Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Telecommunications Relay Services And Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities	)	CC Docket 90-571
	)	CC Docket 98-67
	)	CG Docket 03-123

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

Hands On Video Relay Service, Inc. ("Hands On"), by its counsel, and pursuant to FCC Rule Sections 1.106 and 1.429,[1] and and 47 U.S.C. §405, petitions for partial reconsideration of the Commission's Report and Order, Order on Reconsideration and Further Notice of Proposal Rulemaking, FCC 04-137 (June 30, 2004) ("*Order*"). In support, the following is shown:

I. Introduction.

The Commission's June 30, 2004, *Order* resolved a host of issues relating to the Telecommunications Relay Service ("TRS"). Although Hands On believes most of the issues were correctly resolved, in several respects the *Order* violates the Administrative Procedures Act ("APA"), the Americans With Disabilities Act ("ADA"), or is contrary to the Commission's own rules and precedent. Hands On therefore seeks reconsideration of these matters. Specifically, Hands On seeks reconsideration of:

1. The dismissal of its application for certification as a TRS provider;

2. Extension of the speed of answer waiver for VRS;

3. The setting of $8.854 as the final VRS compensation rate for 2003-04;

[1] Both FCC Rule Sections 1.106 and 1.429 apply to this petition since the *Order* decides both matters subject to notice and comment rule making proceedings and matters not subject to such proceedings.

4. The refusal to provide full retroactivity to the final 2003-04 VRS compensation rate.

5. The refusal to recognize ASL to Spanish VRS as TRS;

As we shall show, with respect to each of these five matters, the *Order* is arbitrary and capricious or otherwise contrary to law. Thus, the Commission must reconsider these issues and resolve them in accordance with the ADA, the APA and its rules and precedent.

II. Hands On has standing to file this petition.

Hands On has standing to file this petition. Hands On provides VRS through contract to two of the major interstate TRS providers, AT&T Corp. ("AT&T") and MCI. Hands On is also a certified provider of VRS for the State of Washington's TRS program. Hands On has been providing VRS since July of 2002, originally in a developmental mode, and since November of 2002 under contract. Thus, Hands On is directly affected by the issues resolved in the *Order* and by the Commission's VRS policies and requirements. Hands On therefore plainly has standing to file this petition. Moreover, since Hands On filed an application for FCC certification to receive payment directly from the Interstate TRS Fund as a stand-alone VRS provider, Hands On undoubtedly has standing to contest the dismissal of its application.

III. The treatment of Hand On's certification application was erroneous, and contrary to the FCC's rules.

On August 30, 2002, Hands On filed with the FCC an application for certification that the company is eligible to receive reimbursement from the Interstate TRS Fund for the provision of VRS. Hands On had begun providing VRS pursuant to FCC Rule Section 64.604 in August of 2002. Hands On promptly filed with NECA its notice of intent to participate as required by **FCC Rule §64.604(c)(5)(G)**. However, NECA, through its TRS staff, stated its outright refusal to pay Hands On for its provision of VRS without the direction of the FCC's Disability Rights Office ("DRO") of

the Consumer and Governmental Affairs Bureau ("Bureau"). Discussions with DRO resulted in DRO informing Hands On that it must file an application for certification, despite that Hands On pointed out to DRO that no such procedure was anywhere stated in the FCC's rules. So Hands On filed the application requesting the Commission to grant it whatever certification was necessary to allow it to draw from the Interstate TRS Fund.

The *Order* dismisses HOVRS's application on the basis that neither Section 225 nor the Commission's rules provides for the FCC to certify any TRS provider as eligible to receive compensation from the Interstate TRS Fund. *Order* at para. 148. As the Order acknowledges, Hands On did not contest that the FCC's rules contain no certification requirement. However, what Hands On did claim was that it was qualified under the rules to receive reimbursement from the Fund.

