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CASE NOS. 10-9536 AND 10-9560

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SORENSON COMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

UNCITED PRELIMINARY ANSWER BRIEF (DEFERRED APPENDIX APPEAL) OF RESPONDENTS

CHRISTINE A. VARNEY
ASSISTANT ATTORNEY GENERAL

CATHERINE G. O'SULLIVAN
ROBERT J. WIGGERS
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

GENERAL COUNSEL

PETER KARANJIA
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
DEPUTY ASSOCIATE
GENERAL COUNSEL

JOEL MARCUS
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

AUSTIN C. SCHLICK

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STATEMENT OF RELATED CASES

There are no prior appeals related to the issues presented in this case, and counsel for the Federal Communications Commission (FCC or the Commission) are not aware of any case pending in any other court of appeals that is related to this one.

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JURISDICTION

The Court has jurisdiction over final orders of the FCC under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). The order on review, *Telecommunications Relay Services*, 25 FCC Rcd 8689 (2010) (Joint App. at ___), was released by the FCC on June 28, 2010, and was published in the Federal Register on August 13, 2010 (75 Fed. Reg. 49491). Sorenson has filed two petitions for review: one in Case No. 10-9536 on July 6, 2010, which followed the June 28 release; and the other in Case No. 10-9560 on September 13, 2010, which followed the August 13 Federal Register publication.

FCC Rule 1.4 determines when the filing clock begins to run. "[F]or all documents in notice and comment … rulemaking proceedings," the clock runs from Federal Register publication, but "for non-rulemaking documents," it runs

from the Commission's release of the item. 47 C.F.R. §§ 1.4(b)(1), (2). We believe that the *Interim Rate Order* is most accurately described as having arisen in a notice and comment proceeding. Thus, the second petition is timely, but the first one is not and should be dismissed. Nevertheless, the Court need not definitively resolve the matter because there is no question that one of the petitions is timely, as both were filed within the 60-day statutory deadline after the pertinent event. *See* 28 U.S.C. § 2344.

QUESTIONS PRESENTED

For years, the rates set by the Federal Communications Commission to reimburse providers of video relay service, a telecommunications service for deaf people, have greatly exceeded the cost of providing service. In the order on review, *Telecommunications Relay Services*, 25 FCC Rcd 8689 (2010) (*Interim Rate Order*) (Joint App. at ___), the FCC lowered the reimbursement rates, on an interim basis, to make them closer to (but still well above) cost. The new interim rates will be in effect for one year while the Commission conducts a rulemaking to comprehensively re-examine video relay service reimbursement rules. The questions presented are:

1) Whether the FCC's interim rates for 2010-2011 are consistent with the governing statute, which requires that telecommunications services for the deaf be "functionally equivalent" to those available to hearing

persons and that such services be "available, to the extent possible and in the most efficient manner," 47 U.S.C. § 225(a)(3), (b)(1); and

2) Whether the agency abused its discretion in setting the interim rates.

STATEMENT OF THE CASE

Almost every user of telecommunications services in the United States – which means nearly every adult in the country – contributes money each month to a fund that pays for providing "telecommunications relay service" (TRS) to persons who have hearing or speech disabilities. Recently, the TRS Fund has reached nearly $1 billion, almost 90 percent of which is used to pay for a particular type of video-based TRS service known as Video Relay Service (VRS). *See Structure and Practices of the Video Relay Service Program*, 25 FCC Rcd 6012, 6018-6019 (2010).

[redacted material]

For several years, the reimbursement rates paid to VRS providers have exceeded by a large margin the costs of providing service, as calculated by the National Exchange Carrier Association (NECA), the entity that has administered the fund since its inception. In the order on review, the FCC lowered the VRS reimbursement rates closer to – but still well above – costs on a one-year interim basis while it conducts a rulemaking to re-examine VRS reimbursement.

Aggrieved that it will earn less money under the interim rates, Sorenson asks this Court to invalidate those interim rates.

1. TRS and VRS.

TRS services are telephone transmission services that afford persons with hearing or speech disabilities the ability to communicate with hearing individuals "in a manner that is functionally equivalent" to the ability of persons without such disabilities to communicate with each other. 47 U.S.C. § 225(a)(3). There are several different types of TRS. *See, e.g.*, *Telecommunications Relay Services*, 19 FCC Rcd 12475, 12480 (2004) (*2004 TRS Order*). The one at issue here, which accounts for the lion's share of TRS-related costs, is known as Video Relay Service (VRS). VRS "allows people with hearing or speech disabilities who use sign language to communicate with voice telephone users through video equipment." 47 C.F.R. § 64.601(a)(26). The user with a hearing or speech impairment communicates using sign language via an Internet-based video link with a third-party "communications assistant" who translates the sign language into speech, which is then relayed by telephone to the person at the other end of the line. The other user communicates by using the process in reverse. *See Structure and Practices of the Video Relay Service Program*, 25 FCC Rcd 1868 ¶2 (CGB 2010).

Congress directed the Commission to ensure that TRS service is "available, to the extent possible and in the most efficient manner," to persons with hearing and speech disabilities. 47 U.S.C. § 225(b)(1). Congress placed the burden of providing TRS directly on "common carrier[s] providing telephone voice transmission services," 47 U.S.C. § 225(c) (*i.e.*, local and long distance telephone companies), but the FCC additionally authorized third parties that are not traditional telephone companies, such as Sorenson, to provide the service. *See Telecommunications Relay Services*, 20 FCC Rcd 20577, 20586-20589 (2005); 47 C.F.R. § 64.603. Now, most TRS is provided by third parties.

2. TRS/VRS Funding.

VRS users do not pay to use the service. *See Sorenson Communications, Inc. v. FCC*, 567 F.3d 1215, 1224 (10th Cir. 2009). Instead of collecting money from users, VRS providers are reimbursed directly from a fund, known as the Interstate TRS Fund (TRS Fund), to which almost all providers of telecommunications services must contribute. 47 U.S.C. § 225(d)(3)(B); 47 C.F.R. § 64.604(c)(5)(iii)(E).[1] Because telecommunications providers pass along to their users the costs of contributing to the TRS Fund, the Fund ultimately is financed by all consumers of covered telecommunications services.

[1] The "Interstate" TRS Fund in fact pays for both interstate and intrastate VRS calls. *See Structure and Practices of the Video Relay Services Program*, 25 FCC Rcd at 6015.

Growth of the TRS Fund has been dramatic, driven largely by the increasing costs of VRS. In 1999, prior to the development of VRS, the Fund required $38 million to pay for TRS service. After VRS service became available in 2002, the Fund grew rapidly, from $115 million in 2003, to $805 million for the period July 2008-June 2009, to about $900 million for the 2009-2010 fund year. NECA, *Relay Services' Reimbursement Rate, Contribution Factor & Fund Size History*.[2] Of that $900 million, VRS accounted for approximately $780 million – roughly 87 percent. *Structure and Practices of the Video Relay Service Program*, 25 FCC Rcd at 6018-6019. Through June 2010, American ratepayers had spent a total of nearly $4.6 billion on TRS services. *See Fund Size History*, *supra*.

[redacted material]

Congress directed that VRS providers be allowed to recover "costs caused by" the provision of TRS services and delegated to the Commission the authority to "prescribe regulations governing" the recovery of those costs. 47 U.S.C. §§ 225(d)(3)(A) & (B). Under the Commission's rules, VRS providers are paid by the Fund under per-minute rates established by the Commission. *See* 47 C.F.R.

