PRELIMINARY BRIEF FOR RESPONDENTS

Oral Argument Requested

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NOS. 08-9503, 08-9507, 08-9545, 08-9547, 08-9550

SORENSON COMMUNICATIONS, INC., *ET AL.*,

PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,

RESPONDENTS

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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STATEMENT OF RELATED CASES

The agency order on review has not previously been before this Court.

Counsel are not aware of any related cases pending in this or any other Court.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Court lacks jurisdiction to consider a major portion of petitioner GoAmerica's argument because it was not presented to the FCC as required by Section 405(a) of the Communications Act.

2. Whether the FCC has authority under the Communications Act to adopt a declaratory ruling to clarify limitations imposed by the statute, FCC regulations and prior FCC rulings governing how providers of telecommunications relay

services market the services they provide and use customer information and moneys they receive solely as a result of their participation in a government program.

3. Whether the Administrative Procedure Act required the Commission to provide parties notice and opportunity to comment before issuing the *Declaratory Rulings* in this case.

4. Whether the *Declaratory Rulings* are arbitrary and capricious under the Administrative Procedure Act.

5. Whether the *Declaratory Rulings* restrict petitioners' speech in violation of the First Amendment.

JURISDICTION

The Court has jurisdiction pursuant to 47 § U.S.C. 402(a) and 28 U.S.C. § 2342(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Statutory Appendix to this brief.

COUNTERSTATEMENT OF THE CASE

Petitioners seek review of two declaratory rulings issued by the Federal Communications Commission regarding a federal program that provides telecommunications services for persons with hearing and speech disabilities. The rulings were intended to limit (1) schemes by providers designed to artificially boost the

number of calls made through the program and thus inflate their own payments from federal funds; and (2) the use of consumer information that petitioners and other companies providing these services obtain solely because of their participation in the federal program, as well as the use of federal money they receive in order to provide such services. The Commission concluded that reasonable restrictions on the use of such consumer data and federal funds received by service providers were necessary to prevent improper marketing practices and to ensure that the federal funds are used for their intended purpose.

COUNTERSTATEMENT OF THE FACTS

A. BACKGROUND

1. The Regulatory Setting

These consolidated petitions for review challenge of two *Declaratory Rulings* of the FCC concerned with Telecommunications Relay Services ("TRS"). *Telecommunications Relay Services*, 22 FCC Rcd 20140 (2007) and *Telecommunications Relay Services*, 23 FCC Rcd 8993 (2008) (JA __, ___). TRS, mandated by Title IV of the Americans with Disabilities Act of 1990,[1] enables an individual with a hearing or speech disability to communicate by telephone with voice telephone users. This is accomplished through TRS facilities operated by TRS providers, such as petitioners, that are staffed by individuals who relay conversations

[1] Pub. L. No. 101-336, § 401, 104 Stat. 327, 336-69 (1990), adding Section 225 to the Communications Act, 47 U.S.C. § 225.

between disabled persons using various types of assistive communication devices and persons using a standard telephone.

Traditionally, TRS calls have been text-based: the TRS provider serves as the link in the conversation, converting text messages from the caller into voice messages, and voice messages from the called party into text messages for the user. Other forms of TRS have developed, including Speech-to-Speech ("STS"), a form of TRS that allows persons with speech disabilities to communicate with voice telephone users through the use of specially trained communications assistants who understand the speech patterns of persons with disabilities and can repeat the words spoken by that person. Video Relay Service ("VRS") is a more recent form of TRS that enables the VRS user and the TRS provider's communications assistant to communicate via a video link in sign language rather than through text. *See generally Telecommunications Relay Services*, 21 FCC Rcd 8379, 8380-84 (2006) ("*2006 Further Notice*") (JA __).

The provision of TRS is "an accommodation that is required of telecommunications providers, just as other accommodations for persons with disabilities are required by the ADA of businesses and local and state governments."[2] To this end, Section 225 of the Communications Act, 47 U.S.C. § 225, places an obligation on entities offering telephone voice transmission service to also offer TRS so

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[2] *Telecommunications Relay Services*, 19 FCC Rcd 12475, 12545 n.521 (2004) (*2004 TRS Report & Order*).

that persons with hearing or speech disabilities can access their service. Further, Section 225, which codifies the TRS provisions of the ADA, is intended to ensure that TRS "give[s] persons with hearing or speech disabilities 'functionally equivalent' access to the telephone network."[3]

The statute provides that TRS users cannot be required to pay rates "greater than the rates paid for … functionally equivalent voice communications services . . . ." 47 U.S.C. § 225(d)(1)(D). Rather the statute and regulations provide that eligible TRS providers, such as petitioners, offering interstate services and certain intrastate services will be compensated for their reasonable costs of doing so from the Interstate TRS Fund, which is created by mandated contributions from common carriers providing interstate telecommunications services.[4]

The amount of carriers' contributions and TRS providers' compensation are determined by the FCC, which has established a per-minute compensation rate. *See, e.g.*, *2006 Further Notice*, 21 FCC Rcd at 8381-84 ¶¶2-69 (JA __); *Telecommunications Relay Services*, 22 FCC Rcd 20140, ¶ 5 (2007) ("*2007 Declaratory Ruling*") (JA __).[5] The Commission has explained that "[t]his rate is not a 'price'

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[3] *Telecommunications Relay Services*, 13 FCC Rcd 14187, 14188 ¶ 6 (1998) (*1998 TRS NPRM*); *see generally* 47 U.S.C. § 225(a)(3).

[4] *See, e.g.*, 47 C.F.R. § 64.604(c)(5)(iii)(E).

[5] Although the statute and the Commission's rules provide that all common carriers providing telephone voice transmission services are obligated to provide TRS, the Commission's rules allow carriers to provide TRS individually, through designees, through a competitively selected vendor or in concert with other car-

(footnote continued on following page)

that is charged to, and paid by, a service user, but rather is a settlement mechanism to ensure that providers are compensated from the Fund for their reasonable costs of providing service." *Id.*

2. The Further NPRM

In 2006 the Commission issued a *Further Notice of Proposed Rulemaking* in which it sought "comment on a broad range of issues concerning the compensation of providers of telecommunications relay services (TRS) from the Interstate TRS Fund (Fund)." *2006 Further Notice*, 21 FCC Rcd at 8379 (JA __). The Commission sought comment on "numerous issues relating to the cost recovery methodology used for determining the TRS compensation rates paid by the Fund, as well as the scope of the costs properly compensable under Section 225 and the TRS regime as intended by Congress." *Id.* at 8385 ¶7 (JA __).

B. THE RULINGS BEFORE THE COURT

1. The 2007 Declaratory Ruling

In November 2007, the Commission released the *Report and Order and Declaratory Ruling* that is before the Court in this case, addressing a number of issues relating to the provision of TRS. *2007 Declaratory Ruling* (JA __). The report and order portion of that action dealt primarily with TRS compensation rates

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(footnote continued from preceding page)

riers. *See* 47 C.F.R. § 64.603. Non-common carriers, such as GoAmerica and Sorenson, become eligible for compensation from the Interstate TRS Fund pursuant to compliance with requirements set forth in the Commission's rules. *See* 47 C.F.R. §§ 64.604, 64.605.

and is not challenged by petitioners.[6] *See id.* at 20141-179 ¶¶1-88 (JA __). In the declaratory ruling portion of that order, the Commission sought to clarify existing limitations imposed on TRS providers in two areas – (1) financial and other incentives that providers may offer TRS users consistent with FCC rules, and (2) TRS providers' improper use of TRS funds and consumer call records and databases for purposes outside of the provision of TRS. *See id.* at 20180-183 ¶¶89-96 (JA __). GoAmerica challenges both aspects of the *Declaratory Rulings*, while Sorenson challenges only the second aspect.[7]

a. Financial and Other Incentives

With respect to TRS providers' use of offers of financial or other incentives to make TRS calls, the Commission pointed to an earlier ruling that addressed a TRS provider's consumer reward program that was based on call minutes. *2007 Declaratory Ruling*, 22 FCC Rcd at 20180 ¶90 (JA __), *citing Telecommunications Relay Services*, 20 FCC Rcd 1466 (CGB 2005) ("*2005 Financial Incentives Declaratory Ruling*"). That ruling concluded that "any program that involves the use of any type of financial incentives to encourage or reward a consumer for placing a TRS call" violates Section 225. *Id.* at 1466 ¶1 (JA __). The 2005 ruling reasoned that "[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,

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[6] *See* GoAmerica Br. at 13; Sorenson Br. at 10.

[7] *See* GoAmerica Br. at 13; Sorenson Br. at 11.

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." *Id.* at 1469 ¶8 (JA __).

The 2005 ruling explained that the obligation placed on TRS providers is to be available to handle calls consumers choose to make, when they choose to make them, and that "[b]ecause the Fund, and not the consumer, pays for the cost of the TRS call, such financial incentives are tantamount to enticing consumers to make calls that they might not ordinarily make." *Id.* The 2005 ruling concluded that, effective March 1, 2005, "any TRS provider offering such incentives for the use of any of the forms of TRS will be ineligible for compensation from the Interstate TRS Fund." *Id.* at 1469-70 ¶9. The Commission noted that its Consumer and Governmental Affairs Bureau had subsequently emphasized the proscription on such incentive programs in a separate ruling, stating that "offering free or discount long distance service to TRS consumers constitutes an impermissible financial incentive, and that programs 'directed at giving the consumer an incentive to make a TRS call in the first place ... are prohibited.'" *See 2007 Declaratory Ruling*, 22 FCC Rcd at 20181 n.236 (JA __), *quoting Telecommunications Relay Services*, 20 FCC Rcd 12503 (CGB 2005).

The Commission also pointed out that at the same time that the *2005 Declaratory Ruling* was released, it issued a Public Notice addressing impermissible TRS marketing practices. *2007 Declaratory Ruling*, 22 FCC Rcd at 20181

¶91 (JA __).[8] That notice stated, among other things, that "[t]he TRS rules do not require a consumer to choose or use only one VRS (or TRS) provider," and that a "consumer may use one of several VRS providers available on the Internet or through VRS service hardware that attaches to a television."[9] 20 FCC Rcd at 1473 (JA __). In addition, it noted that apparently "some providers use their customer database to contact prior users of their service and suggest, urge, or tell them to make more VRS calls." *Id.* The Public Notice concluded that:

> [t]his marketing practice constitutes an improper use of information obtained from consumers using the service, is inconsistent with the notion of functional equivalency, and may constitute a fraud on the Interstate TRS Fund because the Fund, and not the consumer, pays for the cost of the VRS call. As we have noted, the purpose of TRS is to allow persons with certain disabilities to use the telephone system. Entities electing to offer VRS (or other forms of TRS) should not be contacting users of their service and asking or telling them to make TRS calls. Rather, the provider must be available to handle the calls

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[8] *See Federal Communications Commission Clarifies that Certain Telecommunications Relay Services (TRS) Marketing and Call Handling Practices are Improper*, PUBLIC NOTICE, 20 FCC Rcd 1471 (2005) ("*2005 TRS Marketing Practices Public Notice*").

[9] The Commission pointed out that it had emphasized this requirement in other contexts. For example, in a 2006 ruling, it had said that "'consistent with functional equivalency, all VRS consumers must be able to place a VRS call through any of the VRS providers' service, and all VRS providers must be able to receive calls from, and make calls to, any VRS consumer. Therefore, a provider may not block calls so that VRS equipment cannot be used with other providers' service. In addition, a provider may not take other steps that restrict a consumer's unfettered access to other providers' service. This includes the practice of providing degraded service quality to consumers using VRS equipment or service with another provider's service.'" *2007 Declaratory Ruling*, 22 FCC Rcd at 20181 n. 238, *quoting VRS Interoperability Declaratory Ruling and FNPRM*, 21 FCC Rcd 5442, 5456 ¶ 34 (JA __).

> that consumers choose to make. For this reason as well, VRS providers may not require consumers to make TRS calls, impose on consumers minimum usage requirements, or offer any type of financial incentive for consumers to place TRS calls.

Id. (internal footnotes omitted). The Public Notice also "question[ed] whether there are any circumstances in which it is appropriate for a TRS provider to contact or call a prior user of their service," given that "the role of the provider is to make available a service to consumers ... under the ADA when a consumer may choose to use that service." *Id.*

The Commission in the *2007 Declaratory Ruling* noted that despite these earlier rulings, which had gone unchallenged, it had "continue[d] to discover that TRS providers – particularly VRS and IP Relay providers – offer financial and other incentives for consumers to use their service to make relay calls." *2007 Declaratory Ruling*, 22 FCC Rcd at 20182 ¶92 (JA __). The Commission thus reaffirmed its earlier rulings 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." *Id.* The Commission described a variety of financial and other incentives that it considered impermissible. *Id.*

The Commission also emphasized that "impermissible marketing and incentive practices include calling a consumer and requiring, requesting, or suggesting that the consumer make VRS calls." *2007 Declaratory Ruling*, 22 FCC Rcd at

20182 ¶94 (JA __).[10] The Commission emphasized that the limits it had highlighted in the past and was re-emphasizing in the *Declaratory Ruling* were "compelled by the very nature of TRS and the role of relay providers offering the 'dial tone' for consumers to make 'telephone' calls if and when they choose to make them." *Id.* at 20183 n.244 (JA __).

b. Use of Customer Information

In the final two paragraphs of the *2007 Declaratory Ruling* (paragraphs 95 and 96), the Commission called to the attention of TRS providers statements it had made in previous orders that "TRS customer profile information cannot be used for any purpose other than handling relay calls" and that "providers also may not use a consumer or call database to contact TRS users for lobbying or any other purpose." *2007 R&O and Declaratory Ruling*, 22 FCC Rcd at 20183 ¶95 (JA __), *citing Telecommunications Relay Services*, 15 FCC Rcd 5140, 5175 ¶83 (2000)("*2000 TRS Report & Order*") and *2005 TRS Marketing Practices Public Notice*, 20 FCC Rcd 1471. The Commission added that providers found to be "misusing customer information, will be ineligible for compensation from the Fund." *Id.* at ¶96.[11]

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[10] *2005 TRS Marketing Practices Public Notice*, 20 FCC Rcd at 1473.

[11] In the course of participating in the TRS program, TRS providers obtain customer or call database information that includes individual TRS users' names, addresses, phone numbers, and other personal information, as well as carrier of choice, speed dial numbers, calling card numbers, special needs information, emergency numbers and technical information to provide TRS service to the user. *See, e.g., Telecommunications Relay Services*, 18 FCC Rcd 12379, 12390 n. 64 (2000).

3. The 2008 Declaratory Ruling

In response to a motion for administrative stay of the *2007 Declaratory Ruling* filed by Sorenson, the Commission's staff issued an order granting a stay of paragraphs 95 and 96 of the *Declaratory Ruling* in order to give the agency sufficient time to consider Sorenson's arguments.[12]

After considering Sorenson's claims, the Commission issued a ruling clarifying the language contained in paragraphs 95 and 96 of the earlier decision. *Telecommunications Relay Services*, 23 FCC Rcd 8993 (2008) ("*2008 Declaratory Ruling*") (JA __). The Commission said that it "continue[d] to believe that reasonable restrictions on the use of consumer information are necessary to prevent improper marketing practices and to ensure that interstate TRS funds are used for their intended purpose." *Id.* at 8994 ¶1 (JA __).

The Commission explained first that

> the language in paragraphs 95 and 96 restricting the use of consumer information "for any … purpose," does not prohibit contacts by TRS providers with TRS users that are directly related to the handling of TRS calls. Consistent with the Commission's TRS rules and orders, providers may use information derived from a consumer or call database established in conjunction with Section 225 to contact users as long as it is for purposes *related to the handling of relay calls*.

