

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

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|--|---|----------------------|
| In the Matter of |) | |
| |) | |
| Telecommunications Relay Services and |) | CG Docket No. 03-123 |
| Speech-to-Speech Services for Individuals with |) | |
| Hearing and Speech Disabilities |) | |
| |) | |
| Structure and Practices of the Video Relay |) | CG Docket No. 10-51 |
| Service Program |) | |
| |) | |

**COMMENTS OF
SORENSEN COMMUNICATIONS, INC.**

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Executive Summary

Ten years ago, the Federal Communications Commission (“FCC” or “Commission”) approved video relay service (“VRS”) as the first broadband form of relay. This decision marks a watershed in the civil rights struggle of deaf Americans. For the first time, deaf users of American Sign Language (“ASL”) were able to use their own language – rather than typed approximations of it – to make appointments with their doctors, participate in business calls, and chat with hearing friends and relatives. The enhanced ability to call anyone, anytime, anywhere has made VRS the most popular form of relay, even though many deaf ASL users still do not have access to it.

The Commission now is facing another critical decision. When it sets a new VRS rate in this proceeding, it will determine whether America continues to make progress toward the statutory goals of functional equivalence, nationwide access, and inclusion – or not. And it will determine whether VRS continues to drive broadband adoption by the deaf, even in the face of disproportionate poverty, disenfranchisement, and isolation.

The FCC has already laid the groundwork for achieving these goals. In 2007, it unanimously chose to replace the annual cost-of-service approach to setting VRS rates with an incentive-based methodology whose first rate cycle was for three years. By aligning providers’ long-term incentives with the mandates of the Americans with Disabilities Act (“ADA”), the new plan spurred providers to shorten hold times, expand outreach, improve and begin offering videophones, and hire and train more interpreters and more deaf customer service personnel. The new plan also eliminated the worst problems of the old approach, such as annual controversies over provider “costs,” procedural irregularities in setting those “costs,” and wild swings in VRS rates – as much as 77 percent annually.

This progress has now been imperiled by the administrator of the Interstate TRS Fund – the National Exchange Carrier Association (“NECA”) – which has presented four “VRS rate alternatives” for the FCC to consider in adopting a new rate plan. In reality, these are not alternatives at all. Each proposal is based on providers’ reported “costs,” differing only in how those “costs” are measured, and the resulting series of faux “alternatives” appears designed to favor a return to some form of the cost-of-service approach that was discarded in 2007. The Commission must not regress in this manner.

For instance, it would be folly to adopt either of NECA’s proposals to base rates on providers’ historical costs. Both proposals would result in bankruptcy for providers along with chaos and devastation for consumers. One of the proposals would likely drive all providers into bankruptcy, forcing consumers to revert to the slow process of typing their relayed communications, and the other would drive Sorenson into bankruptcy, likely stranding tens of thousands of consumers and making it uneconomical for them to be served by any other provider. The FCC lacks authority under the ADA to adopt any rate, under any methodology, that would make it economically impossible to provide VRS.

Instead, the FCC should adopt a five-year incentive-based plan that sets the VRS rate for all providers at \$5.95 for 2010-11 and reduces that rate by 1 percent in each subsequent year. The FCC also should eliminate “tiered” rates, which would reward inefficiency; repeal the requirement that providers file annual “cost” reports, which would blunt incentives to be created by the new plan; and establish a new Functional Equivalency and Broadband Advisory Committee. These steps will satisfy the ADA, preserve high quality VRS, drive broadband adoption by the deaf, and ensure that the next decade of VRS is as transformative as the first. America needs such a plan, and it is the right thing to do.

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COMMENTS OF SORENSON COMMUNICATIONS, INC.

I. INTRODUCTION AND SUMMARY

Since its inception in 2000, video relay service (“VRS”) has been governed by two radically different rate methodologies. Under the first approach, VRS rates were set annually based on providers’ projected per-minute “costs” for the forthcoming rate year, as proposed to the Commission by the National Exchange Carrier Association (“NECA”), the administrator of the Interstate TRS Fund (“Fund”). Notably, the projected “costs” considered by NECA did not reflect the full costs VRS firms incur in providing the service, but only that portion of provider costs that NECA deemed to be compensable based on FCC rules and orders and informal direction from FCC staff. Complicating the process, the categories of “costs” that were deemed allowable changed almost annually. Not surprisingly, this approach generated annual, extended controversies over what costs incurred in providing VRS would be compensable, the predicted impact of changes in the Commission’s rules on provider costs, the projected pace of growth in VRS

subscribership and demand, and whether the Commission should accept or adjust NECA's proposed VRS rate.

In November 2007, after a 16-month rulemaking, the Commission unanimously chose to move away from this unpredictable annual process, adopting instead a new methodology modeled on price caps that would harness the providers' incentives to make ongoing gains in the efficiency of their operations, invest in new technologies that would improve the quality (and lower the per-unit cost) of VRS, and concentrate their energies on expanding the reach of VRS to the deaf community. Under this approach, VRS rates were set at three levels (or "tiers") ranging from \$6.30 to \$6.77 for the 2007-2008 rate year. For each of the subsequent two rate years, the tiered rates were reduced by 0.5 percent to reflect productivity gains.

The incentive-based plan has worked as anticipated. It has put an end to the annual controversies over provider "costs" and the process by which NECA arrived at its proposed VRS rate, and it has eliminated the wild swings in VRS rates from year to year, which were as high as 77 percent under the old approach. Relying on the transparent, self-executing, three-year rate schedule, providers have instituted long-range plans that advance the statutory goals that VRS become more functionally equivalent, more innovative, more efficiently provided, and more widely available to deaf American Sign Language ("ASL") users. This record of progress is due in large part to the Commission's wise decision to divorce providers' incentives from their "costs." As the United States Court of Appeals for the Tenth Circuit found last year in reviewing the current VRS rate methodology, "the logic of a price cap-based compensation system" for

VRS dictates that the FCC compensate providers “regardless of their actual costs” in providing the service.¹

The initial rate cycle under the incentive-based methodology will expire on June 30, 2010, and the Commission is now charged with setting VRS rates for the next cycle. Unfortunately, this task has been complicated by NECA, which has proposed four sets of tiered “VRS rate alternatives” for the Commission to consider for the period after June 30, 2010.² These proposals appear to have been designed to create the impression that NECA is being flexible (having developed a range of “alternatives”), while in reality each of the “alternatives” heralds a return to some version of the “cost”-based approach that the Commission abandoned in 2007. All four NECA proposals are based on the historical or projected “costs” reported by providers, and adopting any of these proposals would revive (and probably worsen) the problems that existed prior to 2008 and thwart the four key goals of the Americans with Disabilities Act (“ADA”): functional equivalence, technological improvement, nationwide access, and greater efficiency.

NECA’s “historical cost” proposals are particularly egregious. Both of these proposals contain rates so low that they would drive Sorenson into bankruptcy, likely stranding tens of thousands deaf customers, and one of those alternatives would likely plunge *all* VRS providers into bankruptcy, forcing the deaf ASL community to revert to

¹ *Sorenson Communications, Inc. v. FCC*, 567 F.3d 1215, 1221-22 (10th Cir. 2009).