[2] Available at https://www.neca.org/cms400min/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=3871&libID=3891

§ 64.604(c)(5)(iii)(E); *Telecommunications Relay Services*, 22 FCC Rcd 20140 (2007) (*2007 TRS Rate Order*).

Congress thus created TRS as a ratepayer-funded service provided, free of charge, to persons with hearing and speech disabilities persons in order to "remedy the discriminatory effects of a telephone system inaccessible to persons with disabilities," *2007 TRS Order*, 22 FCC Rcd at 20161. Reflecting principles of fiscal responsibility, accountability, and administrative efficiency, the Commission determined in 2004 that reimbursement rates should only "cover the *reasonable costs* incurred in providing the TRS services." *2004 TRS Order*, 19 FCC Rcd at 12543 ¶179 (emphasis added); 47 C.F.R. § 64.604(c)(5)(iii)(E) (rates must be set to recover only "reasonable costs").

Through a series of orders, the Commission has fleshed out the meaning of "reasonable" costs. Such costs "do not include profit or a mark-up on expenses." *2007 TRS Order*, 22 FCC Rcd at 20161. Section 225, the Commission has explained, does not mean "that we must compensate VRS providers for whatever costs they choose to submit, either as a general matter or in pursuit of enhancements that go beyond what is required under the mandatory minimum standards" for VRS. *2004 TRS Order*, 19 FCC Rcd at 12550. Collectively, the prior orders – which neither Sorenson nor any other VRS provider has challenged – establish that reimbursable costs include only those costs directly incurred to

provide service, such as labor costs, directly attributable overhead, start-up expenses, executive compensation, and a fixed return of 11.25 percent on capital investment.

By contrast, the Commission has excluded from reimbursement other, indirect costs, such as a profit mark-up on expenses, certain taxes, research and development costs, and the cost of providing video equipment, software, and technical assistance to VRS users. *See 2004 TRS Order*, 19 FCC Rcd at 12545-12550; *Telecommunications Relay Services*, 21 FCC Rcd 8063, 8070 ¶15 & n.50 (2006); *2007 TRS Rate Order* ¶¶73-82. In segregating the costs that may be reimbursed at ratepayer expense, the Commission has expressed concern that the TRS Fund should "not become an unbounded source of funding for enhancements that go beyond" the standard of functional equivalence established by the FCC, "but which a particular provider nevertheless wishes to adopt." *2004 TRS Order*, 19 FCC Rcd at 12548. No VRS provider, including Sorenson, challenged in court any of those determinations.

Until 2007, the Commission established VRS rates every year based on providers' projections of their costs for the upcoming year. Under that regime, rates were unpredictable and swung widely, ranging from $5.14 to as high as $17.04 per minute. *See 2007 TRS Rate Order* at 20145 ¶6 (2007). In the *2007*

TRS Rate Order, the Commission sought to bring greater predictability to rates to facilitate planning by VRS providers, and accordingly set rates for three years.

In doing so, the agency used the providers' projected cost data to establish a three-tiered rate structure under which a VRS provider is paid a fixed rate for the first 50,000 minutes of customer use per month, a slightly lower rate for the next 450,000 minutes, and somewhat less beyond 500,000 minutes of use of its VRS service. The tiers reflect typically decreasing average costs – achieved by economies of scale – as a provider's service volume increases. *2007 TRS Rate Order*, 22 FCC Rcd at 20163 (third tier includes large providers "who are in the best position to achieve cost synergies"). Under the tiered system, "all providers are compensated at the same rate for the same number of minutes." *Id*. at 20167. The 2007 rates were subject to an annual downward adjustment; for the 2009-2010 fiscal year (which ended June 30, 2010), the rates were $6.70 (Tier I), $6.43 (Tier II), and $6.24 (Tier III). Again, no VRS provider challenged those rates or the tier structure itself. *See* Sorenson Br. 54 (conceding that it "chose not to appeal" the rate-setting aspect of the *2007 TRS Rate Order*).

Although it adopted a three-year rate schedule in 2007, the Commission nevertheless wanted to ensure that VRS rates reflected the actual cost of providing service. The agency therefore directed providers to submit to NECA their cost data each year. *2007 TRS Rate Order* at 20165 n.170. That data, the Commission

explained, "will be helpful in reviewing the reasonableness of rates adopted … and whether they reasonabl[y] correlate with projected costs and prior actual costs." *Ibid*.

3. Overcompensation Problems Associated with VRS Funding.

Soon after the new rates (based on providers' projected costs) became effective in 2007, it became apparent that VRS providers' recoveries from the TRS Fund could easily outstrip their actual costs. In 2008, a congressional committee expressed concern that "consumers are being significantly overcharged to finance the TRS fund and TRS providers are being significantly overcompensated." Majority Staff Report prepared for House Committee on Energy and Commerce, December 2008.[3] Consistent with this finding of substantial overcompensation, since 2005, Sorenson (whose only business consists of providing VRS) has reportedly paid as much as $800 million in cash dividends to its owner – an investment fund. *See* Richard Morgan, "A Failure Of Communication," *The Deal Magazine*, October 1, 2010 (available at http://www.thedeal.com/newsweekly/insights/a-failure-of-communication.php). In addition, given the hundreds of millions of dollars at stake, the TRS Fund has been an unfortunate target of

[3] Available at http://energycommerce.house.gov/images/stories/Documents/PDF/Newsroom/fcc%20majority%20staff%20report%20081209.pdf.

numerous instances of abuse and outright fraud. *See Interim Rate Order* n.32 (Joint App. at ___ - ___).[4]

In 2009, after the 2007 rates had been in effect for two years, the Commission issued a notice of proposed rulemaking seeking comment on whether to adjust rates for the 2009-2010 Fund year "rather than continue to base rates on" the *2007 TRS Rate Order*. The 2007 rates, the Commission noted, "may not accurately reflect the providers' reasonable actual costs of providing service." *Telecommunications Relay Services*, 24 FCC Rcd 6029, 6033 (2009).

The Commission ultimately did not modify the rates for the 2009-2010 Fund year, but instead issued a notice of inquiry on June 28, 2010 to initiate a top-to-bottom review to take a "fresh look" at VRS rates. *Structure and Practices of the Video Relay Service*, 25 FCC Rcd 8597, 8598 ¶1 (2010) (*VRS NOI*). "Over the past few years," the Commission found, "the per-minute compensation rates have significantly exceeded the estimated average per-minute costs of providing VRS." *Id*. ¶30. The entire VRS program, the agency observed, "is fraught with

[4] One VRS provider on which Sorenson relies to support its request for higher Tier III compensation under the interim rates, *see* Sorenson Br. 51 (citing comments from Purple Communications, Inc.), recently entered into a Consent Decree and settlement with the FCC's Enforcement Bureau, which investigates VRS fraud. Under the Consent Decree, Purple agreed to repay the TRS Fund $22 million (inculding penalties and interest) to settle charges of over-billing and abuse of the Fund. *See* News Release: Enforcement Bureau Settle Investigatins of Purple Communications, Inc., Sept. 10, 2010 (available at http://www.fcc.gov/eb/News_Releases/DOC-301517A1.html).

inefficiencies (at best) and opportunities for fraud and abuse (at worst)." *Id*. ¶30. Review was therefore necessary to "ensure that this vital program is effective, efficient, and sustainable." *Id*. ¶1.