Id. at 8997 ¶9 (footnote omitted) (JA __). Second, the Commission explained that "providers may not use consumer information obtained through the provision of

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[12] *Telecommunications Relay Services*, 23 FCC Rcd 1705 (CGB 2008) (JA __). The stay subsequently was extended for several weeks. *Telecommunications Relay Services*, 23 FCC Rcd 7443 (CGB 2008) (JA __).

federally-funded relay services, or use funds obtained from the Interstate TRS Fund, to engage in lobbying or advocacy activities directed at relay users." *Id.* at 8998 ¶10 (JA __). The Commission noted that "[e]vidence in the record shows that at least one service provider has bombarded deaf persons with material seeking to persuade them to support the provider's position on matters pending before the FCC" and found that "using revenue from the TRS Fund, or information obtained from end users in the provision of services supported by the TRS Fund, to engage in that kind of advocacy is inconsistent with the purpose of the TRS Fund." *Id.* (footnote omitted).

The Commission rejected arguments that such restrictions on use of customer information and TRS funds conflict with the First Amendment, noting that in the "context of a federally subsidized program, like the TRS Fund, the government 'may certainly insist that these "public funds be spent for the purposes for which they were authorized."'" *2008 Declaratory Ruling*, 23 FCC Rcd at 8998 at ¶11 (JA __), *quoting United States v. American Library Ass'n*, 539 U.S. 194, 212 (2003).

The TRS Fund, the Commission explained, "is designed to ensure that persons with hearing and speech disabilities have access to the telephone system. It was not intended to finance lobbying by TRS providers directed at end users." *2008 Declaratory Ruling*, 23 FCC Rcd at 8998 ¶11 (JA __). The Commission found that it "is under no obligation 'to fund such activities out of the public fisc'" and that it was appropriate, for the same reasons,

> to restrict the use of customer information acquired in the provision of federally subsidized TRS services. A consumer or call database that a service provider develops and maintains through participation in the TRS program is inextricably tied to that federally funded program. Consequently, it is permissible to prohibit the use of that database for purposes unrelated to the handling of relay calls, such as lobbying end users to support a service provider's position before the Commission.

Id. (footnote omitted), *quoting Rust v. Sullivan*, 500 U.S. 173, 198 (1991).

The Commission emphasized that nothing in its rulings here "would prevent a provider from using information and funds from other sources to engage in lawful lobbying or advocacy activities. Thus, this is not an 'unconstitutional conditions' case in which the government 'effectively prohibit[ed] the recipient from engaging in the protected conduct outside the scope of the federally funded program.'" *Id.* at ¶12, *quoting Rust v. Sullivan*, 500 U.S. at 197. "TRS providers are," the Commission pointed out, "free to use those resources outside the scope of the TRS program to support their positions before the Commission." *Id.*

SUMMARY OF ARGUMENT

The *Declaratory Rulings* issued by the FCC here were within the agency's authority under the Communications Act, were reasonable and were consistent with the First Amendment.

The Court lacks jurisdiction over GoAmerica's challenge to the limitations on the use of financial incentives and marketing practices to artificially boost the number of TRS calls. Those arguments were not made to the Commission by GoAmerica or others, and Section 405(a) of the Communications Act, 47 U.S.C.

§ 405(a), requires arguments to be presented first to the agency before they may be raised on judicial review.

Contrary to petitioners' claims, the FCC possesses ample statutory authority to adopt declaratory rulings to clarify statutory provisions, agency regulations and prior agency rulings. That was the express purpose of the *Declaratory Rulings* at issue here. Section 225(d) of the Act gives the FCC broad authority to "prescribe regulations to implement" Section 225, and those regulations must include, at a minimum, "functional requirements, guidelines, and operations procedures for telecommunications relay services." 47 U.S.C. § 225(d). Likewise, Section 225(b)(1) directs the Commission to "ensure that … telecommunications relay services are available, to the extent possible and in the most efficient manner …." 47 U.S.C. § 225(b)(1). Finally, Section 201(b), 47 U.S.C. § 201(b), authorizes the Commission to take action "as may be necessary in the public interest to carry out the provisions of this Act."

GoAmerica's argument (not supported by Sorenson) that the Commission unlawfully failed to provide notice and comment as required for a rulemaking proceeding under the APA is incorrect. Whether the *Declaratory Rulings* are viewed as an exercise of the Commission's authority to issue "interpretative" rulings (5 U.S.C. § 553(b)(3)(A) or an exercise of its adjudicative authority under the APA "to issue a declaratory order to terminate a controversy or to remove uncertainty"

(5 U.S.C. § 554(e)), the rulings were not subject to the notice and comment procedures imposed by the APA on other matters.

The FCC's reiteration and clarification of its earlier rulings restricting financial incentives and marketing practices of TRS providers encouraging TRS users to make TRS calls that they otherwise would not make was reasonable. The Commission repeatedly has emphasized the unique circumstances of TRS. Non-disabled customers pay for their telephone service, but TRS users do not pay for TRS calls. Because TRS providers, instead, are compensated from the federal TRS Fund for the service they provide, incentive programs can easily entice users to make calls that they otherwise would not make. Contrary to GoAmerica's claims, such incentive programs have nothing to do with the statutory requirement that speech and hearing impaired persons be provided with "functionally equivalent" access to the telephone network. As the FCC has noted repeatedly, it has a duty to protect the integrity of the TRS fund. The limit on marketing incentives is a reasonable method for the agency to implement that duty.

Similarly, the *Declaratory Rulings'* restrictions on TRS providers' use of customer data and TRS Fund reimbursements for lobbying and advocacy activities are reasonable. The Commission correctly pointed out that the purpose of the statutory provisions establishing TRS was to provide persons with speech and hearing disabilities access to the telephone network and was not to facilitate communications initiated by a provider for purposes unrelated to the handling of calls. Making

clear, as the *Declaratory Rulings* did, that TRS providers are restricted to using customer data and TRS Fund moneys for purposes directly related to making TRS calls was a reasonable, indeed unexceptional, explication of the statutory scheme.

Petitioners' arguments that the *Declaratory Rulings* are an unconstitutional restriction on speech in violation of the First Amendment are also without foundation. The Commission correctly concluded that the Supreme Court's decision in *Rust v. Sullivan* is controlling on this issue. The Court's holding there that Congress has authority to insist that "public funds be spent for the purposes for which they were authorized" (500 U.S. at 196) is directly applicable to this case. The Commission has found that use of customer data and TRS Fund moneys for lobbying and advocacy activities directed to TRS users is inconsistent with the purpose of TRS as established by Congress in the Communications Act. Moreover, rather than prohibiting speech, the Commission's rulings simply bar misuse of customers' private information and help channel federal funds toward federal goals.

There is no basis for the suggestion that the government cannot limit what grantees or contractors do with citizens' private information they obtain through their participation in a government program such as the provision of TRS. Certainly, petitioners provide no basis for their argument that limiting their use of such information to purposes directly related to the provision of TRS – the only reason they have the information to begin with – is a violation of their First Amendment speech rights.

Petitioners' argument that *Rust* is inapplicable because they are not grantees but receive moneys from the TRS Fund as payment for services fails as well. Rust contains no discussion of such a distinction, but held as a general matter that it was appropriate for the government to prevent private entities' use of the government's programmatic funds on activities "outside the scope of the federally funded program." 500 U.S. at 193. That general principle is equally applicable here. However, even if there were such a distinction, it would not assist petitioners here because the TRS compensation scheme makes them more like grantees than contractors. The Commission had held that TRS compensation is intended to permit recovery only of providers' actual reasonable cost of providing service. It is therefore entirely consistent with the First Amendment for the Commission to expect TRS providers to use the money received to actually provide service.

GoAmerica's additional argument, in which Sorenson does not join, that the rulings' restrictions on its marketing practices are an unconstitutional limitation on its commercial speech, even if properly before the Court, also fails. The rulings fall well within the principles applicable to regulation of commercial speech. Specifically (1) the Commission plainly has a substantial interest in protecting the integrity of the TRS Fund; (2) the restrictions on financial and other marketing incentives directly advance that interest; and (3) the restrictions are narrowly tailored because the only speech that the rulings restrict is the speech that itself creates the

problem – speech that involves the marketing practices that artificially increase call volumes and deplete the Interstate TRS Fund.

ARGUMENT

I. STANDARD OF REVIEW

A reviewing court may reverse an agency's determinations only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Under that highly deferential standard, the Commission need only articulate a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983); *see Qwest Communications, Int'l, Inc. v. FCC*, 398 F.3d 1222,1229 (10th Cir. 2005). The Court's "review is ultimately a narrow one." *Maier v. EPA*, 114 F.3d 1032, 1039 (10th Cir. 1995). Contrary to petitioner GoAmerica's claim (Br. at 16), the Court does not exercise *de novo* review of an arbitrary and capricious claim. The Court "is not free to substitute its own judgment for that of the agency, but instead must uphold the agency if there is a rational basis for [the agency's] decision." *Northwest Pipeline Corp. v. AFERC*, 61 F.3d 1479, 1486 (10th Cir. 1995); *see also Mainstream Marketing Services, Inc. v. FTC*, 358 F.3d 1228, 1248 (10th Cir. 2004)("arbitrary and capricious" standard of review is "narrow"); *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 300 (D.C. Cir. 2003)(The Court "presume[s] the validity of the Commission's action and will not intervene

unless the Commission failed to consider relevant factors or made a manifest error in judgment.").

The *Declaratory Rulings* at issue here involve interpretations of Section 225 of the Communications Act and prior FCC rulings. Under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) the Court must defer to the agency's interpretation of an ambiguous provision in a regulatory statute that the agency administers if the agency adopts a plausible interpretation of the ambiguous provision. *See McGraw v. Barnhart*, 450 F.3d 493, 500 (10th Cir. 2006); *Albuquerque v. Browner*, 97 F.3d 415, 421-22 (10th Cir. 1996) (agency construction of statute it administers entitled to deference). The Court has recognized that "'administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *Newton v. FAA*, 457 F.3d 1133, 1136-37 (10th Cir. 2006), *quoting United States v. Mead*, 533 U.S. 218, 226-27 (2001). Likewise, this Court has held that an agency's interpretation of its own rulings or regulations is "entitled to great deference" on judicial review. *Newton*, 457 F.3d at 1137.[13]

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[13] GoAmerica argues that deference is not appropriate because it raises constitutional arguments, *citing U S West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999). Br. at 17. *Chevron* deference does not disappear, however, "at the mere mention of a possible constitutional problem; the argument must be serious."

(footnote continued on following page)

II. THE COURT LACKS JURISDICTION TO CONSIDER GOAMERICA'S ARGUMENTS WITH RESPECT TO THE FINANCIAL INCENTIVES AND MARKETING PRACTICES PORTION OF THE DECLARATORY RULINGS.

Insofar as GoAmerica challenges those portions of the *Declaratory Rulings*, set out at paragraphs 89 to 94 of the *2007 Declaratory Ruling*, holding that TRS providers may not use financial incentives or other marketing practices encouraging users to make TRS calls they otherwise might not make, its claims are barred by Section 405(a) of the Communications Act. *See* 47 U.S.C. § 405(a).[14] That provision specifies that filing a reconsideration petition before the Commission is "a condition precedent to judicial review ... where the party seeking such review ... relies on questions of fact or law upon which the Commission ... has been afforded no opportunity to pass." *Id.*; *see, e.g., Sprint-Nextel Corp. v. FCC*, 524 F.3d 253, 256-57 (D.C. Cir. 2008). *See Tele-Communications, Inc. v. Commissioner of Internal Revenue*, 12 F.3d 1005, 1007 (10th Cir. 1993) ("The general rule is that an appellate court will not consider an issue raised for the first time on appeal.").

(footnote continued from preceding page)

National Mining Ass'n v. Kempthorne, 512 F.3d 702, 711 (D.C. Cir. 2008). It likewise argues that the *Declaratory Rulings* should not be given deference because they were issued without notice and comment, *citing Southern Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 828 (10th Cir. 2000). In that case, however, the Court was faced with draft policies that had been published for comment, but not yet finalized, so it "[had] no current interpretation in front of us that has been formally adopted by the agency" to which it could give deference. *Id.* at 829. In this case, by contrast, the FCC has made a final decision, and its considered opinion should be given deference.

[14] Sorenson does not challenge those portions of the *Declaratory Rulings*. Sorenson Br. at 11.

GoAmerica did not file a petition for reconsideration challenging these portions of the *2007 Declaratory Ruling*. Nor does it offer any citation in its brief to indicate that either it or others ever raised below in any other form the constitutional and statutory arguments it makes against these portions of the *Declaratory Rulings*.

We are aware of one party that made a passing reference, in an *ex parte* letter following the release of the *2007 Declaratory Ruling*, to the lawfulness of the financial incentives and marketing practices restrictions in the context of stating that it "supports much of the declaratory ruling which addresses certain abusive marketing practices …" Letter from George L. Lyon, Jr. Counsel, Hands On Video Relay Services, Inc. to Marlene Dortch (Dec. 11, 2007) ("*Hands On Ex Parte*") (JA __). The letter, however, focused primarily on the restrictions in paragraphs 95 and 96 of the *2007 Declaratory Ruling*, which we acknowledge were clearly before the Commission as a result of Sorenson's administrative stay motion. Insofar as the *Hands On Ex Parte* raised questions about the ruling's discussion of TRS providers' marketing practices, it did no more than "point out" circumstances and did not make an argument. *Northwestern Indiana Tel. Co. v. FCC*, 824 F.2d 1205, 1210 n.8 (D.C. Cir. 1987)(merely "point[ing] out" a circumstance without making an explicit argument is ordinarily inadequate to give FCC opportunity to pass on issue within meaning of Section 405(a)). The most that could be said of the *ex parte* letter is that Hands On presented "the grist [of an argument], but nothing was

made of it," as required by Section 405(a). *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 739 (D.C. Cir. 1976).

Moreover, even if the Hands On *ex parte*, when read in isolation, was sufficient to preserve these claims, GoAmerica would be barred from relying on the letter here because the company implicitly disavowed these claims before the Commission. *See Busse Broadcasting Corp. v. FCC*, 87 F.3d 1456, 1461 (D.C. Cir. 1996) (where a party seeking review "seem[s] to abandon its argument … by taking inconsistent positions," the Commission has not been afforded a fair opportunity to pass on an issue). GoAmerica (as well as Hands On, Sorenson, and other providers) signed a separate January 11, 2008 *ex parte* letter to the Commission proposing that the Commission modify *only* paragraphs 95 and 96 of the *2007 Declaratory Ruling*. *See* Letter of Jan. 11, 2008 to Catherine Seidel (JA __).[15] The letter stated that the signers "support the Commission's goals of protecting user privacy and preventing the use of improper financial and similar incentives to stimulate TRS demand …." *Coalition Ex Parte* at 1 (JA __). The letter proposed language to prohibit use of "user-specific consumer or call data in furtherance of *an incentive scheme barred by paragraphs 89-94 of this Declaratory Ruling* or by previous FCC decisions, or in ways that would violate the reasonable privacy expectations of TRS users." *Coalition Ex Parte* at 2 (JA __) (emphasis added).

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[15] The letter was cited in the *2008 Declaratory Ruling* and referred to as the *Coalition Ex Parte*. *See* 23 FCC Rcd at 8996 n.22 (JA __).

Since GoAmerica signed a letter effectively endorsing paragraphs 89-94 of the *2007 Declaratory Ruling*, it clearly did not give the Commission a reasonable opportunity to pass on its (unarticulated) objections to those same paragraphs.

Finally, GoAmerica may contend that these portions of the *2007 Declaratory Ruling* took it by surprise, so it had no opportunity to submit its arguments to the Commission before they were adopted. It is settled, however, that "even when a petitioner has no reason to raise an argument until the FCC issues an order that makes the issue relevant, the petitioner must file 'a petition for reconsideration' with the Commission before it may seek judicial review. 47 U.S.C. § 405(a)." *In re Core Communications, Inc.*, 455 F.3d 267, 277 (D.C. Cir. 2006); *see also Qwest Corp. v. FCC*, 482 F.3d 471, 474-77 (D.C. Cir. 2007).

