)(2)(iii).

[78] *See* 47 C.F.R. § 64.604(c).

[79] *See* Appendix C for proposed rule.

rules to ensure the compensability of submitted minutes as well as to ensure that sub-contractors are providing the quality of service our rules require.

43. As a result, we tentatively conclude that we should amend the TRS mandatory minimum standards to require VRS providers eligible for compensation from the Fund that submit minutes for payment to file with the Commission and Fund administration on a quarterly basis a statement detailing the name and address of each call center the provider owns or controls (this would include subcontractors operating call centers and entities operating calls centers for a subcontractor), the number of CAs and CA managers at the call center, and the name and contact information for the managers of the call center. We also tentatively conclude that we will require VRS providers to file an amendment to their most recent quarterly filing each time they open a new call center, close a call center, or the ownership or management of a call center changes, or changes to the list of providers whose calls are processed through the call center. We propose that such amendments be required to be filed within 30 days of such an event.[80]

44. We seek comment on this proposed rule. We also seek comment, specifically, on any other or different information that should be required to be filed in connection with the ownership and operation of a provider's call centers, or the opening or closing of call centers.

4. Requiring Service to be Offered in the Name of the Provider Seeking Compensation from the Fund; Revenue Sharing Schemes

45. Our rules permit entities seeking to offer VRS and receive compensation from the Fund to apply for Commission certification.[81] In addition, as noted above, our rules permit eligible providers to subcontract with other entities for actual provision of service.[82] One unintended consequence of these rules has been the proliferation of arrangements whereby an entity that is not eligible for payment from the Fund, but desires to offer VRS service and market its own service, enters into subcontracting agreement with an eligible provider so that the eligible provider can submit the entity's minutes to the Fund administrator for payment. In these circumstances, the eligible provider that seeks payment from the Fund simply acts, as a practical matter, as the billing agent for the entity that actually relays the calls, keeping a portion of the revenues paid from the Fund and giving the remainder to the entity that actually handled the calls. Although the eligible provider is responsible for ensuring that such calls billed to the Fund are legitimate, in some cases it is possible that the eligible provider exercises very little oversight over the call handling operations. In other cases, arrangements have been made in order to facilitate fraud.[83] Moreover, because the entity actually relaying the calls usually markets its service under its own brand name, consumers are generally unaware that the entity relaying their calls is not itself a certified or eligible provider. Further, consumers also generally do not know

[80] *See* Appendix C for proposed rule.

[81] *See* 47 C.F.R. § 64.606 (provider certification rules); s*ee generally Telecommunications Relay Services and Speech-to-Speech 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).

[82] *See generally* 47 C.F.R. § 64.604(c)(5)(iii)(F).

[83] *See* note 5, *supra.*

which eligible provider the relay center is affiliated with. GoAmerica (now Purple) has coined such arrangements "white labeling."[84]

46. Similarly, we recognize that some certified or eligible providers often market their services under a variety of brand names or websites. In these circumstances, a consumer placing a VRS call will go to the website of a particular "brand" of VRS, but the call will be routed to an eligible provider's call center. The consumer generally will not know that the "brand" or service through which he or she is making a call is really just a marketing name linked to an eligible provider. Therefore, the consumer will likely not know which eligible provider is actually handling his or her call.[85]

47. Sorenson asserts that these schemes facilitate "minute-pumping and other illicit schemes" because the entities actually handling the relay calls are not accountable to the Commission and the consumer will likely not know "which entity should be subject to a complaint to the Commission."[86] Sorenson therefore proposes that we adopt a rule stating that providers cannot be compensated from the Fund unless the provider seeking compensation "clearly identified itself to the calling parties at the outset of the calls as the TRS provider for those calls."[87] GoAmerica asserts that we should "prohibit the practice of providing 'white-label' services by uncertified entities billing the TRS Fund through certified providers."[88] GoAmerica asserts that "all Internet-based TRS providers should be subject to FCC certification requirements and oversight" so that we end this "grey market of Internet-based relay."[89]

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[84] *See GoAmerica VRS Certification Petition* at 2 ("white-labeling" is the "process where entities that are not certified relay providers offer Internet-based relay (generally VRS), and bill for the service through certified providers").

[85] *See generally Sorenson VRS Call Practice Petition* at 15 (addresses these two kinds of "revenue sharing schemes that deviate from the traditional subcontracting practice").

