

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

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

**COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION**

Its Attorneys:

Jonathan Banks
Genie Barton

607 14th Street, NW
Suite 400
Washington, D.C. 20005
(202) 326-7300

July 6, 2009

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction and Summary	1
II. Background	4
A. Forms of TRS.....	4
B. Growth in Video Relay Service	5
C. VRS Reimbursement Rates.....	8
III. A Reexamination of VRS Compensation	9
IV. Improving Oversight and Fighting Fraud, Waste and Abuse	12
A. The Current Record.....	12
B. Remedial Action	16
V. Conclusion	19

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

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

**COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION**

I. Introduction and Summary

The United States Telecom Association (USTelecom),¹ representing communications providers throughout the broadband industry, strongly supports the statutory aims of Title IV of the Americans with Disabilities Act of 1990 (ADA),² which requires that the Commission enable people with hearing and speech disabilities to enjoy access to telecommunications services that are functionally equivalent to those available to individuals without such disabilities.

Telecommunications Relay Service (TRS) is an essential accommodation for people with hearing and speech disabilities and USTelecom is committed to preserving and advancing these services through their members' substantial contributions to the Interstate TRS Fund (Fund) and their provision of TRS services.

The goals of the ADA are being realized as more functionally equivalent telecommunications services are provided to those who need them every year. However, with this growth, comes concern about the efficiency of the Fund. The Fund has grown tremendously,

¹ USTelecom is the premier broadband trade association representing service providers and suppliers for the telecom industry. USTelecom represents companies offering a wide range of services across communications platforms, including voice, video and data over local exchange, long distance, wireless, Internet and cable services.

² The Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, Title IV (1990) (codified at 47 U.S.C. § 225) (requiring common carriers to provide telecommunications relay services for individuals with hearing and speech disabilities).

increasing more than 21-fold in the last 10 years, from \$45.8 million in 2000 to nearly \$1 billion today.³ In particular, Video Relay Service (VRS) has grown very rapidly and now accounts for nearly 87 percent of the overall cost of the Fund.⁴ As the Fund approaches the \$1 billion mark, it is imperative that the Commission and the Fund Administrator ensure that the Fund operates as efficiently as possible. All consumers ultimately pay for TRS through Commission assessments on carriers – and their contributions must be used effectively and in accordance with the FCC’s rules.

USTelecom urges the Commission to address two critical issues: (1) determining the best method of reimbursing VRS providers for their compensable activities; and (2) renewing efforts to identify and eliminate any fraud, waste and abuse.

We commend the Commission for initiating a proceeding to determine what rate methodology will most effectively promote the integrity of the Fund, while assuring the continuing availability of high quality, innovative VRS. The Commission should work with all stakeholders to determine the appropriate VRS rate reimbursement mechanism to further encourage efficiency, fuel innovation and deliver high quality service at competitive rates. Effective outreach to individuals with hearing and speech disabilities to ensure that they have an opportunity to enjoy the transformative influences of functionally equivalent services is also important.

The statute requires that all TRS must be provided “in the most efficient manner”⁵ possible, and, by rule, reimbursements must reflect providers’ “reasonable costs.”⁶ The task of

³ See NECA, *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, (2009) at Exhibit 2 (“2009 TRS Rate Filing”).

⁴ *Id.*

⁵ 47 U.S.C. § 225(b)(1).

⁶ See 47 C.F.R. § 604(c)(5)(iii)(E). Hereinafter as used in these comments “reasonable costs” shall refer to reimbursements authorized under this rule.

meeting these requirements is made more difficult because there is no “market” for relay services in the traditional sense since the relay component of the service is free to end-users. The Commission must therefore find an alternative mechanism for reimbursement that will nonetheless promote efficiency and reimburse providers for only their “reasonable costs.”

Despite these inherent complexities, it is important that the Commission determine the appropriate rate mechanism as soon as possible. The dramatic increase in the size of the Fund in recent years, largely attributable to VRS, could create a tipping point in public support for TRS and threaten the viability of the program unless the Commission exercises careful oversight.⁷

It is essential to ensure that providers are accurately and fairly reimbursed, that VRS minutes of use are legitimate and that these services are offered in an efficient manner. TRS fraud must be vigorously combated. Fraud distorts competition by rewarding dishonest companies and individuals at the expense of those who compete on the basis of quality and innovation. Fraud inflates the costs of communications services for all consumers and it harms both the user community and the consumers who foot the bill.

Ambiguity in the rules opens the door to fraud. Providing greater detail and clarity on the specific VRS provider activities eligible for reimbursement would improve accuracy and promote efficiency. Knowledge that the Commission will take strong enforcement action will also deter questionable practices.