As part of its comprehensive review process, the Commission sought public input on a wide range of VRS matters. It asked for comment on, for example: whether to establish company-specific, as opposed to industry-wide, compensation (*VRS NOI* ¶¶13-16); and whether to allow reimbursement for outreach and marketing costs (*id*. ¶¶17-19), research and development costs (*id*. ¶20), and videophone equipment costs (*id*. ¶21); *see also Interim Rate Order* ¶7 (Joint App. at ___). As discussed above, under the Commission's unchallenged regulations, none of those categories of costs have been compensable under the VRS program. The Commission also asked for comment on virtually every aspect of the financing of VRS, the incentives for users and providers, and the most appropriate regulatory methods to achieve the goals of the governing statute – 47 U.S.C. § 225, which Title IV of the Americans With Disabilities Act of 1990 added to the Communications Act of 1934. Pub. L. No. 101-336 ¶401.

The Commission's understanding of VRS overcompensation was based in large measure on data submitted by NECA comparing the Commission's existing reimbursement rates, which had been based on providers' projections of their own costs, and actual per-minute costs allowable under the Commission's orders, which

were based on data supplied to NECA since 2006. For Tier III providers such as Sorenson, rates versus actual allowable costs had been as follows:

	2006	2007	2008	2009
Actual Cost	$4.46	$3.96	$4.11	$4.16
VRS Rate	$6.64	$6.44	$6.30	$6.24

See Interim Rater Order ¶9 (Joint App. at ___).

[redacted material]

4. The *Interim Rate Order* on Review.

The three-year rates established in 2007 were set to expire on June 30, 2010. On June 28, 2010, the same day that it issued the *VRS NOI*, the Commission also released the *Interim Rate Order* setting forth interim rates for the next Fund year (July 1, 2010 through June 30, 2011). The rates are "interim" because they fill the gap until the Commission completes its pending *VRS NOI* proceeding.

In setting interim rates, the Commission examined the NECA historical rate and cost data set forth above. The NECA data "reveal[ed] that there [was] a substantial disparity between providers' reported projected costs," on which the existing VRS rates were based, "and what turns out to be their actual costs."

Interim Rate Order, 25 FCC Rcd at 8694 ¶9 (Joint App. at ___). In light of NECA's study of four years of data "showing that providers' projections consistently overstate their costs," the Commission explained that it could "no longer justify basing VRS compensation rates only on projected costs." *Id*. ¶10 (Joint App. at ___). On that basis, the Commission "decline[d] to perpetuate the large discrepancy between actual costs and provider compensation in the face of substantial evidence that providers are receiving far more in compensation than it costs them to provide service." *Interim Rate Order* ¶12 (Joint App. at ___).

NECA had submitted to the FCC proposed reimbursement rates for the 2010-2011 Fund year that it calculated based on the actual cost data it had collected. Those cost-based rates were substantially lower than the prevailing VRS rates – for example, for Tier III, NECA proposed a per-minute rate of $3.90, while the prevailing rate was $6.24. *See Interim Rate Order* Table 1 (Joint App. at ___). The Commission found that "NECA's proposed rates … are reasonable and supported by record evidence." *Id.* ¶13 (Joint App. at ___). It therefore decided to use them as a key component of its calculations in setting the new interim rates. *Ibid*. The Commission was concerned, however, that switching to the NECA rates would result in "a significant and sudden cut to providers' compensation." *Id*. ¶12 (Joint App. at ___).

As a result, the Commission did not simply adopt NECA's proposed cost-based rates; instead, it sought "a reasonable balance between the past rates based on projections that consistently overstate true costs and overcompensate VRS providers, and the NECA-proposed rates based on actual costs." *Interim Rate Order* ¶12 (Joint App. at ___). The Commission thus set a rate based on the mid-point between the existing rate and the NECA-proposed rate for each rate tier. *Id*. ¶2 (Joint App. at ___). For Tier III, the one most relevant here, NECA data showed that the cost to providers is $3.90 per minute, while the prevailing rate under the Commission's 2007 *TRS Rate Order* was $6.24 per minute. Thus, the Interim Rate (the mid-point between those figures) is $5.07 per minute. *Id*. Table 1 (Joint App. at ___).

In July 2010, Sorenson asked the Court to stay the *Interim Rate Order* and to reimpose the prior rates. On July 29, 2010, a panel of this Court declined to grant a stay, finding that although Sorenson "made a compelling argument that it will suffer significant economic harm absent a stay," it nevertheless had "failed to convince [the Court] that it is likely to succeed on the merits of its petition." Order of July 29, 2010 at 2.

SUMMARY OF ARGUMENT

To rein in years of substantial overcompensation that have cost ratepayers hundreds of millions of dollars, the FCC took the relatively modest step of setting

an interim rate structure designed to reduce spiraling VRS overpayments while the agency undertakes a comprehensive review of the entire VRS program. The interim rates strike a proper balance between the competing policies implicit in the statutory directives that "functionally equivalent" VRS be "available, to the extent possible and in the most efficient manner." 47 U.S.C. § 225(b)(1). This Court expressed skepticism about Sorenson's claims to the contrary when it previously denied Sorenson's stay application, and it should reject them on their merits now.

Sorenson's absolutist reading of the statute – that the remedial goals of the Americans With Disabilities Act compel the Commission to maintain what Sorenson appears to view as a limitless fund – makes no sense. In crafting Section 225, Congress not only carefully qualified the objective of making VRS "available" by using the caveats "to the extent possible" and "in the most efficient manner," but also used those flexible concepts deliberately, to vest considerable discretion in the federal agency that administers this highly technical statutory program. Under Sorenson's reading of the statute, there is no end to the Government's funding obligation, "short of extreme expenditures to achieve trivial benefits" (Sorenson Br. 19), but that is a statutory scheme of Sorenson's own devising – not the one Congress enacted.

Here, the Commission properly exercised its statutory discretion. Under the Commission's interim rates for 2010-2011, VRS will continue to be "available"

because the rates more than adequately compensate providers for their costs of providing service. Sorenson does not contend that the Tier III rate (which applies to most of its VRS minutes) will render it, or any other provider, unable to provide service to anyone who requests service. And, contrary to Sorenson's view, the statute's availability objective does not require the public to pay for Sorenson to reach out to every person in the country who might use its services. In any event, Sorenson's supposition that the interim rates will thwart the expansion of TRS (and VRS in particular) to underserved deaf persons is unsupported by evidence and is in fact refuted by NECA's comprehensive evaluation of the actual costs of providing VRS.

Consistent with the statutory scheme, the Commission's interim rates foster the "efficient" provision of services because they bear a closer correlation with the costs of providing service than the prior rates. Sorenson asserts that the statute's efficiency mandate has nothing to do with constraining costs, but it did not raise that argument before the Commission and it is now waived. In any event, the legislative command that service be provided "in the most efficient manner" allows the Commission to ensure that the TRS Fund is not depleted by wasteful spending. It is difficult to imagine that Congress did not intend the Commission to police the costs of a billion-dollar fund that is ultimately paid for by the public.

