

**ORAL ARGUMENT SCHEDULED FOR MARCH 17, 2014**  
**No. 13-1215**

---

---

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

SORENSEN COMMUNICATIONS, INC.,

*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA,

*Respondents.*

---

ON PETITION FOR REVIEW OF A FINAL ORDER  
OF THE FEDERAL COMMUNICATIONS COMMISSION

---

**BRIEF OF THE NATIONAL ASSOCIATION OF THE DEAF  
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER**

---

Roy T. Englert, Jr.  
Joshua S. Bolian  
ROBBINS, RUSSELL, ENGLERT, ORSECK,  
UNTEREINER & SAUBER LLP  
1801 K Street, N.W., Suite 411  
Washington, DC 20006  
(202) 775-4500  
renglert@robbinsrussell.com

*Counsel for the National Association  
of the Deaf as Amicus Curiae*

January 28, 2014

---

---

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel certifies as follows:

**A. Parties and Amici.** All parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Petitioner Sorenson Communications, Inc., except that this brief is filed on behalf of the National Association of the Deaf.

**B. Rulings Under Review.** The petition challenges the Federal Communications Commission's final order: Report and Order and Further Notice of Proposed Rulemaking, *Structure and Practices of the Video Relay Service Program*, CG Docket Nos. 10-51, 03-123, FCC 13-82, 28 FCC Rcd. 8618 (released June 10, 2013).

**C. Related Cases.** Other related cases of which counsel is aware are listed in the Brief for Petitioner Sorenson Communications, Inc.

Dated: January 28, 2014

/s/ Roy T. Englert, Jr.  
Roy T. Englert, Jr.  
ROBBINS, RUSSELL, ENGLERT, ORSECK,  
UNTEREINER & SAUBER LLP  
1801 K Street, N.W., Suite 411  
Washington, DC 20006  
(202) 775-4500  
renglert@robbinsrussell.com

*Counsel for National Association  
of the Deaf as Amicus Curiae*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, counsel states and certifies as follows:

The National Association of the Deaf (NAD) is a private, nonprofit (501(c)(3)), non-stock membership organization incorporated in the District of Columbia and doing business in Silver Spring, Maryland. The NAD has no parent corporation. No publicly held company owns ten percent or greater ownership interest in the NAD.

Dated: January 28, 2014

/s/ Roy T. Englert, Jr.  
Roy T. Englert, Jr.  
ROBBINS, RUSSELL, ENGLERT, ORSECK,  
UNTEREINER & SAUBER LLP  
1801 K Street, N.W., Suite 411  
Washington, DC 20006  
(202) 775-4500  
renglert@robbinsrussell.com

*Counsel for the National Association  
of the Deaf as Amicus Curiae*

## **CERTIFICATE AS TO NECESSITY OF SEPARATE *AMICUS* BRIEF**

Pursuant to D.C. Circuit Rule 29(d), counsel certifies that this separate brief is necessary because it presents an essential and otherwise-absent perspective—that of the millions of deaf and hard-of-hearing Americans who rely on the service at issue. The government funds that service because Congress mandated that these citizens have telecommunications services that are “functionally equivalent” to those of hearing persons. Thus, the ultimate end of the service is to facilitate the communications of deaf and hard-of-hearing Americans. These citizens—through the National Association of the Deaf, which has represented their perspectives since 1880—are concerned that the challenged rule could hinder their progress toward the right of functional equivalence.

Dated: January 28, 2014

/s/ Roy T. Englert, Jr.  
Roy T. Englert, Jr.  
ROBBINS, RUSSELL, ENGLERT, ORSECK,  
UNTEREINER & SAUBER LLP  
1801 K Street, N.W., Suite 411  
Washington, DC 20006  
(202) 775-4500  
renglert@robbinsrussell.com

*Counsel for the National Association  
of the Deaf as Amicus Curiae*

## TABLE OF CONTENTS

	<b>Page</b>
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES.....	i
CORPORATE DISCLOSURE STATEMENT .....	ii
CERTIFICATE AS TO NECESSITY OF SEPARATE <i>AMICUS</i> BRIEF .....	iii
TABLE OF AUTHORITIES.....	vi
GLOSSARY .....	ix
STATUTES AND REGULATIONS .....	1
STATEMENT OF IDENTITY OF <i>AMICUS CURIAE</i> , INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE .....	1
STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTION .....	2
INTRODUCTION .....	2
SUMMARY OF ARGUMENT.....	4
ARGUMENT .....	5
I.    VRS HAS BROUGHT DEAF AND HARD-OF-HEARING INDIVIDUALS CLOSER TO THE CONGRESSIONALLY MANDATED RIGHT OF FUNCTIONAL EQUIVALENCE.....	5
A.    Congress Mandated That Telecommunications Services For Deaf And Hard-Of-Hearing Individuals Be “Functionally Equivalent” .....	5
B.    VRS Is A Telecommunications Service With Unique Potential To Achieve Functional Equivalence .....	7
C.    Nonetheless, VRS Has Yet To Achieve Complete Functional Equivalence.....	10