USTelecom seeks to work with the Commission, the disability community and VRS providers to develop and implement meaningful reforms that will preserve the integrity of the Fund, continue to improve the quality of VRS and ensure that all who can benefit from VRS are aware of its availability. The reforms proposed here will further these goals.

⁷ See, e.g. Letter from Ed Bosson to Michael Copps (May 28, 2009) (on file in CG Docket No. 03-123) at 1 (*Bosson Letter*) (“[S]trong actions are needed from the Federal Communications Commission if VRS is to remain a viable public service.”).

II. Background

A. Forms of TRS

TRS, as the FCC explains, “Uses operators, called communications assistants (CAs), to facilitate telephone calls between people with hearing and speech disabilities and other individuals.”⁸ When TRS first began, it consisted solely of a TTY-based system. There are now a number of different forms of TRS that the Commission has approved to meet the statutory goals of Title IV.⁹ Among these is VRS, which, in 2000, became an approved form of TRS – reimbursable, but not mandatory.¹⁰ VRS allows a user with a broadband connection and a video camera or other similar equipment to contact a TRS center and communicate with a video interpreter using American Sign Language (ASL).¹¹ VRS provides a degree of functional equivalency that is not attainable with text-based TRS by allowing those persons whose primary language is ASL to communicate in sign language, just as a hearing person communicates in his or her language. As a result, the conversation between the two end-users flows in near real time

⁸ See <http://www.fcc.gov/cgb/consumerfacts/trs.html> (“A TRS call may be initiated by either a person with a hearing or speech disability, or a person without such disability. When a person with a hearing or speech disability initiates a TRS call, the person uses a TTY or other text input device to call the TRS relay center, and gives a CA the number of the party that he or she wants to call. The CA in turn places an outbound traditional voice call to that person. The CA then serves as a link for the call, relaying the text of the calling party in voice to the called party, and converting to text what the called party voices back to the calling party.”). (last visited June 5, 2009)

⁹ According to the FCC website, the following forms of TRS are currently in use: Text-to-Voice TTY-based TRS; Voice Carry Over; Hearing Carry Over; Speech-to-Speech Relay Service; Shared Non-English Language Relay Services; Captioned Telephone Service, IP Relay Service; IP Captioned Telephone Service; and Video Relay Service. See <http://www.fcc.gov/cgb/consumerfacts/trs.html>, (last visited June 5, 2009)

¹⁰ See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-67, FCC 00-56, ¶ 9 (March 6, 2000)(“*Improved TRS Order*”).

¹¹ See <http://www.fcc.gov/cgb/consumerfacts/videorelay.html> (“The VRS caller, using a television or a computer with a video camera device and a broadband (high speed) Internet connection, contacts a VRS CA, who is a qualified sign language interpreter. They communicate with each other in sign language through a video link. The VRS CA then places a telephone call to the party the VRS user wishes to call. The VRS CA relays the conversation back and forth between the parties -- in sign language with the VRS user, and by voice with the called party. No typing or text is involved. A voice telephone user can also initiate a VRS call by calling a VRS center, usually through a toll-free number.”). (last visited June 5, 2009).

and in a faster manner than with a TTY or other text-based TRS call.¹² In addition, the video system provides a more nuanced medium by allowing the interpreter to use visual cues such as facial expressions and body language to imbue greater meaning to the signed speech than is possible using a more static medium such as text messages. VRS allows for a real conversational give-and-take, in which the parties can interrupt one another, rapidly exchange thoughts and communicate more spontaneously. For these reasons, VRS has become the preferred form of TRS for those who use ASL as their primary form of communication.

B. Growth in Video Relay Service

Due almost exclusively to the growth of VRS and its higher costs, the overall size of the Fund has skyrocketed in recent years, with Fund reimbursements projected to reach almost \$1 billion in 2009-10.¹³ VRS alone now accounts for more than 50 percent of the minutes of use charged to the Fund, and it is almost five times more expensive than the weighted average of all other forms of TRS – thus accounting for approximately 87 percent of all TRS costs.¹⁴ For the upcoming 2009-10 Fund Year, the National Exchange Carrier Association (NECA) projects VRS demand upwards of 123.8 million minutes, with a weighted average rate per minute of \$6.2972.¹⁵ Demand for all other TRS services is estimated at only 86.1 million minutes, with a weighted average rate per minute of \$1.3805.¹⁶ As VRS minutes climb, it is essential to ensure that they represent legitimate user-generated demand, are accurately recorded and accurately reported.

¹² For additional advantages of VRS, *see* <http://www.fcc.gov/cgb/consumerfacts/videorelay.html> (last visited June 5, 2009).

¹³ *2009 TRS Rate Filing* at Exhibit 2.