[86] *Id.*

[87] *Id.* at App. A, page 9.

[88] *See GoAmerica VRS Certification Petition* at 1. On March 25, 2009, the Commission released a Public Notice seeking comment on GoAmerica's petition. The majority of commenting providers filed in opposition to the petition in full. Four commenters specifically oppose GoAmerica's proposed prohibition of the practice of white labeling because, generally, such white labeling arrangement facilitates competition as it allows new entrants in the market. One provider believes that this arrangement "has the effect of improving services and reducing prices." Two other providers support GoAmerica's proposal on prohibiting the practice of white labeling on the ground that uncertified subcontractors are not subject to effective Commission oversight and regulation. Comments were filed by American Network, Inc. (April 24, 2009); Communications Access Center for the Deaf and Hard of Hearing, Inc. (CAC) (April 24, 2009); Hamilton Relay, Inc. (Hamilton) (April 24, 2009); Healinc Telecom, LLC. (Healinc) (Feb. 6, 2009); Sorenson Communications, Inc. (Sorenson) (April 24, 2009) (Sorenson submitted Petition for Declaratory Ruling in its comments); Viable Communications, Inc. (Viable) (April 23, 2009). Reply Comments were filed by CSDVRS, LLC. (May 8, 2009); Healinc (May 13, 2009); Purple Communications, Inc. (Purple) (formerly GoAmerica, Inc.) (May 11, 2009); Sorenson (May 11, 2009); Telecommunications for the Deaf and Hard of Hearing, Inc.; Association of Late-Deafened Adults, Inc.; National Association of the Deaf; Deaf and Hard of Hearing Consumer Advocacy Network; California Coalition of Agencies Serving the Deaf and Hard of Hearing; American Association of the Deaf-Blind; and Hearing Loss Association of America (TDI Coalition) (May 11, 2009); Viable (May 8, 2009).

[89] *Id.* at 2 (internal quotation marks omitted).

48. We seek comment on Sorenson and GoAmerica's proposals, and on other ways we can ensure both that the entities that actually relay calls are accountable for compliance with our rules, and that consumers know, on a call-by-call basis, which eligible provider is responsible for the call.[90] For example, should any entity receiving payments from the Fund, either directly or indirectly, be required to register with the Commission? To the extent we might prohibit "white-labeling," but allow subcontracting, we seek comment on the precise nature and scope of such a prohibition. For example, should we adopt rules requiring that any subcontractor be disclosed to the Fund administrator before calls generated by that subcontractor are compensable, and that all subcontractors or entities actually handling calls be identified in a provider's monthly submission of minutes for payment? We seek comment generally on how we might amend our rules to address the issues noted above.

5. Whistleblower Protections for VRS CAs and Other Provider Employees

49. We recognize that CAs and other employees of providers are often in the best position to detect possible fraud and misconduct by the provider. At the same time, we recognize that employees are often reluctant to report possible wrongdoing because they fear they may lose their job or be subject to other forms of retaliation. For this reason, there are numerous federal and state whistleblower laws that protect employees who report misconduct by their employers.[91]

50. Given recent evidence of fraud and the billing of illegitimate VRS minutes,[92] we tentatively conclude that we should adopt a specific whistleblower protection rule for the employees and subcontractors of TRS providers. We seek comment on this tentative conclusion and, specifically, on the scope and contents of such a rule.[93] We tentatively conclude that such a rule should not be limited to Internet-based TRS providers but should protect any employee or subcontractor of any TRS provider who reports possible wrongdoing to his or her employer or to the Commission, the Fund administrator, or any federal or state law enforcement entity. We also tentatively conclude that the rule should require providers to inform their employees that they can report fraud and misuse to the Commission's Office of Inspector General. Further, we tentatively conclude that given the importance of detecting and deterring fraud, this rule should become effective immediately upon adoption. We seek comment on these tentative conclusions, as well as on any other issues relating to the adoption of a whistleblower protection rule for employees or subcontractors of TRS providers.

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[90] *See* Appendix C for proposed rule.

[91] *See, e.g.,* Whistleblower Protection Act of 1989, P.L. 101-12, 103 Stat. 16 (1989).