² National Exchange Carriers Association, “Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate,” CG Docket No. 03-123 (April 30, 2010) (“NECA Filing”); *see also* FCC, “National Exchange Carrier Association Submits the Payment Formula and Fund Size Estimate for the Interstate Telecommunications Relay Services Fund for the July 2010 Through June 2011 Fund Year,” CG Docket No. 03-123, Public Notice, DA 10-761 (rel. April 30, 2010) (“Public Notice”).

the laborious process of typing their relayed communications rather than conversing in their own language. The Commission lacks authority under the ADA to destroy VRS in this manner or to adopt any rate, under any methodology, that would make it economically impossible to provide VRS.

Even if some providers could initially survive under one of the historical-cost approaches, it would be untenable for any of those providers to commence handling the minutes formerly handled by Sorenson, since doing so would subject them to the same \$3.89 Tier 3 rate that drove Sorenson into bankruptcy. Instead, each provider would seek to discourage consumers from placing any VRS call that would require it to handle more than 500,000 minutes per month, the point beyond which the provider would only be compensated at the ruinously low Tier 3 rate of \$3.89 per minute. As a result, providers would have an incentive to limit the size of their customer bases in Year 1 and then demand a higher Tier 3 rate in subsequent years, leading to poorer service to fewer users at a higher cost – precisely the opposite of what the statute demands. The Commission therefore should reject both of NECA’s historical-cost proposals along with the very idea of resuscitating a “cost”-based approach under any guise.

Instead, the Commission should craft an improved version of the incentive-based approach that has governed for the past three rate years. In particular, the Commission should adopt a five-year incentive-based plan that sets the VRS rate for all providers at \$5.95 for 2010-2011 and reduces that rate by 1 percent each year thereafter. This five-year plan should not retain any vestiges of the old cost-of-service approach. In particular, the new plan should eliminate the requirement that providers report their compensable annual “costs,” which blunts providers’ incentive to achieve efficiencies by suggesting

that, at some point in the future, the VRS rate might be reset to a “cost”-based level. In place of a counterproductive “cost” filing, the FCC should collect data regarding progress toward functional equivalence, nationwide access, and broadband adoption, which would be evaluated by a new advisory committee. Likewise, VRS rates should not be set at different “tiered” levels that allegedly reflect the different “costs” borne by different providers; this scheme serves only to reward inefficient providers that attract low volumes of usage. Finally, as the Commission indicated in an analogous context, it would be improper to use “cost” data to reinitialize rate levels under a new incentive-based plan because doing so would effectively keep in place the “perverse incentives of rate-of-return regulation” and blunt the incentives for achieving the pro-consumer efficiency gains that the incentive-based methodology was designed to encourage.³

By adopting a new plan along these lines, the Commission would serve the interests of the deaf and promote the four key goals of the ADA. For instance, the five-year horizon of the plan would enhance the stability and predictability of VRS rates, thereby increasing providers’ incentive and ability to undertake long-term projects to improve equipment, shorten hold times, increase hiring and training of interpreters, and operate more efficiently. The \$5.95 rate in Year 1 of the plan represents a substantial 4.5 percent cut from today’s Tier 3 rate of \$6.23, but is still sufficient to allow multiple providers to compete based on innovation, quality of service, outreach, and efficiency.

³ See *Price Cap Performance Review for Local Exchange Carriers; Access Charge Reform*, Fourth Report and Order, 12 FCC Rcd 16642, ¶ 167 (1997) (“*1997 Price Cap Fourth R&O*”); see also FCC, “Connecting America: The National Broadband Plan,” at 147, available at: <<http://download.broadband.gov/plan/national-broadband-plan.pdf>> (“National Broadband Plan”) (“Rate-of-return regulation was not designed to promote efficiency or innovation”) (citing *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, ¶ 32 (1990), *aff’d*, *Nat’l Rural Telecom Ass’n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993)).

Likewise, the 1 percent annual decrease in the rate would double the decrease that occurred in 2008 and 2009, thereby further encouraging the efficiency that is required by the statute and that protects the integrity of the Fund. Finally, as the quality and availability of VRS improve, it will increasingly drive broadband adoption among the deaf, a key goal of the Commission.⁴

Sorenson urges the Commission to adopt this five-year incentive-based plan quickly so that it can take effect on July 1, 2010, without the need for interim rates or other temporizing expedients. However, if the Commission believes it must adopt an interim rate plan to take effect on July 1, 2010, it should maintain the status quo by extending the existing rate plan: *i.e.*, during the interim period, VRS rates should be set at levels that are 0.5 percent lower than the 2009-10 rates. Taking this step will ensure that deaf consumers continue to enjoy the benefits of a stable and predictable incentive-based approach even during an interim period. Hearing Americans have long enjoyed such benefits for most of their communication services. The deaf ASL community deserves no less.

II. THE NEW VRS RATE PLAN MUST FULFILL THE STATUTORY MANDATE OF THE ADA

Telecommunications relay services (“TRS”) are governed by Title IV of the ADA, which is codified in relevant part in section 225 of the Communications Act of

⁴ IP Relay also has driven broadband adoption and benefited from a price cap methodology that will expire on June 30, 2010. The Commission therefore should adopt an IP Relay rate plan that is similar to that for VRS: *i.e.*, a five-year price cap plan in which the rate is set at \$1.222 for the first year (a reduction of 4.5 percent from the current level), with each subsequent yearly rate being reduced by 1 percent, and which contains no vestiges of a “cost”-based approach. Since NECA has proposed only a single rate for IP Relay, and that rate is reasonably close to \$1.222, these comments focus on the appropriate VRS rate for the next rate cycle.

1934, as amended (“Communications Act”). Although section 225 does not specifically address rate issues, it mandates four goals that the Commission must advance in all TRS matters, including when setting rates for interstate relay services. In particular, section 225 requires the Commission to “ensure” that all deaf, hard-of-hearing, and speech-disabled individuals have (i) nationwide access, “to the extent possible,”⁵ (ii) to “functionally equivalent” relay services,⁶ (iii) that are made available “in the most efficient manner,”⁷ (iv) pursuant to FCC rules that permit “the development of improved technology.”⁸ These directives are obligatory, not discretionary,⁹ and the Commission therefore must ensure the VRS rate plan to take effect after June 30, 2010 promotes each of the four goals.

Sorenson applauds the Commission for having advanced the statutory mandates in prior proceedings, including, most notably, its 2007 decision to adopt a three-year

⁵ 47 U.S.C. § 225(b)(1) (incorporating by reference the goal of universal service codified in section 1 of the Communications Act, 47 U.S.C. § 151). *See also* H.R. REP. NO. 101-485, Part 2, at 129 (May 15, 1990) (“H.R. Rep. 101-485 Pt. 2”) (“Title IV . . . will help to further the statutory goals of universal service as mandated in the Communications Act of 1934”); *id.* at 130 (FCC should “ensure universal service to the hearing- and speech-impaired community,” and establishing minimum standards for TRS will help “attain[] meaningful universal service for this population”).

⁶ *Id.* § 225(a)(3).

⁷ *Id.* § 225(b)(1).