Hands On explained, in its application that FCC Rule Section 64.604(c)(iii)(5)(F) sets forth the eligibility criteria for receiving payments from the TRS Fund. *See* Hands On Application. The three classes of eligible entities are:

1. **TRS facilities operated under contract with and/or by certified state TRS programs pursuant to §64.605; 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.**

And Hands On explained that the only procedure the rules require to draw from the fund is to file the notice of intent to participate, which as discussed above, Hands On filed. *Id.*

Nevertheless, Hands On also explained in its application that although "the first category of eligible providers requires that they operate under contract with or be associated

with a state TRS program certified by the Commission ... Categories 2 and 3, merely cite to operation pursuant to §64.604." *See* Hands On Application. Hands On further explained that "Section 64.604 contains no requirement for certification as long as the provider is a common carrier, or is owned by or operated under contract with a common carrier providing interstate services." *Id.* Hands On also explained that "notwithstanding the lack of any certification requirement under categories 2 and 3 for §64.604, the staff and the TRS Fund administrator took the position that certification is required for Hands On to receive reimbursement directly from the TRS Fund." *Id.*. Hands On then explained that it came within the third category of eligible TRS providers because it was an interstate common carrier providing TRS pursuant to Section 64.604 of the FCC's rules. *Id.*

Hands On explained that Section 3 of the Communications Act of 1934, as amended, 47 U.S.C. § 153 defines a "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire, or radio ...." And that Section 225(a)(1) of the Act, similarly defines a common carrier. *Id.* Hands On further explained that FCC Rule §63.01 provides that "Any party that would be a domestic interstate communications common carrier is authorized to provide domestic, interstate services to any domestic point and to construct any domestic transmission line as long as it obtains all necessary authorizations from the Commission for use of radio frequencies." *Id.* FCC Rule Section 63.01 thus afforded blanket Section 214 certification to all domestic common carriers. *See Section 214 Entry and Exit Certification Requirements*, 14 FCC Rcd ___, 16 CR 529 (1999). Accordingly, by operation of law, Hands On possessed FCC authority to provide interstate common carrier services.

It is well established that the sine qua non of common carrier status is a quasi-public character which arises out of the undertaking to carry for all people indifferently. Particular services offered need not be practically available to the entire public. In fact a specialized carrier whose services is of possible use to only a fraction of the population may nonetheless be a common carrier if it holds itself out to serve indifferently all potential users. It is not essential that there be a statutory or other legal commandment to serve indiscriminately, rather it is the practice of such indifferent service that confers "common carrier" status. *See National Ass'n Regulatory Utility Com'rs v. FCC*, 533 F.2d 601 (D.C. Cir. 1976).

Hands On's Application stated it would provide interstate resale service through its purchase and resale of DSL lines for its VRS clients (and others requesting the service).[2] It further showed it would be offering interstate service through ts processing of VRS traffic received from the Internet and its completion of interstate VRS traffic via delivery of traffic to leased public switched network lines from its local exchange carrier and/or through the purchased services of interexchange carriers. Thus, plainly Hands On showed it was an interstate common carrier providing TRS service pursuant to Section 64.604 of the rules.[3]

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[2]**The furnishing of a line to a third party to facilitate an interstate communication is the provision of common carriage subject to the Commission's jurisdiction. *Ward v. Northern Ohio Tel. Co.*, 300 F.2d 816 (6th Cir. 1962), *cert. denied* 371 U.S. 820.**

[3]**In *Beehive Telephone, Inc. v. Bell Operating Cos.*, 78 Rad. Reg 2d (P&F) 1376 (1995), the Commission stressed that the "key feature of common carriage under Section 3(h) of the Act is the provision of service indifferently to all potential customers. There the Commission rejected the claim that access to the 800 number database was not common carriage in the face of a claim that "SMS access service does not enable customers to transmit anything." It was sufficient, said the Commission that the service was "incidental to a service that provides transmission of intelligence of the customer's own design and choosing" that was sufficient to support a finding of common carriage.**

In this case, Hands On not only holds itself out indifferently to supply lines to customers, it performs a service that allows its customers "to transmit intelligence of the customer's own design and choosing," the deaf customer's message traffic, and Hands On completes that call over facilities it leases to allow transmission of the message traffic to the hearing recipient. Plainly, then, Hands On is engaged in interstate common carriage.

Hands On holds itself out to provide VRS service indiscriminately to the public. Indeed, the rules so require it to do so. Since Hands On is plainly then engaged for hire in interstate communication by wire (i.e., Internet and the public switched telephone network). Hands On is thus plainly a common carrier. As such, it is eligible to receive reimbursement from the TRS Fund by the express provisions of FCC Rule Section 64.604.