Under the interim rates, VRS will be "functionally equivalent" to telephone service. The legislative history of Section 225 makes clear that functional equivalence is to be measured against the minimum standards for service set by the Commission, and Sorenson has failed to show that the interim rates would cause the provision of VRS to fall short of those standards.

Sorenson is also wrong in claiming that the interim rates violate a statutory directive that the Commission's regulation of TRS (including VRS) neither discourage nor impair the development of improved technology. The interim rates, which are thirty percent higher than allowable costs as calculated by NECA, leave plenty of room for technological improvement, and Sorenson provided no evidence to the contrary.

Finally, the interim rates are not arbitrary and capricious under the Administrative Procedure Act. The Commission properly based the rates in part on the cost-based rates suggested by NECA, which has collected four years of cost data from numerous VRS providers. Although the NECA data reflect the FCC's exclusion of certain expenses from reimbursable costs, those exclusions have been part of the Commission's rules – without challenge – for years. And, in calculating the interim rates, the Commission sought to move VRS rates closer toward costs while avoiding an abrupt and potentially disruptive change that could hamper

providers' ability to offer service. In that situation, it was reasonable to split the difference between the existing rates and rates based on cost.

The Commission likewise properly preserved the tier system – once advocated by Sorenson itself – on an interim basis while it reexamines the entire VRS program. The NECA data show that there is a significant cost differential between Tiers II and III, and the graduated approach to reimbursement rates under the tier system appropriately reflects that differential. Moreover, contrary to Sorenson's claim, similarly situated providers are paid exactly the same amounts for providing VRS minutes in a given tier. Only by comparing apples (providers whose minutes primarily fall within Tiers I and II) with oranges (Sorenson itself, whose minutes primarily fall within Tier III) does Sorenson claim an irrational disparate treatment. But, if anything, Sorenson is overcompensated for its Tier I and II minutes relative to higher cost providers.

ARGUMENT

I. THE COMMISSION IS ENTITLED TO CONSIDERABLE DEFERENCE UNDER THE APPLICABLE STANDARDS OF REVIEW.

At the crux of this case is the proper understanding and application of 47 U.S.C. § 225. In assessing an administrative agency's interpretation of a statute that Congress has entrusted it to apply, the parties agree that the Court's review is governed by the standard set forth in *Chevron USA, Inc. v. Natural Resources*

Defense Council, 467 U.S. 837 (1984). *See* Sorenson Br. 23-24. If the intent of Congress is clear from the statutory language, "that is the end of the matter." *Chevron*, 467 U.S. at 842-843. But if the statutory language does not reveal the "unambiguously expressed intent of Congress" on the "precise question" at issue, the Court must accept the agency's interpretation as long as it is reasonable and "is not in conflict with the plain language of the statute." *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992). *See Rosillo-Puga v. Holder*, 580 F.3d 1147, 1153 (10th Cir. 2009).

Sorenson suggests that *Chevron* applies less forcefully when an agency interprets less broadly than is possible a statute (like Section 225) that has "remedial" purposes. Br. 27-29. But Sorenson's cases do not support that position. Although courts have said that remedial statutes should be broadly construed, *e.g. Wheeler v. Hurdman*, 852 F.2d 257(10th Cir. 1987), Sorenson cites no case for the proposition that agencies receive less *Chevron* deference to their interpretation of remedial statues than any other type of statute. Indeed, such a proposition would cause a major change in *Chevron* jurisprudence, for many statutes – essentially, all that address social reform – may be described as "remedial." Nor does Sorenson cite any case in which an agency's interpretation of ambiguous statutory language was rejected as unreasonable simply because another approach that arguably better accomplished the law's remedial purposes

could be imagined. As this Court has warned, remedial statutory purposes "cannot be used as a justification for rewriting … statutes." *Wheeler*, 852 F.2d at 262. Thus, expansive congressional goals may support an agency's broad interpretation of an ambiguous statute, but they cannot defeat a narrower (but nonetheless reasonable) agency interpretation. In sum, Sorenson has failed to show that the Commission's implementation of Section 225 calls for anything other than a garden-variety application of *Chevron*.

With respect to Sorenson's claims under the Administrative Procedure Act, the Court may reverse the agency's decision only upon a finding that it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "In performing arbitrary and capricious review, [the Court will] accord agency action a presumption of validity; the burden is on the petitioner to demonstrate that the action is arbitrary and capricious." *Copar Pumice Co. v. Tidwell*, 603 F.3d 780, 793 (10th Cir. 2010) (citation omitted). Agency action is arbitrary and capricious only if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency," or if the agency action "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*,

463 U.S. 29, 43 (1983). Thus, arbitrary and capricious review is "narrow in scope," and the Court may not "substitute [its] judgment for that of the agency." *Copar Pumice*, 603 F.3d at 793-794 (citations omitted).

"The 'arbitrary and capricious' standard is particularly deferential in matters implicating predictive judgments and *interim regulations*." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009) (emphasis added). In *Rural Cellular*, the D.C. Circuit deferred to the FCC's interim cap on a universal service fund that, like the TRS Fund, had experienced dramatic growth. The Court held that "the Commission's policy to place a limit on the extraction of funds from ordinary people for an unnecessary subsidy is clearly entitled to deference." *Id*. at 1108.[5] *See also MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 140 (D.C. Cir. 1984) ("substantial deference by courts is accorded to an agency when the issue concerns interim relief"); *Wellford v. Ruckelshaus*, 439 F.2d 598, 601 (D.C. Cir. 1971) (it is "particularly appropriate to defer to [administrative] discretion when the question at issue is a matter of interim relief").

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[5] Sorenson fails in its attempt to distinguish *Rural Cellular Association* on the ground that it applies only where the FCC acted to "maintain the status quo" or "avoid market disruption." Br. 26; *see* 588 F.3d at 1106. Here, the Commission set an interim rate that is 30 percent higher than the allowable cost of service calculated by NECA precisely to avoid the effect that "a significant and sudden cut to providers' compensation" that could have on their ability to provide service – in other words, to avoid market disruption. *Interim Rate Order* ¶12 (Joint App. at ___).

II. THE *INTERIM RATE ORDER* IS CONSISTENT WITH SECTION 225.

Congress expressly delegated to the FCC the authority to establish regulations governing the recovery of "costs caused by" the provision of TRS services. 47 U.S.C. § 225(d)(3)(B). Congress also directed the Commission to ensure that TRS (including VRS) be "available, *to the extent possible and in the most efficient manner*." 47 U.S.C. § 225(b)(1) (emphasis added). That statutory language provides no specific standards or methodologies for the rate-setting function entrusted to the Commission; rather, it contemplates that the Commission will fill in the gaps in the legislative scheme to give concrete meaning to the undefined standards. "[W]here Congress leaves a statutory term undefined, it makes an implicit delegation of authority to the agency to elucidate a specific provision of the statute through reasonable interpretation." *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 474 (D.C. Cir. 1998) (quotation marks omitted). Section 225 therefore grants the Commission substantial interpretive leeway. *See N-A-M v. Holder*, 587 F.3d 1052, 1056 (10th Cir. 2009) (*per curiam*) (Court will defer under *Chevron* to agency interpretation of "somewhat open-ended" statutory definitions); *First American Discount Corp. v. CFTC*, 222 F 3d. 1008, 1013-1014 (D.C. Cir. 2000) (deferring to agency construction of "undefined" statutory term). As explained below, the Commission properly exercised its interpretive authority here.