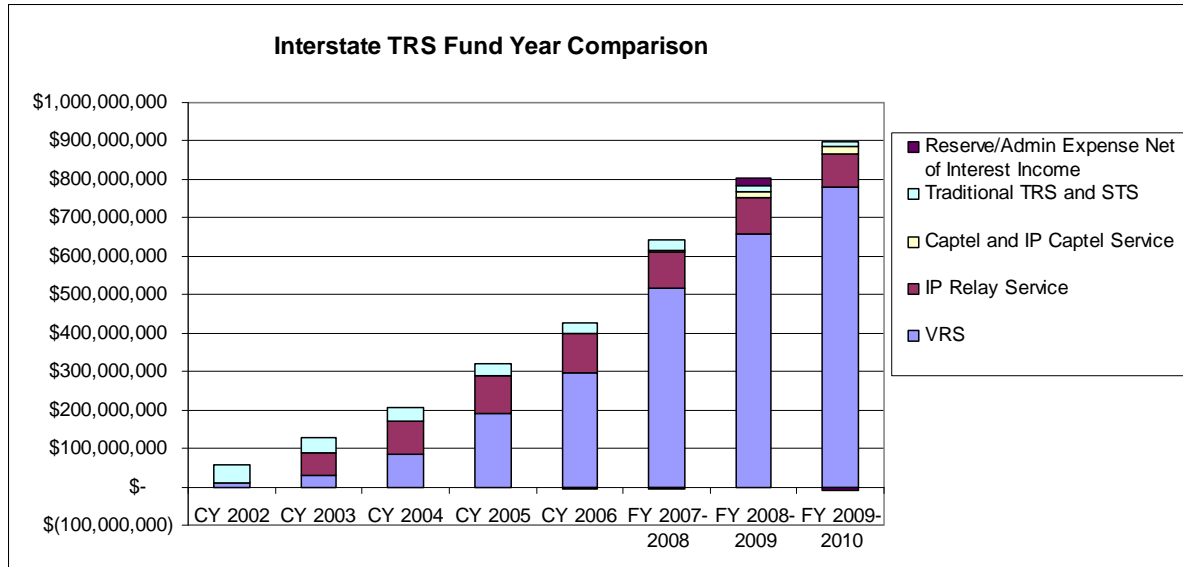
¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

In 2000, the year VRS was introduced, the Fund was \$45.8 million.¹⁷ It is now more than 21 times that size. In the past four years alone, the Fund has more than doubled in size, to \$980,992,075 million for 2009-10 (before application of the prior-year surplus).¹⁸ Chart 1 illustrates the high level of growth in the Fund over the course of the last several years.¹⁹

Chart 1



VRS minutes of use have also grown at an extraordinary rate, from just over 500,000 per calendar year in 2002 to more than 115 million projected for 2009, a compound annual growth rate of 116 percent.²⁰ Chart 2 illustrates the astonishing growth in VRS minutes over the last several years.

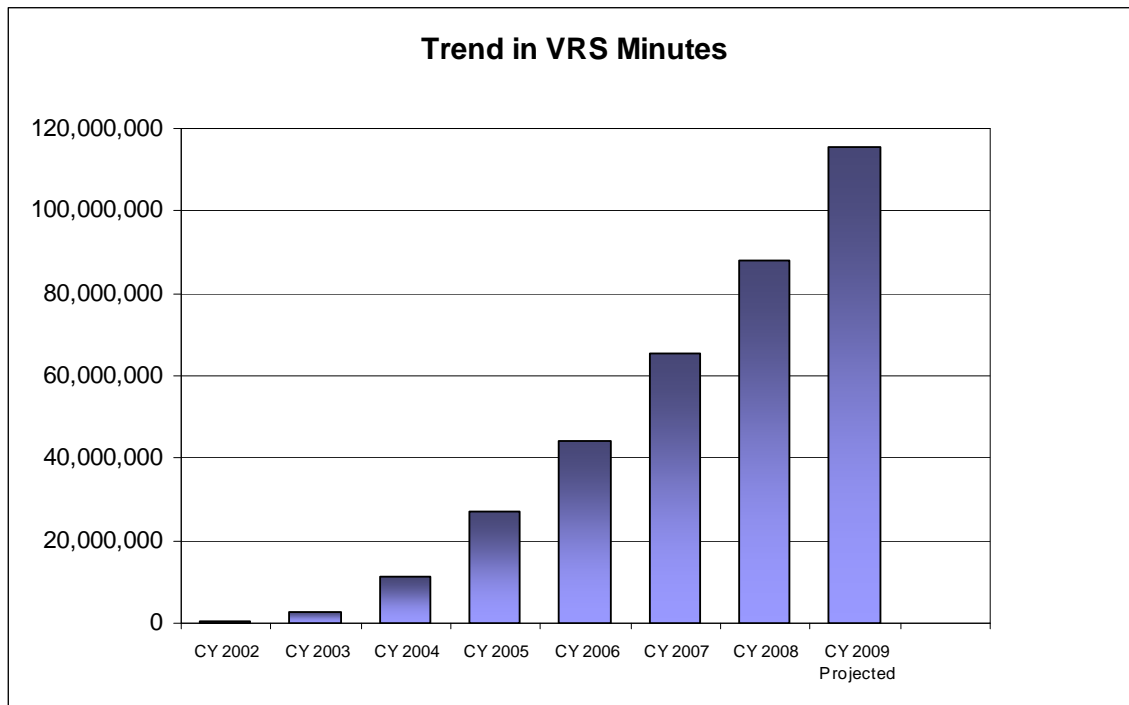
¹⁷ See Telecommunication Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, *Report and Order and Further Notice of Proposed Rulemaking*, 65 FR 38432, ¶ 9 (2000) (“...permit[] the recovery of the costs of both intrastate and interstate [VRS] calls from the interstate TRS Fund.”); see also, *2009 TRS Rate Filing* at Exhibit 2.