**TABLE OF CONTENTS—Continued**

**Page**

II. THE FCC’S RATE CUT IS A POTENTIAL STEP AWAY FROM FUNCTIONAL EQUIVALENCE .....12

    A. Common Sense Suggests That Cutting Rates Could Hinder The Progress Of VRS Toward Functional Equivalence .....13

    B. Experience Suggests That Cutting Rates Could Hinder The Progress Of VRS Toward Functional Equivalence .....16

        1. The FCC’s 2010 VRS Rate Cut..... 16

        2. The FCC’s 2013 IP Relay Rate Cut..... 18

        3. The FCC’s Experience With Rate-Of-Return Regulation..... 21

CONCLUSION .....24

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Nat'l Rural Telecom Ass'n v. FCC</i> , 988 F.2d 174 (D.C. Cir. 1993) .....	22
<b>Statutes and Legislative History</b>	
42 U.S.C. § 12101(b)(1) .....	5
* 47 U.S.C. § 225 .....	5
* 47 U.S.C. § 225(a)(3).....	2, 5, 6, 12, 18
* 47 U.S.C. § 225(b)(1) .....	2, 5, 6, 12
* 47 U.S.C. § 225(d)(2) .....	6, 12
Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 .....	6
<b>Administrative Materials</b>	
Second Report and Order, <i>Policy and Rules Concerning Rates for Dominant Carriers</i> , CC Docket No. 87-313, FCC 90-314, 5 FCC Rcd. 6786 (released Oct. 4, 1990).....	22, 23
Report and Order and Further Notice of Proposed Rulemaking, <i>Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities</i> , CC Docket No. 98-67, FCC 00-56, 15 FCC Rcd. 5140 (released Mar. 6, 2000).....	8

---

\* Authorities upon which we chiefly rely are marked with asterisks.

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket Nos. 90-571, 98-67, CG Docket No. 03-123, FCC 04-137, 19 FCC Rcd. 12475 (released June 30, 2004) ..... 5-6

Report and Order and Further Notice of Proposed Rulemaking, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, WC Docket No. 05-196, FCC 08-151, 23 FCC Rcd. 11591 (released June 24, 2008).....10

Order, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, FCC 10-115, 25 FCC Rcd. 8689 (released June 28, 2010).....16

Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208, FCC 11-161, 26 FCC Rcd. 17663 (released Nov. 18, 2011).....23

Order, *Applications of AT&T Inc. and Deutsche Telekom AG for Consent To Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, 26 FCC Rcd. 16184 (released Nov. 29, 2011) .....21

Public Notice, Rolka Loube Saltzer Associates Submits Payment Formulas & Funding Requirement for the Interstate Telecommunications Relay Services Fund for the July 2013 Through June 2014 Fund Year, CG Docket Nos. 03-123 and 10-51, DA 13-1137, 28 FCC Rcd. 7296 (released May 17, 2013) .....19

Report and Order and Further Notice of Proposed Rulemaking, *Structure and Practices of the Video Relay Service Program*, CG Docket Nos. 10-51, 03-123, FCC 13-82, 28 FCC Rcd. 8618 (released June 10, 2013) ..... 8, 10, 14, 15, 22, 23

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

Order, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 03-123 and 10-51, DA 13-1483, 28 FCC Rcd. 9219 (released July 1, 2013).....20

Letter to John Goodman, Corporate Vice President and Chief Legal Officer, Purple Communications, Inc., *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, DA 13-1704, 28 FCC Rcd. 11243 (August 2, 2013).....20

Letter to Scott R. Friermuth, Counsel - Government Affairs, Sprint Corp., *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, DA 13-1705, 28 FCC Rcd. 11244 (August 2, 2013).....20

**Other Authorities**

Peter W. Huber et al., *Federal Telecommunications Law* (2d ed. 1999).....22

I. King Jordan, *Ensuring Access to Phone Service Guaranteed Under the ADA*, The Hill (Oct. 10, 2013, 2:00 PM), <http://thehill.com/blogs/congress-blog>..... 8, 21

Frank R. Lin et al., *Hearing Loss Prevalence in the United States*, 171 Archives Internal Med. 1851 (2011) .....7

## **GLOSSARY**

CA	Communication Assistant
FCC	Federal Communications Commission
IP Relay	Internet Protocol Relay
NAD	National Association of the Deaf
TTY	Teletypewriter
VRS	Video Relay Service

## STATUTES AND REGULATIONS

All pertinent statutory provisions and regulations are set forth in the Brief for Petitioner Sorenson Communications, Inc.

### **STATEMENT OF IDENTITY OF *AMICUS CURIAE*, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE**

*Amicus* is the National Association of the Deaf (NAD), established in 1880 by deaf and hard-of-hearing leaders who believed in the right of the American Deaf community to use sign language, to congregate on issues important to it, and to represent its interests at the national level. The NAD is a nonprofit federation, and its mission is to preserve, protect, and promote the civil, human, and linguistic rights of deaf and hard-of-hearing individuals in the United States. The advocacy scope of the NAD is broad, covering the breadth of a lifetime and affecting future generations in the areas of early intervention, education, employment, health care, technology, telecommunications, youth leadership, and more. Since 1976, the NAD Law and Advocacy Center has protected the legal rights of deaf and hard-of-hearing people through the courts.