⁸ *Id.* § 225(d)(2); *see also* H.R. Rep. 101-485 Pt. 2 at 131, 133-34 (describing Congress’s goal of encouraging the use of “state-of-the-art technology” and guarding against “freezing technology or thwarting the introduction of a superior or more efficient technology”).

⁹ *See, e.g., Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, ¶ 18 (2000) (“*Improved TRS R&O*”) (“We believe that nationwide availability of STS is possible, and we are therefore obligated to require it.”).

incentive-based plan for VRS rates.¹⁰ These prior successes, however, should not obscure the pressing need for additional progress.

For example, the availability of VRS is nowhere near the one hundred percent mandated by the ADA or even the 95.7 percent of voice telephones for hearing households.¹¹ While hard to document, it appears that as many as half or more of households with deaf ASL users lack access to VRS.¹² Furthermore, many (probably most) of the deaf individuals without access to VRS have not adopted broadband, and may lack the basic “digital literacy” to understand what broadband is, how to obtain it, or why it is needed for VRS. Many other deaf individuals live in isolated communities, with few if any opportunities to use ASL or to interact with deaf support groups, or have not fully integrated into local deaf communities. These individuals not only are harder to locate, but also are generally less advanced in terms of their ASL skills and ability to navigate the cultural and economic barriers still prevalent in mainstream society.

¹⁰ Sorenson also applauds the Consumer and Governmental Affairs Bureau (“Bureau”) for having taken initial steps to root out fraudulent and abusive practices by VRS providers and to define more clearly what types of VRS calls are legitimate and hence compensable. *See Structure and Practices of the Video Relay Services Program*, Declaratory Ruling, 25 FCC Rcd 1868 (2010); FCC, News Release, “Purple Communications Acknowledges Debt, Begins Payback to Telecommunications Relay Fund,” 2010 FCC LEXIS 1513 (rel. Mar. 9, 2010). Sorenson was at the forefront of urging the FCC to take these steps and many others, and subsequently has pointed out that much more needs to be done to protect the integrity of the Fund. *See* Sorenson Petition for Rulemaking, CG Docket No. 03-123 (Oct. 1, 2009); Letter from Regina M. Keeney, counsel to Sorenson, to Marlene H. Dortch, FCC Secretary, CG Docket No. 10-51 (Mar. 5, 2010). It is critical to note, however, that adopting and enforcing new rules regarding compensable calls is distinct from setting an appropriate VRS rate and therefore should have no bearing on this proceeding.

¹¹ FCC, “Telephone Subscribership in the United States,” at 1 (rel. February 2010), *available at*: <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296121A1.pdf>.

¹² This claim is based on estimates of the number of deaf ASL users and the number of installed videophones.

Successful outreach to these individuals will be more expensive than it was for early VRS adopters, who tended to have high ASL skill levels, a good understanding of the Internet, and facility with broadband applications.

Likewise, although ASL users who communicate via VRS enjoy the greatest degree of functional equivalence available today,¹³ the prospect of full functional equivalence has, if anything, become more distant, and as a result, the need for technological improvement has become more acute.¹⁴ For instance, in recent years, hearing people have come to enjoy an ever-expanding array of Internet-enabled features and applications on their smart phones and other devices. VRS providers – which until recently were working overtime to implement ten-digit numbering and enhanced 911 – are only beginning to research, develop, and provide similar capabilities to deaf consumers.¹⁵ Providers also continue to struggle to locate, recruit, and train sufficient numbers of qualified interpreters, a problem that is becoming more severe as greater numbers of deaf with less advanced skills begin to use VRS. Because these individuals tend to be less proficient in ASL or to use nonstandard forms of ASL, interpreters often

¹³ See, e.g., *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, 20 FCC Rcd 13165, ¶ 3 (2005); Order, 21 FCC Rcd 6733, ¶ 4 (2006); Declaratory Ruling and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5442, ¶ 11 (2006) (“*Interoperability Order*”); Order on Reconsideration, 20 FCC Rcd 13140, ¶ 3 (2005) (“*Spanish-ASL Order*”).

¹⁴ As the Commission has found, functional equivalence is an evolving norm, “requir[ing] periodic reassessment” in light of the “ever-increasing availability of new services and the development of new technologies.” *Improved TRS R&O* ¶ 4.

¹⁵ See Elizabeth Lyle, FCC OBI, “A Giant Leap and a Big Deal: Delivering on the Promise of Equal Access to Broadband for People with Disabilities,” at 3 (describing how TRS has struggled to keep pace with improvements in the communications used by hearing people), available at: <[http://download.broadband.gov/plan/fcc-omnibus-broadband-initiative-\(obi\)-working-report-giant-leap-big-deal-delivering-promise-of-equal-access-to-broadband-for-people-with-disabilities.pdf](http://download.broadband.gov/plan/fcc-omnibus-broadband-initiative-(obi)-working-report-giant-leap-big-deal-delivering-promise-of-equal-access-to-broadband-for-people-with-disabilities.pdf)> (“*A Giant Leap and a Big Deal*”).

need special training to handle VRS calls involving these individuals. Even with such training, moreover, a VRS interpreter often needs to “team” with one or more other interpreters in order to interpret these calls in the quick and accurate manner required for functional equivalency.

More progress also needs to be made in ensuring that VRS is provided “in the most efficient manner.”¹⁶ The current VRS rate plan, although largely modeled on price caps, retains the requirement that providers file annual “cost” reports. The continued need to account for and report compensable (or “allowable”) “costs” imposes large administrative burdens on providers and perpetuates a disincentive to decrease these “costs.” Further inefficiencies have been caused by a “tiered” rate scheme that rewards inefficient, low-volume providers with higher rates. As set forth below, only after these flaws are corrected will the Commission be able to ensure that VRS is made available “in the most efficient manner” that benefits consumers and protects the integrity of the Fund.

Given the wide gap between the ADA’s mandates and the present reality, the Commission must adopt a VRS rate plan that encourages rapid progress toward each of the four goals mandated by Congress. Such a plan should encourage providers to engage in the robust outreach, research and development, and quality-of-service enhancements needed to allow deaf ASL users to participate fully in “the economic and social mainstream of American life.”¹⁷ This mainstream increasingly relies on broadband – the dominant infrastructure of modernity – and it therefore is not surprising that the Commission’s Joint Statement on Broadband, as well as the National Broadband Plan,

¹⁶ 47 U.S.C. § 225(b)(1).

¹⁷ H.R. Rep. 101-485 Pt. 2 at 129 (describing purpose of the ADA); *see also* 136 Cong. Rec. S 9684 (July 13, 1990) (statement of Sen. Inouye).

underscore the need to ensure that deaf Americans are able to take advantage of the transformative effects of broadband and critical broadband applications such as VRS.