¹⁸ *TRS Rate Filing* at Exhibit 2.

¹⁹ Unless otherwise noted, charts herein illustrate data sourced from the *2009 TRS Rate Filing*.

²⁰ *2009 TRS Rate Filing* at Exhibit 3-7.

Chart 2



The popularity of VRS is due to a variety of factors. First, as noted above, VRS is viewed by many as the relay service that most closely achieves functional equivalency because it allows ASL users to communicate in their native language, without having to type out what they want to say. Growth in the use of VRS can also be attributed to the free video phones offered by multiple VRS providers²¹ and the increase in the availability of broadband services. In addition, significant provider reimbursement rates may be encouraging providers to artificially stimulate demand by means of questionable VRS provider marketing practices and other potentially fraudulent activities.

²¹ See “Deception and Distrust: The Federal Communications Commission Under Chairman Kevin J. Martin,” Majority Staff Report, Committee on Energy and Commerce, U.S. House of Representatives, at 4 (Dec. 2008)(citing Memorandum from Tom Chandler, Chief, Disability Rights Office, FCC, “The Interstate TRS Fund and the compensation of TRS providers,” attached as Exhibit 3)(“Majority Staff Report”) available at <http://energycommerce.house.gov/images/stories/Documents/PDF/Newsroom/fcc%20majority%20staff%20report%20081209.pdf> (last visited June 11, 2009).

C. VRS Reimbursement Rates

For the first several years of the service, VRS providers were compensated on a per-minute basis determined by the weighted average per minute cost of all providers. In its *2007 TRS Rate Methodology Order*, the Commission adopted a new cost recovery methodology for VRS that recognized that the greater the call volume, the greater the efficiencies and the lower the cost per minute.²² For that reason, the Commission adopted a tiered-rate methodology based on monthly call volume in order to set rates that would capture the economies of scale and scope of large providers and account for the higher costs of providers that had a lower call volume.²³

As reflected in Chart 3, the Commission established three VRS rate tiers with decreasing rates. Tier I covers the first 50,000 monthly VRS minutes; Tier II includes monthly minutes between 50,001 and 500,000; and Tier III provides compensation for monthly minutes above 500,000.²⁴ These provider-recommended rates were initially set for a three-year period – to be reduced annually by 0.5 percent to reflect productivity gains – at which time the Commission indicated it would re-evaluate the rates.²⁵

Chart 3

Monthly VRS Minutes	2005 - 07 Rates	2007 - 08 Rates	2008 - 09 Rates	2009 - 10 Proposed Rates
First 50,000	\$6.644	\$6.770	\$6.7362	\$6.7025
50,001 to 500,000	\$6.644	\$6.500	\$6.4675	\$6.4352
Above 500,000	\$6.644	\$6.300	\$6.2685	\$6.2372

²² See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Declaratory Ruling, 22 FCC Rcd 20140 (2007) (*2007 TRS Rate Methodology Order*).

²³ See *id.* ¶¶ 47-56.

²⁴ *Id.*

²⁵ *2007 TRS Rate Methodology Order* ¶ 72.

III. A Reexamination of VRS Compensation

Stakeholders' concerns about the dramatic growth of the VRS portion of the TRS Fund have triggered calls by the Commission and the Interstate TRS Advisory Council to carefully examine whether the provider reimbursement methodology currently in place for VRS is optimal. We commend the Commission for undertaking this critical inquiry now and to ensure that as the three-year rate schedule nears its end, a new methodology will be put in place. As similar debates over distribution of universal service funding illustrate, there are competing values and concerns that must be weighed in order to choose among various approaches such as market-based mechanisms, proxy-based models or historical cost-based rate methodologies.