The challenged agency order could burden the rights of deaf and hard-of-hearing people under the Americans with Disabilities Act. The NAD, which has long advocated for the rights of individuals who are deaf and hard of hearing, believes that its views can inform this Court, and assist the Court in arriving at the correct decision in this case.

Pursuant to Fed. R. App. P. 29(a) and D.C. Circuit Rule 29(b), on October 24, 2013, this Court granted the NAD's unopposed motion for leave to file as *amicus curiae* in support of petitioner.

### **STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTION**

No party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person other than counsel for *amicus* contributed money intended to fund the preparation or submission of this brief.

### **INTRODUCTION**

For 23 years, individuals who are deaf or hard-of-hearing, or have speech disabilities, have had a statutory right to obtain telephone services “*functionally equivalent*” to those available to individuals without such disabilities. 47 U.S.C. § 225(a)(3), (b)(1) (emphasis added). More specifically, the Federal Communications Commission has been commanded to “ensure that interstate and intrastate [functionally equivalent services] are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.” *Id.* § 225(b)(1) (incorporating definition of “telecommunications relay services” from (a)(3)).

To that end, the government oversees and regulates telecommunications services for deaf and hard-of-hearing persons to ensure that such services are “functionally equivalent” to the services used by hearing persons. Since Congress

recognized functional equivalence as a right in the Americans with Disabilities Act of 1990, much progress has been made. In particular, deaf and hard-of-hearing callers can now communicate through the telephone to those who use the conventional telephone as well as other devices by using sign language, which was hardly thinkable in 1990. The technology that makes this possible—Video Relay Service (VRS)—is the subject of this case.

The NAD, as an advocate for the deaf and hard-of-hearing community, respectfully urges the Court to keep its focus on the overriding goal of functional equivalence. In the challenged order, the FCC—Congress’s agent for effecting functional equivalence—has cut the reimbursement rates for VRS significantly. This order is just one instance of the FCC’s overriding objective of fighting fraud and inefficiency in services that assist the deaf and hard of hearing. Although fighting fraud and inefficiency is a laudable objective, it cannot lawfully be pursued in a way that departs from the statutory command to achieve all possible functional equivalence. Insofar as the challenged order crosses that threshold (and there is reason to believe that it does), the NAD opposes it. We urge the Court, as the guardian of Congress’s intent, to ensure that the burdens of reducing fraud and inefficiency do not fall on deaf and hard-of-hearing consumers—the very population the VRS program is intended to serve.

## SUMMARY OF ARGUMENT

**I.** Congress has mandated that deaf and hard-of-hearing persons must have telecommunications services that are “functionally equivalent” to those available to hearing persons. The technology at issue here, Video Relay Service (VRS), has transformed telecommunications for the deaf and hard of hearing by enabling them to make phone calls using sign language. VRS is therefore among the most promising means to fulfill Congress’s mandate. Nonetheless, even VRS remains shy of complete functional equivalence in important ways.

**II.** Although the NAD lacks the data and the expertise to evaluate particular rate orders, it opposes any regulation that frustrates the progress of VRS toward functional equivalence. And it is concerned that the rate order challenged here could be such a regulation. Common sense dictates that lower payments for a service are unlikely to improve the service—which is particularly true here, as the rate order does not account for important costs of providing VRS service. Experience reaches the same conclusion. The FCC’s prior rate cuts to VRS and to a related service, as well as its overall experience with “rate-of-return” regulation (like the rate order at issue here), forebode ill consequences.

## ARGUMENT

### I. VRS HAS BROUGHT DEAF AND HARD-OF-HEARING INDIVIDUALS CLOSER TO THE CONGRESSIONALLY MANDATED RIGHT OF FUNCTIONAL EQUIVALENCE

Under the Americans with Disabilities Act, deaf and hard-of-hearing people have a right to telecommunications services that are “functionally equivalent” to those of hearing people. 47 U.S.C. § 225(a)(3); see *id.* § 225(b)(1). Video relay service (VRS), the subject of this case, has done more than anything since the Act itself to make this right a reality. Despite this progress, however, VRS still needs to be improved before it fully realizes the goal of functional equivalence.

#### A. Congress Mandated That Telecommunications Services For Deaf And Hard-Of-Hearing Individuals Be “Functionally Equivalent”

The statutory framework of the regulatory scheme at issue is Title IV of the Americans with Disabilities Act of 1990, codified at 47 U.S.C. § 225. Title IV furthers the Act’s purpose of “provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1). The FCC itself has explained that Title IV is part of “the long line of federal civil rights laws” stretching back to the Civil Rights Act of 1964.<sup>1</sup>

---

<sup>1</sup> Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket Nos.