III. THE NEW VRS RATE PLAN SHOULD FURTHER THE COMMISSION'S GOALS FOR BROADBAND

On March 16, 2010, the Commission adopted a Joint Statement on Broadband, emphasizing that “[u]biquitous and affordable broadband can unlock vast new opportunities for Americans,” and therefore “[e]very American should have a meaningful opportunity to benefit from the broadband communications era – regardless of geography, race, economic status, disability, residence on tribal land, or degree of digital literacy.”¹⁸ Unfortunately, many deaf Americans have not yet had *any* opportunity to benefit from broadband – much less a “meaningful” opportunity – precisely because they face disproportionately high barriers to broadband access and adoption arising from geography, economic status, disability, or degree of digital literacy.¹⁹

¹⁸ *Joint Statement on Broadband*, GN Docket No. 10-66, Joint Statement on Broadband, FCC 10-42, ¶ 3 (2010) (rel. March 16, 2010).

¹⁹ The plight of deaf and other disabled Americans is emphasized in the National Broadband Plan, which repeatedly drives home two main messages: On the one hand, the welfare of disabled Americans is increasingly dependent on access to affordable broadband and useful broadband applications; on the other hand, it is precisely these Americans who face the greatest barriers to such access, and who therefore are in direst need of governmental efforts to ensure that they are not “left behind.” *Compare, e.g.*, National Broadband Plan at 5 (“[W]ith broadband, people with disabilities can live more independently, wherever they choose. They can telecommute and run businesses from their homes or receive rehabilitation therapy in remote and rural areas.”), *with id.* at 23 (“people with disabilities . . . face distinctive barriers to using broadband”) and *id.* at 169 (identifying barriers to adoption faced by people with disabilities). *See also A Giant Leap and a Big Deal* at 6 and *passim* (describing “numerous barriers to broadband usage faced by peoples with disabilities, including inaccessible hardware, software, and services, and inaccessible web content”).

For example, a disproportionate number of deaf American adults²⁰ are unemployed,²¹ receive Social Security,²² live in poverty,²³ or have household income below \$20,000.²⁴ In addition, deaf Americans are more likely to live in rural areas than in urban or suburban areas, thus providing an even greater obstacle to broadband access.²⁵ These factors, combined with persistent cultural and technological

²⁰ See Erika Steinmetz, U.S. Census Bureau, “Current Population Reports” in *Americans With Disabilities: 2002, Household Economic Studies*, Table A (issued May 2006), available at: <<http://www.census.gov/prod/2006pubs/p70-107.pdf>> (“2002 Household Economic Studies”) (estimating that one million Americans aged 15 years and older are unable to hear a conversation at all); Cornell University, *2008 Disability Status Report*, Rehabilitation Research and Training Center on Disability Demographics and Statistics, p. 11, available at: <http://www.ilr.cornell.edu/edi/DisabilityStatistics/statusreports/2008-pdf/2008-StatusReport_US.pdf> (“2008 Disability Status Report”) (over 10 million Americans report having a hearing disability).

²¹ See *2002 Household Economic Studies*, Table 5 (about 30% of working-age individuals with severe difficulty hearing a conversation were unemployed, versus about 12% of the U.S. working-age population with no reported disability); *2008 Disability Status Report* at 32, 39 (working-age people without a disability have an employment rate that is 40.4 percentage points higher than those with a disability, and earn about \$5,100 more per year).

²² See *2002 Household Economic Studies*, Table 4 (almost 30% of those identified as having a “severe disability,” including deafness, receive Social Security, compared to 2.5% of those who report no disability).

²³ *Id.* (25.9% of workers who report having a “severe disability” live in poverty, compared to roughly 8% of those without a disability); *2008 Disability Status Report* at 42 (the poverty rate of working-age people with a disability was 25.3 percent, versus only 9.6 percent for people without a disability); Peiyun She & Gina A. Livermore, *Long-Term Poverty and Disability Among Working-Age Adults: Research Brief*, Cornell Univ. Rehabilitation Research and Training Center on Employment Policy for Persons with Disabilities (June 2006), available at: <<http://digitalcommons.ilr.cornell.edu/edicollect/1226/>> (disability is an extremely important, and frequently overlooked, risk factor for long-term poverty among working-age adults).

²⁴ *2002 Household Economic Studies*, Table 4 (37.8% of workers who report having a “severe disability” earn a household income of less than \$20,000, versus 12.3% of workers with no disability).

²⁵ “Demographic Aspects of Hearing Impairment: Questions and Answers,” Center for Assessment and Demographic Studies, Gallaudet University, 1994, Table 9, available at: <<http://research.gallaudet.edu/Demographics/factsheet.php>> (the prevalence of

barriers,²⁶ have often isolated and marginalized deaf individuals.²⁷ Deaf Americans are much more likely than their hearing counterparts to have inadequate access to healthcare, education, government agencies or services, or support networks,²⁸ and their access to the nation's communications system only began to improve in 1990 when access to functionally equivalent TRS was mandated as part of the ADA. As a result of these barriers, deaf and other disabled Americans have a broadband adoption rate of only 42 percent – much lower than the 65 percent rate for all American adults.²⁹

hearing impairment is greater at all ages among the population living in rural areas); Frank G. Bowe, *Broadband and Americans with Disabilities*, Report of the National Ass'n of the Deaf and the New Millennium Research Council, at 20 (2002), *available at*: <<http://www.newmillenniumresearch.org/archive/disability.pdf>> (“*Broadband and Americans with Disabilities*”) (disabled Americans are more likely to live in rural areas). As recently recognized by the Commission, “[b]roadband access to the Internet throughout rural America would be particularly valuable in assisting people with disabilities to realize their full potential” by allowing them “to communicate in real time in a visual and unfiltered manner, rather than on a delayed basis through a specialty device such as a TTY.” *Bringing Broadband to Rural America: Report on a Rural Broadband Strategy*, 24 FCC Rcd 12791, ¶ 22 (2009).

²⁶ See ADA, 42 U.S.C. § 12101(a) (“discrimination against individuals with disabilities continues to be a serious and pervasive social problem”); *A Giant Leap and a Big Deal* at 6-12 (describing barriers to broadband experienced by deaf and other disabled Americans).

²⁷ *Broadband and Americans with Disabilities* at 3 (“Whether because of chronic health conditions, environmental barriers, communication barriers, or other obstacles, loneliness is a sad reality for many hundreds of thousands of persons with disabilities in the United States today.”).

²⁸ See *2008 Disability Status Report* at 46; National Association of the Deaf, “Position Statement on Mental Health Services for People who are Deaf and Hard of Hearing, 2003,” *available at*: <<http://www.nad.org/issues/health-care/mental-health-services/position-statement>>; Charlotte A. Schoenborn and Kathleen Heyman, Division of Health Interview Statistics, “Health Disparities Among Adults with Hearing Loss: United States, 2000-2006,” *available at*: <<http://www.cdc.gov/nchs/data/hestat/hearing00-06/hearing00-06.htm>>. These problems are particularly acute for deaf Americans who live in rural areas that lack significant concentrations of deaf people or interpreters.

²⁹ National Broadband Plan at 23, 167.

As these data make clear, if the Commission is to succeed in “mak[ing] broadband more accessible to people with disabilities,”³⁰ it cannot ignore the plight of deaf Americans. Nor can it ignore VRS, the first and only form of relay that allows deaf ASL users to communicate in real time in their own language. For these Americans, VRS uniquely has the potential to become the kind of “killer application” that can drive broadband adoption even in the face of the disproportionate poverty, disenfranchisement, and cultural and geographic isolation that deaf Americans continue to experience.³¹ VRS already has driven the manufacture, distribution, and use of more than 100,000 videophones that have been specifically designed to meet the needs of deaf ASL users. This alone is a remarkable feat, but the full transformative power of VRS will be realized only if the Commission adopts a rate plan that ensures the ongoing viability of VRS as the most functionally equivalent form of relay.