[92] *See* note 5, *supra.*

[93] Sorenson proposes the following rule: "Providers shall permit any employee, agent, or contractor to disclose to a designated manager any known or suspected violations of FCC rules, or any other activity that the reporting person believes to be unlawful, wasteful, fraudulent, or abusive, or that otherwise could result in the improper billing of minutes to the Interstate TRS Fund. Providers must make available at least one means by which such disclosure may be made anonymously. Providers must promptly investigate any report of wrongdoing and, when warranted, take appropriate corrective action. Providers may not discipline any employee, agent, or contractor solely for reporting under this provision." *Sorenson VRS Call Practice Petition* at App. A, page 9.

6. Transparency and the Disclosure of Provider Financial and Call Data

51. In the *2006 TRS Cost Recovery FNPRM*, the Commission sought comment on whether providers' cost and demand data should be made public so that consumers and others can more meaningfully comment on the Fund administrator's proposed compensation rates.[94] The Commission stated that "[h]istorically, 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. 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."[95] The Commission therefore sought comment 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," and whether there were "other ways to make the rate setting process under the current methodology more transparent."[96] In the *2007 TRS Rate Methodology Order*, the Commission concluded that because it was adopting tiered VRS rates for a three year period, it was not necessary to resolve this issue at that time.[97]

52. More recently, however, as a result of the *2009 VRS Rates NPRM* seeking comment on whether the VRS rates should be modified for the 2009-2010 Fund year,[98] a consumer group filed a *Motion for Protective Order* seeking access to the VRS providers' cost data relevant to the calculations of VRS rates for 2009-2010 based on providers' actual and/or projected costs.[99] The consumer group argued that, absent access to the underlying cost data, they could not meaningfully comment on the appropriateness of any particular VRS rates.[100] Several providers filed oppositions to the motion, arguing that there is no way to guarantee that sensitive proprietary data could be sufficiently protected by a protective order that grants access

[94] *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* CG Docket No. 03-123, Further Notice of Proposed Rulemaking, 21 FCC Rcd 8379, 8398-99, paras. 43-44 (July 20, 2006).

[95] *Id.* at 8398, para. 43 (internal footnote omitted).

[96] *Id.* at 8399, para. 44.

[97] *See 2007 TRS Rate Methodology Order*, 22 FCC Rcd at 20140, 20172-73, paras. 87-88.

[98] *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* CG Docket No. 03-123, Public Notice and Notice of Proposed Rulemaking, 24 FCC Rcd 6029 (May 14, 2009) (*2009 VRS Rate NPRM*).

[99] Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), Motion for Protective Order, CG Docket No. 03-123 (May 20, 2009). Specifically, the consumer group proposed that it have access to the cost data associated with the VRS compensation rates noted in the *2009 VRS Rate NPRM*, subject to a protective order, so that it could more meaningful comment on the appropriate VRS rate.

[100] *Id.*

to their data to consumers.[101] Other commenters, however, asserted that the Commission should allow greater access to the underlying cost data on which VRS rates may be based.[102]

53. The present Fund size is nearly one billion dollars, and these monies are paid to providers to subsidize services Congress has mandated that voice telephone companies offer to persons with hearing and speech disabilities. Congress also mandated that TRS users cannot be required to pay for the service. As a result, the Commission has made clear that the compensation rates are intended to compensate providers for their marginal costs of providing this service. In this context, therefore, it may not be consistent with public policy to allow provider specific cost and demand data to be kept confidential, notwithstanding the present existence of some competition in the provision of service. We also remain concerned that consumers and other stakeholders, as they have previously asserted, cannot meaningfully comment on the appropriateness of the compensation rates without access to the underlying cost and demand data. Further, it is reasonable to consider whether the ratepayers who pay for the costs of VRS should have a right to know the actual costs of providing this service. Finally, all providers are subject to the same service rules, and if all providers are also subject to the same disclosure rules, there may be little disadvantage to any particular provider(s).

54. For these reasons, we seek additional comment on the need for transparency in the costs of providing VRS service that is compensated from the Fund. Specifically, we seek comment on whether we should require that all VRS provider cost and demand data be made available to the public and, if so, how such a requirement should be implemented. We seek comment on how we might balance the legitimate need for transparency of provider costs with any legitimate interest in keeping that information (or some portion of it) confidential. We request that commenters favoring disclosure specifically address the scope of such requirement, how the data should be made public, and any exceptions or limits to a rule requiring disclosure of provider specific cost and demand data.