The keystone of Title IV, in turn, is its mandate of functional equivalence. Under this mandate, any deaf or hard-of-hearing individual should be able to “engage in communication by wire or radio” in a manner that is “*functionally equivalent* to the ability of a hearing individual.” 47 U.S.C. § 225(a)(3) (emphasis added).<sup>2</sup> In other words, deaf and hard-of-hearing individuals must be able to use telephone-like services as easily and as effectively as hearing people can. Congress tasked the FCC with “ensur[ing]” that such services “are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals.” *Id.* § 225(b)(1). Moreover—and importantly—“functionally equivalent” is not frozen in time as of 1990. Rather, Congress expressly required that the FCC’s regulations “encourage . . . the use of existing technology and do not discourage or impair the development of improved technology.” *Id.* § 225(d)(2).

---

90-571, 98-67, CG Docket No. 03-123, FCC 04-137, 19 FCC Rcd. 12475, 12479 ¶ 3 n.17 (released June 30, 2004).

<sup>2</sup> Congress reaffirmed this mandate when, in 2010, it changed other parts of Section 225(a)(3) but left the functional-equivalence language intact. See Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, § 103, 124 Stat. 2751, 2755.

## **B. VRS Is A Telecommunications Service With Unique Potential To Achieve Functional Equivalence**

VRS has proven to be a communications watershed for many of the Nation's 48 million deaf and hard-of-hearing people<sup>3</sup> and their hearing contacts. When Congress enacted the Americans with Disabilities Act in 1990, the main telecommunications device for the deaf and hard of hearing was the teletypewriter (TTY) phone. In a TTY conversation, a deaf person calls a hearing person through an intermediary called a communication assistant (CA). The deaf person types words on a special device, which the CA reads aloud to the hearing person. The hearing person then speaks back, and the CA types those words in, making them appear on the deaf person's screen. The result differs from how either party usually communicates face to face.

VRS, though similar in concept to TTY, fundamentally changed that dynamic. Whereas TTY connected its users to CAs by typed text, VRS connects them by video link, enabling deaf callers to use sign language. The CA then speaks the signed words to the other caller, conveying connotations that might be absent in written words. When the hearing caller speaks back, the CA signs the words to the

---

<sup>3</sup> Recent work by researchers at the Johns Hopkins School of Medicine indicates that more than 48 million Americans aged 12 and older suffer from hearing loss. Frank R. Lin et al., *Hearing Loss Prevalence in the United States*, 171 *Archives Internal Med.* 1851 (2011). This number could swell as the populace ages.

deaf caller on video. The result is a more natural, seamless conversation that occurs in real time, whereas in TTY calls, the speed is limited to the speed of a person's ability to type, which averages about 50 to 60 words per minute as compared to the normal conversation speed possible with VRS. See generally Report and Order and Further Notice of Proposed Rulemaking, *Structure and Practices of the Video Relay Service Program*, CG Docket Nos. 10-51, 03-123, FCC 13-82, 28 FCC Rcd. 8618, 8621-22 ¶ 4 (released June 10, 2013) [hereinafter *Order*] (describing process of VRS calls).

Since the FCC recognized it in 2000,<sup>4</sup> VRS technology has brought its users closer to functional equivalence. As Dr. I. King Jordan—president of Gallaudet University for eighteen years—recently wrote, he uses VRS “every day to make telephone calls from my home, my office and my tablet computer.” I. King Jordan, *Ensuring Access to Phone Service Guaranteed Under the ADA*, The Hill (Oct. 10, 2013, 2:00 PM), <http://thehill.com/blogs/congress-blog>. “In the years before VRS,” by contrast, “I had to depend on others to make calls for me.” *Ibid.* But that is no longer necessary with the more effective communication that VRS offers.

---

<sup>4</sup> Report and Order and Further Notice of Proposed Rulemaking, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, FCC 00-56, 15 FCC Rcd. 5140, 5152-54 ¶¶ 21-27 (released Mar. 6, 2000).

And Dr. Jordan is not alone. More than two-thirds of deaf and hard-of-hearing persons, according to an informal 2011 survey, have abandoned TTY altogether.<sup>5</sup>

The benefits of VRS have extended to hearing users as well. Because each person who is deaf or hard of hearing has to call many others who can hear—his or her doctors, his or her children’s caregivers, his or her family—it is likely that most VRS users are *not* deaf or hard of hearing. With VRS, hearing callers experience a more natural conversational pace than was possible with TTY, with its speed limitation based on people’s maximum typing speed, and people in general do not need to learn the jargon that TTY users substituted for intonation. In addition, many deaf and hard-of-hearing individuals are more comfortable using American Sign Language through VRS than the written English necessary for TTY calls. And this improved ease of communication builds a broader bridge between those who use the conventional telephone and those who do not—the whole point of functional equivalence.