USTelecom seeks to work collaboratively with all other stakeholders – providers, users, and the consumers who contribute to the Fund – to revise the current VRS compensation methodology by appropriately balancing these competing concerns. The goal must be, as it is in the universal service context, to ensure that the Fund is stable, predictable and capable of providing an evolving level of functional equivalency as technologies develop that can better serve the deaf and hard of hearing and speech-disabled communities. At the same time we must ensure that TRS services are secured “in the most efficient manner.”²⁶ TRS, no less than any other subsidized service, must be efficiently provided to ensure that recipients have quality service, to preserve the integrity of the program and to contain costs paid by those who fund the service.

As noted in the *Majority Staff Report*, a Commission memorandum raises questions about whether the Fund is now significantly overcompensating VRS providers.²⁷ USTelecom shares

²⁶ 47 U.S.C. § 225(b)(1).

²⁷ See *Majority Staff Report* at 4-8 and Exhibit 3.

that concern and commends the Commission for launching an inquiry to determine how such problems are best remedied.

There may need to be clarification regarding what costs are “reasonable.” As just one example, the unaudited growth in costs that are being incurred for marketing and outreach by providers is troubling. Industry-wide spending on VRS marketing and outreach was \$19.6 million in 2007.²⁸ This grew to \$29.9 million in 2008 – a 53 percent increase in just one year. For 2008, this represents more than 8 percent of the weighted average costs per minute across all providers.²⁹ USTelecom fully supports the statutory mandate to provide for TRS outreach, but we suggest that outreach has an important public element to ensure effectiveness. Outreach should be planned, coordinated and targeted to reach all potential users. There should be accountability for how funds are expended and evaluation of the results achieved.

An improved approach might allow a reasonable expenditure on branded marketing by providers, but put general responsibility for program outreach in others’ hands. The Commission, for example, could determine with the user communities how much should be allocated for various types of TRS outreach, put out a request for proposal (as was done for the digital TV transition effort) and contract with a professional firm or non-profit entity to conduct TRS outreach – which would include lists and other access to service providers. The Commission would gain control over the reasonableness and efficacy of the money being invested in ensuring that all members of the hearing and speech-disability community have knowledge about and access to all forms of TRS. Similarly, to the extent there is concern about eliminating implicit equipment subsidies in the current VRS rates, the Commission might instead

²⁸ See 2009 TRS Rate Filing at 15.

²⁹ See *id.* Marketing and Outreach is listed as \$0.34 per minute; calculated as portion of total cost per minute of \$4.14.

consider a targeted, explicit equipment subsidy program for those unable to afford video phone devices.

The current reimbursement methodology also provides incentives for questionable practices that may compromise transparency, accountability and quality of service. For example, we now have a situation where uncertified providers team up with certified VRS providers to sell VRS and the companies “share” the revenues earned from submission of claims to the Fund.³⁰

Maintaining a system that overcompensates providers would be fundamentally inappropriate, at least in part because consumers ultimately bear the burden of funding TRS through Commission assessments on their underlying interstate carriers.³¹ Since 2000 when VRS was introduced, the TRS “contribution factor” – the Commission’s mechanism that generates funding for TRS programs – has risen from a 0.04 percent assessment on interstate revenues to an all-time high of 1.137 percent today.³²

Moreover, as the Commission knows well from managing rapid increases in the Universal Service Fund (USF), such growth can lead to inefficiencies and strain scarce oversight resources. Excessive USF provider reimbursements themselves violate the Communications Act. The Tenth Circuit, for example, has repeatedly recognized that “excessive subsidization arguably may affect the affordability of telecommunications services,” thus violating core

³⁰ See Petition for Rulemaking of GoAmerica, Inc., CG Dkt. No. 03-123 (Jan. 23, 2009)(Purple Petition) (suggesting that “the ‘back door has been left open’ for unqualified and uncertified entities to act as relay service providers without adequate oversight through so-called ‘white labeling.’ This 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. . . .The existence of this ‘grey market’ in Internet-based relay inherently poses risks to the integrity of the relay program.”

³¹ 47 U.S.C. § 225(d)(3)(B).