IV. A MULTI-YEAR INCENTIVE-BASED PLAN IS THE BEST WAY TO FULFILL THE ADA AND DRIVE BROADBAND ADOPTION

A multi-year, incentive-based VRS rate plan is plainly superior to a cost-of-service methodology – as well as other approaches, such as competitive bidding – in advancing the goals codified in section 225. By reinforcing providers’ incentives to innovate, enhance quality, attract customers, and lower costs, this incentive-based approach will encourage providers to offer the best service to the greatest number of users in the most efficient manner. By making VRS more attractive and available to

³⁰ National Broadband Plan at 10.

³¹ See National Broadband Plan at xi (recognizing that broadband networks “only create value to consumers and businesses when they are used in conjunction with broadband-capable devices to deliver useful applications and content”); *Video Device Competition*, MB Docket No. 10-91, Notice of Inquiry, FCC 10-60, ¶ 1 (rel. Apr. 21, 2010) (predicting that the development of smart video devices would “encourage wider broadband use and adoption”).

consumers, these developments, in turn, will spur more deaf users to adopt broadband. Providers, in short, will be encouraged to fulfill all four of the principal goals codified in section 225, and in so doing, to help advance a key broadband goal of the Commission.

Despite the superior merits of an incentive-based approach, NECA has not even attempted to propose a multi-year rate schedule that would perpetuate this approach for the period after June 30, 2010. Instead, it has proposed four “cost”-based alternatives, each of which would apply only for a single year. The manner in which NECA calculated these proposals is unfair, illogical, and based on incomplete and flawed data. For example, the NECA proposal “on which the Bureau particularly seeks comment”³² would slash Sorenson’s Tier 3 rate (at which the majority of its minutes are compensated) from \$6.23 per minute to less than \$3.90 per minute. Under the same NECA proposal, the next largest VRS providers would continue to have a VRS rate above \$6.00 per minute.³³ In other words, NECA is proposing to adopt a Sorenson-only Tier 3 rate that would effectively punish Sorenson for reporting lower historical “allowable” costs than its less efficient competitors. Such gross unfairness would be arbitrary on its face, inconsistent with the ADA’s efficiency mandate, and unlikely to survive judicial review.³⁴ As explained below, moreover, a decision to adopt any of NECA’s proposals,

³² Public Notice at 2.

³³ NECA Filing at 25, Table 3.

³⁴ See 5 U.S.C. § 706. NECA’s “Projected Costs” and “Historical Costs” proposals also would arbitrarily set Tier 2 rates that are higher than Tier 1 rates, notwithstanding the FCC’s apparent belief that Tier 1 providers have higher “costs” than providers in higher tiers. Compare NECA Filing at 25, Table 3, with *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Declaratory Ruling, 22 FCC Rcd 20140, ¶¶ 52-54 (2007) (“*2007 Rate Methodology Order*”). Furthermore, all four proposals suffer from arbitrary decisions to exclude the “cost” data of certain providers when calculating the particular tiered rates proposed in the NECA Filing. See NECA Filing at 20-25.

or any other approach based on providers' "costs," would run afoul of the ADA and subject deaf consumers to irreparable harm.

A. A Decision to Set Rates Based on Projected Costs Would Thwart the ADA's Goals

Until the three-year rate plan took effect in March 2008, VRS rates were set annually based on providers' *projected* compensable "costs." The Commission should not attempt to rehabilitate this approach for the period after June 30, 2010. Beyond the annual controversies and procedural problems that such a decision would entail, a projected-cost approach simply would not advance the ADA's goals nearly as well as a multi-year incentive-based methodology. Indeed, as history demonstrates, the incentive-based rate plan for VRS has advanced the ADA's goals far more directly and quickly than was possible under the old cost-of-service approach.

Functional equivalence and technological improvement. VRS providers compete to serve the deaf community through innovation and quality of service. Providers, therefore, have always been eager to execute business plans that will produce useful innovations and improve the quality of service to their customers. Before the three-year plan took effect, however, this incentive was blunted because providers were encouraged to incur only those "costs" that were deemed compensable by the FCC and NECA, rather than to allocate their resources to service improvements, equipment enhancements, and other uses that would advance functional equivalence.³⁵ This

³⁵ The Relay Service Data Request form that VRS providers submit annually to NECA asks only for certain categories of costs that the FCC and NECA deem to be compensable. The Request fails to seek (or specifically excludes) information regarding many of the costs that Sorenson actually incurs, including the following: (i) costs to research and develop technical solutions to allow providers to meet mandatory minimum TRS standards temporarily waived by the FCC; (ii) costs to develop, manufacture, install,

incentive to misallocate resources was exacerbated by the lack of a stable, predictable VRS rate. Because rates gyrated wildly from year to year, and because the criteria used to determine the rates (and the “costs” used to set them) constantly shifted, providers could not be confident that next year’s rate would be sufficient to fund their initiatives to improve VRS, including many longer-term projects requiring more than a year to bring to fruition.

These impediments were largely removed when the three-year plan took effect. Because providers knew ahead of time what the VRS rate plan would be over the course of three years, they had a stronger incentive to invest in innovations and service quality enhancements. Sorenson in particular took the following steps in reliance on the three-year, incentive-based plan:

- ramped up efforts to locate, recruit, and train interpreters, and to build call centers where necessary, thereby putting downward pressure on inflationary wage increases resulting from the nationwide shortage of qualified ASL interpreters and reducing average VRS hold times from over 44 seconds in February 2008 (the month before the three-year plan took effect) to under 10 seconds now;
- implemented Enhanced 911 ahead of the FCC’s deadline;
- began distributing local ten-digit North American Numbering Plan numbers ahead of the original FCC deadline;

and test videophones for use by deaf customers; (iii) costs to teach customers how to use videophones and VRS; (iv) costs of acquiring ten-digit North American Numbering Plan telephone numbers (local or toll free); (v) costs of porting ten-digit numbers; (vi) E911 charges imposed under state or local E911 funding mechanisms; (vii) costs associated with raising and servicing capital; (viii) costs associated with certain calls involving more than one interpreter; and (ix) most state, federal, foreign, and gross receipts taxes (NECA allows only 2 cents per minute despite imposing regulatory requirements on these calls). In addition, compensable costs do not include an allowance for a reasonable return. Although the FCC allows an 11.25% return on capital, VRS is a heavily labor-intensive business – not a capital-intensive one. Accordingly, the return-on-capital allowance comes nowhere close to approximating a reasonable allowance for return.