Accordingly, the Court lacks jurisdiction to consider GoAmerica's arguments directed at paragraphs 89 to 94 of the *2007 Declaratory Ruling*, and the Court should dismiss its petition for review insofar as it seeks review of that portion of the *Declaratory Rulings*.

III. THE DECLARATORY RULINGS ARE STATUTORILY PERMISSIBLE AND REASONABLE.

A. The FCC Acted Within Its Statutory Authority In Adopting The Declaratory Rulings.

Both petitioners contend that the Commission acted outside of its statutory authority in adopting the *Declaratory Rulings'* restrictions on use of TRS customer information and funds. *See* Sorenson Br. at 38, GoAmerica Br. at 50. Those argu-

ments are baseless. Congress has conferred on the Commission express authority, indeed the duty, to implement and enforce the provisions of the Communications Act governing TRS. *See, e.g.*, 47 U.S.C. § 225(b)(1)("[T]he Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible *and in the most efficient manner*, to hearing-impaired and speech-impaired individuals in the United States" (emphasis added)); § 225(d) (directing FCC to "prescribe regulations to implement" Section 225, "including regulations that . . . establish functional requirements, guidelines, and operations procedures for telecommunications relay services").

The Commission's clarifications and emphasis in the *Declaratory Rulings* on TRS providers' responsibilities were based on the agency's conclusion that reasonable restrictions on the use of customer information and TRS funds received by providers are "necessary to prevent improper marketing practices and to ensure that interstate TRS funds are used for their intended purpose." *2008 Declaratory Ruling*, 23 FCC Rcd at 8996 ¶8. Regulation based on such findings is squarely within the agency's authority to ensure that TRS are made available in "the most efficient manner" (47 U.S.C. § 225(b)(1)) and to "establish functional requirements" and "guidelines" for TRS (47 U.S.C. § 225(d)(1)).

Sorenson argues (Br. at 40-41) that Congress restricted Commission regulations governing TRS to the seven subject areas specifically listed in Section 225(d)(1). Similarly, GoAmerica contends that the Commission lacked statutory

authority to adopt the *Declaratory Rulings* because Section 225 does not "direct or even contemplate the FCC restricting communications between Providers and Users" (Br. at 52). These arguments fail at the threshold because the restrictions at issue here plainly fall within one of the subject areas specified in Section 225(d)(1), *i.e.*, "functional requirements, guidelines, and operations procedures for telecommunications relay services." 47 U.S.C. § 225(d)(1)(A). Moreover, even if this were not the case, petitioners' argument would fail in light of the statutory language on which they attempt to rely. Section 225(d)(1) states that the Commission shall "prescribe regulations to implement this section, *including* regulations that" address the seven specified areas to which Sorenson points. *Id.* (emphasis added). It is obvious that the use of the term "including" demonstrates that the seven areas specified in subsections (A) – (G) were illustrative, not limiting.

Indeed, this Court has recognized that "'include' is defined as 'to place, list, or rate as a part or component of a whole or of a larger group, class, or aggregate.' WEBSTER'S THIRD NEW INT'L DICTIONARY, 1143 (1993). The Supreme Court has noted that the term 'including' 'is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.' *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941)(citations omitted)." *DirecTV v. Crespin*, 224 Fed.Appx. 741, 748 (10th Cir. March 16, 2007)(unpublished); *see also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189 (1941). So too here; there is nothing in Section 225 of the statute to suggest that Congress

intended to limit the Commission's broad regulatory authority to "implement" the TRS statute to the specific, illustrative categories set out in Section 225(d)(1).

Sorenson cites inapposite cases illustrating the obvious proposition that there are limits on the FCC's exercise of its authority. *See* Br. at 38-42. In *Motion Picture Ass'n of America v. FCC*, 309 F.3d 796 (D.C. Cir. 2002), for example, the court found that where no other provision of the Act authorized the Commission to adopt the rules in question, it could not rely solely on its ancillary authority as a basis to adopt rules significantly implicating the content of television programming. Here, by contrast, Congress has conferred on the Commission explicit authority to implement TRS (s*ee* 47 USC § 225), and the Commission's actions are directly related to that authority. Moreover, Sorenson's reliance on *Motion Picture Ass'n* for the proposition that "it will not be lightly presumed that Congress implicitly delegated to an agency the authority to abridge freedom of speech" (Br. at 39) is relevant only if the Commission's action here abridges freedom of speech. As we discuss below, it does not.

Similarly, in *American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005), the court found that the Commission's regulations reached into an area – regulation of consumer electronic devices when those devices are no longer engaged in the process of wire or radio communications – that exceeded the agency's authority. Here, by contrast, the subject of the Commission's restrictions

– TRS Fund compensation and customer information derived from the provision of TRS – is directly within the Commission's authority under 47 U.S.C. § 225.

In addition to the specific authority contained in Section 225, the FCC has ample authority pursuant to other provisions of the Communications Act to adopt the *Declaratory Rulings*. For example, Section 201(b) of the Act, 47 U.S.C. § 201(b), provides that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." The Supreme Court, construing the FCC's authority under Section 201(b), has held that Congress's decision to insert a new statute into the Communications Act meant that the FCC had authority, pursuant to the provisions of Section 201(b), to carry out the provisions of the new statute by adopting rules as it concludes are necessary. *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 377-78 (1999). The Court added there that it is "not peculiar that the [Congressionally] mandated regulations should be specifically referenced, whereas regulations permitted pursuant to the Commission's § 201(b) authority are not." *Id.* at 385; *see also Alliance for Community Media v. FCC*, 529 F.3d 763, 774 (6th Cir. 2008)(statutory silence as to specific authority in a provision like Section 225 "does not divest the agency of its express authority [under Section 201(b)] to prescribe rules interpreting that provision."). In this case, Congress placed the TRS statute into the Communications

Act, and can be presumed to have known that Section 201(b) would therefore give the agency general rulemaking authority to implement the program.[16]

The Commission's authority to adopt rules and issue orders under this statutory provision, in addition to the specific provisions of Section 225, provide ample statutory authority for the *Declaratory Rulings'* interpretive rulings at issue here. Petitioners' apparent view that Congress, in directing the Commission to establish the TRS program and "prescribe regulations to implement" the program, somehow did not give the Commission the requisite authority to take appropriate steps to safeguard the TRS Fund's integrity and to ensure that funds are used for activities consistent with the purposes of the program is meritless.

B. The FCC Acted Reasonably In Adopting The Declaratory Rulings.

1. The Declaratory Rulings Complied With The APA.

GoAmerica, but not Sorenson, contends that the Commission failed to comply with the notice and comment requirement of the legislative rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. 553(b). In fact, the *Declaratory Rulings* are consistent with APA procedural requirements. The rulings involve an "interpretative rule" that is not subject to the notice and comment requirement of the APA. 5 U.S.C. § 553(b)(3)(A). *See Lincoln v. Vigil*, 508 U.S. 182, 195

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[16] *See also* 47 U.S.C. § 154(i)(providing authority for the Commission to issue orders it concludes "may be necessary in the execution of its functions."); *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1404 (D.C. Cir. 1996) (describing Section 154(i) as the "necessary and proper" clause of the Communications Act).

(1993). An interpretative rule is one "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995). In contrast to a legislative rule, in which the agency creates new rights or obligations, an interpretative rule provides "the agency's opinion as to what the governing statute means." *American Trucking Ass'n, Inc. v. United States*, 688 F.2d 1337, 1342 (11th Cir. 1982). Interpretative rules "merely clarify or explain existing law or regulations." *D.H. Blattner & Sons, Inc. v. Secretary of Labor*, 152 F.3d 1102, 1109 (9th Cir. 1998).

GoAmerica claims that the *Declaratory Rulings* come within the rulemaking provisions of the APA because they "are FCC statements prescribing law or policy with significant future effect." Br. at 42. In this case, however, the FCC simply clarified its interpretation of Section 225 of the Communications Act as set out several times in earlier rulings. In these earlier rulings, as we have discussed above (*see* pp. 8-9), the Commission had repeatedly held that any marketing and financial incentive programs designed to encourage TRS users to make calls they otherwise would not make were in violation of Section 225. *See 2007 R&O and Declaratory Ruling*, 22 FCC Rcd at 20180-83 ¶¶89-96; *2008 Declaratory Ruling*, 23 FCC Rcd at 8993-96 ¶¶1-7. Moreover, the Commission's clarification of the restrictions on providers' use of customer information was based on a rule the agency had adopted in 2000 requiring, among other things, that customer "data may not be used for any purpose other than to connect the TRS user with the called parties desired by that

user." 47 C.F.R. § 64.604(c)(7); *see 2007 Declaratory Ruling*, 22 FCC Rcd at 20183 ¶95 & n.245 (JA __).

"Merely because a rule has a wide-ranging effect does not mean that it is 'legislative' rather than 'interpretative.'" *British Caledonian Airway, Ltd. v. CAB*, 584 F.2d 982, 989 (D.C. Cir. 1978). And in *British Caledonian Airway*, the D. C. Circuit added:

> The Board's order does not establish new controls pursuant to its authority under the Act, but rather only explains what the extant statutory-regulatory system entails with respect to a single item. This is, by its very nature a declaratory interpretation, not a legislative-type promulgation. We have recently held that an agency need not resort to rulemaking proceedings to interpret a statute or regulation and thereby remind its regulatees of the content of their obligations, even if in so doing an arguable new obligation is imposed on them.

Id. at 991, *citing Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 599-601 (D.C. Cir. 1973)("If the Commission is simply reminding [regulatees] of an already existing duty, rulemaking is not required."). The most that could be said for GoAmerica's argument is that the *Declaratory Rulings*, in clarifying the agency's view of what is required under Section 225 of the statute, imposed an "arguable new obligation" on GoAmerica limiting its ability to increase the volume of its TRS business and thereby the costs to the TRS Fund. However, in so doing the Commission was simply "remind[ing] its regulatees of the content of their obligations" under the statute and its rules, something that it has done repeatedly in the past. *See Yale Broadcasting*, 478 F.2d at 600 & n.21 (holding that it is "entirely reasonable for the Commission to issue 'reminders' referring to specific areas when such prob-

lems exist" without engaging in rulemaking and noting specific situation in the past where the Commission had issued such reminders).

The rulings also were procedurally proper as an exercise of the Commission's adjudicative authority under Section 5(d) of the APA "to issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e); *see Qwest Services Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007) (declaratory ruling can be a form of adjudication under the APA). The rulings' purpose was to clarify the limitations imposed by the statute and prior FCC rulings on (i) TRS providers' attempts to encourage use of TRS services through financial incentives and marketing practices and (ii) TRS providers' use of information about their customers and funds they obtained from the TRS Fund through the provision of TRS services. *See 2008 Declaratory Ruling*, 23 FCC Rcd at 8997-99 ¶¶9-14. The decision whether to proceed by rulemaking or adjudication lies within the agency's discretion. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). This is true "regardless of whether the decision may affect agency policy and have general prospective application." *Chisholm v. FCC*, 588 F.2d 349, 365 (D.C. Cir. 1976). As adjudicatory orders adopted pursuant to 5 U.S.C. § 554(e), the *Declaratory Rulings* here are not subject to the notice and comment and other requirements of the APA for legislative rules. *See* 5 U.S.C. § 553.

2. Financial Incentives And Marketing Practices

If the Court concludes that it has jurisdiction to consider GoAmerica's arbitrary and capricious challenges to the *Declaratory Rulings'* conclusions regarding financial incentives and marketing practices, arguments in which Sorenson does not join,[17] the Court should reject them.

The core of GoAmerica's argument is that the *Declaratory Rulings* "make it impossible for Providers to have the same relationship with Users that telephone companies have with their non-disabled customers, and this cannot be reconciled with the 'functionally equivalent' mandate." Br. at 63. This is a bizarre application of the statutory directive to provide functionally equivalent services for persons with speech or hearing disabilities. TRS providers, as the Commission has pointed out repeatedly, inherently do not have the same relationship with their users as telephone companies when it comes to the cost of the service: non-disabled customers pay for their telephone service, but TRS users do not pay for TRS calls. Because TRS providers are compensated for TRS calls by the federal fund, not users, an incentive program can easily "entic[e] consumers to make calls that they might not ordinarily make.'" *2007 Declaratory Ruling*, 22 FCC Rcd at 20180 ¶90 (JA __). The goal of such activities is simply to generate additional revenues for

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[17] *See* Sorenson Br. at 11; *see also* Request for Stay Pending Review at 22, filed by Sorenson Communications, Inc. (FCC CG Docket 03-123) (Jan. 28, 2008) (noting that it did "not challenge the prohibition on contacting users for call-pumping purposes" and does "not seek to contact users in ways that violate their reasonable privacy expectations").

TRS providers – and additional costs to the interstate TRS Fund – and have nothing to do with providing functionally equivalent services to hearing- or speech-impaired persons. *See 2005 Financial Incentives Declaratory Ruling*, 20 FCC Rcd at 1467-71(providing examples of improper marketing practices); *2005 TRS Marketing Practices Public Notice*, 20 FCC Rcd at 1472-75 (same).

The Commission had made precisely the same point in 2005: "the purpose of TRS is to allow persons with certain disabilities to use the telephone system. Entities electing to offer VRS (or other forms of TRS) should not be contacting users and asking or telling them to make TRS calls. Rather, the provider must be available to handle the calls that consumers choose to make." *2005 TRS Marketing Practices Public Notice*, 20 FCC Rcd at 1473. The Commission has effectively rejected the argument that financial incentives or marketing practices that seek to encourage users to make more TRS calls has anything to do with functional equivalency: "Section 225 defines TRS as 'telephone transmission services' provided to an individual who has a hearing or speech disability 'in a manner that is functionally equivalent' to those services offered to persons without such disabilities. 47 U.S.C. § 225(a)(3). Because we have determined that financial incentive programs violate the functional equivalency requirement, providers engaging in these programs are no longer providing TRS within the meaning of the statute." *2007 Declaratory Ruling*, 22 FCC Rcd at 20183 n.246 (JA __).

GoAmerica argues (Br. at 63) that the Commission has employed an "expansive application" of the functional equivalence requirement that, according to the company, would require the agency to permit GoAmerica to use incentive programs to inflate the number of TRS calls. The decisions it cites are inapposite; they all relate to the statutory definition of functional equivalence as relating to the ability of hearing or speech disabled persons to use the phone network: "The term 'telecommunications relay services' means telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communications by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communications services by wire or radio." 47 U.S.C. § 225(a)(3). GoAmerica cites no action by the Commission suggesting that that requirement obligates the agency to permit TRS providers to take action encouraging TRS users to inflate their usage of the service by making additional or longer calls than they otherwise would make. The Commission's outreach policies, cited by GoAmerica, plainly look toward education of the public or TRS users generally about the availability of TRS and not the sort of call-pumping activities for which GoAmerica seeks approval.[18]

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[18] *See, e.g., 2004 TRS Report & Order*, 19 FCC Rcd 12475, 12515 ¶96 (2004) ("[C]ommon carriers obligated to provide TRS must take steps to educate the

(footnote continued on following page)

In particular, GoAmerica complains that its inability to provide incentives for consumers to give feedback regarding the quality of its services "has a particularly negative impact on the provision of functionally equivalent TRS." Br. at 64. However, the Commission found that "[p]roviders seeking feedback on the quality of their service can readily do so without offering call incentives." *2007 Declaratory Ruling*, 22 FCC Rcd at 20182 ¶93 (JA __). GoAmerica does not offer any non-conclusory explanation in its brief to dispute the Commission's conclusion and, as noted, it never took the opportunity to explain to the Commission why the agency was wrong in this respect by filing a petition for reconsideration.