That the FCC has no rules for certifying TRS providers, is irrelevant to whether they TRS providers are eligible to draw form the TRS fund. Paragraph 99 of the *Order* plainly states that the Commission's regulations "currently provide that TRS providers may establish their eligibility by showing that they are 'owned by or operated under contract with a common carrier providing interstate [TRS] services' or are "[i]nterstate common carriers offering TRS pursuant to Section 64.604.'" Quoting 47 C.F.R.§64,604(c)(5(iii)(E)(2) and (3), *Order* at notes 289-90. If the rules so provide, then they imply a certification process, or some other process so the "showing" can be made. In fact, however, there is no "showing" requirement in Section 64.604. If an entity is a common carrier providing TRS pursuant to FCC Rule Section 64.604, it is entitled to draw from the Interstate TRS Fund. Hands On was and is an interstate common carrier providing TRS pursuant to Section 64.604, and is such is entitled to draw from the Interstate TRS Fund.

What is apparent is that the FCC staff *think*s there should be a showing requirement and the staff has off the public record directed NECA to refuse to reimburse entities which are not certified as part of state TRS programs. The staff essentially said so in a meeting with Hands On on October 31, 2002, in indicating it would not grant Hands On's certification application. There it was stated that unless Hands On was affiliated with a state TRS program or under contract to a carrier that was affiliated with a state program, it would not be allowed to draw from the Interstate TRS Fund. In essence, the staff amended Section 64.604 ultra vires to eliminate the third eligibility category in Section 64.604(c)(iii)(5)(F).

In light of the above discussion, the appropriate action the Commission should have taken on Hands On's certification application was to dismiss it with a statement that no

certification is necessary to obtain reimbursement from the Interstate TRS Fund. Hands On, therefore, asks the Commission to take that action now.[4]

IV. The Commission should reconsider extension of the VRS speed of answer waiver.

On September 22, 2003, Hands On submitted a request for extension of certain waivers of the TRS rules and a request for clarification of certain other TRS requirements as they pertain to VRS. Among the rules for which Hands On requested waiver, was the TRS requirements that 85 percent of calls be answered within 10 seconds. Hamilton Telephone, another VRS provider, also sought similar waivers of the TRS requirements as they pertain to VRS. On November 25, 2003, Communication Services for the Deaf, Inc. ("CSD"), another VRS provider, submitted its Ex Parte Amendment to Comments on Petitions for VRS Waivers ("Amended Comments"). CSD had

[4] Hand On acknowledges it is currently providing VRS under contract with the State of Washington as part of that state's TRS program. That does not moot Hands On's request herein since its contract with Washington requires it to incur certain costs and take certain action it would not necessarily take were it drawing from the Interstate TRS Fund as an interstate common carrier. Moreover, Hands On's contract with Washington is subject to termination or non-renewal by the state, under certain circumstances.

previously supported Hands On's and Hamilton's waivers requests. *See* CSD's October 20, 2003 Comments in this proceeding.

CSD pointed out that VRS provides greater functional equivalency than traditional TRS because it allows deaf and hard of hearing persons who use American Sign Language to telecommunicate in their natural language. Amended Comments at 2. CSD explained that the Commission initially declined to make VRS mandatory due to technological uncertainties regarding the service when reimbursement was originally authorized in 2000. Amended Comments at 3. CSD further explained that although the Commission's decision not to mandate VRS was the correct one in 2000, now many of those technological uncertainties are ameliorated or resolved. *See* Amended Comments at 3-4. CSD concluded it is time to re-examination the speed of answer waiver. Amended Comments at 4.

Hands On agreed and shortly thereafter amended its waiver request. It explained that when the Commission approved reimbursement of VRS, very little VRS was provided, and there was only one provider. It explained that what VRS was provided was provided via ISDN lines from public locations, not over the Internet. Thus, demand for the service was severely restricted. Since that time, VRS demand has grown exponentially. As of October of 2003, Hands On reported there were more than 360,000 VRS minutes reported by six providers. Now in September of 2004, the latest available report shows more than 730,000 minutes of VRS provided in May of 2004. *See* Monthly TRS Fund Status Report (available at www.NECA.org).

In its amendment to its waiver request, Hands On stated it knew of no reason why it could not meet a speed of answer requirement. The only issue Hands On stated was a limitation on its meeting a speed of answer requirement was one of cost, with the then present VRS reimbursement

rate of $7.751 not allowing Hands On to meet a speed of answer requirement. Thus the only limiting factor was cost.