³² See NECA, *Relay Services’ Reimbursement Rate, Contribution Factor & Fund Size History*, https://www.neca.org/portal/server.pt/gateway/PTARGS_0_0_307_206_0_43/https%3B/prodnet.www.neca.org/me dia/RELAYRATESHISTORY_revised_08_13_08.pdf (last checked May 22, 2009).

universal service principles.³³ In the TRS context, excessive provider reimbursement rates may violate section 225(d)(3)(B) if such rates do not reasonably reflect provider “costs.”³⁴

Overpayments to VRS providers may also violate the Commission’s obligation to ensure that relay services are made available “in the most efficient manner.”³⁵

IV. Improving Oversight and Fighting Fraud, Waste and Abuse

Lax oversight and intimations of fraud, waste, and abuse in the VRS program create a significant public perception problem for the Fund. Yet necessary VRS auditing and monitoring programs are still sorely lacking. It is critical for the Commission to get a handle on whether the allegations of abuses of the Fund are true, provide more detail and certainty regarding allowable activities/minutes of use that are reimbursable and institute vigorous audit programs and enforcement actions if problems such as “manufactured minutes” are uncovered.³⁶

A. The Current Record

For several years the FCC’s own Inspector General has called for greater oversight of the Fund in his annual reports.³⁷ In 2007, the Inspector General told then-Chairman Martin that “improving fund administration and the procedures for setting accurate reimbursement rates for service are significant management challenges for the FCC.”³⁸ In a follow-up to his 2007 recommendation for TRS provider audits, in 2008 the Inspector General conducted performance audits of seven TRS providers which collectively accounted for 15 percent of all Fund payments

³³ *Qwest Communications Int’l v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005); see also *Alenco Communications v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000).

³⁴ 47 U.S.C. § 225(d)(3)(B).

³⁵ 47 U.S.C. § 225(b)(1).

³⁶ *Bosson Letter* at 2-3 and n. 3 (Bosson defines “manufactured minutes” as “reimbursable minutes created for the sole purpose of artificially ramping up VRS minutes with calls placed at the direction of (or designed by) VRS providers”).

³⁷ See Office of the Inspector General Semi-Annual Report to Congress (revised) (Dec. 2008) (2008 IG Report), available at http://www.fcc.gov/oig/SAR_Revised_12242008.pdf and Office of the Inspector General Semi-Annual Report to Congress (Dec. 2007) (2007 IG Report), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278589A1.pdf.

³⁸ 2007 IG Report at 13.

between 2006-07.³⁹ The Inspector General warned that risks identified in the TRS audits “could result in rapid cost growth and require higher funding rates.”⁴⁰ He concluded that the Commission needed “to establish cost standards in order to control costs” and “stronger sanctions” to combat waste, fraud and abuse and to improve the internal controls of the Fund administrator.⁴¹

NECA is required under Section 64.604)(c)(5)(iii)(E) of the Commission's rules to “establish procedures to verify payment claims.”⁴² In December 2008, a Majority Staff Report of the House Energy and Commerce Committee on FCC governance found issues concerning possible overcompensation of VRS providers and lack of adequate verification of claims for Fund reimbursement.⁴³ The Staff Report recognized that there were significant concerns with the rate at which reimbursements were set by the Commission.⁴⁴ The Staff Report concluded that “there is substantial evidence that the FCC has failed to set reasonable rates for compensation of TRS providers. As a result, consumers are being significantly overcharged to finance the TRS Fund and TRS providers are being significantly overcompensated.”⁴⁵

Other sources have pointed to questionable practices with respect to minutes of use and reimbursement claims. In its November 8, 2008 *ex parte*, the National Association for State Relay Administration (NASRA) drew to the FCC’s attention a number of questionable marketing schemes that provide financial or other incentives for increased use of VRS and asked for

³⁹ 2008 IG Report at 15-18. The IG also reported that an eighth audit could not be completed because the provider had not complied with the data request. As of this writing no action has been taken for the failure to comply with the audit request.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 47 C.F.R. § 64.604)(c)(5)(iii)(E).

⁵³ Majority Staff Report at 4-8; Exhibit 3.

⁴⁴ *Id.* at 6.

⁴⁵ *Id.* at 7.

clarification as to whether the practices it identified violated FCC rules.⁴⁶ One of these schemes allegedly involved VRS providers offering a fee to independent marketing services that hired hearing disabled persons as telemarketers to induce the independent marketing firm to contract with the particular VRS provider for their marketing efforts or created marketing units themselves to direct calls through their own VRS service.⁴⁷ Additionally, NASRA points out that there are programs in which a subscriber to the VRS service “earns” free equipment by signing up others as subscribers to that VRS provider’s service.⁴⁸

Sorenson Communications filed in support of NASRA’s comments and asked the Commission “to clarify the impermissibility of certain practices” identified by NASRA and to take decisive enforcement action against those that violate Commission rules.⁴⁹ In Sorenson’s view, these practices all violate Commission decisions forbidding offering financial incentives to induce users to increase minutes of use, whether for their own benefit or that of a third party.⁵⁰ Sorenson also drew the Commission’s attention to similar questionable schemes identified in its Comments and Petition for Declaratory Ruling.⁵¹

In his recent letter, Ed Bosson has provided what he calls “a few examples” of ways that VRS providers have allegedly “manufactured minutes” which have been claimed for reimbursement, greatly inflating the total VRS minutes of use.⁵² These included the following:

⁴⁶ See Letter from the Directors of the National Association for State Relay Administration to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 2008).