- increased the frequency of one-on-one training by qualified trainers to assist deaf consumers with new features or functions of videophones;
- rolled out a second-generation Sorenson videophone for distribution to deaf customers who rely on ASL;
- developed better call-routing software and enhanced safeguards to protect against waste, fraud, and abuse;
- conducted research and development, including efforts to develop a third-generation videophone;
- built and opened a VRS Interpreting Institute that provides state-of-the-art facilities and training for aspiring VRS interpreters; and
- improved the survivability of the Sorenson nationwide infrastructure by deploying redundant critical sites in multiple regions of the country so as to avoid service interruptions in case of a large-scale disaster or emergency.

These efforts – and similar ones by Sorenson’s competitors³⁶ – have benefited consumers by enhancing functional equivalency and spurring competition and technological innovation at a quicker pace and to a greater extent than occurred under the old cost-of-service approach.

Nationwide access. Because even today many households with deaf ASL users lack access to VRS, providers have both the opportunity and the incentive to attract large numbers of new customers. Under the cost-of-service approach, however, this incentive was blunted because key costs associated with attracting new customers (*e.g.*, training consumers how to use videophones) were treated as non-compensable. The incentive was especially weak for outreach campaigns targeting geographically isolated deaf

³⁶ See, *e.g.*, Letter from Sprint Nextel Corporation, Snap Telecommunications, Inc., Sorenson Communications, Inc., and Purple Communications, Inc. to Marlene H. Dortch, FCC Secretary, CG Docket No. 03-123, at 3 (May 1, 2009) (describing millions of dollars invested by Snap!VRS in reliance on the stable, three-year rate plan adopted in the *2007 Rate Methodology Order*). At least one other provider (Z) has launched a new line of videophones, and at least one provider (Purple) has launched a new version of its VRS software.

individuals or those with less advanced ASL skills, because those campaigns required longer-term investments that were difficult to justify given the uncertainty in rates from year to year.

When the three-year rate plan was adopted, these artificial barriers to outreach were lowered, allowing providers to conduct more robust outreach in accord with the nationwide access mandate of the ADA. Sorenson in particular has ramped up outreach to (i) inform deaf ASL users about the availability of VRS and its life-changing potential, with a greater focus on marginal subgroups, such as deaf individuals who live in rural areas, and (ii) improve access to VRS in the workplace so that deaf employees have the same ability to communicate over distance as their hearing colleagues. As a result of these and other efforts industry-wide, VRS penetration has increased substantially since October 2007, when the incentive-based plan was adopted.

Maximum efficiency. Under the old cost-of-service approach, VRS providers had a perverse disincentive to reduce their compensable “costs.” This disincentive thwarted the ADA’s mandate that VRS be made available “in the most efficient manner,”³⁷ and thus put upward pressure on the size of the Fund.

The three-year rate plan mitigated this problem by encouraging all providers to lower their costs and giving them greater predictability so as to foster investment in programs that would reduce costs in the future. Sorenson, for example, aggressively located, recruited, hired, and trained more interpreters, opened a VRS Institute to improve interpreter skills, and built new call centers. These steps not only improved Sorenson’s speed-of-answer, but also helped to address the interpreter shortage by putting downward

³⁷ 47 U.S.C. §225(b)(1).

pressure on labor costs. The three-year rate plan also simplified the annual rate-setting process, thereby reducing the inefficient expenditure of time and money by consumers, NECA, the FCC, and providers in what had previously been a perennially complex and contentious process of rate setting.³⁸

B. A Decision to Set Rates Based on Historical Costs Also Would Thwart the ADA's Goals and Would Be Procedurally Infirm

Even worse than a decision to base VRS rates on projected allowable costs would be the folly of basing rates on so-called "historical costs." A decision to use historical allowed costs would entail all of the problems associated with basing rates on projected costs, plus others to boot.

As with projected costs, historical allowed costs measure only those costs deemed compensable by the FCC and NECA, omitting a number of categories of costs actually incurred in the provision of VRS.³⁹ As a result, the "Historical VRS Cost Summary" presented by NECA reflects flawed data that substantially understates the full historical costs of providers.⁴⁰ Compounding this problem, a decision to base VRS rates on historical "costs" would do nothing to alleviate the bad incentives created by a projected "cost" approach. Providers would still have an incentive to overallocate their resources

³⁸ See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Further Notice of Proposed Rulemaking, 21 FCC Rcd 8379, ¶ 7 (2006) ("2006 Rate Methodology NPRM") (describing "administrative challenges" presented in recent years under the old rate methodology, particularly with respect to the VRS rate).

³⁹ See *supra* note 35.

⁴⁰ NECA Filing at 17, Table 2. NECA is well aware of the substantial gulf between Sorenson's historical allowable costs and its historical full costs. In several recent years, Sorenson's annual "cost" filing (*i.e.*, the Relay Service Data Request form mentioned *supra* note 35) has disclosed that Sorenson's non-allowed costs totaled well over \$100 million per year.

to activities deemed compensable, to the detriment of noncompensable activities that would improve functional equivalence and nationwide access for the deaf; and, providers would still have a disincentive to achieve the efficiency gains mandated by the statute (not to mention a disincentive to grow monthly minutes beyond the second-tier level).

A methodology based on actual historical costs would thwart the ADA in other ways as well. If providers were to incur rising per-minute costs for the immediate future, basing rates for a particular year on the actual costs of the prior year(s) would result in providers receiving compensation that is not sufficient to cover their expenses during that year. Such undercompensation (which would occur even if all costs incurred by providers were compensable) likely would force many providers to exit the business and deter new providers from entering the business in the first place. Such results would undermine, and perhaps destroy, the competitive paradigm that hitherto helped advance the statutory goals of full availability, functional equivalency, maximum efficiency, and technological advancement, to the benefit of deaf consumers.

In addition, basing rates on historical costs would increase incentives for providers to raise costs, thereby putting upward pressure on VRS rates and the Fund without reducing the administrative burdens of the rate setting process. For example, if a provider knows that the rate at which VRS will be compensated during future rate periods will be based on the costs it incurs during the present rate period, that provider will have a strong incentive to increase its present costs as much as possible. To deter such actions, regulators would be forced to wage a costly – and probably futile – rear-guard campaign in an effort to assess the prudence of each cost incurred by each provider, to determine whether each provider operated efficiently, and to adjust future rates accordingly.

The foregoing problems would exist under any historical-cost approach to setting VRS rates. The two historical-cost proposals presented by NECA, however, would disserve consumers and violate the ADA in a particularly egregious manner. One of these proposals – labeled “Historical Costs Current Tiers”⁴¹ – would likely drive all VRS providers into bankruptcy, potentially leaving the entire deaf ASL community without any means to communicate by relay in their own language. Under the ADA, the Commission is required to ensure that functionally equivalent VRS is available to all deaf ASL users on a nationwide basis; the ADA therefore bars the Commission from adopting any VRS rate, under any methodology, that would destroy the VRS business or otherwise make it less available to the deaf community or less functionally equivalent.

The other historical-cost alternative proposed by NECA – labeled “Historical Costs”⁴² – would at a minimum drive Sorenson into bankruptcy, potentially stranding tens of thousands of deaf consumers and making it untenable for any other provider to commence handling the minutes formerly handled by Sorenson, since doing so would subject them to the same \$3.8963 Tier 3 rate that drove Sorenson into bankruptcy. Under that scenario, instead of seeking to serve as many customers as possible, as required by the ADA, the surviving providers would seek to limit their subscribership to levels that would ensure that their monthly call volumes did not exceed the 500,000 minute level at which the ruinously low Tier 3 rate would kick in. Furthermore, no entity would ever again be willing to invest in any surviving provider because they would be on notice that the future viability of those providers could be destroyed on short notice by the adoption of a drastically lower rate, just as Sorenson’s viability was destroyed. This proposal, too,

⁴¹ NECA Filing at 25, Table 3.