7. Provider Audits

55. As noted in the *Declaratory Ruling* above,[103] the Commission is authorized to suspend payment to providers who do not submit to audits. We seek comment on whether we should amend the TRS mandatory minimum standards to include more specific and stringent auditing rules in order to better safeguard the integrity of the Fund. Commenters favoring such rules should address the scope and frequency of such audits. For example, should we perform or contract for annual audits of all providers? We seek comment on any other issues related to the auditing of providers to ensure both that the compensation rates are based on legitimate data, and that the minutes submitted for payment were handled in compliance with our rules.

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[101] *See, e.g.,* Sorenson Communications, Inc., Opposition of Sorenson Communications, Inc. CG Docket No. 03-123 (June 1, 2009); AT&T, Inc. *et al.,* Opposition to Motion for a Protective Order (June 1, 2009).

[102] *See, e.g.,* TDI, Telecommunications for the Deaf and Hard of Hearing, Inc. *et al*., CG Docket No. 03-123, at 5-7 (June 6, 2009).

[103] *See* Section III, *supra.*

8. Record Retention

56. The TRS rules do not address how long providers must preserve their call detail and other records that support their claims for payment from the Fund. We seek comment on whether we should amend our rules to specifically address this issue. We recognize that to detect and deter fraud or other call or billing irregularities we must have access to the underlying call data. We note that the Commission's rules require common carriers that offer or bill toll telephone services to retain for 18 months billing information for such calls.[104]

57. We tentatively conclude that we will amend the TRS rules to require Internet-based TRS providers to retain their call detail records, other records that support their claims for payment from the Fund, and those records used to substantiate the costs and expense data submitted in the annual relay service data request form, for five years.[105] We seek comment on this tentative conclusion, and how we might define more specifically the scope of the records subject to this rule.[106]

9. Provider Certification Under Penalty of Perjury

58. In the *Order* above, we adopt interim rule requiring the CEO, CFO, or other senior executive of a relay service provider to certify, under penalty of perjury, that: (1) minutes submitted to the Fund administrator for compensation were handled in compliance with section 225 and the Commission's rules and orders, and are not the result of impermissible financial incentives, or payments or kickbacks, to generate calls, and (2) cost and demand data submitted to the Fund administrator related to the determination of compensation rates or methodologies are true and correct. We tentatively conclude that we should adopt these rules permanently, and seek comment on this tentative conclusion. We also seek comment on whether there are any additional elements that should be covered by these proposed certifications, and, in general, whether there are any additional safeguards that we should adopt as rules to ensure the veracity and completeness of provider submissions, and to help ensure that providers comply with the Commission's TRS rules and policies.

VI. PROCEDURAL MATTERS

59. *Comment Filing Procedures.* Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

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[104] *See generally* 47 C.F.R. 42.1 & 42.6 (preservation of records of communications common carrier); *see e.g.,* 47 C.F.R. § 54.516(a) (requiring a five year record retention time period for the Universal Service Fund School and Libraries).

[105] Five years is the amount of time E-Rate eligible entities are required to retain records in accordance with section 54.516 of the Commission's rules. 47 C.F.R. § 54.516. We find these entities to be similarly situated to VRS providers seeking compensation from the Fund, and therefore tentatively conclude that we should adopt an analogous document retention time requirement.

[106] *See* Appendix C for proposed rule.

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/. Filers should follow the instructions provided on the website for submitting comments.

    - ECFS filers must transmit one electronic copy of the comments for CG Docket No. 10-51. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket number. Parties may also submit an electronic comment by Internet e-mail.

- Paper Filers: 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 due to security measures). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

    - All hand-delivered and/or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. 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.

60. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street SW, Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via email to fcc@bcpiweb.com. Documents in GC Docket No. 10-43 will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th Street SW, Room CY-A257, Washington, D.C. 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

61. 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.[107]

62. 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 document can also be downloaded in Word and Portable Document Format at <http://www.fcc.gov/cgb/dro>.

63. *Ex Parte Rules.* This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[108] 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.[109] Other requirements pertaining to oral and written presentations are set forth in Section 1.1206(b) of the Commission's rules.

64. *Final Regulatory Flexibility Analysis*. The interim rule adopted in this *Order* is being adopted without notice and comment, and therefore are not subject to Regulatory Flexibility Act analysis under 5 U.S.C. § 604(a). We will perform appropriate regulatory flexibility analyses for any permanent rules we adopt at a later date.