⁴⁷ *Id.* at 7.

⁴⁸ *Id.* at 8.

⁴⁹ Letter from Ruth Milkman, Counsel to Sorenson Communications, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 03-123, at 1 (Nov. 25, 2008)(“Sorenson NASRA Letter”).

⁵⁰ *Id.* at

⁵¹ Comments and Petition for Declaratory Ruling of Sorenson Communications, Inc., CG Dkt. No. 03-123 pp. 1-9 and Exhibits A-C (April 24, 2009)(detailing various schemes for racking up minutes of use by providing free conferences for adults and free story readings to induce people with hearing disabilities to call in to the provider and passively listen to the material being offered).

⁵² See *Bosson Letter* at 2-3.

- VRS Provider(s) paying a person with hearing loss to make VRS calls to its own VRS call centers, with kickback payments tied to minutes incurred.
- Alternatively, persons with hearing loss are also paid by Providers on an hourly basis to place calls all day long to a pre-supplied list of phone numbers that provide information or news.
- Some providers pre-supply those callers with business numbers that have long wait times to connect to a live person.
- VRS providers forcing its management personnel who have hearing loss and can sign to make multiple video conference calls every day (even though they can have meetings in conference rooms and use their own interpreters instead of utilizing VRS).
- VRS provider creating a to-do list for selected staff to make irrelevant and pointless VRS calls.
- VRS provider contract with a telemarketer to make their marketing/sales calls through VRS provider in return for some kickback funds.
- VRS provider advertising on a website for phone-in classes where persons with hearing loss can call and “listen” to lectures using VRS.
- VRS provider using its deaf salespersons to make VRS calls where they based Return of Investment on number of VRS minutes, not based on the sales hits.⁵³

Bosson believes that these alleged schemes result not only in vastly overstating minutes of use, but also are undermining quality of service, ruining interpreter morale and driving up interpreter costs.”⁵⁴ In his view, vigorous enforcement that stamps out “manufactured minutes”

⁵³ *Id.* at 2-3.

⁵⁴ *Id.* at 3.

will have a number of salutary results including reducing the costs of interpreters, driving unscrupulous operators out of business, improving the quality of VRS service and allowing the Commission to set a reimbursement rate “more in line with market realities.”⁵⁵ USTelecom agrees.

Sorenson’s *Comments and Petition for a Declaratory Ruling* supports in part the Purple Petition that seeks, among other things to prohibit uncertified entities from providing relay service and billing the Fund for reimbursement through certified providers who then take a cut of the reimbursement. USTelecom supports the effort to end this practice. The fact that some of these uncertified providers are apparently participating in schemes to generate minutes of use and are holding themselves out as bona fide providers of VRS, without being subject to the mandatory minimum standards, further illustrates problems with current VRS practices.⁵⁶ Certification protects the user community by ensuring that providers are accountable directly for the quality and confidentiality of the service that they deliver to users. Strong enforcement of the mandatory minimum standards is necessary to ensure that VRS quality does not deteriorate.

B. Remedial Action

The Commission has the tools to combat the problems set forth in the previous section. Section 64.604(c)(5) of the Commission’s rules provides NECA with ample authority to conduct appropriate oversight and examination of the data underlying claims for reimbursement from the Fund and to conduct regular audits of providers.⁵⁷ Provider audits should be conducted on a

⁵⁵ *Id.* at 3-4.

⁵⁶ See Petition for Rulemaking of GoAmerica, Inc., CG Dkt. No. 03-123 (Jan. 23, 2009) (Purple Petition). GoAmerica changed its name to Purple shortly after filing its Petition.

⁵⁷ 47 C.F.R 64.604(c)(5) provides for the collection of necessary data from providers seeking reimbursement. “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

regular basis and examination of a provider's VRS books and records should be undertaken by NECA or by the Commission if there is an indication of irregularities or suspected fraud. In such cases, the Administrator should exercise its authority to withhold payment pending a resolution of the issue under investigation.⁵⁸ But regulatory tools are not enough; resources must be committed to these endeavors. To make meaningful improvements, the Commission must allocate additional personnel and financial resources and make greater control of the TRS program a priority.