The NAD applauds certain steps the FCC has taken to bring VRS closer to functional equivalence with mainstream telephones. For example, in the *Order* under review in this Court, the FCC endorses a “reference platform” intended to

---

<sup>5</sup> Telecommunications for the Deaf and Hard of Hearing et al. 4-1-2011 Comments 5 (JA1566). The survey elicited 274 responses through the mailing lists of the NAD and another group, and through social media. Unfortunately, more exhaustive data about VRS use are not available at this time.

make it easier for different kinds of VRS phones to work together. See *Order* ¶¶ 53-61. The FCC has also advanced functional equivalence in assigning ten-digit telephone numbers for video phones used by deaf and hard-of-hearing individuals and ensured that any calls, whether from conventional telephones or from other video phones to such numbers, are automatically and appropriately routed to ensure that communication is achieved.<sup>6</sup>

### **C. Nonetheless, VRS Has Yet To Achieve Complete Functional Equivalence**

In many respects, however, realizing the full potential of VRS to meet the statutory command of functional equivalence remains a dream deferred. Some of the system's most essential functions continue to fall short of mainstream expectations. For example, while all CAs are expected to handle VRS calls effectively and efficiently, some CAs may not know specialized medical terminology, and this may cause some difficulties for VRS users in communicating with their doctors. Despite such a problem, the FCC has resisted appeals for "skill-based" call routing and, additionally, has resisted any kind of certification requirement for CAs. See *Order* ¶¶ 176-180. And VRS users may be unable to reach one another at all.

---

<sup>6</sup> See Report and Order and Further Notice of Proposed Rulemaking, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, WC Docket No. 05-196, FCC 08-151, 23 FCC Rcd. 11591, 11601-628 ¶¶ 20-104 (released June 24, 2008).

There are myriad kinds of VRS equipment, and, according to a 2012 Gallaudet study, there is no VRS system that fully interoperates with every other VRS system.<sup>7</sup> Due to this limited interoperability, survey respondents reported using multiple systems to be able to call one another.<sup>8</sup> For hearing users, by contrast, a phone is a phone is a phone; any one can call any other. Hearing users need not get multiple phones in order to communicate with one another.

In addition to missing these basics, VRS has failed to keep pace with the evolving standards of mainstream telephones. Voice mail and caller ID, for example, have become commonplace, but they are far from universal on VRS. More importantly, the quality of VRS continues to lag on mobile phones. VRS users, therefore, remain behind the curve on one of the most widely adopted innovations of recent years.

These shortcomings illustrate why Congress's mandate of functional equivalence is as necessary as ever. Deaf and hard-of-hearing Americans still lack some of the basic functions to which others are accustomed. And, although improvements in technology have made VRS possible, advances in technology also continue to raise the bar of functional equivalence. Congress has charged the FCC with

---

<sup>7</sup> Technology Access Program at Gallaudet University 8-9-2012 Letter 1 (JA457).

<sup>8</sup> Telecommunications for the Deaf and Hard of Hearing et al. 4-1-2011 Comments 4 (JA1565).

surmounting those challenges and continuing to “ensure” functional equivalence.  
47 U.S.C. § 225(a)(3), (b)(1), (d)(2).

## **II. THE FCC’S RATE CUT IS A POTENTIAL STEP AWAY FROM FUNCTIONAL EQUIVALENCE**

The NAD strongly opposes any regulation that slows or reverses the progress of VRS toward the civil right of functional equivalence. And it is concerned that the challenged *Order*—which cuts the government’s reimbursement rates for VRS providers, the backbone of the system—could be such a regulation. The NAD has no expertise in ratemaking and does not endeavor to offer the Court analysis of the relationship of particular rates to providers’ costs, but the NAD is well positioned to explain to the Court the dire consequences of errors in setting the appropriate level or mechanism of provider reimbursement. Legally, functional equivalence must be the touchstone of any rate regulation. Practically, any move away from functional equivalence will have significant effects, felt by the persons on whose behalf the NAD advocates.

As explained below, both common sense and experience indicate that a sharp rate cut over several years like the *Order* is far more likely to hinder than to further functional equivalence. Indeed, it might be worse—if, as petitioner Sorenson warns, the *Order* “result[s] in the collapse of the VRS industry” (Br. 28), deaf and hard-of-hearing Americans will lose more than a decade of progress. The Court should be careful to ensure that it does not bless an *Order* with those poten-

tial consequences unless it is satisfied that the agency has carefully considered all aspects of the issue and come to defensible conclusions.

**A. Common Sense Suggests That Cutting Rates Could Hinder The Progress Of VRS Toward Functional Equivalence**

Lower payment for VRS services must burden someone, and there is reason to believe that it ultimately will burden deaf and hard-of-hearing people—precisely those whom VRS helps in furtherance of the statutory mandate to achieve functional equivalence. Reason for alarm exists because, while the FCC has sought only to reduce the profits of VRS providers, it has lumped valuable services in with “profits.”

Consider two examples. First, the providers commonly subsidize the purchase of their equipment. Whereas a mainstream voice phone might cost \$10, a VRS phone costs many times more. Rather than making the customer pay the difference—in addition to having to obtain high-speed Internet services (both at home and via mobile systems), which is necessary for the use of VRS—VRS providers often include free or low-cost equipment with their service plans. Doing so brings VRS users one step closer to functional equivalence. That is especially true because, as the NAD and others have urged the FCC, many people who are

deaf or hard of hearing are unemployed or underemployed and thus unable to afford expensive VRS equipment.<sup>9</sup>

Second, the *Order* compels VRS providers to improve their “speed of answer,” the amount of time it takes a VRS user to reach a CA and place a call. (Speed of answer is thus analogous to the time it takes for a hearing user to hear a dial tone after picking up the handset. *Order* ¶ 136 n.299.) The new standard—30 seconds or less, 85 percent of the time, measured on a daily basis (*Order* ¶ 135)—remains far longer than hearing callers would expect. But it, too, brings VRS users one step closer to functional equivalence.