Accordingly, Hands On was in agreement with the substance of CSD's Amended Comments and urged the Commission to grant only a limited one-year waiver of the speed of answer requirement. However, Hands On suggested the 85/10 speed of answer standard might not be appropriate for VRS, and suggested that after the one year waiver, the Commission should set an interim standard of 85 percent of calls answered within 20 seconds to run another year while the Commission would conduct a rule-making proceeding to determine whether functionally equivalent VRS requires a different speed of answer from other TRS services.

In analyzing the requested limited speed of answer waiver request, the Commission articulated the correct standard, but it then failed to apply that standard. The standard is that although the Commission must give the waiver request a "hard look," it may waive the rules only after the applicant has met a heavy burden to show good cause, and the agency must explain why its deviation from its rules better serves the public interest by articulating the special circumstances justifying the waiver. *Order* at para. 110.

The *Order* contains no discussion sufficient to justify continuation of the speed of answer waiver beyond that necessary to allow providers a transitional period to ramp up to the currently waived standard. Although the *Order,* at para. 121, states that the Commission finds that VRS will benefit from an extension of the answer speed waiver, the *Order* fails to state how. Nor does the *Order* articulate any special circumstances justifying the waiver's extension. Moreover, the *Order* is simply irrational in its curt dismissal of Hands On's and CSD's assertions that only lack of sufficient funding -- a matter wholly within the FCC's control -- prevents them from meeting the waived

standard. *See Order* at 122. As the Commission made clear at para. 110, the law requires *providers* to justify a waiver or an extension of a waiver with a *heavy burden of proof*. The *Order* turns this standard on its head and asserts without explanation that the "record does not reflect that the sole, or even principal, reason that this requirement cannot be met is because of the current VRS compensation rate." If this were so, one would have expected that the *Order* would be able to articulate what the record does show are the principal reasons why providers cannot meet the speed of answer requirement, and exactly what has been shown by a heavy burden of proof to justify continuation of the waiver. In other words, the *Order* would articulate the special circumstances which justify waiver. Yet, it does not.

The failure of the Commission to articulate what are the special circumstances justifying an extension of the speed of answer waiver renders the *Order's* treatment of this matter subject to invalidation on judicial review. *See Northeast Cellular Telephone Company L.P. v. FCC,* 897 F.2d 1164 (D.C. Cir. 1990). For this reason the speed of answer waiver extension must be reconsidered. On reconsideration, the Commission should grant waiver only through June 30, 2005, at which time the Commission should require providers to meet an answer speed criterium of 85 percent of calls answered within 20 seconds. That standard should apply until the Commission completes the examination of the proper answer speed for VRS in the pending Further Notice of Proposed Rule Making in Docket 03-123.

V. The determination of the $8.854 per minute rate for VRS violates the APA.

In its *Order,* the Commission reconsidered the Bureau's setting of an "interim" 2003-04 VRS compensation rate of $7.751,[5] set the final rate at $8.854, and made the $8.854 rate retroactive to

[5] *See Telecommunications Relay Service*, 18 FCC Rcd 12823 (2003) ("*Interim Rate Order"*).

September 1, 2003. In so doing, the Commission violated the basic requirement of the APA that requires the Commission to provide a reasoned explanation for its decisions. *See AT&T Corp v. FCC*, 236 F.2d 729, 736-37 (D.C. Cir. 2001).

A. The Order fails to explain how the Commission got to a $8.854 VRS rate.

The *Order* must be reconsidered because it fails to explain adequately how the Commission arrived at a $8.854 VRS final rate for 2003-04.

The Bureau's June 30, 2003 *Interim Rate Order* set the VRS compensation rate at $7.751 by eliminating some $26 million of projected expenses. *Order* at para. 164. The expenses eliminated included provider claimed profit and tax allowances of some $11 million. *Order* at para. 177 n.507. The Commission eliminated those claimed expenses and then substituted an 11.25 percent rate of return on investment. The *Order* affirms that substitution. *Order* at para. 177-82. Hands On does not contest that the Commission has adequately explained what it did with respect to this aspect of the cost exclusions, the matter of profit, although for reasons fully addressed in the record of this proceeding, Hands On disagrees with the Commission's decision on this matter.

The remaining cost adjustments, however, are another story. The Commission's sole description of them is that the Bureau "adjusted labor costs to account for inefficiencies in the labor cost submissions of some VRS providers ... disallowed certain engineering costs it found unreasonable ... and excluded some data from providers entirely, based on its assessment that the data were erroneous or unreliable." *Order* at para. 185 n.530.