A. In Setting its Interim Rates, the Commission Reasonably Balanced Competing Legislative Objectives.

The Commission has consistently interpreted Section 225 as implicating a variety of sometimes conflicting statutory goals. On the one hand, the agency has recognized that the statute serves an important function in bringing communications services to persons with hearing and speech disabilities. *2004 TRS Order*, 19 FCC Rcd at 12479-12480; *Telecommunications Relay Services*, 15 FCC Rcd 5140, 5143-5144 (2000). At the same time, however, the Commission has recognized its responsibility under the statute's "efficiency" mandate to ensure that compensation rates "do not overcompensate entities that provide TRS." *Interim Rate Order* ¶20 (Joint App. at ___); *see also* p. __, *infra* (discussing efficiency clause). Thus, the Commission has determined that VRS providers are entitled only to "reasonable" compensation and – in a series of unchallenged orders – has excluded from reimbursement certain expenses, such as the cost of video equipment supplied to end users, that represent indirect costs associated with providing service. *See 2004 TRS Order*, 19 FCC Rcd at 12543; 47 C.F.R. § 64.604(c)(5)(iii)(E); *2007 TRS Order*, 22 FCC Rcd at 20170 ¶82. Otherwise, the Commission warned, the TRS Fund could "become an unbounded source of funding" for any service, however expensive, that "a particular provider nevertheless wishes to adopt." *2004 TRS Order*, 19 FCC Rcd at 12548.

In establishing interim VRS reimbursement rates, the Commission thus properly "balance[d] the interests of contributors to the Fund … with the interests of users of TRS." *Interim Rate Order* ¶20 (Joint App. at ___). *See Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999) ("When an agency must balance a number of potentially conflicting [statutory] objectives ... judicial review is limited to determining whether the agency's decision reasonably advances at least one of those objectives."). Contrary to Sorenson's characterization, that does not involve "a cavalier claim" by the agency "of authority to 'balance' away the deaf and hearing impaired community's right to universal service" (Sorenson Br. 19), but rather reflects a careful weighing of the twin statutory objectives of improving the availability of VRS while also fostering efficiency. As the Commission has explained, Section 225 does not require the Government to "compensate VRS providers for whatever costs they choose to submit, either as a general matter or in pursuit of enhancements that go beyond what is required under the mandatory minimum standards." *2004 TRS Order*, 19 FCC Rcd at 12550. Like many statutes aimed at social reform, Section 225 reflects a compromise between the conflicting policies of improved service and cost control. And, "when several [policies] are implicated in a single decision, only the Commission may decide how much precedence particular policies will be granted." *MobileTel, Inc. v. FCC*, 107 F.3d 888, 895 (D.C. Cir. 1997). Here, the Commission reasonably

considered the interests of all telephone users when setting interim rates that avoided overcompensation. *See Rural Cellular Ass'n*, 588 F.3d at 1103.

By contrast, Sorenson's reading of the statute would compel the Commission to accept whatever rates VRS providers claim they need to provide service to a wider population – essentially regardless of the ensuing burden on the TRS Fund. Indeed, the only limit on the Government funding obligation that Sorenson contemplates is that the Commission may "stop short of extreme expenditures to achieve trivial benefits." Sorenson Br. 19. But the statute says nothing about "extreme expenditures," and instead authorizes the Commission to pursue the objective of making VRS available "to the extent possible and in the most efficient manner." 47 U.S.C. § 225(b)(1).

What the Commission did here is entirely consistent with its actions – upheld on judicial review – in other cases. In similar situations involving subsidies meant to promote universal telephone service under 47 U.S.C. § 254, courts have upheld interim efforts by the FCC to control the cost of subsidies and avoid excessive funding of service providers. *See Rural Cellular Ass'n*, 588 F.3d at 1102-1102 (affirming cap on payments into universal service fund, and rejecting telephone service providers' claim that the universal service statute "compels the Commission to welcome wretched excess – at least so long as compensating fee exactions can be squeezed out of consumers"); *Alenco Communications v. FCC*,

201 F.3d 608, 620-621 (5th Cir. 2000) (affirming cap on universal service fund payments).

Ensuring that reimbursement rates are tied to cost of service was especially important in setting the interim rates. Record evidence demonstrated that for the past several years VRS providers had been overcompensated by hundreds of millions of dollars at the expense of the general public and in direct violation of the statutory mandate to provide service "in the most efficient manner." *See* pp. 10-13, *supra*. At the same time, the Commission took steps to ensure that the reimbursement rate would enable VRS providers to continue to provide service. The agency thus avoided a sudden and potentially disruptive shift to cost-based rates by averaging the prior rate and the cost-based rate. Indeed, the interim rate ($5.07) not only covers a Tier III provider's costs ($3.90), but also incorporates an additional 30 percent premium. The Commission's approach was well within the considerable discretion that Congress granted it. As we demonstrate below, Sorenson's contrary statutory arguments lack merit.

B. The Interim Rates Ensure "Availability."

Sorenson first asserts that the FCC violated Section 225's requirement that TRS services be "available to the extent possible . . . ." Under Sorenson's reading of the statute, the TRS Fund must be used to finance not only the provision of VRS services consistent with the Commission's minimum standards for such services,

but also outreach efforts to expand the base of VRS users to reach every deaf person in the country. Sorenson Br. 30-31. "The statute," Sorenson argues, "says nothing about balancing interests" in achieving an alleged goal of "one hundred percent" universal TRS service. Br. 30, 32. Thus, Sorenson insists that the statute mandates a VRS reimbursement rate that will fund the "enormous investments" that it wishes to make to achieve total universal service. Br. 35.

In fact, Section 225 requires no such thing. "[A]vailable" means "present and ready for use," American Heritage Dictionary of the English Language at 126 (3d ed. 1992), and under that ordinary usage of the word, VRS service is available if a deaf person who wants service may receive it. Importantly, Sorenson does not claim that at the interim VRS rates, which are 30 percent higher than documented allowable costs, it (or any other VRS provider) is unable to serve any customer who requests service. [redacted material]

Because Sorenson's primary argument (*see* Br. 26-32) turns on the unsupported assumption that the interim rates are so low that they will impede the remedial goal of the statute, these facts are fatal.

Moreover, the statute does not say simply that TRS services should be available; to the contrary, Congress specified that they be available "to the extent possible and in the most efficient manner," 47 U.S.C. § 225(b)(1). Sorenson all

but ignores these important caveats when it asserts that the statute "says nothing about balancing [the] interests" of VRS users and the people who pay for the service. Such a balancing is plainly contemplated by Congress's use of an efficiency test that takes into account costs (*see* pp. 31-33, *infra*). Otherwise, as Sorenson presumably would have it, the TRS fund would be a blank check for whatever VRS providers wished to spend on their services. The Commission has properly rejected that theory, explaining that "providers are not entitled to unlimited financing," even if "a relatively higher VRS compensation rate … would be more beneficial to the providers' ability … to offer VRS." *2004 TRS Order*, 19 FCC Rcd at 12551.