The Commission has observed that it has a "duty to 'safeguard the integrity of the [TRS] fund.'" *2005 Financial Incentives Declaratory Ruling*, 20 FCC Rcd at 1469 n.27, *quoting 2004 TRS Report & Order*, 19 FCC Rcd at 12515 ¶97 (2004). As the agency responsible under the statute for implementing and administering TRS, the Commission was appropriately concerned with the growing cost of the various forms of TRS, which has risen some twenty-fold – from approximately

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(footnote continued from preceding page)

> public about TRS. We take this opportunity to clarify that the responsibility for outreach lies with all carriers to 'assure that callers in their service areas are aware of TRS. The term "callers" refers to the general public, not just consumers with speech and hearing disabilities. It is crucial for everyone to be aware of the availability of TRS for it to offer the functional equivalence required by the statute.'"

$40,000,000 to $800,000,000 – in the decade from 1999 to 2009.[19] The limitations on TRS providers' financial incentives and marketing practices discussed in the *Declaratory Rulings* were a limited and focused way to protect the integrity of the fund and constitute a reasonable application of the agency's authority under the statute. GoAmerica's surprising contention that the FCC has no legitimate interest in exercising regulatory oversight of the amount of TRS usage because the purpose of TRS "is to expand (rather than contract) the access of hearing-impaired and speech-impaired persons to telecommunications" is absurd. Br. at 36. There is nothing to suggest that Congress' goal that the "full benefits of the telephone network are extended and shared equally by all our citizens" would be carried out in a manner unrelated to any concern about the cost of providing that service. Indeed, Section 225 requires that the Commission "shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in *the most efficient manner*." 47 U.S.C. § 225(b)(1).(emphasis added). The FCC has reasonably concluded that part of its responsibility in this area is to examine practices by TRS providers that attempt to drive up usage of the service artificially and thus increase the burden on the TRS Fund (and by extension all telephone users).

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[19] *See* http://www.neca.org/media/relayrateshistory_revised_08_13_08.xls (Aug. 18, 2008)(showing growth of interstate TRS fund from $38.3 million in 1999 to $805.5 million for the period July 2008-June 2009).

3. Use Of Customer Data and TRS Funds

Both petitioners claim that the restrictions set forth in the *Declaratory Rulings* on TRS providers' use of customer data and TRS funds are arbitrary and capricious. These claims are similarly without foundation. As the expert agency assigned to implement the statute, the Commission explained that the TRS program's purpose is to "ensure that persons with hearing and speech disabilities have access to the telephone system." Not surprisingly, the Commission's regulations have therefore specified since 2000 that customer information "may not be used for any purpose other than to connect the TRS user with the called parties desired by that TRS user," 47 C.F.R. § 64.604(c)(7), and that regulation has never been challenged.

The statute's purpose plainly is not to facilitate providers' lobbying of such persons or to facilitate communications initiated by a provider for purposes unrelated to the providers' handling of relay calls, and petitioners do not seriously argue otherwise. As a result, the Commission's conclusion that a TRS provider's use of customer information or compensation received from the TRS Fund for such activities is inconsistent with the statute's purpose falls easily with the agency's discretion under an arbitrary and capricious standard of review. *2008 Declaratory Ruling*, 23 FCC Rcd at 8998 ¶¶10-11.

It is thus difficult to take seriously Sorenson's claim that the Commission "has not offered a reasoned explanation for the restrictions it imposed" and "has

not identified a legitimate government interest." (Br. at 45). The Commission reasonably identified the purpose of the statutory provisions creating TRS as being "intended to ensure that individuals with hearing or speech disabilities have access to telephone services that are 'functionally equivalent' to those available to individuals without disabilities." *2008 Declaratory Ruling*, 23 FCC Rcd at 8994 ¶2 (JA __). We do not understand petitioners to disagree with that. It was thus reasonable for the Commission to conclude that TRS providers are limited to using customer information derived from the provision of TRS service only "for purposes *related to the handling of relay calls*" and are prohibited from using such customer data, as well as funds obtained from the Interstate TRS Fund, "to engage in lobbying or advocacy activities directed at relay users." *Id.* at 8997-98 ¶¶9 & 10 (JA __). The Commission was doing no more in these rulings than restricting TRS providers' use of customer information and TRS funds obtained through participation in the TRS program to action within the purposes for which Congress created TRS and established the Interstate TRS Fund.

Sorenson is also mistaken in its claims that the rulings are arbitrary as well as "not credible" and an "obvious pretext" (Br. at 46, 47) because the Commission has not restricted all advocacy activity but only lobbying and advocacy activities directed at TRS users. It is well established that agencies need not address all problems "in one fell swoop," but may focus on problems that seem most important at the time. *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C.Cir.

1984), *citing Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955); *see also Oklahoma Educ. Ass'n v. Alcoholic Beverage Laws Enf. Comm'n*, 889 F.2d 929, 934 (10th Cir. 1989)(same). That was what the Commission did in the *Declaratory Rulings*, focusing on a particular kind of provider activity beyond the scope of the program that had been brought to its attention. *2008 Declaratory Ruling*, 23 FCC Rcd at 8998 ¶10 (JA) (noting that a TRS provider had "bombarded deaf persons with material seeking to persuade them to support the provider's position on matters pending before the FCC."). And indeed the Commission indicated here that it would consider additional restrictions if evidence of the need for such action should arise in the future. *See 2008 Declaratory Ruling*, 23 FCC Rcd at 8994 n.5 (JA __).[20] For example, should the Commission become aware that TRS providers are using money from the TRS Fund to pay Bruce Springsteen, Madonna, or other famous entertainers to sing at office holiday parties, Sorenson Br. at 47, the Commission has clearly reserved the right to take appropriate action.

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[20] Sorenson's additional complaint that the Commission sought its assistance recently "to help educate and inform consumers about the [digital television] transition by putting a link to the Commission's DTV transition materials on the Sorenson Website and including information in the Sorenson newsletter" (Br. at 48) is entirely irrelevant to the issues here. Seeking a TRS provider's voluntary assistance in publicizing a unique and important national public issue such as the DTV transition is not inconsistent with the agency's conclusions that a provider's use of customer information and TRS funds to advocate its own private agenda is inconsistent with the purposes of TRS.

Petitioners refer to a further rulemaking proceeding begun by the Commission as additional evidence of the alleged arbitrariness of the *Declaratory Rulings*. Their reliance on that proceeding is misplaced.[21] First, petitioners refer to a notice of proposed rulemaking that is not final agency action. Second, an argument that an agency has acted arbitrarily and capriciously cannot be based on a claim that its action in an order before the Court is inconsistent with a later adopted action, much less a later adopted non-final action, such as a notice of proposed rulemaking. *See MacLeod v. ICC*, 54 F.3d 888, 892 (D.C. Cir. 1995)("We will not reach out to examine a decision made after the one actually under review."). In any event, there is no inconsistency. The notice in question seeks comment on modifying rules relating to use of customer data because of changes the Commission was adopting with respect to how TRS is provided. Specifically, the Commission in June 2008 adopted a system for assigning users of most Internet-based forms of TRS ten-digit telephone numbers that "will further the functional equivalency mandate by ensuring that Internet-based TRS users can be reached by voice telephone users in the same way that voice telephone users are called." *TRS 10-Digit Numbering Report & Order and Further Notice*, 23 FCC Rcd at 11592-93 ¶1. As part of that pro-

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[21] *See* Sorenson Br. at 37; GoAmerica Br. at 56-58, 62, *citing Telecommunications Relay Service and E911 Requirements*, 23 FCC Rcd 11591 (2008)("*TRS 10-Digit Numbering Report & Order and Further Notice*"). A summary of the Further Notice of Proposed Rulemaking contained in this document was published at 73 Fed.Reg. 41307 (July 18, 2008).

ceeding, the Commission undertook to consider how statutory and rule provisions governing customer proprietary network information ("CPNI") should apply to TRS providers under this new regime. *See id.* at 11639; 47 U.S.C. § 222; 47 C.F.R. §§64.2001 *et seq.* Those rules are designed to protect consumer privacy.

The Commission noted that it had previously held that Section 222 of the Communications Act and its CPNI rules, which apply to "telecommunications carriers," do not apply to TRS providers such as petitioners because they do not provide "telecommunications" within the meaning of the Act. *See* 23 FCC Rcd at 11642 ¶136. The Commission recognized the interplay between existing restrictions on TRS providers' use of customer information and restrictions imposed by the CPNI rules and sought comment on "how best to reconcile the CPNI rules with the existing TRS restrictions on TRS providers' use of customer database information." *Id.* at 11646 ¶145. As the Commission noted, there have been "differences between TRS, where there traditionally has been no subscription agreement and consumers do not pay for the service, and other market-based communications services that are paid for by the consumer …." *Id.* The Commission specifically referred to the *Declaratory Rulings* before the Court in this case, and sought "comment on whether, in the TRS context, we should apply CPNI requirements that permit the use or disclosure of personally identifiable consumer information for marketing purposes and, if so, whether this action is consistent with the Commission's existing TRS requirements." *Id.* The Commission also sought comment on

"how replacing existing protections with CPNI requirements would affect the privacy of TRS consumers with regard to customer profile information; specifically, would any data protected by the current rules not fall under the definition of CPNI? Would extending the CPNI rules to cover TRS impede the provision of TRS?" *Id.*

Petitioners disparage the Commission's efforts in that pending rulemaking proceeding to reconcile two different regulatory approaches intended to protect consumer privacy with the new ten-digit numbering regime that it is in the process of implementing as evidence that the Commission is "unsure about which constitutionally protected communications its regulations permit" (Sorenson Br. at 37) or is leaving TRS providers "in an impossible position when deciding whether to communicate with their customers …" GoAmerica Br. at 58. In fact, neither is true. The Commission has made clear in the *Declaratory Rulings* what communications are permitted between TRS providers and TRS users, but it is considering whether changes may be necessary in light of the new regime that employs ten-digit numbering and the selection of a default TRS provider for most Internet-based TRS users. How that demonstrates that the *Declaratory Rulings* are arbitrary is left unexplained by petitioners.

Moreover, GoAmerica's protest that it is unable to discern the difference between the communications the Commission held in the *Declaratory Rulings* was proscribed and the outreach efforts to implement the new ten-digit numbering regime is not credible. The Commission explained the need for outreach and edu-

cation in the order adopting the ten-digit numbering rules. The explanation is clear on its face and does not in any way conflict with the *Declaratory Rulings*. *See* 23 FCC Rcd at 11623-25. To the extent that GoAmerica has doubts whether a proposed communication to educate users about the new rules could be viewed as related to the handling of TRS calls, it is free to seek formal or informal guidance from the Commission. *See, e.g., id.* at 11625 ¶91 ("Commission staff will also continue to work closely with industry and consumer groups to ensure that TRS users are aware of and understand these new requirements.").

IV. THE DECLARATORY RULINGS DO NOT IMPINGE ON PETITIONERS' FIRST AMENDMENT SPEECH RIGHTS.

Petitioners' claims that the Commission's rulings restrict speech in violation of the First Amendment and are also unconstitutionally vague should be found equally unavailing. The core of their arguments with respect to the limitations on use of customer data and TRS funds is premised on the mistaken claim that the Commission's action "prohibit[s] political, commercial and other speech." Sorenson Br. at 15; *see also* GoAmerica Br. at 32. It does not. As the Commission correctly concluded, its rulings do not "prevent a provider from using information and funds from other sources to engage in lawful lobbying or advocacy activities," thus distinguishing its action here from "an 'unconstitutional conditions' case in which the government 'effectively prohibit[ed] the recipient from engaging in the protected conduct outside the scope of the federally funded program.'" *2008 Declaratory Ruling*, 23 FCC Rcd at 8998 ¶12, *quoting Rust v. Sullivan*, 500 U.S. at 198.

Rather than prohibiting speech, the Commission's rules simply bar misuse of customers' private information and help channel federal funds toward federal goals.

GoAmerica's additional argument that the rulings' restrictions on its marketing practices are an unconstitutional limitation on its commercial speech, even if properly before the Court, fails. The rulings fall well within the principles applicable to regulation of commercial speech.

A. The Rulings' Limitations On Use Of Customer Data and TRS Funds Do Not Unlawfully Restrict Petitioners' Speech.

In imposing reasonable limits on participants in a federal program, the Commission correctly relied on *Rust*, in which recipients of federal family planning funds raised a First Amendment challenge to a restriction on their provision of abortion counseling. The Supreme Court rejected that claim, holding that Congress has authority to insist "that public funds be spent for the purposes for which they were authorized." 500 U.S. at 196. The Court further explained that "the recipient is in no way compelled to operate a [federal] project; it can simply decline the subsidy." *Id.* at 199 n.5. That analysis is controlling here; the Commission reasonably concluded that the "TRS Fund is designed to ensure that persons with hearing and speech disabilities have access to the telephone system. It was not intended to finance lobbying by TRS providers directed at end users." *2008 Declaratory Ruling*, 23 FCC Rcd at 8998 ¶11. As in *Rust*, neither Sorenson nor GoAmerica is required to be a TRS provider. If they are unwilling to comply with the restrictions the Commission has found applicable, they can decline the payments from the TRS

Fund and end their participation in this federal subsidy program. Moreover, as the Commission made clear, they are free to use "funds from other sources to engage in lawful lobbying or advocacy activities." *2008 Declaratory Ruling*, 23 FCC Rcd at 8998 ¶12 (JA __).[22]

Sorenson attempts to distinguish *Rust* by claiming that, unlike *Rust*, the funds that it receives for providing TRS to its users "are payments *for services rendered*," rather than grants or subsidies. Br. at 22. As an initial matter, even if this distinction were correct, it would provide no support for Sorensen's challenge to the Commission's restriction on its use of customer information it obtains solely through its participation in the TRS program. There is no basis in the case law or in common sense for the suggestion that the government cannot limit what grantees *or* contractors do with citizens' private information they obtain through their work for the government. For example, if the IRS contracted with a company to field tax questions from taxpayers, there is no question that it could prohibit the company from using the information it obtained about taxpayers in performance of that con-

[22] Sorenson complains that permitting it to engage in lobbying and advocacy using non-TRS funds is "illusory" because 99.9% of its revenue comes from the TRS Fund. Br. at 29. There is nothing in the TRS program that requires Sorenson to exist solely as a TRS provider. That it has voluntarily adopted a business model eschewing other sources of income does not render its ability to diversify its business "illusory." Nor should the particulars of Sorenson's business plan affect the facial constitutionality of a generally-applicable regulatory interpretation.

tract to lobby them or for some other purpose outside the scope of the contract. So too here.

Sorenson's claimed distinction fails with respect to use of funds as well. It cites to no discussion of a contractor-grantee dichotomy in *Rust*; instead, the Court there held as a general matter that it was appropriate for the government to prevent private entities' use of the government's programmatic funds on activities "outside the scope of the federally funded program." 500 U.S. at 193. Although the details of each federal program necessarily vary, that general principle is equally applicable here, and the correct answer to the constitutional question does not turn on the details of the particular mechanism chosen by the Commission to fund the provision of TRS service.

Moreover, in this case, the mechanism chosen by the Commission to fund the provision of TRS service makes TRS providers more like grantees than traditional government contractors. The Commission has stressed that the TRS "compensation rate is not a 'price' that is charged to, and paid by, a service user, but rather is a settlement mechanism to ensure that providers are compensated from the Fund *for their actual reasonable cost of providing service*." *2007 Declaratory Order* ¶ 25 (JA) (emphasis added). The Commission has issued "[s]pecific [g]uidelines on [a]llowable [c]osts" and said that companies such as Sorenson and GoAmerica that "only offer relay services" should be compensated only for "costs

[that] are reasonable and necessary to the provision of relay service." *Id.* ¶ 73 & n.197.[23]

Given that the TRS compensation rate is intended to permit recovery of *only* providers' "actual reasonable cost of providing service," it is entirely consistent with the First Amendment for the Commission to expect providers to use the money received to actually provide service. There should not be excess money to engage in lobbying or other activities outside the scope of the program, such as paying Bruce Springsteen to entertain employees at the office holiday party (*see* Sorenson Br. at 47); rather providers should be plowing the compensation they receive back into the provision of service by, for example, attracting better qualified communications assistants and improving training, *see* 47 C.F.R. § 64.604(a)(1), or increasing staffing in order to reduce wait times for TRS users, *see id.* § 64.604(b)(2).