In response to supplemental data from providers, the *Order* states that the Commission restored $9,503,801 in VRS costs and 213,415 in net reimbursable VRS minutes,[6] resulting in a final

[6] Apparently, the increase in minutes represents the addition of one of more providers'

rate of $8.854. The *Order* contains no rational explanation why it restored the amount it did and why it upheld the exclusions that it did. For this reason, the *Order* is arbitrary and capricious and must be reconsidered.

For example, the *Order* contains no intelligible discussion of the labor inefficiencies found, what was their nature and how the Commission evaluated these projected costs. The reader of the *Order* is simply left to wonder. The purpose of the requirement that the Commission adequately explain its decisions is to avoid arbitrary and capricious decisions. *See, e.g., PBGC v. LTV* Corp., 110 S.Ct. 2668, 2680 (1990). By requiring an explanation, the APA helps insure that the Commission's decisions are reasonable and lawful. Here there is no explanation, merely conclusory statements with no discussion of the nature of the alleged labor inefficiencies and not even a dollar amount given as to the amount excluded. There is no way a reviewing court can determine whether the Commission acted reasonably in excluding alleged labor inefficiencies or simply arbitrarily cut expense items to reduce a rate the agency considered too high. We are left to wonder, for example, what were the incorrect assumptions the Commission found in providers' labor cost data. *See Order* at 191 & n.547. We are left to wonder what were the inconsistencies between budgeted salaries, reimbursable minutes and actual experience. We are left to wonder how the Commission arrived at the $8.854 VRS rate. This is a prime example of the agency going from the "tolerably terse to the intolerably mute." *See* ***Greater Boston Television Corp. v. FCC*****, 444 F.2d 841, 852 (D.C. Cir. 1970).**

The agency is tasked by the APA to articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *See Motor Vehicle*

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information that was entirely excluded by the Bureau.

Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed2d 443 (1983). Here we are left to wonder what facts were even found, much less how those facts are rationally connected to the choice the Commission made.

Likewise, although the Commission indicates it reinstated certain engineering expenses the Bureau had considered unreasonable, we are still left to guess at the nature of these expenses. And we are left to wonder what was the amount of the expenses the Commission continues to consider unreasonable, as well as the basis for that conclusion.

Even where the Commission discussed a category of engineering expenses, its discussion still crosses the line from tolerably terse to intolerably mute. Thus, the Commission stated that it affirmed the Bureau's disallowance of expenses directed at research and development, including software development, relating to VRS enhancements that go beyond the applicable mandatory minimum standards. *Order* at para. 189. Aside from the fact that the Bureau's *Interim Rate Order* no where expressed that limitation, *see June 30, 2003 Interim Rate Order* at paras. 29-38, the *Order* also no where explains how it applied this decisional criterium to its rate determination, how it arrived at this decisional criterium, or how it arrived at a conclusion that any particular engineering expense was directed at exceeding mandatory minimum standards. We raise this issue because at no point previous to this has the Commission either articulated this standard as the talisman of appropriate engineering expense, nor asked for data to support such expenses.

Beyond that, however, the articulated standard is insufficient to evaluate the entire set of engineering expenses. For example, there is no minimum FCC standard with respect to computer platforms for which VRS must be compatible. There is no standard that VRS must be compatible with Microsoft Windows. There is no standard that VRS must be compatible with the D-Link

Videophone device. There is no standard that VRS must be compatible with an Apple MacIntosh computer. There is no standard that VRS must be compatible with any particular computer or video system. Yet, unless a provider's VRS is compatible with at least one computer or video system, it cannot provide VRS at all, and if not compatible with each of them, a provider's service would be inaccessible to large numbers of potential VRS users. So how does the *Order's* articulated standard apply to that case? We are left to wonder.[7]

Similar is the issue of frames per second of VRS transmission. The FCC has no minimum standard for VRS frames per second. Does this mean the Commission will allow engineering costs to achieve only one frame per second, which is clearly insufficient to provide VRS, or for the 60 frames per second, the equivalent of full motion television, which we suggest would be well in excess of what is required to provide acceptable quality? The *Order's* articulated standard cannot answer that question for the simple reason that the Commission has no mandatory minimum

[7] A portion of HOVRS's 2003-04 engineering cost estimates was directed to making its service compatible with each of these platforms. Neither the *Order*, nor any other data source serves to shed light of whether the Commission included these expenses in its rate calculation or excluded them.

standard for video quality. Yet, plainly some degree of video quality is necessary to provide VRS. The *Order* admits these expenses were at issue, yet fails to discuss how they were resolved.