Finally, Sorenson contends that the fact that many deaf persons do not currently use VRS proves that the interim rates have failed to make this service available to such persons. Br. 35. That argument is flawed because the fact that some deaf persons do not currently avail themselves of VRS does not mean that the service is unavailable to them. Rather, their lack of use may be explained by any number of factors, including their own communication preferences or the cost they must incur to obtain the necessary broadband Internet connection for VRS. Indeed, Sorenson itself informed the Commission that "many (probably most) of the deaf individuals without access to VRS have not adopted broadband [Internet access]." Comments of Sorenson Communications, Inc. at 8 (May 14, 2010) (Joint

App. at ___). As long as those persons can receive service upon request – and Sorenson does not claim that they cannot – VRS is available to them within the meaning of the statute, whether or not they choose to use it.

C. The Interim Rates Ensure "Efficiency."

In tandem with the "to the extent possible" qualification to the availability requirement, Section 225 requires the FCC to ensure that TRS services be available "in the most efficient manner." As shown below, that language contemplates that the Commission will exercise its discretion and expertise in setting rates that balance cognizable benefits against costs. Sorenson, by contrast, reads Section 225 as unequivocally requiring the Commission to set rates that provide incentives for individual VRS providers to become more efficient at providing whatever level of service they opt to offer – without taking into account total program costs. Br. 39-41. The Commission erred, Sorenson argues, by interpreting efficiency as "a limitation on how much may be spent on VRS." Br. 39.

At the outset, Sorenson is barred from raising that argument now because it did not previously raise it before the agency. Section 405(a) of the Communications Act provides that the filing of a petition for reconsideration with the agency is a "condition precedent to judicial review" of any "questions of fact or law upon which the Commission … has been afforded no opportunity to pass." 47 U.S.C. § 405(a); *see Sorenson Communications*, 567 F.3d at 1227. Thus, the Court

"must ask whether the Commission has been afforded an opportunity to pass on the [petitioner's] arguments," *Sprint Nextel Corp. v. FCC*, 524 F.3d 253, 257 (D.C. Cir. 2008) (quotation marks omitted), and if the Commission lacked that opportunity, the petitioner may not raise its arguments in court. Before the Commission, Sorenson never asserted that the plain text of the efficiency clause unambiguously bars considerations of cost – or at least (as Sorenson now claims) costs that are not "extreme." Br. at 19, 42. Nor did Sorenson petition for administrative reconsideration when the Commission interpreted efficiency to require VRS rates to take account of the cost of service. Its argument is therefore statutorily barred.

In any event, the Commission properly interpreted and applied the efficiency clause. Sorenson's reading rests on the fundamental misconception that Section 225 compels the FCC to provide limitless financing for TRS. In fact, as with nearly every pertinent term in Section 225, the efficiency clause gives the Commission wide interpretive discretion. One dictionary definition of "efficient" is "[a]cting or producing effectively with a *minimum of waste, expense*, or unnecessary effort." *American Heritage Dictionary of the English Language* at 587 (3d ed. 1993) (emphasis added). It follows that the Commission may take into account program costs in setting reimbursement rates. Indeed, it is difficult to imagine that Congress did not intend the Commission to take account of costs in

administering a publicly financed fund that has recently grown to nearly $1 billion. *Cf. Rural Cellular Ass'n*, 588 F.3d at 1095 (it was "entirely reasonable" for the FCC "to consider its interest in avoiding excessive funding from consumers" and limit the costs of a universal service fund "in the face of evidence showing providers were receiving subsidies in excess of what is needed to allow them to remain in the market.")

By reining in the spiraling overpayments that compromised the integrity of the VRS program for several years, and by taking an interim measure to better align reimbursement rates with actual compensable costs, the Commission acted consistently with its statutory mandate. The prior rates, under which hundreds of millions of dollars in excess compensation were funded by the public, cannot plausibly be described as having a minimum of waste or expense. The interim rates, which bring rates closer to – but still thirty percent above – costs, encourage, rather than discourage, efficiency. *See* 47 U.S.C. § 225(b)(1).

Contrary to Sorenson's claim, the Commission did not interpret the efficiency clause as a cost-based limitation on the obligation to make VRS available, thereby implying that the Commission could simply elect at any time to cut VRS funding. *See* Sorenson Br. 39, 41. As discussed above, VRS remains available to anyone who requests it, and Sorenson does not claim otherwise. Sorenson's view of the statute – that ratepayers must fund whatever level of

service Sorenson chooses to provide, without regard to the cost of that service – has been rejected by the FCC without prior challenge from Sorenson or any other provider. Six years ago, for example, the Commission rejected a request by VRS providers to raise rates in order to enable them to provide higher levels of service, holding that "the providers are not entitled to unlimited financing from the Interstate TRS Fund to enable them to further develop a service that is not even required." *2004 VRS Order*, 19 FCC Rcd at 12551. Sorenson has provided no persuasive reason to question the Commission's longstanding interpretation of the efficiency clause.

D. The Interim Rates Ensure "Functional Equivalence."

Section 225 defines telecommunications relay services as telephone services that allow hearing- and speech-impaired persons to communicate with non-impaired persons "in a manner that is functionally equivalent to the ability of" non-impaired people to communicate with each other. Sorenson complains that the interim rates fail to ensure functional equivalence, but it is wrong.

The statute does not define "functionally equivalent" and therefore leaves it to the FCC to define the term. *Nat'l R.R. Passenger Corp.*, 503 U.S. at 417. The legislative history of Section 225 reveals that the statute "requires the FCC to establish minimum federal standards … including … the standards that will define functional equivalence between telecommunications relay services and voice

telephone transmission services." H.R. Rep. No. 485 Pt. 2, 101st Cong. 2d Sess. at 133 (1990); *see also* 136 Cong. Rec. H2421-02 at H2431 (May 17, 1990) (testimony indicating that the FCC's mandatory minimum standards define functional equivalence). Consistent with the legislative purpose, the Commission has determined that "functional equivalence" is "defined by the applicable mandatory minimum standards" established by the Commission and is "met when the service complies with" those standards. *2004 TRS Order*, 19 FCC Rcd at 12547-548 ¶189 & n.540.

As relevant here, the agency has established a minimum VRS standard that requires VRS providers to "answer 80 percent of all VRS calls with[in] 120 seconds." *Telecommunications Relay Services*, 20 FCC Rcd 13165, 13175 (2005), *codified at* 47 C.F.R. § 64.604(b)(2)(iii). Under the Commission's interpretation of Section 225, as long as that standard is met (and no other Commission standard is violated), VRS is functionally equivalent to ordinary telephone service.[6] Contrary to Sorenson's claim (Br. 38), there is nothing novel about this approach, which was established by the Commission long ago.

[6] Sorenson argues (Br. 37) that the Commission has stated that the 120-second standard is only "moving toward" functional equivalence and is not itself functional equivalence. But 120 seconds is the only standard the Commission has set and therefore by definition constitutes functional equivalence. Moreover, Sorenson's argument is beside the point because the actual answer times at issue here – [redacted material] – are nowhere near the 120-second limit.

Prior to the *Interim Rate Order*, Sorenson had an average wait time

[redacted material]

Sorenson has provided no evidence showing the actual effect of the interim rates upon its wait times. Indeed, in denying a stay of the rates, the Commission's Consumer and Governmental Affairs Bureau found [redacted material] to be "de minimis." *Order Denying Stay Motion*, 25 FCC Rcd 9115, 9122 ¶23 (CGB 2010). As a result, the interim rates do not undermine functional equivalence.