Moreover, there is a pressing need for clarification and certainty as to whether some practices violate the TRS rules. Many of the schemes identified above, for example, are not user-generated calls as envisioned by the statute, but ways of generating use.⁵⁹ Such schemes to generate minutes of use do not serve the TRS mission, which is to provide a functionally equivalent way for those with and without hearing and speech-disabilities to communicate. These activities are analogous to the "traffic pumping" schemes that some rural LECs have engaged in the last several years to artificially drive up access charge revenues.

The Commission's "no financial incentives" decisions appear already to forbid many of these practices.⁶⁰ In its *2005 Financial Incentives Declaratory Ruling*, the Commission made

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."

⁵⁸ See 47 C.F.R. 604(c)(5)(iii)(E)(providing that the 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").

⁵⁹ See generally, In The Matter Of Publix Network Corporation; Customer Attendants, LLC, Revenue Controls Corporation; Sigtel, Inc.; and Focus Group, LLC, *Order to Show Cause and Notice of Opportunity for Hearing*, 17 FCC Rcd 11,487 (2002). Irrespective of the merits of programs that employ the deaf, provide conferences or offer other information of interest, programs that are designed to generate minutes of use are not contemplated by the statute and the minutes of use generated by offering them are not generally compensable.

⁶⁰ See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, *Report and Order and Declaratory Ruling*, 22 FCC Rcd 20140, 20173-76, §§ 89-96 (2007) (2007 TRS Cost Recovery Declaratory Ruling), *rev'd in part Sorenson Commc'ns, Inc. v. FCC*, ___F.3d___, 2009 WL 1561430. Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, *Declaratory Ruling*, 20 FCC Rcd 1466, § 1 (Cons. & Govt. Aff. Bur. 2005) (2005 Financial

clear that “[p]rograms directed at giving the consumer an incentive to make a TRS call in the first place, or to place a longer TRS call than the consumer might otherwise make, are prohibited ...”.⁶¹ The Commission explained its reasons for holding that incentive schemes violated the statute: “[t]he fact that any TRS reward or incentive program has the effect of enticing TRS consumers to make TRS calls that they would not otherwise make, which allows the provider to receive additional payments from the Fund, and results in ‘payments’ to consumers for using the service, puts such programs in violation of Section 225.”⁶² In its *2007 TRS Cost Recovery Declaratory Ruling*, the Commission “reaffirm[ed] the *2005 Financial Incentives Declaratory Ruling* and the *2005 TRS Marketing Practices PN*, and “reiterate[d] that providers seeking compensation from the Fund may not offer consumers financial or other tangible incentives, either directly or indirectly, to make relay calls.”⁶³ The Commission also clarified that such programs are not allowed “even in circumstances where the benefit goes to a third party...”⁶⁴

Going forward, the Commission should clarify its rules to prohibit “manufactured minutes” or financial incentives schemes because they do not serve legitimate TRS objectives. In addition, the Commission’s clarification should include more detailed descriptions of those activities that are permissible for reimbursement.⁶⁵ The Commission should prioritize enforcement of these rules. Where the Commission believes that the violation is clear, it should immediately withhold payments and begin an enforcement proceeding against the offending provider.

Incentives Declaratory Ruling); 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, *Public Notice*, 20 FCC Rcd 1471 (2005) (*2005 TRS Marketing Practices PN*).

⁶¹ 20 FCC Rcd

⁶² *Id.* at 1469, § 8

⁶³ *2007 TRS Cost Recovery Declaratory Ruling*, 22 FCC Rcd at 20175, § 92.

⁶⁴ *Id.* at § 93.

⁶⁵ See *Bosson Letter* at 5 (“FCC and its Enforcement Bureau actions clarifying what kind of calls are acceptable will have a trickledown effect on the industry in a matter of months”).

V. Conclusion

USTelecom strongly supports the goals of section 225 of the Act and believes that VRS plays a central role in achieving these goals. Much must be done to ensure that VRS continues to provide functionally equivalent telecommunications services to those whose primary language is ASL. USTelecom agrees that a prompt reexamination of the way providers are reimbursed is essential to maximize the Fund's resources, discourage those who would make a "quick buck" at the expense of consumers and preserve the integrity of the program. USTelecom commends the Commission for taking the first step towards such a reexamination and pledges to work with all stakeholders to achieve real, long-lasting reform.

As part of its reform effort, USTelecom calls upon the Commission to make the Fund a top priority – to undertake the needed rate methodology review, increase oversight and perform audits and take enforcement actions, where necessary. Addressing pending petitions for clarification that certain practices violate the TRS rules should be part of that effort, as well. These steps are necessary to preserve the integrity of the Fund and assure that the important goals of section 225 will to be realized.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION



By: _____

Genie Barton
Jonathan Banks

Its Attorneys

607 14th Street, NW, Suite 400
Washington, D.C. 20005
202-326-7300

July 6, 2009