Contrary to Sorenson's suggestion (Br. at 27), the Commission does not claim that it has a "government message to convey or protect from distortion," but

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[23] Sorenson asserted in comments filed in this proceeding that if the Commission were to select any rate other than the one proposed by the National Exchange Carrier Association ("NECA"), which administers the Interstate TRS Fund, it would result in "VRS rates below, in some cases far below, the level needed to fund providers' reasonable costs." *See* Sorenson Comm. at 8 (filed May 16, 2007). That is the rate the Commission adopted, although it also adopted a tiered approach in which high volume providers like Sorenson get a slightly reduced rate for monthly minutes above 50,000 and 500,000. *See 2007 Declaratory Ruling*, 22 FCC Rcd at 20173 ¶¶67-72 (JA __).

rather that TRS is a narrowly focused government program and it has an entirely legitimate interest in seeing that funds spent on that program further its ends. The purpose of the TRS program is to provide disabled Americans with assistance in communicating speech of their choice. It is not to fund the messages of TRS providers. Providers are simply designed to be the conduit for the speech of TRS users. The First Amendment poses no barrier to the Commission's efforts to ensure that providers use the federal funds they receive to fulfill that role.

Healthcare Ass'n of New York State, Inc. v. Pataki, 471 F.3d 87 (2d Cir. 2006), upon which Sorenson heavily relies, to the extent that it is relevant at all, supports the Commission's position rather than Sorenson's. Sorenson cites *Health-care Ass'n* for the claim that "the FCC's restrictions here affect 'private funds,' not 'state funds'" and that the effect of the rulings here is "to limit Sorenson's money, rather than the FCC's." Br. at 23, 24. That is incorrect.

As an initial matter, the *Healthcare Ass'n* case involved a labor law question of whether a New York statute, which restricted employers from spending funds received from the state to hire employees or contractors to attempt to influence union organizing campaigns, was preempted by the National Labor Relations Act. The Second Circuit's discussion came in that context and did not involve any direct First Amendment analysis.

However, to the extent that *Healthcare Ass'n* has relevance here, it supports the Commission's rulings. That decision said the relevant question in such cases is

whether the policy "is aimed at making sure that State funds are only spent on the purposes the statute has chosen, or whether, instead, the State has used its spending power to restrict the associations' protected speech beyond their dealings with the state." 471 F.3d at 102. The FCC's action in the *Declaratory Rulings* here was precisely to ensure that TRS funds are spent for the statutory purpose of providing TRS services. The purpose of the restrictions the FCC imposed, as it said, was to ensure "'that these "public funds be spent for the purposes for which they were authorized."'"[24] The Commission expressly found that "using revenue from the TRS Fund or information obtained from end users in the provision of services supported by the TRS Fund, to engage in [lobbying or advocacy activities directed at TRS users] is inconsistent with the purpose of the TRS Fund." *2008 Declaratory Ruling*, 23 FCC Rcd at 8998 ¶10.

Sorenson's further reliance on the *dissenting* opinion in *Chamber of Commerce v. Lockyer*, 463 F.3d 1076 (9th Cir. 2006)(*en banc*), leads it to make the same mistake as the dissenting judge, who argued that the state statute at issue there "abrogates the First Amendment rights of employers to speak out and discuss union organizing campaigns." *Lockyer*, 463 F. 3d at 1098. As the *en banc* majority held, however, the dissent's view was "erroneous … [because] the California sta-

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[24] *2008 Declaratory Ruling*, 23 FCC Rcd at 8998 ¶11 (JA __), *quoting United States v. American Library Ass'n*, 539 U.S. 194, 212 (2003) and *Rust*, 500 U.S. at 196.

tute does not impose any condition on the *receipt* of state grant and program funds. Because an employer retains the freedom to raise and spend its own funds however it wishes – so long as it does not *use* state grant and program funds on union-related advocacy – [the state statute] does not infringe employers' First Amendment right to express whatever view they wish on organizing." *Lockyer*, 463 F.3d at 1096. The Ninth Circuit's decision was reversed and remanded by the Supreme Court solely on preemption grounds. The First Amendment issue was not before the Supreme Court, and the Court did not address the issue. *See Chamber of Commerce v. Brown*, 128 S.Ct. 2408 (2008).

Sorenson has argued that our reading of the Ninth Circuit majority's opinion is mistaken because the majority was discussing only the use of "grant" funds, and the dissenting judge, on whose opinion Sorenson relies, was discussing the use of "contract" funds, which aspect of the statute was not before the court. *See Sorenson Stay Reply* at 5 (Aug. 28, 2008). While it is true that the majority and the dissent were discussing different parts of the relevant state statute, the language of the majority remains the same.[25] The statute there, as the Commission's rulings here, imposed no condition on the receipt of government funds – a TRS provider like Sorenson "retains the freedom to raise and spend its own funds however it wishes

[25] Moreover, Sorenson's distinction fails in light of the nature of the TRS funding formula, which, as discussed above, is not meant to approximate a fixed "price" for providers but instead to reimburse them only for their reasonable costs of providing service. *2007 Declaratory Ruling*, 22 FCC Rcd at 20155 ¶ 25 (JA __).

– so long as it does not *use* [TRS] program funds on [TRS]-related advocacy." Thus the Commission rulings here, like the statute in *Lockyer* do "not infringe employers' First Amendment right to express whatever view they wish …." *Lockyer*, 463 F.3d at 1096.

The FCC's statement in the *2008 Declaratory Ruling* thus is fully consistent with both *Rust* and the Ninth Circuit majority's holding in *Lockyer*:

> nothing we do here would prevent a provider from using information and funds from other sources to engage in lawful lobbying or advocacy activities. Thus, this is not an 'unconstitutional conditions' case in which the government "effectively prohibit[ed] the recipient from engaging in the protected conduct outside the scope of the federally funded program." TRS providers are free to use those resources outside the scope of the TRS program to support their positions before the Commission.

2008 Declaratory Ruling, 23 FCC Rcd at 8998 ¶12, *quoting Rust*, 500 U.S. at 197. The *Rust* court held that Congress could impose conditions on receipt of funds because "when the Government appropriates public funds to establish a program, it is entitled to define the limits of that program." The FCC did no more than that here. *See also Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544-46 (1983) (holding tax exemption for non-profit groups that do not engage in lobbying did not violate First Amendment and noting that a group could qualify for the tax exemption by adopting a "dual structure," with one arm for non-lobbying activities and another for lobbying); *DKT Int'l, Inc. v. United States Agency for Int'l Development*, 477 F.3d 758 (D.C. Cir. 2007) (rejecting First Amendment challenge to requirement that recipients of funds from AIDS/HIV

education program adopt policy of opposition to prostitution and sexual trafficking, and noting that recipients could set up subsidiary to receive the funds and adopt the policy).[26]

Nor does this Court's decision in *U S West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999), provide any support for petitioners. The Court held there that "a restriction on speech tailored to a particular audience, 'targeted speech,' cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience, 'broadcast speech.'" Here, the Commission's rulings with respect to use of customer data and TRS funds have not restricted speech to a particular audience; it has restricted the use of information obtained because of participation in the TRS program and the use of funds received from the government-created TRS Fund. The *Declaratory Rulings*, outside of the financial incentive and marketing

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[26] Sorenson has also contended in a separate pleading that the Commission's argument is "directly contrary" to a position taken by the United States in an *amicus* brief to the Supreme Court on certiorari in *Lockyer*. *See* Sorenson Stay Reply at 4-5. That is not so. The brief to which Sorenson refers expressly did not address a First Amendment question. The Solicitor General made clear that "[r]egardless of whether [the statute] violates the First Amendment (an issue the parties agreed was not presented below…), the question here is a distinct one, namely, whether California's restriction on employer advocacy regarding unionization impermissibly conflicts with federal labor policy and the exclusive jurisdiction of the Board." Brief for United States as Amicus Supporting Petitioners, *Chamber of Comm. v. Brown*, No. 06-939 at 33 (Jan. 2008). The question before the Supreme Court involved only an issue of preemption in the area of labor law, and the amicus brief of the United States on which Sorenson has relied expressly did not, and cannot fairly be read to, take a position on a First Amendment issue that was not before the Court.

limitations, do not restrict petitioners' right to speak to TRS users in any way or with respect to any subject so long as they do not use information and funds derived from participation in the government-created TRS program. *See Rust*, 500 U.S. at 193 ("'[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.'") (*quoting Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983)).

Sorenson claims that the "invalidity of the present restrictions [on the use of customer information] follows *a fortiori* from *US West*," which the Commission "entirely ignore[d]." Br. at 32, 33. The Commission did not discuss the *U S West* decision because it has no application here. The customer data at issue there had been created as part of that carrier's private, commercial (albeit regulated) operations. The customer information at issue here, unlike that in *U S West*, was developed solely in the context of Sorenson's participation in a government created and funded program. It is plainly not Sorenson's property; Sorenson would not have the information but for its agreement to carry out a government function. Nothing in *U S West* suggests that participants in such a program have a constitutional right to unrestricted use of such information and funds, as Sorenson appears to contend. U S West involved a strictly regulatory scheme, not a subsidy program of the type at issue here.

Both Sorenson's and GoAmerica's discussion of this issue, and in particular their criticism of the Commission's failure to consider an "opt out" alternative

(*e.g.*, Sorenson Br. at 32-33; GoAmerica Br. at 36-37) and their reliance on *U S West*, serve to highlight their misunderstanding of the fundamental difference in that case and this one. The petitioner in *U S West* was not participating in a government program. The customer data at issue there had been created as part of that carrier's private, commercial operations, and there was no question of use of revenue derived from a government-established program. Here, as the Commission noted repeatedly, the purpose of TRS is to allow persons with certain disabilities to use the telephone system – to provide a "'dial tone' for consumers to make 'telephone' calls if and when they choose to make them.'" *2007 Declaratory Ruling*, 22 FCC Rcd at 20183 n.244 (JA __). Activities that encourage users to make unnecessary calls or that use consumer data or TRS funds for purposes not directly related to making TRS calls were properly found by the Commission as inconsistent with the goals of the statute. In short, *U S West* involved an entirely different regulatory scheme.

Sorenson claims that the FCC's actions would be "inexplicable" but for what it asserts is the FCC's true intention in adopting the *Declaratory Rulings* – an "apparent desire to insulate itself from the 'burden' of hearing the views of the deaf community." Br. at 28. Sorenson's claim is based on the fact that the Commission did not specifically highlight other examples of activities inconsistent with the purpose of the program. Sorenson contends, for example, that the "FCC's reliance on the 'purpose of the TRS fund' is preposterous" because the Commission

did not restrict Sorenson from using payments it receives from the TRS fund to itself lobby the FCC or Congress directly, nor did it prevent Sorenson from using TRS Fund payments for purposes irrelevant to the TRS fund such as "funding the annual holiday party." Br. at 28.

Sorenson misunderstands the Commission's analysis. The Commission noted the background rule that "revenue from the TRS Fund, or information obtained from end users in the provision of services supported by the TRS fund" may not be used in ways that are "inconsistent with the purpose of the TRS Fund." *2008 Declaratory Ruling*, 23 FCC Rcd at 8998 ¶ 10 (JA __). This is consistent with the Commission's pre-existing (and unchallenged) regulation stating that TRS customer data "may not be used for any purpose other than to connect the TRS user with the called parties desired by that TRS user," 47 C.F.R. § 64.604(c)(7), and its explanation that the TRS compensation rate is intended only to cover "reasonable actual costs of providing service," *2007 Declaratory Ruling*, 22 FCC Rcd at 20145 ¶ 5 (JA __).

The Commission identified contacting TRS users for lobbying purposes as an example of an activity falling outside the scope of the program, but by doing so it by no means implicitly stated that all other non-program-related activities were permissible. Rather, the Commission sought only to focus on the aspects of the problem that seemed most important at the time – the use of customer data and TRS funds for lobbying and advocacy. *2008 Declaratory Ruling*, 23 FCC Rcd at

8998 ¶10 (JA) (noting that a TRS provider had "bombarded deaf persons with material seeking to persuade them to support the provider's position on matters pending before the FCC."). The Commission's particular focus on lobbying expenses was also consistent with the longstanding ratemaking principle that "lobbying" is a cost that is "typically given special regulatory scrutiny for ratemaking purposes" and that "[u]nless specific justification to the contrary is given, such costs are presumed to be excluded from the costs of service in setting rates." 47 C.F.R. § 32.7300(h)(1).

As noted earlier, agencies need not address all problems "in one fell swoop." *National Ass'n of Broadcasters*, 740 F.2d at 1207. And even in the First Amendment context, "[a]s a general rule, the First Amendment does not require that the government regulate all aspects of a problem before it can make progress on any front." *Mainstream Marketing Services*, 358 F.3d at 1238. It would be open to the Commission in future orders to identify additional activities that are beyond the scope of the TRS program; its failure to exhaustively catalogue them in this order presents no First Amendment problem.

Petitioner GoAmerica also contends that the rulings are unlawfully content or viewpoint-based because they "ban speech because of its content" and they "restrict core political speech." Br. at 21 n.13, 33. Insofar as GoAmerica is addressing the limitations on use of customer data and use of TRS funds, the rulings have no reference to viewpoint and content and thus there is no basis for its

argument. The *Declaratory Rulings* simply found that it is inappropriate for customer data and TRS funds to be used for any lobbying activity. That is not a viewpoint based restriction.[27] To the extent GoAmerica is addressing the restrictions on financial incentives and marketing practices, as we discuss below the rulings are well within the FCC's authority to regulate commercial speech under the First Amendment.

Finally, petitioners' claims that the restrictions set out in the *Declaratory Rulings* are unlawfully vague, whether on constitutional grounds (Sorenson Br. at 35) or in violation of the APA (GoAmerica Br. at 54), have no basis. A regulation is unconstitutionally vague "only if its language fails to provide people of ordinary intelligence a reasonable opportunity to understand" that the conduct in question is proscribed. *United States v. Welch*, 327 F.3d 1081, 1095 (10th Cir. 2003), *quoting Hill v. Colorado*, 530 U.S. 703, 732 (2000). Petitioners' claims notwithstanding, there is no serious dispute as to what the Commission was referring when it restricted use of customer information or TRS funds for "lobbying or advocacy

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[27] As this case demonstrates, TRS providers disagree among themselves on many issues. Sorenson supports the Commission's limitations on incentives intended to increase TRS call volume, while GoAmerica opposes them. *See also* Comments of Sorenson Communications, Inc., at 1-4, CG Docket 03-123 (filed Sept. 4, 2007)(opposing complaint filed against Sorenson by five competitors, including GoAmerica, asking the FCC to void certain provisions in contracts between Sorenson and its video interpreters as contrary to public policy)(JA __). The restriction on contacting TRS users for lobbying on this issue is content-neutral: it would apply equally to Sorenson and GoAmerica.

activities directed at relay users." *2008 Declaratory Ruling*, 23 FCC Rcd at 8998 ¶10 (JA __). Indeed, it gave an example of a complaint of a TRS provider that had "bombarded deaf persons with material seeking to persuade them to support the provider's position on matters pending before the FCC." *Id.* There is no basis for Sorenson's claim that persons of ordinary intelligence are unable to understand what conduct is not permitted. Moreover, parties are free to seek clarification as to specific conduct by requesting a declaratory ruling from the Commission (*see* 47 C.F.R. § 1.2) or through less formal means (*see, e.g.*, *TRS Ten Digit Numbering*, 23 FCC Rcd at 11625 ¶91 ("Commission staff will also continue to work closely with industry and consumer groups to ensure that TRS users are aware of and understand these new requirements.")). *See generally K-S Pharms., Inc. v. American Home Prods. Corp.*, 962 F.2d 728, 732 (7th Cir. 1992) (noting that "specificity may be created through the process of construction," and that "[c]larity via interpretation is enough even when the law affects political speech").