E. The Interim Rates Are Consistent With The Technology Clause.

Section 225 states that the Commission "shall ensure that regulations prescribed to implement this section encourage … the use of existing technology and do not discourage or impair the development of improved technology." 47 U.S.C. § 225(d)(2). Sorenson claims that the interim rates violate that provision because they do not include the cost of customer equipment such as videophones. The disallowance of such costs, Sorenson asserts, discourages the development of new technology. Br. 43-44. That claim fails on multiple grounds.

First, Sorenson has not shown how a rate that exceeds allowable costs by thirty percent discourages or impairs a provider from investing in new technology. The statute, moreover, does not require the FCC to ensure that technological

development is affirmatively funded or that every discrete action taken by the Commission must further technological development. In approving VRS as an authorized and reimbursable TRS service, the Commission encouraged technological developments that have revolutionized communication by those with hearing and speech disabilities – as Sorenson wholeheartedly agrees. *See* Br. 8 ("VRS is indisputably the most 'functionally equivalent' service yet developed to serve the deaf community.").

In any event, the FCC has ruled since at least 2006 that the cost of videophones supplied to customers is not a recoverable expense, on the basis that "compensable expenses must be *the providers'* expenses in making the service available and not the customer's costs of receiving the service." *Telecommunications Relay Services*, 21 FCC Rcd 8063, 8071 (2006). Videophones are customer equipment, not a telephone transmission service that enables functionally equivalent communications. *2007TRS Rate Order*, 22 FCC Rcd at 20170-20171. Sorenson's business decision to encourage use of its service by providing free customer equipment suggests that Sorenson is reaping a healthy profit on its service, but it does not suggest that the equipment must be subsidized by the TRS Fund.

III. THE COMMISSION ACTED WITHIN ITS DISCRETION IN SETTING THE INTERIM RATES.

Sorenson argues that the *Interim Rate Order* is arbitrary and capricious because: (1) the NECA rates that served as the basis for the interim rates supposedly are "unreliable," (2) the Commission averaged the NECA rates and the prior rates, and (3) the Commission's use of payment tiers was allegedly irrational. To the contrary, the Order was a reasonable exercise of the Commission's authority.

A. Use Of The NECA Rates Was Reasonable.

The Commission set the interim VRS rates at the midpoint of the rates proposed by NECA and the rates that the Commission had set in 2007. Sorenson complains that the Commission erred by relying to any extent on NECA's proposed rates. Br. 45. According to Sorenson, NECA improperly excluded some of the "real" costs of providing VRS, "including developing and providing videophones, providing technical assistance, and taxes and debt service." *Ibid*.

In fact, the exclusions from the NECA rates reflect the very same costs that the Commission has excluded from VRS reimbursement since at least 2004. For years, the FCC has excluded, for example, certain taxes, research and development costs, and the cost of providing video equipment, software, and technical assistance to users. *See 2004 TRS Order*, 19 FCC Rcd at 12545-12550;

Telecommunications Relay Services, 21 FCC Rcd 8063, 8070 ¶15 & n.50 (2006); *2007 TRS Rate Order* ¶¶73-82; *see also* pp. 7-8, *supra*. Sorenson did not challenge any of those exclusions at the time. The Commission explained that reimbursement rates are intended to cover the reasonable costs a TRS provider incurs in providing a level of service that complies with the Commission's minimum standards for VRS. Thus, the Commission noted, a VRS provider "cannot determine for itself that it is going to provide something different from or beyond the Commission's rules, and still expect compensation from the Fund." *Declaratory Ruling and NPRM*, 21 FCC Rcd 5442, 5457-5458 ¶39 (2006). Because the Commission reasonably has excluded those matters from reimbursement – and has done so for years without challenge by Sorenson – the Commission did not exceed its discretion when it based its rates in part upon NECA data that reflected the same longstanding exclusions.

Sorenson's complaint that NECA's proposed rates do not reflect the costs of "debt service" (Br. 45) deserves special mention.

[redacted material]

At

the same time, Sorenson has reportedly paid as much as *$800 million* in dividends to its investment fund owner. *See* "A Failure Of Communication," *supra*. These statistics underscore that the Commission did not act irrationally when it based its interim rates on NECA data that excluded from reimbursement interest payments on corporate debt. *See Order Denying Stay Motion*, 25 FCC Rcd at 9121 ("Sorenson has not shown that its claimed costs, which include interest and dividend payments, are the result of sound business decisions."). The TRS Fund is intended to reimburse the costs of providing an accommodation to persons with hearing or speech disabilities; it was never meant to support a lucrative investment vehicle at public expense. Moreover, there is no good reason why the Commission should establish rates that provide an incentive to raise capital through debt rather than equity.

Sorenson also objects to NECA's decision to include in its rates a 1.6 percent cash working capital allowance. That allowance compensates providers for the time value of the money spent to provide service during the time lag between the provision of service and reimbursement from the Fund. Sorenson believes NECA's approach to be arbitrary because the allowance assumes that the TRS Fund will reimburse VRS providers within 30 days, whereas it actually takes 65 days for such reimbursement. Br. 47. The Commission explained that because the working capital reimbursement is paid on a rolling basis every month, "it does

not *substantially* matter whether the lag time from a specific cost submission is thirty days or sixty-five days." *Interim Rate Order* n.23 (Joint App. at ___) (emphasis added). In other words, as a practical matter, the period during which the provider does not have use of its money is limited to 30 days. Any mismatch between a particular expense and the reimbursement for that expense, the Commission found, would have no significant impact on the provider. That conclusion was sound.

B. The Commission Properly Determined The Interim Rates.

Sorenson next claims that the Commission failed to provide a satisfactory explanation for its decision to set the interim rates at the midpoint between NECA's historical cost-based rates and the Commission's own 2009-2010 rates based on providers' projections of their costs. Br. 48-49.

The courts have recognized that the FCC "has broad discretion in selecting methods for the exercise of its powers to make and oversee rates." *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1228 (D.C. Cir. 1980). Thus, the Commission's rate-setting decisions are "appropriately treated as policy determinations in which the agency is acknowledged to have expertise." *United States v. FCC*, 707 F.2d 610, 618 (D.C. Cir. 1983). "The relevant question is whether the agency's numbers are within a zone of reasonableness, not whether its numbers are precisely right." *WorldCom, Inc. v. FCC*, 238 F.3d 449, 461-462

(D.C. Cir. 2001) (internal quotation marks omitted)). And, "[a]s long as the Commission makes a 'reasonable selection from the available alternatives,' its selection of methods will be upheld 'even if the court thinks [that] a different decision would have been more reasonable or desirable.'" *Southwestern Bell Telephone Co. v. FCC*, 168 F.3d 1344, 1352 (D.C. Cir. 1999), quoting *MCI Telecommunications Corp. v. FCC*, 675 F.2d 408, 413 (D.C. Cir. 1982).