What is the answer? We would suggest that the standard the *Order* adopts, disallowing engineering expenses beyond that necessary to meet minimum mandatory standards is simply insufficient to evaluate rationally all the costs at issue here. That standard could not possibly have been applied to exclude the various costs which were excluded, including apparently engineering expenses to improve picture quality. Rather, the proper standard for judging these expenses for which there is no minimum standard, and the one that the Commission should adopt on reconsideration, is one of reasonableness, having proper regard for the cost to be incurred versus the benefit to be achieved. To hold otherwise would impede the technical development of TRS service in defiance of the express requirement of Section 225, and impose a standard the FCC simply is not and cannot apply without micro managing every facet of the TRS service.

Section 225 of the Act requires providers to be reimbursed their *reasonable* costs of providing service. Moreover, Section 225 requires the Commission in formulating its regulations for TRS not to discourage technical innovation. We fully agree with the Commission that Congress's exhortation is not a license to tap the Interstate TRS Fund to provide relay service to deaf, hard of hearing and speech disabled persons beyond that which is functionally equivalent to the telephone service available to hearing persons. But by the same token functional equivalence is not a bare minimal lifeline service as the *Order* can be read to imply. *See Order* at paras. 194-99.

This is aptly illustrated by the FCC's decision not to specify any minimum standard for IP Relay security. As the Commission explained, "We will not require ... that providers adopt any particular technology in this regard. We will allow TRS providers to determine for themselves the

level of security they will offer consumers, and the means by which they will protect the privacy of the Internet-based TRS callers and their personal identification information, so that no aspect of a relayed conversation is retrievable in any form." *Order* at para. 51. Since the FCC is not setting a mandatory minimum standard for call security, how is the FCC to evaluate provider costs incurred in ensuring call security? The answer again is the reasonableness standard set forth in Section 225. That standard plainly requires the Commission to evaluate cost versus benefit with due regard for the service the deaf, hard of hearing and speech disabled community receives.

It was therefore wholly appropriate for the Commission to have examined VRS costs in light of the $17 plus VRS rate prevailing in the 2002-03 period. In Hands On's view, there was likely a problem with the calculation of that rate. That being said, however, it is apparent that the examination of the 2003-04 VRS cost data swung the pendulum way too far in the direction of cost control, without appropriate concern for the effect on VRS quality and availability and without a reasonabled decision on their the interim or final VRS rate. Since the *Order* failed to correct that problem, the Commission must reconsider and correct the *Order*.

B. The Order's treatment of research and development expense is arbitrary.

A prime example of the arbitrary and capricious approach the *Order* follows, is its treatment of research and development expense. The *Order* holds that the reasonable costs for which TRS providers will be paid must relate to the provision of the service in compliance with the applicable non-waived mandatory minimum standards. *Order* at para. 199. Apparently the logic behind this holding is that functional equivalence is determined by the rules' minimum standards that are not waived. *Id.* The major flaw, among others, to this position, however, is that functional equivalence is determined by the minimum standards, where there are such standards, not by the unwaived

minimum standards. The waivers that have been granted, for example, for speed of answer, choice of interexchange carrier, and automatic routing of emergency calls, have been granted not because they are unnecessary to achieve functional equivalence, but because they are not practicable or because they are not feasible to implement at this time. The *Order* itself, makes this point very clear. *See Order* at paras. 115, 118, 127, 132 & 135.

By definition, the mandatory minimum standards are those items the Commission considers essential to achieve functional equivalence with the telephone service available to hearing persons. The waivers in question do not change the definition of functional equivalence, and the Commission has never before even suggested that position. Rather, each of the waivers that has been granted has been granted because of the technical infeasibility of providing the waived feature *not* because of a Commission determination that the waived functionality is unnecessary to achieve functional equivalence. Thus, research and development expenses which are designed to meet waived standards are necessary to achieve functionally equivalent TRS. Those expenses should therefore be included in the rate calculation

The exclusion of research and developement costs is also contrary to precedent. The Commission has held that research and development is an appropriate element of a rate when it is for the benefit of consuming ratepayers. *Communications Satellite Corporation*, 90 F.C.C.2d 1159 (1982). *See also Public Service Company of New Mexico v. FERC*, 832 F.2d 1201, 1214-15 (10th Cir. 1987). *See also* Satrom, *Office of Consumers' Counsel v. FERC*, 2 Energy Law Journal 119 (1981); Comments of Ed Bosson in Docket 98-67 (May 21, 2004) (Mr. Bosson, Texas Relay Administrator, has aptly been described as the father of VRS). Where research and development

stand to benefit deaf, hard of hearing, and speech disabled consumers , those expenses are manifestly appropriate cost elements to the VRS rate.