65. *Initial Regulatory Flexibility Certification*. With respect to this *Notice*, an Initial Regulatory Flexibility Certification (IRFC) is contained in the Appendix A. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an IRFC 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 IRFC and must be filed by the deadlines for comments on the *Notice* specified in paragraph 59 above. The Commission will send a copy of the *Notice*, including the IRFC, to the Chief Counsel for Advocacy of the Small Business Administration.[110]

66. *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

[107] *See* 47 C.F.R. § 1.48.

[108] 47 C.F.R. §§ 1.200 et seq.

[109] *See* 47 C.F.R. § 1.1206(b)(2).

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

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."

67. *Congressional Review Act.* The Commission will send a copy of this *Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. *See* 5 U.S.C. § 801(a)(1)(A). The interim rule contained in this *Order* shall take effect upon publication of a summary of the *Order* in the Federal Register for the reasons stated therein. *See id.* § 808(2).

VII. ORDERING CLAUSES

68. 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 Order, Declaratory Ruling, and Notice of Proposed Rulemaking IS ADOPTED.

69. IT IS FURTHER ORDERED that this Order shall be effective upon publication of a summary in the Federal Register, pursuant to 5 U.S.C. § 553(d)(3) and section 1.427(b) of the Commission's rules, 47 C.F.R. § 1.427(b), subject to OMB approval for new information collection requirements.

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

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 rulemaking 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 that: (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. In the *Notice*, the Commission reaches tentative conclusions on a range of issues affecting the provision of VRS and ways to detect and prevent fraud and misuse in the VRS program. Specifically, the Commission tentatively concludes that: all VRS call centers must be located in the United States; VRS CAs must work in a centralized call center where other personnel are present, including other CAs and supervisors; the Commission should adopt new rules, affording providers due process, addressing procedures for the suspension or withholding of payments to providers in circumstances where the Fund administrator reasonably believes that the minutes may not be legitimate or otherwise were not submitted in compliance with the TRS rules, but placing the burden on the provider to show that the minutes in question are compensable and were handled in accordance with the TRS rules; VRS calls that originate *or* terminate overseas shall not be compensable from the Fund; a CA should disconnect a VRS call in which the caller's face does not appear on the screen (including when the caller is using a "privacy screen"), or where the call is "idle," for more than two minutes; a rule specifically barring compensation for remote training calls initiated or promoted by or on behalf of a provider would serve as an additional deterrent against fraud and misuse of the Fund; providers must use automated, rather than manual, methods to capture a TRS call's conversation time, to the nearest second, for each call submitted for payment from the Fund; the TRS rules should specifically require that providers file certain call data information in order to eligible for compensation from the Fund, and providers must file it electronically and in a standardized format; providers must file with the Commission and Fund administrator on a quarterly basis a

[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.

statement detailing the name address of each call center the provider owns or controls (including subcontract arrangements), as well as various information concerning the management of such call centers; the Commission should adopt a permanent rule requiring the CEO, CFO, or other senior executive of a provider submitting data to the Fund administrator to make various certifications under penalty of perjury; the Commission should adopt specific whistleblower protection rules for the employees and subcontractors of TRS providers; and Internet-based TRS providers must retain their call detail records, and other records to support their claims for payment from the Fund, for five years.

3. The *Notice* also seeks comment on whether the Commission should prohibit "white-label" Internet-based TRS services -- where non-certified providers offer service and bill the Fund through certified providers -- and on other ways that the Commission can ensure that the entities that actually relay calls are accountable for compliance with the Commission's rules. In addition, it seeks comment on whether -- and if so, how -- VRS provider cost and demand data should be made available to the public, and whether the Commission should adopt more specific and stringent auditing rules in order to better safeguard the integrity of the Fund.

4. With regard to whether a *substantial number* of small entities may be affected by the requirements proposed in this *Notice*, the Commission notes that, of the fourteen providers affected by the *Notice*, no more than five meet the definition of a small entity. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such firms having 1,500 or fewer employees.[6] Currently, fourteen providers receive compensation from the Interstate TRS Fund for providing any form of TRS. Because no more than five of the providers that would be affected by this *Notice*, if adopted, are deemed to be small entities under the SBA's small business size standard, the Commission concludes that the number of small entities potentially affected by our proposed rules is not substantial. Moreover, given that all providers potentially affected by the proposed rules, including those deemed to be small entities under the SBA's standard, would be entitled to receive prompt reimbursement for their reasonable costs of compliance, the Commission concludes that the *Notice*, if adopted, will not have a significant economic impact on these small entities.