The problem is that the government does not pay VRS providers to do either of these things. The FCC repeatedly has refused to include the cost of equipment and installation in its calculations of providers’ costs. *Id.* ¶¶ 193-194. And, though its new speed-of-answer rule expects more from providers, the FCC declined to fund its mandate. *Id.* ¶ 137. In both cases, therefore, the costs of improving VRS for its users do not appear as costs in the FCC’s ledger. Hence, these beneficial

---

<sup>9</sup> Telecommunications for the Deaf and Hard of Hearing et al. 8-18-2010 Comments 11 (JA120).

expenditures are potential victims of any rate cut designed (as the *Order* is) to “bring[] VRS compensation rates in line with costs.” See *id.* ¶ 185.<sup>10</sup>

Moreover, the primary cost of VRS is for the labor involved—qualified sign language interpreters. Cutting the rates without any assurance of maintaining the quality of sign language interpreters is certain to lead to diminished quality of service and a loss of functional equivalence. Further, cutting rates will prevent any possibility of skill-based routing to ensure that subsets of skilled interpreters are available for calls involving specialized areas such as in the medical and legal fields. The FCC has not acted to assess the quality of interpreting services or to enhance such quality in any meaningful way, yet it seeks to cut rates.

Even if the rate cut does nothing more than slash VRS-provider profits, it could still harm Congress’s intended beneficiaries. The opportunity for profit invites firms to enter a market; the loss of that opportunity prompts them to leave it. That matters here because both the FCC and the NAD have recognized that healthy competition among VRS providers tends to promote functional equivalence.<sup>11</sup> Thus, without reasonable profits for VRS providers, VRS *users* may face

---

<sup>10</sup> Nor is this logic limited to these two issues. For example, the FCC currently does not treat research and development expense as a cost, though it is considering doing so. See *Order* ¶ 20.

<sup>11</sup> *Order* ¶ 200; Telecommunications for the Deaf and Hard of Hearing et al. 4-12-2011 Letter, Attachment (“Policy Statement”) 2 (JA1576).

fewer and less desirable choices. Indeed, as we show below, a closely related service has already met this fate.

## **B. Experience Suggests That Cutting Rates Could Hinder The Progress Of VRS Toward Functional Equivalence**

We need not resort to speculation to see how a rate cut could lead VRS away from functional equivalence. Recent experience has demonstrated how rate regulation like that in the *Order* may disserve consumers. Three episodes are particularly instructive: the FCC’s 2010 cut in VRS rates; the FCC’s 2013 cut in the rates of “IP Relay” (a related service); and the FCC’s rejection of “rate-of-return”-type regulation in general.

### **1. The FCC’s 2010 VRS Rate Cut**

In 2010, the FCC cut the compensation rate for the bulk of VRS traffic by almost 20 percent.<sup>12</sup> There, as here, the FCC stressed its goal of eliminating “the large discrepancy between actual costs and provider compensation” that it believed to exist.<sup>13</sup>

---

<sup>12</sup> Order, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, FCC 10-115, 25 FCC Rcd. 8689, 8694, ¶ 8 (released June 28, 2010) (reducing the Tier III rate from \$6.24 per minute to \$5.07 per minute).

<sup>13</sup> *Id.* at 8695, ¶ 12.

The consequences were unfortunate. VRS providers laid off CAs in large numbers and closed VRS centers.<sup>14</sup> According to the Registry of Interpreters for the Deaf, which is the leading organization that regulates the profession of sign language interpreters, those layoffs and closures result in CAs being forced to work for “unhealthy periods of time,” reducing the quality of their work.<sup>15</sup> Sorenson, the largest provider of VRS services, corroborated those concerns. It has admitted that, despite being the “most efficient provider of VRS” with the lowest cost per minute, it was “forced to fire employees and increase wait times in 2010” following the rate cuts.<sup>16</sup> As stated above, a means to cope with the rate cuts would have been to hire lower-cost CAs, who are generally less educated and qualified, particularly in regional signing.

In short, the rate cut left VRS providers facing a dilemma, and their deaf and hard-of-hearing subscribers worse off—further away from, not closer to, the “functional equivalence” promised by Congress in 1990. The rate cut in the *Order* appears to be substantially similar, so that similar outcomes seem likely. One main difference is that the *Order* begins from a lower baseline rate, which could make the cuts even more detrimental than the rate cuts were in 2010. The FCC has not

---

<sup>14</sup> See Registry of Interpreters for the Deaf, Inc., 11-14-2012 Letter 3 (JA1590).

<sup>15</sup> *Ibid.*

<sup>16</sup> Sorenson Communications, Inc., 11-14-2012 Letter 28 (JA1240).

conducted any studies among deaf and hard-of-hearing users of the VRS system to assess the quality of this system, nor has the FCC conducted any studies of the sign language interpretation skills of CAs. The FCC therefore has not determined whether services have deteriorated after prior rate cuts. Nevertheless, it has proceeded with further rate cuts without determining the status of functional equivalence for deaf and hard-of-hearing consumers.