B. The Rulings' Limitations On The Use Of Financial Incentives And Marketing Practices Improperly To Encourage TRS Use Do Not Unlawfully Restrict GoAmerica's Speech.

GoAmerica alone contends that the *Declaratory Rulings'* limitations on the use of financial incentives and marketing practices unlawfully restricts constitutionally protected speech. Br. at 18. GoAmerica recognizes that these limitations involve commercial speech and that while commercial speech is entitled to protection under the First Amendment, it is not entitled to the same level of protection as

non-commercial speech. *Central Hudson Gas & Elec. v. Public Service Comm'n*, 447 U.S. 557, 563 (1980); *see U S West, Inc.*, 182 F.3d at 1233; *Mainstream Marketing Services*, 358 F.3d at 1237. "[C]ommercial speech [is entitled to] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values," and is subject to regulation that might be forbidden "in the realm of noncommercial expression." *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989). The courts will uphold restrictions on commercial speech if the government shows a substantial interest in the regulation, that the regulation advances that interest, and that the regulation is narrowly drawn to achieve its purpose." *Central Hudson*, 447 U.S. at 557. The restrictions on financial incentives and marketing practices meet each of those standards.

The FCC obviously has a substantial interest in ensuring proper use of public funds that are paid to TRS providers. GoAmerica's views to the contrary (*e.g.*, Br. at 23) are baseless. The issue is not, as GoAmerica claims, an effort by the FCC to "minimiz[e] the use of TRS services." Br. at 23. Nothing in the *Declaratory Rulings* can be read to reflect an intention by the agency to "minimize" usage of TRS services. The matter that the FCC sought to address was the <u>improper</u> use of financial incentives and other marketing practices to entice or encourage use of

TRS that otherwise would not occur.[28] As the Commission explained in its *2005 Financial Incentives Declaratory Ruling*,

> It follows that TRS providers cannot be encouraging TRS calls with financial incentives or rewards. Because the Fund, and not the consumer, pays for the cost of the TRS call, such financial incentives are tantamount to enticing consumers to make calls that they might not ordinarily make. In addition, in these circumstances TRS is no longer simply an accommodation for persons with certain disabilities, but an opportunity for their financial gain. In other words, offering financial incentives or rewards to TRS users also violates the functional equivalency mandate because it gives TRS consumers more than free access to TRS, and therefore to the telephone system; it gives them an additional financial reward for using a service that is provided as an accommodation under the ADA.

29 FCC Rcd at 1469. As noted earlier, the Commission has a "duty to 'safeguard the integrity of the [TRS] fund.'" *Id.* at n.27. Such a clear responsibility constitutes a "substantial interest" under *Central Hudson.*

The restrictions on the use of financial incentives and marketing practices also complies with the requirement that the regulations in question "directly advance" the government interest and "do more than provide 'only ineffective or remote support for the government's purpose.'" *Mainstream Marketing*, 358 F.3d at 1237. The problem the Commission identified was "call pumping," *i.e.*, the practices of some TRS providers to encourage TRS users to make calls they ordi-

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[28] The practices that the Commission sought to address are sometimes referred to as "call pumping." *See*, *e.g.*, Request for Stay Pending Review at 22, filed by Sorenson Communications, Inc. (FCC CG Docket 03-123) (Jan. 28, 2008) (noting that it did "not challenge the prohibition on contacting users for call-pumping purposes").

narily would not make through the use of financial incentives or other marketing practices.[29] The *Declaratory Rulings* restrictions thus directly advance the goal of limiting such activity and effectively support the purpose of protecting the integrity of the TRS fund by limiting reimbursements to those calls that TRS users choose to make on their own without artificial financial or other incentives offered by TRS providers. *See, e.g., 2007 Declaratory Ruling*, 22 FCC Rcd at 20183 n. 244 (JA __) (*Declaratory Rulings'* restrictions "compelled by the very nature of TRS and the role of relay providers offering the 'dial tone' for consumers to make 'telephone' calls if and when they choose to make them.").

GoAmerica ignores this aspect of the *Declaratory Rulings* and instead argues that the Commission was attempting to protect privacy interests of TRS users. Br. at 26. While the Commission certainly believes that TRS users' customer

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[29]The Commission has addressed various forms of "call pumping" on numerous occasions. *See, e.g., 2007 Declaratory Ruling*, 22 FCC Rcd at 20175 ¶¶ 92-94 (JA __)(prohibiting sweepstake giveaways, sponsorships tied to service usage, charitable contributions by providers based on calls made, tying the receipt of free equipment to minimum TRS usage, and other practices involving the giving of gifts, payments, or financial incentives that have the effect of rewarding consumers for making TRS calls); *2005 Financial Incentives Declaratory Ruling*, 20 FCC Rcd at 1466-70 ¶¶ 1-9 (JA __) (prohibiting rewards program that provided reimbursement to TRS consumers for the amount of the consumer's DSL or cable modem bill based on minimum TRS usage); *2005 TRS Marketing Practices Public Notice*, 20 FCC Rcd at 1473 (prohibiting providers from encouraging or requiring minimum TRS usage by consumers or the offering of "any type of financial incentive for consumers to place TRS calls").

information is entitled to privacy protections,[30] that was not the agency's goal in restricting TRS providers' commercial speech insofar as that speech sought to encourage TRS calls that otherwise would not have been made. Indeed, GoAmerica even acknowledges that the Commission "never even mentioned the word 'privacy' in the Rulings …." Br. at 25.

Finally, the *Declaratory Rulings* are "narrowly tailored not to restrict more speech than necessary." *Mainstream Marketing*, 358 F.3d at 1237. The only speech the rulings restrict is the speech that itself creates the problem – speech that involves the marketing practices that the Commission found contrary to the goals and purpose of TRS. GoAmerica's claim that the agency erred because it did not "give any consideration to an obvious and much less burdensome 'opt-out' alternative (i.e., restricting Provider communications with a User only if that user affirmatively declines to receive them)" (Br. at 28) fails on two counts. First, neither GoAmerica nor any other party ever presented that option to the Commission, and, as we have noted, it may not raise such arguments for the first time on review.

However, even if the argument had been presented, it makes no sense. Speech encouraging TRS users to engage in improper use of TRS would be inappropriate under any approach, whether "opt-out" or "opt-in." Despite the Com-

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[30] *See, e.g., 2004 TRS Order*, 19 FCC Rcd at 5175 ¶83.

mission's repeated explanations, GoAmerica fundamentally misunderstands, or perhaps simply disagrees with, the FCC as to the goals and purposes of TRS. The Commission has explained that

> the obligation placed on TRS providers is to be available to handle calls consumers choose to make, when they choose to make them, *i.e.*, to be the "dial tone" for a consumer that uses relay to call to a voice telephone user, and because consumers do not pay for this service but rather providers are compensated pursuant to Title IV of the ADA, providers may not offer relay users financial and similar incentives, directly or indirectly, to use their service.

2007 Declaratory Ruling, 22 FCC Rcd at 20183 ¶96 (JA __); *see also 2008 Declaratory Ruling*, 23 FCC Rcd 8999 ¶13 (JA __). Maximizing TRS providers' revenue simply is not a goal of the statute, and that is the only plausible explanation for GoAmerica's position that the rulings are not narrowly tailored. The Commission has made clear that the *Declaratory Rulings* do "not prohibit contacts by TRS providers with TRS users that are directly related to the handling of TRS calls." *Id.* at 8997 ¶9 (JA __). GoAmerica offers no plausible basis for the argument that further limitation is necessary to comply with the narrow tailoring requirement of *Central Hudson*. The restrictions here are narrowly drawn to accomplish the legislative ends of the statute and the Commission's prior rulings in this area and go no further.

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review.

STATEMENT AS TO ORAL ARGUMENT

Pursuant to Local Rule 38(C)(4), respondents request oral argument. Oral argument will benefit the Court in addressing the arguments presented in petitioners' briefs.

Respectfully submitted,

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October 17, 2008

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7)(B)(as modified by the Court's order of Oct. 7, 2008 granting Respondents' motion to extend the word limits for their brief to 18,000 words), I hereby certify that the accompanying "Preliminary Brief for Respondents" in the captioned case was prepared using a proportionally spaced 14 point typeface and contains **16,437** words as measured by the word count function of Microsoft Office Word 2003.

/s/ C. Grey Pash, Jr.

C. Grey Pash, Jr.

October 17, 2008

CERTIFICATE OF SERVICE

I, C. Grey Pash, Jr., hereby certify that the foregoing "Brief for Respondents" was served on October 17, 2008 by electronic mail and by mailing copies by First Class United States mail to the following persons at the addresses shown:

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CERTIFICATE OF DIGITAL SUBMISSION

I. C. Grey Pash, Jr., hereby certify that no privacy redactions were required on this document, and the digital-form submission of this document is an exact copy of the written document filed with the Clerk.

The digital version of the document has been scanned for viruses using Symantec AntiVirus version 10.1.5.5010 (10/16/08 rev.4).

/s/ C. Grey Pash, Jr.

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October 17, 2008

Statutory Addendum

47 U.S.C. § 154(i)

(i) Duties and powers

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

47 U.S.C. § 222

(a) In general

Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.

(b) Confidentiality of carrier information

A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

(c) Confidentiality of customer proprietary network information

(1) Privacy requirements for telecommunications carriers

Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

(2) Disclosure on request by customers

A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person

designated by the customer.

(3) Aggregate customer information

A telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service may use, disclose, or permit access to aggregate customer information other than for the purposes described in paragraph (1). A local exchange carrier may use, disclose, or permit access to aggregate customer information other than for purposes described in paragraph (1) only if it provides such aggregate information to other carriers or persons on reasonable and nondiscriminatory terms and conditions upon reasonable request therefor.

(d) Exceptions

Nothing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers, either directly or indirectly through its agents--

(1) to initiate, render, bill, and collect for telecommunications services;

(2) to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services;

(3) to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service; and

(4) to provide call location information concerning the user of a commercial mobile service (as such term is defined in section 332(d) of this title) or the user of an IP-enabled voice service (as such term is defined in section 615b of this title)--

(A) to a public safety answering point, emergency medical service provider or emergency dispatch provider, public safety, fire service, or law enforcement official, or hospital emergency or trauma care facility, in order to respond to the user's call for emergency services;

(B) to inform the user's legal guardian or members of the user's immediate family of the user's location in an emergency situation that involves the risk of death or serious physical harm; or

(C) to providers of information or database management services solely for purposes of assisting in the delivery of emergency services in response to an emergency.

(e) Subscriber list information

Notwithstanding subsections (b), (c), and (d) of this section, a telecommunications carrier that provides telephone exchange service shall provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format.

(f) Authority to use location information

For purposes of subsection (c)(1) of this section, without the express prior authorization of the customer, a customer shall not be considered to have approved the use or disclosure of or access to--

(1) call location information concerning the user of a commercial mobile service (as such term is defined in section 332(d) of this title) or the user of an IP-enabled voice service (as such term is defined in section 615b of this title), other than in accordance with subsection (d)(4) of this section; or

(2) automatic crash notification information to any person other than for use in the operation of an automatic crash notification system.

(g) Subscriber listed and unlisted information for emergency services

Notwithstanding subsections (b), (c), and (d) of this section, a telecommunications carrier that provides telephone exchange service or a provider of IP-enabled voice service (as such term is defined in section 615b of this title) shall provide information described in subsection (i)(3)(A) [FN1] of this section (including information pertaining to subscribers whose information is unlisted or unpublished) that is in its possession or control (including information pertaining to subscribers of other carriers) on a timely and unbundled basis, under

nondiscriminatory and reasonable rates, terms, and conditions to providers of emergency services, and providers of emergency support services, solely for purposes of delivering or assisting in the delivery of emergency services.

(h) Definitions

As used in this section:

(1) Customer proprietary network information

The term “customer proprietary network information” means--

(A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier;

except that such term does not include subscriber list information.

(2) Aggregate information

The term “aggregate customer information” means collective data that relates to a group or category of services or customers, from which individual customer identities and characteristics have been removed.

(3) Subscriber list information

The term “subscriber list information” means any information--

(A) identifying the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; and

(B) that the carrier or an affiliate has published, caused to be published, or

accepted for publication in any directory format.

(4) Public safety answering point

The term “public safety answering point” means a facility that has been designated to receive emergency calls and route them to emergency service personnel.

(5) Emergency services

The term “emergency services” means 9-1-1 emergency services and emergency notification services.

(6) Emergency notification services

The term “emergency notification services” means services that notify the public of an emergency.

(7) Emergency support services

The term “emergency support services” means information or data base management services used in support of emergency services.

47 U.S.C. 225

(a) Definitions

As used in this section--

(1) Common carrier or carrier

The term “common carrier” or “carrier” includes any common carrier engaged in interstate communication by wire or radio as defined in section 153 of this title and any common carrier engaged in intrastate communication by wire or radio, notwithstanding sections 152(b) and 221(b) of this title.

(2) TDD

The term “TDD” means a Telecommunications Device for the Deaf, which is a

machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system.

(3) Telecommunications relay services

The term “telecommunications relay services” means telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio. Such term includes services that enable two-way communication between an individual who uses a TDD or other nonvoice terminal device and an individual who does not use such a device.

(b) Availability of telecommunications relay services

(1) In general

In order to carry out the purposes established under section 151 of this title, to make available to all individuals in the United States a rapid, efficient nationwide communication service, and to increase the utility of the telephone system of the Nation, the Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.

(2) Use of general authority and remedies

For the purposes of administering and enforcing the provisions of this section and the regulations prescribed thereunder, the Commission shall have the same authority, power, and functions with respect to common carriers engaged in intrastate communication as the Commission has in administering and enforcing the provisions of this subchapter with respect to any common carrier engaged in interstate communication. Any violation of this section by any common carrier engaged in intrastate communication shall be subject to the same remedies, penalties, and procedures as are applicable to a violation of this chapter by a common carrier engaged in interstate communication.

(c) Provision of services

Each common carrier providing telephone voice transmission services shall, not later than 3 years after July 26, 1990, provide in compliance with the regulations prescribed under this section, throughout the area in which it offers service, telecommunications relay services, individually, through designees, through a competitively selected vendor, or in concert with other carriers. A common carrier shall be considered to be in compliance with such regulations--

(1) with respect to intrastate telecommunications relay services in any State that does not have a certified program under subsection (f) of this section and with respect to interstate telecommunications relay services, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the Commission's regulations under subsection (d) of this section; or

(2) with respect to intrastate telecommunications relay services in any State that has a certified program under subsection (f) of this section for such State, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the program certified under subsection (f) of this section for such State.

(d) Regulations

(1) In general

The Commission shall, not later than 1 year after July 26, 1990, prescribe regulations to implement this section, including regulations that--

(A) establish functional requirements, guidelines, and operations procedures for telecommunications relay services;

(B) establish minimum standards that shall be met in carrying out subsection (c) of this section;

(C) require that telecommunications relay services operate every day for 24 hours per day;

(D) require that users of telecommunications relay services 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;

(E) prohibit relay operators from failing to fulfill the obligations of common carriers by refusing calls or limiting the length of calls that use telecommunications relay services;

(F) prohibit relay operators from disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of the call; and

(G) prohibit relay operators from intentionally altering a relayed conversation.

(2) Technology

The Commission shall ensure that regulations prescribed to implement this section encourage, consistent with section 157(a) of this title, the use of existing technology and do not discourage or impair the development of improved technology.

(3) Jurisdictional separation of costs

(A) In general

Consistent with the provisions of section 410 of this title, the Commission shall prescribe regulations governing the jurisdictional separation of costs for the services provided pursuant to this section.

(B) Recovering costs

Such regulations shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction. In a State that has a certified program under subsection (f) of this section, a State commission shall permit a common carrier to recover the costs incurred in providing intrastate telecommunications relay services by a method consistent with the requirements of this section.