5. Therefore, we certify that the proposals in this *Notice*, if adopted, will not have a significant economic impact on a substantial number of small entities.

6. The Commission will send a copy of the *Notice*, including a copy of this Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the SBA.[7] This initial certification will also be published in the Federal Register.[8]

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[6] 13 C.F.R. § 121.201, NAICS code 517110. According to Census Bureau data for 1997, there were 2,225 firms in this category which operated for the entire year. U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 513310 (issued Oct. 2000). Of this total, 2,201 firms had employment of 999 or fewer employees, and an additional 24 firms had employment of 1,000 employees or more. Thus, under this size standard, the majority of firms can be considered small. (The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more.")

[7] 5 U.S.C. § 605(b).

[8] 5 U.S.C. § 605(b).

APPENDIX B

Interim Rule

Part 64 of Title 47 of the Code of Regulations is amended as follows:

Part 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for part 64 continues to read as follows:

Authority: 47 U.S.C. 154, 254(k); secs. 403(b)(2)(B), (C), Public Law 104-104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 225, 226, 228, and 254(k) unless otherwise noted.

* * * * *

2. Section 64.604(c)(5)(iii)(I) is revised to read as follows:

§ 64.604 Mandatory minimum standards.

(a) * * *

(b) * * *

(c) * * *

(5) * * *

(iii) ***

(I) *Information filed with the administrator.* The Chief Executive Officer (CEO), Chief Financial Officer (CFO), or other senior executive of a provider submitting minutes to the Fund for compensation must, in each instance, certify, under penalty of perjury, that the minutes were handled in compliance with section 225 and the Commission's rules and orders, and are not the result of impermissible financial incentives or payments to generate calls. The CEO, CFO, or other senior executive of a provider submitting cost and demand data to the TRS Fund administrator shall certify under penalty of perjury that such information is true and correct. The administrator shall keep all data obtained from contributors and TRS providers confidential and shall not disclose such data in company-specific form unless directed to do so by the Commission. Subject to any restrictions imposed by the Chief of the Consumer & Governmental Affairs Bureau, the TRS Fund administrator may share data obtained from carriers with the administrators of the universal support mechanisms (See 47 CFR 54.701 of this chapter), the North American Numbering Plan administration cost recovery (See 47 CFR 52.16 of this chapter), and the long-term local number portability cost recovery (See 47 CFR 52.32 of this chapter). The TRS Fund administrator shall keep confidential all data obtained from other administrators. The administrator shall not use such data except for purposes of administering the TRS Fund, calculating the regulatory fees of interstate common carriers, and aggregating such fee payments for submission to the Commission. The Commission shall have access to all data

reported to the administrator, and authority to audit TRS providers. Contributors may make requests for Commission nondisclosure of company-specific revenue information under § 0.459 of this chapter by so indicating on the Telecommunications Reporting Worksheet at the time that the subject data are submitted. The Commission shall make all decisions regarding nondisclosure of company-specific information.

APPENDIX C

Proposed Rules

Part 64 of Title 47 of the Code of Regulations is amended as follows:

Part 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for part 64 continues to read as follows:

Authority: 47 U.S.C. 154, 254 (k); secs. 403 (b)(2) (B), (C), Public Law 104-104,

110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 225, 226, 228, and 254 (k) unless otherwise noted.

* * * * *

2. Section 64.604(a) is revised to add paragraphs (a)(3)(ix), (a)(6) and (a)(7) to read as follows:

§ 64.604 Mandatory minimum standards.

(a) * * *

* * * * *

(3) * * *

* * * * *

(ix) Relay calls that enable a person with hearing or speech disability to participate in a remote training program, made available to the public or to an entity's employees, do not fall within the scope of this Subpart.

* * * * *

(6) In addition to those standards set forth above, Internet-based TRS providers shall be subject to the following standards:

(i) *Automated call data collection.* For each Internet-based TRS call, providers must automatically record session and conversation time to the nearest second.

(ii) *Revenue sharing agreements.* The administrator shall not compensate for minutes resulting from an Internet-based TRS call unless the entity seeking compensation from the Fund for such minutes clearly identified itself to the calling parties at the beginning of the call as the TRS provider for the call.