## **2. The FCC's 2013 IP Relay Rate Cut**

Internet Protocol Relay (“IP Relay”) is another form of “telecommunications relay service” for the deaf and hard of hearing and, as such, is covered by the functional equivalence mandate. See 47 U.S.C. § 225(a)(3). Whereas VRS uses a video link, IP Relay is more like the older TTY relay service. As with the TTY relay service, users communicate their words to a CA by typing them; unlike TTY relay users, IP Relay users send their typed words over the Internet rather than over a phone line. Thus, unlike TTY relay users, IP Relay users are not chained to a specialized device, such as the TTY—they may use IP Relay on their computers and smartphones.

IP Relay is an important complement to VRS. Deaf and hard-of-hearing people use IP Relay on the go, as VRS equipment may be unavailable, and VRS might not be available by mobile phone due to such factors as slow network conditions. IP Relay is also important to deaf and hard-of-hearing users who do not sign

well, such as adults deafened late in life. VRS has limited utility for deaf and hard-of-hearing individuals who do not sign well. Users who are both deaf and blind may not be able to use VRS, but they can use IP Relay with programs that allow them to increase the size of the text or through the use of a braille-enabled terminal. Finally, IP Relay helps users whose words could be lost in translation between spoken English and sign language with CAs who are unfamiliar with certain subject areas, such as professionals using terms of art in their fields.

The FCC recently proposed, then imposed, a cut on IP Relay rates comparable to its 2010 VRS rate cut. On May 17, 2013, it proposed cutting per-minute IP Relay compensation rates by nearly 20%.<sup>17</sup> It also proposed a 6% “efficiency factor” cut, which would reduce compensation rates by that amount each of the following two years. In previous calculations, the efficiency factor reduction was only 0.5%.<sup>18</sup> IP Relay providers protested that they could not achieve the efficiency gains that the cuts envisioned.<sup>19</sup> Nonetheless, the FCC imposed the rate cut on

---

<sup>17</sup> Public Notice, Rolka Loube Saltzer Associates Submits Payment Formulas & Funding Requirement for the Interstate Telecommunications Relay Services Fund for the July 2013 Through June 2014 Fund Year, CG Docket Nos. 03-123 and 10-51, DA 13-1137, 28 FCC Rcd. 7296, 7297 (released May 17, 2013).

<sup>18</sup> Rolka Loube Saltzer Associates LLC 5-1-2013 Report (JA722).

<sup>19</sup> *E.g.*, Sorenson Communications, Inc., 6-7-2013 Comments (JA1598); Purple Communications, Inc., 5-31-2013 Comments (JA1592).

July 1.<sup>20</sup> In doing so, it brushed aside the providers' arguments that the cuts might drive some of them out of the market.<sup>21</sup> Yet it did not explain how fewer choices would further the standard of functional equivalence mandated by statute.

In the wake of the proposed rate cuts, and consistent with the industry's predictions, three carriers stopped offering IP Relay, dropping the number of providers to two.<sup>22</sup> And those exits led to downgraded service. For example, both of the two remaining providers sought—and were granted—a waiver of the FCC's speed-of-answer requirement.<sup>23</sup> The waivers were sought to accommodate the influx of subscribers from the departing providers. Additionally, one of the two

---

<sup>20</sup> Order, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 03-123 and 10-51, DA 13-1483, 28 FCC Rcd. 9219, 9219 ¶ 2 (released July 1, 2013).

<sup>21</sup> *Id.* at 9224 ¶ 15.

<sup>22</sup> Compare <http://www.fcc.gov/encyclopedia/trs-providers> cached on April 25, 2013, with current page; see <http://web.archive.org>. For information about the carriers' departures, see <http://www.hamiltonrelay.com/corporate/faqs/index.html> (Hamilton Relay); [http://relayservices.att.com/content/365/IMPORTANT\\_INFORMATION.html](http://relayservices.att.com/content/365/IMPORTANT_INFORMATION.html) (AT&T); <http://online.wsj.com/article/PR-CO-20130708-907081.html> (Sorenson Communications).

<sup>23</sup> Letter to John Goodman, Corporate Vice President and Chief Legal Officer, Purple Communications, Inc., *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, DA 13-1704, 28 FCC Rcd. 11243 (August 2, 2013); Letter to Scott R. Friermuth, Counsel - Government Affairs, Sprint Corp., *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, DA 13-1705, 28 FCC Rcd. 11244 (August 2, 2013).

remaining providers is also considering leaving this market, which would leave IP Relay users with only one provider. See Jordan, *supra*. Moreover, that sole remaining provider outsources its CAs to another country, and, as a result, the deaf and hard-of-hearing consumers using this provider are often unaware that the CAs speaking for them do so with a foreign accent. Consequently, IP Relay has already deteriorated to the point where there is no functional equivalence anymore.