(e) Enforcement

(1) In general

Subject to subsections (f) and (g) of this section, the Commission shall enforce this section.

(2) Complaint

The Commission shall resolve, by final order, a complaint alleging a violation of this section within 180 days after the date such complaint is filed.

(f) Certification

(1) State documentation

Any State desiring to establish a State program under this section shall submit documentation to the Commission that describes the program of such State for implementing intrastate telecommunications relay services and the procedures and remedies available for enforcing any requirements imposed by the State program.

(2) Requirements for certification

After review of such documentation, the Commission shall certify the State program if the Commission determines that--

(A) the program makes available to hearing-impaired and speech-impaired individuals, either directly, through designees, through a competitively selected vendor, or through regulation of intrastate common carriers, intrastate telecommunications relay services in such State in a manner that meets or exceeds the requirements of regulations prescribed by the Commission under subsection (d) of this section; and

(B) the program makes available adequate procedures and remedies for enforcing the requirements of the State program.

(3) Method of funding

Except as provided in subsection (d) of this section, the Commission shall not refuse to certify a State program based solely on the method such State will implement for funding intrastate telecommunication relay services.

(4) Suspension or revocation of certification

The Commission may suspend or revoke such certification if, after notice and opportunity for hearing, the Commission determines that such certification is no longer warranted. In a State whose program has been suspended or revoked, the Commission shall take such steps as may be necessary, consistent with this section, to ensure continuity of telecommunications relay services.

(g) Complaint

(1) Referral of complaint

If a complaint to the Commission alleges a violation of this section with respect to intrastate telecommunications relay services within a State and certification of the program of such State under subsection (f) of this section is in effect, the Commission shall refer such complaint to such State.

(2) Jurisdiction of Commission

After referring a complaint to a State under paragraph (1), the Commission shall exercise jurisdiction over such complaint only if--

(A) final action under such State program has not been taken on such complaint by such State--

(i) within 180 days after the complaint is filed with such State; or

(ii) within a shorter period as prescribed by the regulations of such State; or

(B) the Commission determines that such State program is no longer qualified for certification under subsection (f) of this section.

47 U.S.C. § 402(a)

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

47 U.S.C. § 405(a)

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have

been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

5 U.S.C. § 553

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) 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.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 554

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved--

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a [FN1] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of--

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for--

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not--

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply--

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

5 U.S.C. §706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C. § 2342(1)

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

47 C.F.R. § 1.2

The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.

47 C.F.R. § 32.7300

This account shall be used to record the results of transactions, events and circumstances affecting the company during a period and which are not operational in nature. This account shall include such items as nonoperating taxes, dividend income and interest income. Whenever practicable, the inflows and outflows associated with a transaction or event shall be matched and the result shown as a net gain or loss. This account shall include the following:

(a) Dividends on investments in common and preferred stock, which is the property of the company, whether such stock is owned by the company and held in its treasury, or deposited in trust including sinking or other funds, or otherwise controlled.

(b) Dividends received and receivable from affiliated companies accounted for on the equity method shall be included in Account 1410, Other noncurrent assets, as a reduction of the carrying value of the investments.

(c) Interest on securities, including notes and other evidences of indebtedness, which are the property of the company, whether such securities are owned by the company and held in its treasury, or deposited in trust including sinking or other funds, or otherwise controlled. It shall also include interest on cash bank balances, certificates of deposits, open accounts, and other analogous items.

(d) For each month the applicable amount requisite to extinguish, during the interval between the date of acquisition and date of maturity, the difference between the purchase price and the par value of securities owned or held in sinking or other funds, the income from which is includable in this account. Amounts thus credited or charged shall be concurrently included in the accounts in which the securities are carried.

(e) Amounts charged to the telecommunications plant under construction account related to allowance for funds used during construction. (See § 32.2000(c)(2)(x).)

(f) Gains or losses resulting from:

(1) The disposition of land or artworks;

(2) The disposition of plant with traffic;

(3) The disposition of nonoperating telecommunications plant not previously used in the provision of telecommunications services.

(g) All other items of income and gains or losses from activities not specifically provided for elsewhere, including representative items such as:

(1) Fees collected in connection with the exchange of coupon bonds for

registered bonds;

(2) Gains or losses realized on the sale of temporary cash investments or marketable equity securities;

(3) Net unrealized losses on investments in current marketable equity securities;

(4) Write-downs or write-offs of the book costs of investment in equity securities due to permanent impairment;

(5) Gains or losses of nonoperating nature arising from foreign currency exchange or translation;

(6) Gains or losses from the extinguishment of debt made to satisfy sinking fund requirements;

(7) Amortization of goodwill;

(8) Company's share of the earnings or losses of affiliated companies accounted for on the equity method; and

(9) The net balance of the revenue from and the expenses (including depreciation, amortization and insurance) of property, plant, and equipment, the cost of which is includable in Account 2006, Nonoperating plant.

(h) Costs that are typically given special regulatory scrutiny for ratemaking purposes. Unless specific justification to the contrary is given, such costs are presumed to be excluded from the costs of service in setting rates.

(1) Lobbying includes expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances, or repeal or modification of existing referenda, legislation or ordinances) or approval, modification, or revocation of franchises, or for the purpose of influencing the decisions of public officials. This also includes advertising, gifts, honoraria, and political contributions. This does not include such expenditures which are directly related to communications with and appearances before regulatory or other governmental

bodies in connection with the reporting utility's existing or proposed operations;

(2) Contributions for charitable, social or community welfare purposes;

(3) Membership fees and dues in social, service and recreational or athletic clubs and organizations;

(4) Penalties and fines paid on account of violations of statutes. This account shall also include penalties and fines paid on account of violations of U.S. antitrust statutes, including judgements and payments in settlement of civil and criminal suits alleging such violations; and

(5) Abandoned construction projects.

(i) Cash discounts on bills for material purchased shall not be included in this account.

47 C.F.R. §64.603

Each common carrier providing telephone voice transmission services shall provide, not later than July 26, 1993, in compliance with the regulations prescribed herein, throughout the area in which it offers services, telecommunications relay services, individually, through designees, through a competitively selected vendor, or in concert with other carriers. Speech-to-speech relay service and interstate Spanish language relay service shall be provided by March 1, 2001. In addition, each common carrier providing telephone voice transmission services shall provide, not later than October 1, 2001, access via the 711 dialing code to all relay services as a toll free call. A common carrier shall be considered to be in compliance with these regulations:

(a) With respect to intrastate telecommunications relay services in any state that does not have a certified program under § 64.606 and with respect to interstate telecommunications relay services, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with § 64.604; or

(b) With respect to intrastate telecommunications relay services in any state that has a certified program under § 64.606 for such state, if such common carrier (or other entity through which the carrier is providing such relay services) is in

compliance with the program certified under § 64.606 for such state.

47 C.F.R. § 64.604

The standards in this section are applicable December 18, 2000, except as stated in paragraphs (c)(2) and (c)(7) of this section.

(a) Operational standards--

(1) Communications assistant (CA).

(i) TRS providers are responsible for requiring that all CAs be sufficiently trained to effectively meet the specialized communications needs of individuals with hearing and speech disabilities.

(ii) CAs must have competent skills in typing, grammar, spelling, interpretation of typewritten ASL, and familiarity with hearing and speech disability cultures, languages and etiquette. CAs must possess clear and articulate voice communications.

(iii) CAs must provide a typing speed of a minimum of 60 words per minute. Technological aids may be used to reach the required typing speed. Providers must give oral-to-type tests of CA speed.

(iv) TRS providers are responsible for requiring that VRS CAs are qualified interpreters. A “qualified interpreter” is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

(v) CAs answering and placing a TTY-based TRS or VRS call must stay with the call for a minimum of ten minutes. CAs answering and placing an STS call must stay with the call for a minimum of fifteen minutes.

(vi) TRS providers must make best efforts to accommodate a TRS user's requested CA gender when a call is initiated and, if a transfer occurs, at the time the call is transferred to another CA.

(vii) TRS shall transmit conversations between TTY and voice callers in real time.

(2) Confidentiality and conversation content.

(i) Except as authorized by section 705 of the Communications Act, 47 U.S.C. 605, CAs are prohibited from disclosing the content of any relayed conversation regardless of content, and with a limited exception for STS CAs, from keeping records of the content of any conversation beyond the duration of a call, even if to do so would be inconsistent with state or local law. STS CAs may retain information from a particular call in order to facilitate the completion of consecutive calls, at the request of the user. The caller may request the STS CA to retain such information, or the CA may ask the caller if he wants the CA to repeat the same information during subsequent calls. The CA may retain the information only for as long as it takes to complete the subsequent calls.

(ii) CAs are prohibited from intentionally altering a relayed conversation and, to the extent that it is not inconsistent with federal, state or local law regarding use of telephone company facilities for illegal purposes, must relay all conversation verbatim unless the relay user specifically requests summarization, or if the user requests interpretation of an ASL call. An STS CA may facilitate the call of an STS user with a speech disability so long as the CA does not interfere with the independence of the user, the user maintains control of the conversation, and the user does not object. Appropriate measures must be taken by relay providers to ensure that confidentiality of VRS users is maintained.

(3) Types of calls.

(i) Consistent with the obligations of telecommunications carrier operators, CAs are prohibited from refusing single or sequential calls or limiting the length of calls utilizing relay services.

(ii) Relay services shall be capable of handling any type of call normally provided by telecommunications carriers unless the Commission determines that it is not technologically feasible to do so. Relay service providers have the burden of proving the infeasibility of handling any type of call.

(iii) Relay service providers are permitted to decline to complete a call because credit authorization is denied.

(iv) Relay services shall be capable of handling pay-per-call calls.

(v) TRS providers are required to provide the following types of TRS calls: (1) Text-to-voice and voice-to-text; (2) VCO, two-line VCO, VCO-to-TTY, and VCO-to-VCO; (3) HCO, two-line HCO, HCO-to-TTY, HCO-to-HCO.

(vi) TRS providers are required to provide the following features: (1) Call release functionality; (2) speed dialing functionality; and (3) three-way calling functionality.

(vii) Voice mail and interactive menus. CAs must alert the TRS user to the presence of a recorded message and interactive menu through a hot key on the CA's terminal. The hot key will send text from the CA to the consumer's TTY indicating that a recording or interactive menu has been encountered. Relay providers shall electronically capture recorded messages and retain them for the length of the call. Relay providers may not impose any charges for additional calls, which must be made by the relay user in order to complete calls involving recorded or interactive messages.

(viii) TRS providers shall provide, as TRS features, answering machine and voice mail retrieval.

(4) Emergency call handling requirements for TTY-based TRS providers. TTY-based TRS providers must use a system for incoming emergency calls that, at a minimum, automatically and immediately transfers the caller to an appropriate Public Safety Answering Point (PSAP). An appropriate PSAP is either a PSAP that the caller would have reached if he had dialed 911 directly, or a PSAP that is capable of enabling the dispatch of emergency services to the caller in an expeditious manner.

(5) STS called numbers. Relay providers must offer STS users the option to maintain at the relay center a list of names and telephone numbers which the STS user calls. When the STS user requests one of these names, the CA must repeat the name and state the telephone number to the STS user. This information must be transferred to any new STS provider.

(b) Technical standards--

(1) ASCII and Baudot. TRS shall be capable of communicating with ASCII and Baudot format, at any speed generally in use.

(2) Speed of answer.

(i) TRS providers shall ensure adequate TRS facility staffing to provide callers with efficient access under projected calling volumes, so that the probability of a busy response due to CA unavailability shall be functionally equivalent to what a voice caller would experience in attempting to reach a party through the voice telephone network.

(ii) TRS facilities shall, except during network failure, answer 85% of all calls within 10 seconds by any method which results in the caller's call immediately being placed, not put in a queue or on hold. The ten seconds begins at the time the call is delivered to the TRS facility's network. A TRS facility shall ensure that adequate network facilities shall be used in conjunction with TRS so that under projected calling volume the probability of a busy response due to loop trunk congestion shall be functionally equivalent to what a voice caller would experience in attempting to reach a party through the voice telephone network.

(A) The call is considered delivered when the TRS facility's equipment accepts the call from the local exchange carrier (LEC) and the public switched network actually delivers the call to the TRS facility.

(B) Abandoned calls shall be included in the speed-of-answer calculation.

(C) A TRS provider's compliance with this rule shall be measured on a daily basis.

(D) The system shall be designed to a P.01 standard.

(E) A LEC shall provide the call attempt rates and the rates of calls blocked between the LEC and the TRS facility to relay administrators and TRS providers upon request.

(iii) Speed of answer requirements for VRS providers are phased-in as follows: by January 1, 2006, VRS providers must answer 80% of all calls within 180 seconds, measured on a monthly basis; by July 1, 2006, VRS providers must answer 80% of all calls within 150 seconds, measured on a monthly basis; and by Janury 1, 2007, VRS providers must answer 80% of all calls within 120 seconds, measured on a monthly basis. Abandoned calls shall be included in the VRS speed of answer calculation.

(3) Equal access to interexchange carriers. TRS users shall have access to their

chosen interexchange carrier through the TRS, and to all other operator services, to the same extent that such access is provided to voice users.

(4) TRS facilities.

(i) TRS shall operate every day, 24 hours a day. Relay services that are not mandated by this Commission need not be provided every day, 24 hours a day, except VRS.

(ii) TRS shall have redundancy features functionally equivalent to the equipment in normal central offices, including uninterruptible power for emergency use.

(5) Technology. No regulation set forth in this subpart is intended to discourage or impair the development of improved technology that fosters the availability of telecommunications to person with disabilities. TRS facilities are permitted to use SS7 technology or any other type of similar technology to enhance the functional equivalency and quality of TRS. TRS facilities that utilize SS7 technology shall be subject to the Calling Party Telephone Number rules set forth at 47 CFR 64.1600 et seq.

(6) Caller ID. When a TRS facility is able to transmit any calling party identifying information to the public network, the TRS facility must pass through, to the called party, at least one of the following: the number of the TRS facility, 711, or the 10-digit number of the calling party.

(c) Functional standards--

(1) Consumer complaint logs.

(i) States and interstate providers must maintain a log of consumer complaints including all complaints about TRS in the state, whether filed with the TRS provider or the State, and must retain the log until the next application for certification is granted. The log shall include, at a minimum, the date the complaint was filed, the nature of the complaint, the date of resolution, and an explanation of the resolution.

(ii) Beginning July 1, 2002, states and TRS providers shall submit summaries of logs indicating the number of complaints received for the 12-month period ending May 31 to the Commission by July 1 of each year. Summaries of logs

submitted to the Commission on July 1, 2001 shall indicate the number of complaints received from the date of OMB approval through May 31, 2001.

(2) Contact persons. Beginning on June 30, 2000, State TRS Programs, interstate TRS providers, and TRS providers that have state contracts must submit to the Commission a contact person and/or office for TRS consumer information and complaints about a certified State TRS Program's provision of intrastate TRS, or, as appropriate, about the TRS provider's service. This submission must include, at a minimum, the following:

(i) The name and address of the office that receives complaints, grievances, inquiries, and suggestions;

(ii) Voice and TTY telephone numbers, fax number, e-mail address, and web address; and

(iii) The physical address to which correspondence should be sent.

(3) Public access to information. Carriers, through publication in their directories, periodic billing inserts, placement of TRS instructions in telephone directories, through directory assistance services, and incorporation of TTY numbers in telephone directories, shall assure that callers in their service areas are aware of the availability and use of all forms of TRS. Efforts to educate the public about TRS should extend to all segments of the public, including individuals who are hard of hearing, speech disabled, and senior citizens as well as members of the general population. In addition, each common carrier providing telephone voice transmission services shall conduct, not later than October 1, 2001, ongoing education and outreach programs that publicize the availability of 711 access to TRS in a manner reasonably designed to reach the largest number of consumers possible.

(4) Rates. TRS users shall 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 the point of origination to the point of termination.