(iii) *Whistleblower protections.* Providers shall permit any employee, agent, or contractor to disclose to a designated manager any known or suspected violations of FCC rules, or any other activity that the reporting person believes to be unlawful, wasteful, fraudulent, or abusive, or that otherwise could result in the improper billing of minutes to the Interstate TRS Fund. Providers must make available at least one means by which such disclosure may be made anonymously. Providers must promptly investigate any report of wrongdoing and, when warranted, take appropriate corrective action. Providers may not discipline any employee, agent, or contractor solely for reporting under this provision. Providers shall also inform all employees, agents, and contractors that they may directly contact the Commission's Office of Inspector General to report wrongdoing.

(iv) *Record retention.* Providers shall retain their call detail records for five years from the date of service, and shall make such records available to the Commission or administrator upon request.

(7) In addition to those standards set forth above, Video Relay Service providers shall be subject to the following standards:

(i) *Idle time or no face on screen.* If either party to a VRS call is away from the call, or otherwise unavailable or unresponsive, for more than two minutes the CA may disconnect the call, except when the call has been placed on hold by a business. If at any time during a VRS call a VRS CA is confronted with only a blank screen (*e.g.,* a privacy screen), or a screen that does not display the face of the video caller, the CA may disconnect the call if the video caller's face does not reappear within two minutes.

(ii) *Call center information*. VRS providers shall file quarterly reports with the Commission and the administrator by March 31, June 30, September 20, and December 31 each year stating the name and address of each call center the provider owns or controls (including call centers owned or operated by subcontractors or entities operating calls centers for a subcontractor), the number of CAs and CA managers at each call center, and the name and contact information for the key managers at each call center. VRS providers shall file an amendment to their most recent quarterly filing within 30 days of opening a call center, closing a call center, or the changing the ownership or management of a call center.

3. Section 64.604(b)(4) is revised to add paragraph (iii) to read as follows:

(b) * * *

(4) * * *

* * * * *

(iii) *Location of call centers.* VRS call centers must be located in the United States.

4. Section 64.604(c)(5)(iii)(E) is revised to read as follows:

§ 64.604 Mandatory minimum standards.

(c) * * *

(5) * * *

(iii) * * *
* * * * *

(E) *Payments to TRS providers*. TRS Fund payments shall be distributed to TRS providers based on formulas approved or modified by the Commission. The administrator shall file schedules of payment formulas with the Commission. Such formulas shall be designed to compensate TRS providers for reasonable costs of providing interstate TRS, and shall be subject to Commission approval. Such formulas shall be based on total monthly interstate TRS minutes of use. TRS minutes of use for purposes of interstate cost recovery under the TRS Fund are defined as the minutes of use for completed interstate TRS calls placed through the TRS center beginning after call set-up and concluding after the last message call unit. In addition to the data required under paragraph (c)(5)(iii)(C) of this section, all TRS providers, including providers who are not interexchange carriers, local exchange carriers, or certified state relay providers, must submit reports of interstate TRS minutes of use to the administrator in order to receive payments. These reports shall include the call record ID sequence, CA ID, session start and end times, conversation start and end times, incoming telephone number or IP address for Internet-based TRS service not subject to the numbering requirements under § 64.611 , outbound telephone number or IP address for Internet-based TRS service not subject to the numbering requirements under § 64.611, total conversation minutes, and total session minutes. In addition, VRS and IP Relay providers shall include in their reports speed of answer compliance data. The administrator shall establish procedures to verify payment claims, and may suspend or delay payments to a TRS provider if the TRS provider fails to provide adequate verification of payment upon reasonable request, or if directed by the Commission to do so. The administrator shall make payments only to eligible TRS providers operating pursuant to the mandatory minimum standards as required in § 64.604, and after disbursements to the administrator for reasonable expenses incurred by it in connection with TRS Fund administration. TRS providers receiving payments shall file a form prescribed by the administrator. The administrator shall fashion a form that is consistent with parts 32 and 36 procedures reasonably tailored to meet the needs of TRS providers. The Commission shall have authority to audit providers and have access to all data, including carrier specific data, collected by the fund administrator. The fund administrator shall have authority to audit TRS providers reporting data to the administrator. The formulas should appropriately compensate interstate providers for the provision of VRS, whether intrastate or interstate.