Apart from that, the very fact that a mere two providers survived the rate cut threatens functional equivalence. The FCC recently recognized as much for mainstream mobile-phone users—it blocked a merger for fear that it would “result in the top two wireless providers having a market share of approximately 75 percent.”<sup>24</sup> Yet the effect of the FCC’s rate cut was to put 100 percent of the IP Relay market in the hands of two providers. This, we submit, is not functional equivalence.

### **3. The FCC’s Experience With Rate-Of-Return Regulation**

Finally, the *Order*’s rates could fetter progress toward functional equivalence because they employ an outmoded ratemaking methodology known as rate-of-return. Under that methodology, the regulator determines an allowable rate-of-

---

<sup>24</sup> Order, *Applications of AT&T Inc. and Deutsche Telekom AG for Consent To Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, 26 FCC Rcd. 16184, 16185 ¶ 3 (released Nov. 29, 2011).

return on capital investment. Then, it sets the rate by summing up that allowable rate (as a percentage of capital investment), the capital investment, and any other “reasonably and prudently incurred” expenses. Peter W. Huber et al., *Federal Telecommunications Law* § 2.2.3 (2d ed. 1999). In the *Order*, the FCC applies this methodology to VRS rates. See *Order* ¶¶ 188-196.

The FCC and this Court have documented the shortcomings of rate-of-return regulation. Because it aligns profit solely with capital investment, it encourages companies to “pad” capital investment and discourages them from cutting unnecessary costs.<sup>25</sup> Additionally, as the FCC has explained, rate-of-return regulation “does not provide sufficient incentives for broad innovations in the way firms do business.”<sup>26</sup> This Court has agreed, recognizing that rate-of-return has “cost incentives [that] are perverse” and “creates incentives for cost shifting that may defeat the regulatory purpose and have other ill effects.” *Nat’l Rural Telecom Ass’n v. FCC*, 988 F.2d 174, 178 (D.C. Cir. 1993). The National Association of the Deaf urges the FCC to adopt rates that reward providers for innovations that promote functional equivalence.

---

<sup>25</sup> See Second Report and Order, *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, FCC 90-314, 5 FCC Rcd. 6786, 6790 ¶¶ 29-30 (released Oct. 4, 1990) (explaining that, under rate-of-return regulation, “carriers in fact attribute unnecessary costs to their operations in an effort to generate more revenue” and “tend[] to pad investments or expenses”).

<sup>26</sup> *Id.* ¶ 32.

For these reasons, the FCC has discarded or is discarding rate-of-return regulation in most arenas. More than two decades ago, it set aside rate-of-return for the mainstream telephone providers that carry most of the Nation’s voice traffic, moving to more incentive-based forms of regulation.<sup>27</sup> More recently, for the smaller voice carriers that remain under rate-of-return regulation, it has sought to “transition towards a more incentive-based form of regulation with better incentives for efficient operations.”<sup>28</sup> The FCC even wants to move VRS away from rate-of-return, but it has no plans to do so until at least 2017. See *Order* ¶ 217 (“[W]e propose to transition to a new ratemaking approach that makes use of competitively established pricing, *i.e.*, contract prices set through a competitive bidding process, where feasible.”).

The *Order*, then, saddles the deaf and hard-of-hearing users of VRS with a regulatory anachronism. The well-documented shortcomings of rate-of-return regulation reflect one more way in which the *Order*’s rates could stand in the way of functional equivalence.

---

<sup>27</sup> *Ibid.*

<sup>28</sup> Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208, FCC 11-161, 26 FCC Rcd. 17663, 17709 ¶ 117 (released Nov. 18, 2011).

## CONCLUSION

For the foregoing reasons, the Court should grant petitioner's petition for review and vacate the FCC's rate cut.

Respectfully submitted,

Dated: January 28, 2014

By: /s/ Roy T. Englert, Jr.

Roy T. Englert, Jr.

Joshua S. Bolian

ROBBINS, RUSSELL, ENGLERT, ORSECK,

UNTEREINER & SAUBER LLP

1801 K Street, N.W., Suite 411

Washington, DC 20006

(202) 775-4500

renglert@robbinsrussell.com

*Counsel for National Association  
of the Deaf as Amicus Curiae*

## CERTIFICATE OF COMPLIANCE

Counsel certifies as follows:

1. This brief complies with the type-volume requirement of Fed. R. App. P. 29(d) because this brief contains 5,277 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1); and
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: January 28, 2014

/s/ Roy T. Englert, Jr.  
Roy T. Englert, Jr.  
ROBBINS, RUSSELL, ENGLERT, ORSECK,  
UNTEREINER & SAUBER LLP  
1801 K Street, N.W., Suite 411  
Washington, DC 20006  
(202) 775-4500  
renglert@robbinsrussell.com

*Counsel for the National Association  
of the Deaf as Amicus Curiae*

## CERTIFICATE OF SERVICE

I hereby certify that, on January 28, 2014, I caused a true and correct copy of the foregoing to be filed with the Court by CM/ECF, and caused additional copies to be served upon counsel for all parties by CM/ECF and by email.

Dated: January 28, 2014

/s/ Roy T. Englert, Jr.  
Roy T. Englert, Jr.