⁴² *Id.*

would effectively destroy the VRS that deaf consumers have come to rely on, leaving at best a hollowed-out husk of a program that is less functionally equivalent, less efficient, and less available.⁴³

Even if the FCC somehow managed to avoid the foregoing problems, it would still face a high procedural hurdle to using historical costs to set rates. In its *2007 Rate Methodology Order*, the Commission unanimously chose to reject the use of historical costs in favor of an incentive-based methodology that putatively relies on “providers’ projected costs.”⁴⁴ It is far from clear, of course, that the incentive-based methodology actually relies on projected costs. With the exception of tiers, the VRS rate plan adopted in 2007 is identical to the IP Relay rate plan also adopted in the same order: both plans established predictable three-year rate schedules that adjusted downward by 0.5 percent; both plans allowed for exogenous cost filings; and both plans applied to relay services in which a single provider handled a majority of all minutes. Yet, the Commission chose to label the IP Relay plan a “price cap” plan while labeling the VRS plan a “cost”-based

⁴³ In a May 10, 2010 message to the VRS community, the Bureau stated that it is “not true” that the “video relay service (VRS) program is threatened” by the so-called “historical-cost” rates proposed by NECA. “A Message from the FCC’s Consumer and Governmental Affairs Bureau to the VRS Community,” from Joel Gurin, Bureau Chief, and Karen Peltz Strauss, Deputy Bureau Chief (May 10, 2010), *available at*: <<http://deaf-times.com/announcement/alert-fcc-releases-a-message-to-clarify-its-position-on-vrs/>>. The Bureau made this claim – which goes to the heart of whether the proposed historical-cost rates would be lawful and conducive to the public interest – *four days before* initial comments in this proceeding were due to be filed. It is the epitome of arbitrary decision making for an agency to have already decided key legal and public policy issues before comments are even submitted. Here, the arbitrariness is especially egregious since the Bureau’s premature decision contradicts thousands of deaf individuals who have submitted early-filed comments saying the VRS program *is* threatened based on NECA’s proposed historical-cost rates.

⁴⁴ *2007 Rate Methodology Order* ¶ 52; *see also 2006 Rate Methodology NPRM* ¶¶ 24-48 (seeking comment on whether to base VRS rates on historical costs).

plan, and chose to include tiered rates only in the latter plan.⁴⁵ In reality, it is more accurate to describe both plans as price cap plans. Indeed, less than a year ago the United States Court of Appeals for the Tenth Circuit issued a unanimous opinion explaining that VRS providers are compensated pursuant to a “price cap” plan.⁴⁶

As the foregoing makes clear, the three-year plan was based on one of two possible rate methodologies: an incentive-based (or “price cap”) methodology, or a projected-“cost” methodology. Either way, the Commission presumed that the methodology would continue to apply after June 30, 2010, although the rate level and number of tiers could be modified for the next multi-year rate cycle.⁴⁷ Under these circumstances, any decision to create a new methodology – based on historical costs or any other approach that deviates from the incentive-based (or projected-“cost”) approach adopted in 2007 – would amount to a rule change that could be adopted only pursuant to a new rulemaking proceeding. Since only the full Commission can commence such a proceeding,⁴⁸ the Bureau’s Public Notice cannot provide a sound legal basis for ruling that providers’ historical costs will be used to set VRS rates.⁴⁹

⁴⁵ *2007 Rate Methodology Order* ¶¶ 43-56. Tellingly, the smaller IP Relay providers have shown no signs of needing the kind of tiered subsidies that smaller VRS providers claim they need.

⁴⁶ *Sorenson Communications v. FCC*, 567 F.3d at 1221; *see also id.* at 1222 (VRS providers are compensated based on FCC’s “choice of a price cap scheme which itself seeks to reward efficiency and increase market access by allowing providers to retain cost savings.”).

⁴⁷ *2007 Rate Methodology Order* ¶ 72 (“At the end of the three-year period, we will reassess what the tiers and rates shall be for the ensuing three-year period.”).

⁴⁸ *See* 47 C.F.R. § 0.361; *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003).

⁴⁹ Moreover, to the extent the VRS rate methodology adopted in 2007 is a price cap plan that is not based on costs of any kind, a new rulemaking would be required to set VRS rates based on projected costs as well.

Perhaps aware of this hurdle, the Bureau claims that it “seeks to refresh the record on the NPRM portion of the *2009 PN and NPRM*, which sought comment on whether VRS tiered rates should be recalculated based on data reflecting the actual costs of providing VRS.”⁵⁰ Although the *2009 PN and NPRM* was adopted by the full Commission, refreshing the record in that proceeding would provide no lawful basis for using actual (historical) costs to calculate VRS rates for the period after June 30, 2010. The *2009 NPRM* consists of a single short paragraph, and twice in that paragraph the Commission stated that it was seeking comment on the VRS rates only for the 2009-2010 rate year.⁵¹ The Commission affirmed this temporal limitation in the first paragraph of the *2009 PN and NPRM*,⁵² and there is no sentence anywhere in that document that suggests a broader time frame. Since the *2009 NPRM* is limited to the 2009-10 rate year, which will expire on June 30, 2010, refreshing the record in that proceeding cannot create a sound procedural basis for the Bureau or Commission to take any step that would affect VRS rates or the VRS rate methodology for the period after June 30, 2010.

⁵⁰ Public Notice at 1 (citing *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Public Notice and Notice of Proposed Rulemaking, 24 FCC Rcd 6029, ¶ 11 (2009) (“*2009 PN and NPRM*” or “*2009 NPRM*”).

⁵¹ *2009 NPRM* ¶ 11 (“we seek comment on whether we should recalculate the VRS rates for each tier for the 2009-2010 Fund year”); *id.* (“we seek comment on whether, for the 2009-2010 Fund year, we should adopt new VRS rates for each tier”).

⁵² *2009 PN and NPRM* ¶ 1 (“In the *Notice of Proposed Rulemaking (NPRM)*, we seek comment on whether . . . we should modify the compensation rates for Video Relay Service (VRS) for the 2009-2010 Fund year.”).

V. FOR THE PERIOD AFTER JUNE 30, 2010, THE FCC SHOULD ADOPT A FIVE-YEAR INCENTIVE-BASED PLAN THAT WILL ENCOURAGE PROVIDERS TO ADVANCE THE ADA'S GOALS

In crafting a rate plan for the period after June 30, 2010, the Commission should hew to the ADA's mandates while also heeding the lessons of the past. In particular, the Commission should ensure that (i) the VRS rate is adequate to keep the service viable, (ii) the VRS rate is sufficiently predictable and stable over a multi-year period to encourage providers to undertake the longer-term investments needed to make VRS more functionally equivalent, more available, and more efficient, and (iii) the VRS rate declines by a reasonably significant percentage at the end of each rate year to give providers a strong incentive to become more efficient in serving consumers.