Indeed, exclusion of research and development is particularly inappropriate given Congress's direction to the FCC that its regulations "not discourage or impair the development of improved [relay] technology." 47 U.S.C. §225(d)(2). Moreover, the Commission's waiver orders, including the instant *Order*, plainly require providers to discuss their research and development efforts designed to meet the waived requirements. *See Telecommunications Relay Service*, 18 FCC Rcd 12379 (2003); *Order* at paras. 111, 121&140. The clear implication of this requirement to report on research and development efforts is that the Commission expects providers to conduct research and development to meet waived standards. This is especially the case given that these waivers are not indefinite.[8] Rather each one is time limited with the earliest waiver expiring January 1, 2006, in 15 months. How can the Commission expect providers ever to meet these waived standards if they cannot build the cost of meeting these standard into the TRS rates?

Furthermore, in paragraph 121 of the *Order* the Commission exhorts providers to work diligently to meet the needs of callers and suggests that competition among VRS providers will achieve that result. The problem with that exhortation, however, is that providers have no financial incentive to spend money to meet waived standards given that the Commission limits them only to their costs of providing TRS at the minimum unwaived standard, denies them a profit margin on TRS expenses, and does not allow them to include the research and development costs of meeting

[8] Were a minimum standard to be permanently waived for any TRS service because the Commission finds that meeting the waiver is not necessary to functional equivalency, it might be reasonable to exclude research and development for such a standard. Such an example would be the 60 wpm typing standard for VRS interpreters, since that standard is plainly inapplicable to VRS.

the waived standard in the TRS rates. Given that the Commission expects research and development to meet waived requirements, it was irrational for the *Order* to hold that it will not allow the Interstate TRS Fund to pay for it.

For all of these reasons, the *Order* should be reconsidered to allow reasonable research and development expenses to be included in the cost of TRS, including VRS to the extent to meet non-permanently waived standards.

C. The exclusion of "proprietary" software is arbitrary.

The *Order's* treatment of software costs is also flawed and requires reconsideration. The *Order* upholds the exclusion of "proprietary" software costs as unreasonable. *Order* at para. 189. Yet, at no point does the *Order* explain why such costs are not reasonable, describe what proprietary software was at issue, or even discuss the amount of such costs that were excluded from the 2003-04 VRS rate.[9] There is no reason why such costs are per se unreasonable. FCC Rule Section 64.604(e) provides that FCC Rule Part 32 is the basis for TRS cost accounting. Nothing in FCC Part 32 suggests that proprietary software, as opposed to non-proprietary software, is not a legitimate cost item. Certainly to the extent a provider develops software independent of TRS for sale and seeks to impose the entire cost of that software upon the Interstate TRS Fund, such a cost allocation would be unreasonable. Likewise, to the extent the software is used for TRS purposes and for non-TRS proposes, the provider is only entitled to the TRS element of the software's costs. But to exclude the entirety of such expense because the software is deemed proprietary is simply an arbitrary decision and hence violates the APA.

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[9] The *Order* also states without any citation to FCC rules, generally accepted accounting expenses, or any other authority, that as a general matter engineering expenses, apparently including software costs, cannot be reported as immediate expenses in the year they are incurred. This matter

D. The decision to apply to the $8.854 VRS rate only from September 1, 2003 was arbitrary and capricious.

As discussed above, the *Order* increased the VRS payment rate from $7.751 to $8.854, and applied that rate retroactive to September 1, 2003. The sole rationale for applying that decision only from September 1, 2003 was because "this compensation rate is based on information that was

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requires clarification as to what engineering expenses are in fact current costs and what are capital expenses.