(5) Jurisdictional separation of costs--

(i) General. Where appropriate, costs of providing TRS shall be separated in accordance with the jurisdictional separation procedures and standards set forth

in the Commission's regulations adopted pursuant to section 410 of the Communications Act of 1934, as amended.

(ii) Cost recovery. Costs caused by interstate TRS shall be recovered from all subscribers for every interstate service, utilizing a shared-funding cost recovery mechanism. Except as noted in this paragraph, with respect to VRS, costs caused by intrastate TRS shall be recovered from the intrastate jurisdiction. In a state that has a certified program under § 64.606, the state agency providing TRS shall, through the state's regulatory agency, permit a common carrier to recover costs incurred in providing TRS by a method consistent with the requirements of this section. Costs caused by the provision of interstate and intrastate VRS shall be recovered from all subscribers for every interstate service, utilizing a shared-funding cost recovery mechanism.

(iii) Telecommunications Relay Services Fund. Effective July 26, 1993, an Interstate Cost Recovery Plan, hereinafter referred to as the TRS Fund, shall be administered by an entity selected by the Commission (administrator). The initial administrator, for an interim period, will be the National Exchange Carrier Association, Inc.

(A) Contributions. Every carrier providing interstate telecommunications services shall contribute to the TRS Fund on the basis of interstate end-user telecommunications revenues as described herein. Contributions shall be made by all carriers who provide interstate services, including, but not limited to, cellular telephone and paging, mobile radio, operator services, personal communications service (PCS), access (including subscriber line charges), alternative access and special access, packet-switched, WATS, 800, 900, message telephone service (MTS), private line, telex, telegraph, video, satellite, intraLATA, international and resale services.

(B) Contribution computations. Contributors' contribution to the TRS fund shall be the product of their subject revenues for the prior calendar year and a contribution factor determined annually by the Commission. The contribution factor shall be based on the ratio between expected TRS Fund expenses to interstate end-user telecommunications revenues. In the event that contributions exceed TRS payments and administrative costs, the contribution factor for the following year will be adjusted by an appropriate amount, taking into consideration projected cost and usage changes. In the event that contributions are inadequate, the fund administrator may request authority from the Commission to borrow funds commercially, with such

debt secured by future years' contributions. Each subject carrier must contribute at least $25 per year. Carriers whose annual contributions total less than $1,200 must pay the entire contribution at the beginning of the contribution period. Service providers whose contributions total $1,200 or more may divide their contributions into equal monthly payments. Carriers shall complete and submit, and contributions shall be based on, a "Telecommunications Reporting Worksheet" (as published by the Commission in the Federal Register). The worksheet shall be certified to by an officer of the contributor, and subject to verification by the Commission or the administrator at the discretion of the Commission. Contributors' statements in the worksheet shall be subject to the provisions of section 220 of the Communications Act of 1934, as amended. The fund administrator may bill contributors a separate assessment for reasonable administrative expenses and interest resulting from improper filing or overdue contributions. The Chief of the Consumer & Governmental Affairs Bureau may waive, reduce, modify or eliminate contributor reporting requirements that prove unnecessary and require additional reporting requirements that the Bureau deems necessary to the sound and efficient administration of the TRS Fund.

(C) 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.

(D) [Reserved]

(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. 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 TRS Fund 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.

(F) TRS providers eligible for receiving payments from the TRS Fund are:

(1) TRS facilities operated under contract with and/or by certified state TRS programs pursuant to § 64.606; or

(2) TRS facilities owned by or operated under contract with a common carrier providing interstate services operated pursuant to § 64.604; or

(3) Interstate common carriers offering TRS pursuant to § 64.604; or

(4) Video Relay Service (VRS) and Internet Protocol (IP) Relay providers certified by the Commission pursuant to § 64.606.

(G) Any eligible TRS provider as defined in paragraph (c)(5)(iii)(F) of this

section shall notify the administrator of its intent to participate in the TRS Fund thirty (30) days prior to submitting reports of TRS interstate minutes of use in order to receive payment settlements for interstate TRS, and failure to file may exclude the TRS provider from eligibility for the year.

(H) Administrator reporting, monitoring, and filing requirements. The administrator shall perform all filing and reporting functions required in paragraphs (c)(5)(iii)(A) through (c)(5)(iii)(J) of this section. TRS payment formulas and revenue requirements shall be filed with the Commission on May 1 of each year, to be effective the following July 1. The administrator shall report annually to the Commission an itemization of monthly administrative costs which shall consist of all expenses, receipts, and payments associated with the administration of the TRS Fund. The administrator is required to keep the TRS Fund separate from all other funds administered by the administrator, shall file a cost allocation manual (CAM) and shall provide the Commission full access to all data collected pursuant to the administration of the TRS Fund. The administrator shall account for the financial transactions of the TRS Fund in accordance with generally accepted accounting principles for federal agencies and maintain the accounts of the TRS Fund in accordance with the United States Government Standard General Ledger. When the administrator, or any independent auditor hired by the administrator, conducts audits of providers of services under the TRS program or contributors to the TRS Fund, such audits shall be conducted in accordance with generally accepted government auditing standards. In administering the TRS Fund, the administrator shall also comply with all relevant and applicable federal financial management and reporting statutes. The administrator shall establish a non-paid voluntary advisory committee of persons from the hearing and speech disability community, TRS users (voice and text telephone), interstate service providers, state representatives, and TRS providers, which will meet at reasonable intervals (at least semi-annually) in order to monitor TRS cost recovery matters. Each group shall select its own representative to the committee. The administrator's annual report shall include a discussion of the advisory committee deliberations.

(I) Information filed with the administrator. 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.

(J) The administrator's performance and this plan shall be reviewed by the Commission after two years.

(K) All parties providing services or contributions or receiving payments under this section are subject to the enforcement provisions specified in the Communications Act, the Americans with Disabilities Act, and the Commission's rules.

(6) Complaints--

(i) Referral of complaint. If a complaint to the Commission alleges a violation of this subpart with respect to intrastate TRS within a state and certification of the program of such state under § 64.606 is in effect, the Commission shall refer such complaint to such state expeditiously.

(ii) Intrastate complaints shall be resolved by the state within 180 days after the complaint is first filed with a state entity, regardless of whether it is filed with the state relay administrator, a state PUC, the relay provider, or with any other state entity.

(iii) Jurisdiction of Commission. After referring a complaint to a state entity under paragraph (c)(6)(i) of this section, or if a complaint is filed directly with a state entity, the Commission shall exercise jurisdiction over such complaint

only if:

(A) Final action under such state program has not been taken within:

(1) 180 days after the complaint is filed with such state entity; or

(2) A shorter period as prescribed by the regulations of such state; or

(B) The Commission determines that such state program is no longer qualified for certification under § 64.606.

(iv) The Commission shall resolve within 180 days after the complaint is filed with the Commission any interstate TRS complaint alleging a violation of section 225 of the Act or any complaint involving intrastate relay services in states without a certified program. The Commission shall resolve intrastate complaints over which it exercises jurisdiction under paragraph (c)(6)(iii) of this section within 180 days.

(v) Complaint procedures. Complaints against TRS providers for alleged violations of this subpart may be either informal or formal.

(A) Informal complaints--

(1) Form. An informal complaint may be transmitted to the Consumer & Governmental Affairs Bureau by any reasonable means, such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, or some other method that would best accommodate a complainant's hearing or speech disability.

(2) Content. An informal complaint shall include the name and address of the complainant; the name and address of the TRS provider against whom the complaint is made; a statement of facts supporting the complainant's allegation that the TRS provided it has violated or is violating section 225 of the Act and/or requirements under the Commission's rules; the specific relief or satisfaction sought by the complainant; and the complainant's preferred format or method of response to the complaint by the Commission and the defendant TRS provider (such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, or some other method that would best accommodate the complainant's hearing or speech disability).

(3) Service; designation of agents. The Commission shall promptly forward any complaint meeting the requirements of this subsection to the TRS provider named in the complaint. Such TRS provider shall be called upon to satisfy or answer the complaint within the time specified by the Commission. Every TRS provider shall file with the Commission a statement designating an agent or agents whose principal responsibility will be to receive all complaints, inquiries, orders, decisions, and notices and other pronouncements forwarded by the Commission. Such designation shall include a name or department designation, business address, telephone number (voice and TTY), facsimile number and, if available, internet e-mail address.

(B) Review and disposition of informal complaints.

(1) Where it appears from the TRS provider's answer, or from other communications with the parties, that an informal complaint has been satisfied, the Commission may, in its discretion, consider the matter closed without response to the complainant or defendant. In all other cases, the Commission shall inform the parties of its review and disposition of a complaint filed under this subpart. Where practicable, this information shall be transmitted to the complainant and defendant in the manner requested by the complainant (e.g., letter, facsimile transmission, telephone (voice/TRS/TTY) or Internet e-mail.

(2) A complainant unsatisfied with the defendant's response to the informal complaint and the staff's decision to terminate action on the informal complaint may file a formal complaint with the Commission pursuant to paragraph (c)(6)(v)(C) of this section.

(C) Formal complaints. A formal complaint shall be in writing, addressed to the Federal Communications Commission, Enforcement Bureau, Telecommunications Consumer Division, Washington, DC 20554 and shall contain:

(1) The name and address of the complainant,

(2) The name and address of the defendant against whom the complaint is made,

(3) A complete statement of the facts, including supporting data, where available, showing that such defendant did or omitted to do anything in contravention of this subpart, and

(4) The relief sought.

(D) Amended complaints. An amended complaint setting forth transactions, occurrences or events which have happened since the filing of the original complaint and which relate to the original cause of action may be filed with the Commission.

(E) Number of copies. An original and two copies of all pleadings shall be filed.

(F) Service.

(1) Except where a complaint is referred to a state pursuant to § 64.604(c)(6)(i), or where a complaint is filed directly with a state entity, the Commission will serve on the named party a copy of any complaint or amended complaint filed with it, together with a notice of the filing of the complaint. Such notice shall call upon the defendant to satisfy or answer the complaint in writing within the time specified in said notice of complaint.

(2) All subsequent pleadings and briefs shall be served by the filing party on all other parties to the proceeding in accordance with the requirements of § 1.47 of this chapter. Proof of such service shall also be made in accordance with the requirements of said section.

(G) Answers to complaints and amended complaints. Any party upon whom a copy of a complaint or amended complaint is served under this subpart shall serve an answer within the time specified by the Commission in its notice of complaint. The answer shall advise the parties and the Commission fully and completely of the nature of the defense and shall respond specifically to all material allegations of the complaint. In cases involving allegations of harm, the answer shall indicate what action has been taken or is proposed to be taken to stop the occurrence of such harm. Collateral or immaterial issues shall be avoided in answers and every effort should be made to narrow the issues. Matters alleged as affirmative defenses shall be separately stated and numbered. Any defendant failing to file and serve an

answer within the time and in the manner prescribed may be deemed in default.

(H) Replies to answers or amended answers. Within 10 days after service of an answer or an amended answer, a complainant may file and serve a reply which shall be responsive to matters contained in such answer or amended answer and shall not contain new matter. Failure to reply will not be deemed an admission of any allegation contained in such answer or amended answer.

(I) Defective pleadings. Any pleading filed in a complaint proceeding that is not in substantial conformity with the requirements of the applicable rules in this subpart may be dismissed.

(7) Treatment of TRS customer information. Beginning on July 21, 2000, all future contracts between the TRS administrator and the TRS vendor shall provide for the transfer of TRS customer profile data from the outgoing TRS vendor to the incoming TRS vendor. Such data must be disclosed in usable form at least 60 days prior to the provider's last day of service provision. Such data may not be used for any purpose other than to connect the TRS user with the called parties desired by that TRS user. Such information shall not be sold, distributed, shared or revealed in any other way by the relay center or its employees, unless compelled to do so by lawful order.

47 C.F.R. § 64.605

(a) Additional Emergency Calling Requirements Applicable to Internet-based TRS Providers.

(1) As of December 31, 2008, the requirements of paragraphs (a)(2)(i) and (a)(2)(iv) of this section shall not apply to providers of VRS and IP Relay.

(2) Each provider of Internet-based TRS shall:

(i) Accept and handle emergency calls and access, either directly or via a third party, a commercially available database that will allow the provider to determine an appropriate PSAP, designated statewide default answering point, or appropriate local emergency authority that corresponds to the caller's

location, and to relay the call to that entity;

(ii) Implement a system that ensures that the provider answers an incoming emergency call before other non-emergency calls (i.e., prioritize emergency calls and move them to the top of the queue);

(iii) Request, at the beginning of each emergency call, the caller's name and location information, unless the Internet-based TRS provider already has, or has access to, a Registered Location for the caller;

(iv) Deliver to the PSAP, designated statewide default answering point, or appropriate local emergency authority, at the outset of the outbound leg of an emergency call, at a minimum, the name of the relay user and location of the emergency, as well as the name of the relay provider, the CA's callback number, and the CA's identification number, thereby enabling the PSAP, designated statewide default answering point, or appropriate local emergency authority to re-establish contact with the CA in the event the call is disconnected;

(v) In the event one or both legs of an emergency call are disconnected (i.e., either the call between the TRS user and the CA, or the outbound voice telephone call between the CA and the PSAP, designated statewide default answering point, or appropriate local emergency authority), immediately re-establish contact with the TRS user and/or the appropriate PSAP, designated statewide default answering point, or appropriate local emergency authority and resume handling the call; and

(vi) Ensure that information obtained as a result of this section is limited to that needed to facilitate 911 services, is made available only to emergency call handlers and emergency response or law enforcement personnel, and is used for the sole purpose of ascertaining a user's location in an emergency situation or for other emergency or law enforcement purposes.

(b) E911 Service for VRS and IP Relay.

(1) Scope. The following requirements are only applicable to providers of VRS or IP Relay. Further, the following requirements apply only to 911 calls placed by users whose Registered Location is in a geographic area served by a Wireline E911 Network.

(2) E911 Service. As of December 31, 2008:

(i) VRS or IP Relay providers must, as a condition of providing service to a user, provide that user with E911 service as described in this section;

(ii) VRS or IP Relay providers must transmit all 911 calls, as well as ANI, the caller's Registered Location, the name of the VRS or IP Relay provider, and the CA's identification number for each call, to the PSAP, designated statewide default answering point, or appropriate local emergency authority that serves the caller's Registered Location and that has been designated for telecommunications carriers pursuant to § 64.3001 of this chapter, provided that "all 911 calls" is defined as "any communication initiated by an VRS or IP Relay user dialing 911";

(iii) All 911 calls must be routed through the use of ANI and, if necessary, pseudo-ANI, via the dedicated Wireline E911 Network; and

(iv) The Registered Location, the name of the VRS or IP Relay provider, and the CA's identification number must be available to the appropriate PSAP, designated statewide default answering point, or appropriate local emergency authority from or through the appropriate automatic location information (ALI) database.

(3) Service Level Obligation. Notwithstanding the provisions in paragraph (b)(2) of this section, if a PSAP, designated statewide default answering point, or appropriate local emergency authority is not capable of receiving and processing either ANI or location information, a VRS or IP Relay provider need not provide such ANI or location information; however, nothing in this paragraph affects the obligation under paragraph (c) of this section of a VRS or IP Relay provider to transmit via the Wireline E911 Network all 911 calls to the PSAP, designated statewide default answering point, or appropriate local emergency authority that serves the caller's Registered Location and that has been designated for telecommunications carriers pursuant to § 64.3001 of this chapter.

(4) Registered Location Requirement. As of December 31, 2008, VRS and IP Relay providers must:

(i) Obtain from each Registered Internet-based TRS User, prior to the initiation of service, the physical location at which the service will first be utilized; and

(ii) If the VRS or IP Relay is capable of being used from more than one location, provide their Registered Internet-based TRS Users one or more methods of updating their Registered Location, including at least one option that requires use only of the CPE necessary to access the VRS or IP Relay. Any method utilized must allow a Registered Internet-based TRS User to update the Registered Location at will and in a timely manner.