The Commission also should ensure that the new plan's incentives are not blunted by two remnants of the old cost-of-service methodology. First, the Commission should eliminate the requirement providers file annual "cost" reports with NECA. The reports impose unnecessary administrative burdens on providers as well as the Commission, and the continuing obligation to file them raises the specter that the FCC will use providers' reported projected "costs" to reinitialize the VRS rate for the next multi-year cycle to commence after June 30, 2010. Although this step would be contrary to logic and precedent,⁵³ the Commission's continuing focus on "costs" keeps alive the notion that providers will be penalized for having achieved the very pro-consumer efficiencies that

⁵³ At the end of the initial period of price cap regulation for incumbent LECs, the FCC decided against resetting incumbent LEC access charge rates at levels based on the prior cost of service regime. The FCC found that such resetting would effectively keep in place the "perverse incentives of rate-of-return regulation" and blunt the incentives for achieving efficiency gains that the incentive-based methodology was designed to encourage. *1997 Price Cap Fourth R&O* ¶ 167; see also *id.* ("we have declined . . . many parties' suggestions that we reinitialize access rates based on LECs' individual rates of return").

the three-year plan was designed to encourage. The Commission therefore should eliminate this harmful relic.

It also should eliminate the use of “tiered” rates and instead adopt a single VRS rate for all providers. The Commission now has three years of experience showing that tiers are a harmful anachronism that cannot be squared with the efficiency mandate of the ADA or the interests of consumers. As an initial matter, tiers were originally intended to function as a proxy for the “different per-minute costs” projected by VRS providers in their annual filings.⁵⁴ In practice, however, there is no reason to think that tiers even crudely reflect cost differences. For instance, the “costs” to which tiers are putatively tied reflect only a portion of expenses that firms actually incur in providing VRS, and are not calculated in a uniform way across providers. Because reported “costs” are thus divorced from reality, it is likely that tiered rates – those adopted in the past and those proposed by NECA – do not reflect the true cost differentials, if any, experienced by VRS providers. Furthermore, even if the tiered rates bore some resemblance to reality, the use of tiers rewards inefficient, low-volume providers. This structure sits uneasily with the ADA, which requires that TRS be made available to as many deaf Americans as possible “in the most efficient manner.”

Beyond the statutory mandate, tiers simply do not make sense. In competitive markets, efficient firms that attract consumers are rewarded with increased market share and greater profits, and less efficient firms are forced to become more efficient or leave the market. Growth and prosperity are a reward for efficiency; efficiency is not a by-product or a reward for getting bigger. The use of tiers stands this paradigm on its head.

⁵⁴ *2007 Rate Methodology Order* ¶ 53.

Tiers *punish* efficient firms that attract consumers, and they allow inefficient firms to remain in the business and continue imposing their higher costs on the contributors to the Fund.

In addition, tiers undermine the public interest by raising the cost of the program. If, for example, Sorenson is able to provide service to a deaf person for \$5.95, it would not advance the public interest to pay a less efficient carrier more to serve the same customer at a higher rate. Yet NECA's "projected costs" and "historical costs" proposals would pay \$6.18 and \$6.03 to Tier 2 providers. Moreover, since the very low rate proposed under the "historical costs" proposal would likely cause Sorenson to leave the market and other carriers to avoid becoming Tier 3 providers, former Sorenson customers would impose additional costs on the fund if they were able to obtain service.

Under the *Melody Music* principle,⁵⁵ the Commission must provide a reasoned explanation for treating VRS providers differently from each other. It simply will not be possible for the Commission to do so under proposals such as NECA's "historical costs" proposal, which puts Sorenson in a tier of its own and compensates other providers at rates approximately 50 percent higher than those available to Sorenson. Even assuming NECA's figures accurately reflected providers' costs (and they do not), an explanation that the Commission was willing to compensate other providers at the rate of \$6.03 per minute while compensating Sorenson at the rate of \$3.89 because the other provider's costs are higher would not pass muster. As noted above, that would amount to saying that the Commission is willing to pay more – much more – to inefficient providers, and

⁵⁵ *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

that is not reasonable. Policy and law therefore dictate that the Commission move to a single VRS rate for the next cycle.

Based on the foregoing principles, Sorenson urges the Commission to adopt a five-year VRS rate plan to commence on July 1, 2010, with a single (non-tiered) rate for the first year of \$5.95 per minute. This rate would decrease each subsequent year by 1 percent, resulting in the following rates over the life of the plan:

- Year 1 (2010-11): \$5.95 per minute
- Year 2 (2011-12): \$5.89 per minute
- Year 3 (2012-13): \$5.83 per minute
- Year 4 (2013-14): \$5.77 per minute
- Year 5 (2014-15): \$5.72 per minute

Providers no longer would have to submit annual reports regarding their compensable “costs.” Instead, the Commission would evaluate information regarding VRS penetration, the ASL interpreter pool, VRS industry structure, VRS service quality, and broadband affordability and availability. Sorenson urges the FCC to establish a new Functional Equivalence and Broadband Advisory Committee to collect this information and make recommendations based on it.

This plan has a number of commendable features. It best serves the deaf by fully aligning the incentives of providers with the ADA’s goals, without any of the counterproductive and legally suspect features of the old cost-of-service approach. For example, tiers would be eliminated to encourage efficiency as required by the ADA and protect the integrity of the Fund. The \$5.95 rate in Year 1 of the plan represents a 4.5 percent cut from today’s Tier 3 rate of \$6.23 – a decrease large enough to stem growth in

the Fund and to accelerate pro-consumer provider efficiencies, but not so large as to cut service to the deaf, drive providers into bankruptcy, or punish providers for having achieved efficiencies over the last three years. The five-year duration of the plan would make VRS rates even more stable and predictable than they have been since 2007, thereby increasing the incentive for providers to invest, innovate, and improve service and outreach to the deaf. Likewise, the 1 percent annual decrease in the rate would double the decrease that occurred in 2008 and 2009, thereby further encouraging the efficiency required by the statute and protecting the integrity of the Fund.⁵⁶ Finally, the information to be collected by the Commission no longer would concern providers' "cost"-data, for which there is no sound purpose, but rather would focus on the extent to which goals of the ADA and the Commission's broadband goals are being satisfied.

⁵⁶ The reduction would be greater than 1 percent in inflation-adjusted terms. If inflation were at 3 percent for a particular year, for instance, a provider would have to achieve efficiencies of 4 percent (inflation plus 1 percent) to break even.

VI. CONCLUSION

For the foregoing reasons, the Commission should adopt a five-year incentive-based VRS rate plan, as set forth above, to commence on July 1, 2010. Sorenson urges the Commission to adopt this plan expeditiously so that it can take effect on July 1, 2010 without the need for interim rates or other provisional measures. However, if the Commission believes it must adopt an interim rate plan to take effect on July 1, 2010, it should maintain the status quo by extending the existing rate plan: *i.e.*, during the interim period, VRS rates should be set at levels that are 0.5 percent lower than the 2009-10 rates.

Respectfully submitted,

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