FCC Rule Section 64.604 references TRS costs to the FCC's accounting rules in Part 32. FCC Rule 32.6535 classifies engineering expense as an expense account, not as a capital account. Similarly, engineering expense is not one of the accounts that is included in the determination of capital investment pursuant to Section 65.820. Moreover, the TRS administrator and FCC personnel recently met with TRS providers to discuss the proposed data collection form for 2005-06. That form call for engineering expenses to be reported as a current expense item, not as a capital investment item.

submitted after we adopted the *[Interim Rate Order]*." *Order* at para. 193. This explanation fails the APA's test that requires a rational relationship between the facts found and the agency's decision for several reasons.

First, although the decision might have been based on data received after June 30, 2003, the *Order* fails to disclose when it actually was received. As such, the Commission has shown no rational relationship between the undisclosed date the information was submitted and the decision to apply the $8.854 rate only back to September 1, 2003.

Second, the timing of the submission of the supplemental data after July 1, 2003, was a matter wholly within control of the Bureau. The Bureau choose to disallow providers' costs without giving them any form of notice or opportunity to be heard in advance of the effective date of its June 30, 2003 *Interim Rate Order*. Moreover, the Bureau issued its *Interim Rate Order* on 12 hours advance notice, making it impossible for any provider to respond to the cost exclusions prior to the *Order* becoming effective.

Third, it is not clear in the least respect what rational relationship the submission of data after the release of the Bureau's *Interim Rate Order* has to do with the *Order's* decision to apply the final VRS rate only back to September 1, 2003. The final VRS rate of $8.854 was required to compensate VRS providers for their reasonable costs of providing service. The Commission did not find that provider's costs in July and August of 2003 were less than $8.854, but their reasonable cost of service after September 1, 2003 was $8.854. Rather, the Commission found that provider's data, as supplemented pursuant to Commission invitation and request, showed that the reasonable cost of providing VRS for the time period from July 1, 2003 to June 30, 2004 was $8.854. Therefore, the only rational decision the Commission could have made was to apply that rate back to July 1, 2003.

That the Commission failed to do so demonstrates beyond question that the September 1, 2003 date was an arbitrary and capricious choice, likely merely designed to limit the cost of VRS service. As such it was unlawful and must be modified on reconsideration to July 1, 2003.

VI. The Commission's refusal to authorize payment for ASL to Spanish VRS is premised on an erroneous factual finding and is contrary to the intent of the ADA.

The *Order* refuses to allow payment from the Interstate TRS Fund for ASL to Spanish VRS. *Order* at paras. 55-62. The stated rationale is that ASL to Spanish is "non-shared language TRS" which exceeds the functional equivalency mandate because it is essentially a translation, value-added service. *See Order* at paras. 60-61. That decision, however, is based on the false factual premise that ASL to English VRS is shared language TRS. Otherwise, it would be disallowed as "non-shared language." As the Commission notes in para. 56 of the *Order,* however, it has previously concluded that ASL translation service is necessary to provide functional equivalency to ASL users. As the Commission explained, ASL is a language with a syntax and grammar different from that of English. *Id.* Accordingly, it is arbitrary and capricious to allow payment for ASL to English translation and not ASL to Spanish translation given that Spanish is the second most spoken language in the United States. In this connection, Hands On has reviewed the Petition for Reconsideration filed September 30, 2004, by CSD, and fully agrees with the discussion of this issue by that petitioner. Rather than burdening the record largely with a repetition of the salient points CSD makes, Hands On simply notes its agreement and incorporates those arguments by reference herein. *See* CSD Petition at 2-12.

VII. Conclusion.

As shown above, the *Order* in several key respects fails the requirements of reasoned decision making required by the APA and is inconsistent with the ADA, the FCC's rules and

precedent. Hands On therefore requests the Commission to reconsider its decision (1) dismissing Hands On's certification application; (2) extending the speed of answer waiver for VRS; (3) setting the VRS rate at $8.854; (4) applying the final VRS rate only from September 1, 2003; (5) and refusing to authorize the reimbursement for ASL to Spanish VRS. On reconsideration, the Commission should acknowledge that Hands On is qualified to draw form the Interstate TRS Fund, should limit the waiver of the speed of answer requirement to only one year, should reverse its exclusion of research and development and proprietary software charges, establish a reasonableness standard for all categories of TRS expenses, raise the VRS rate as a result, apply that rate from July 1, 2004, and acknowledge that ASL to Spanish VRS is compensable from the Interstate TRS Fund.

Respectfully submitted,

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Certificate of Service

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