Contrary to Sorenson's argument, the Commission clearly explained why it chose a point between the NECA rates and the prior rates to arrive at the interim rates. As an initial matter, the Commission pointed out that it was necessary to reduce "the large discrepancy between actual costs and provider compensation in the face of substantial evidence that providers are receiving far more in compensation than it costs them to provide service." *Interim Rate Order* ¶12 (Joint App. at ___). NECA's cost-based rates, the Commission found, were "reasonable and supported by record evidence." *Id.* ¶13 (Joint App. at ___). But the Commission recognized that those rates were substantially lower than the Commission's 2009-2010 rates. Accordingly, the Commission was concerned about the effects of "a significant and sudden cut to providers' compensation" on the ability of VRS providers to continue to offer their services to persons with hearing and speech impairments. *Id.* ¶12 (Joint App. at ___). As a result, the

Commission explained that "adjusting NECA's proposed rates … for a one-year, interim period strikes the correct balance." *Ibid.*

Not only did the Commission fully explain its approach, but its methodology was entirely sensible and supported by substantial evidence. It made sense to harmonize the existing rates and NECA's cost-based rates, thereby reducing overpayments by the TRS Fund while ensuring that the interim rates would "permit service providers to continue offering service in accordance with [the Commission's] rules." *Interim Rate Order* ¶12 (Joint App. at ___). And, given the Commission's dual purposes of moving reimbursement rates closer toward costs while avoiding a sudden change that could hamper providers' ability to offer service, it was reasonable to set a rate between the Commission's prevailing rates and the rates based on actual allowable costs.

In essence, the Commission faced a range of possible rates – a lower bound defined by the NECA rate, and an upper bound defined by the existing 2009-2010 rate. The Commission chose a number directly in the middle of that zone – that is, squarely within the "zone of reasonableness." *WorldCom, Inc.*, 238 F.3d at 461-462. To be sure, in setting such rates, "an agency may not pluck a number out of thin air," but "[w]hen a line has to be drawn …, the Commission is authorized to make a 'rational legislative-type judgment.'" *WJG Telephone Co. v. FCC*, 675 F.2d 386, 388-89 (D.C. Cir. 1982) (citations omitted). Not surprisingly, courts

frequently have upheld rates based on the midpoint of a range of possibilities. *See Public Service Comm'n of Kentucky v. FERC*, 397 F.3d 1004, 1010 (D.C. Cir. 2005); *Tennessee Gas Pipeline Co. v. FERC*, 926 F.2d 1206, 1209 (D.C. Cir. 1991) (court "has no quarrel" with using "the general methodology" of adopting the midpoint of range of figures to establish a rate); *cf. American Public Communications Council v. FCC*, 215 F.3d 51, 57 (D.C. Cir. 2000) (affirming rates based in part on the midpoint between two relevant numbers). So long as "the figure selected by the agency reflects its informed discretion, and is neither patently unreasonable nor 'a dictate of unbridled whim,' then the agency's decision adequately satisfies the standard of review," *ibid*. (citations omitted). That is precisely the case here.

Sorenson relies heavily (Br. 52-53) on *United States Telephone Ass'n v. FCC*, 188 F.3d 521 (D.C. Cir. 1999) (*USTA*), but that case has no bearing on its challenge to the interim rates. In *USTA*, the court considered the FCC's calculation of a yearly rate adjustment, called an "x-factor," under a price cap ratemaking methodology. Thus, *USTA* addressed the Commission's *application* of a methodology intended to measure precisely a rate adjustment, and the Court found errors in some of the data points on which the Commission relied in making its adjustment.

This case, by contrast, involves the Commission's *formulation* of a methodology. The question here is not – as it was in *USTA* – whether specific data points should or should not be used to calculate the rate. Rather, it is whether the overarching methodology chosen by the Commission was within the Commission's rate-setting discretion. As explained above, it was.

Finally, Sorenson argues that the Commission erroneously stated that the final rates "were within the range of rates proposed by VRS providers." Br. 50. Sorenson points to a Table in the *Interim Rate Order* setting forth the Commission's calculation of its interim rates, and complains that the Table improperly suggests that Tier III providers supplied a range of proposals from $4.61 to $5.95, whereas no provider specifically proposed a rate of $4.61. Br. 50-51; *see also Interim Rate Order* Table 1 (Joint App. at ___). As an initial matter, if Sorenson wishes to argue on appeal that the heading used in the Commission's Table constituted error, it was obliged by 47 U.S.C. § 405(a) to raise the matter before the Commission in a petition for reconsideration. In the absence of such a petition, as discussed above (pp. 30-31, *supra*), the Court may not consider the claim.

But, even if Sorenson had properly preserved the claim, it lacks merit. The comments submitted by VRS provider CSDVRS, LLC suggested a possible rate methodology yielding a Tier III rate of $4.616. *See Comments of CSDVRS LLC* at

8, Figure 4 (Joint App. at ___). While CSDVRS may not have explicitly advocated setting compensation at that rate, its methodology represented a "propose[d]" "alternative" to a "Return on Investment method" that resulted in the $4.61 rate that the *Interim Rate Order* referenced. *Id*. at 7 (Joint App. at ___); *see also Interim Rate Order* Table 1 (Joint App. at ___). Finally, Sorenson has not explained how any error in a heading included in the Commission's Table could prove that the Commission exceeded its discretion in adopting the interim rates. Accordingly, Sorenson's challenge to the Commission's rate-setting methodology fails.

C. The Commission Properly Used A Tier Structure With Reasonable Payment Differentials.

In 2007, the Commission adopted a tiered VRS reimbursement structure based on data showing that different VRS providers "are not similarly situated with respect to their market share and their costs of providing service." *2007 TRS Order*, 22 FCC Rcd at 20163. The evidence before the Commission demonstrated that "providers that handle a relatively small amount of minutes … have relatively higher per-minute costs" and that "providers that handle a larger number of minutes … have lower per-minute costs." *Ibid*. The Commission therefore explained that its tiered approach allowed providers to be reimbursed at a rate "that likely more accurately correlates to their actual costs." *Ibid*. The tiers were

structured on a "cascading" basis so that "providers would be compensated at the same rate for the minutes falling within a specific tier." *Ibid.* Thus, all providers received the same rate, regardless of cost, for the first 50,000 minutes of service provided; all received the same rate for the next 450,000 minutes; and all received the same rate beyond that point. *Id*. at 20163-20164. At the time, Sorenson supported the use of payment tiers. *See 2007 TRS Rate Order*, 22 FCC Rcd at 20164 n.160.

In the *Interim Rate Order*, the Commission retained the tier structure. NECA's cost-based data showed that Tier III providers had dramatically lower costs than Tier I and II providers. *See Interim Rate Order* Table 1 (Joint App. at ___). And, relying on that data, the Commission found that "the current tier structure remains a workable, reliable way to account for the different costs incurred by carriers based on their size and volume of TRS minutes relayed" and that "[t]he rationale for adopting the tiers … remains applicable." *Id*. ¶17 (Joint App. at ___).

Sorenson argues that the Commission was wrong in retaining the tier system. First, Sorenson claims that the tiers are based on "cost differentials that [the Commission] fail[ed] to identify or quantify" and that the *Interim Rate Order* did not discuss "any actual data that might support a differential" between tiers. Br. 56. That claim fails, however, in light of NECA's cost data, which are based

on cost reports submitted to NECA by all VRS providers. Those data show a significant cost differential between Tier II ($6.03 per minute) and Tier III ($3.90 per minute). *Interim Rate Order* Table 1 (Joint App. at ___). Thus, NECA's data alone justify the Commission's retention of tiers.[7] Nor does it help Sorenson that NECA's calculated Tier I costs are slightly lower than Tier II costs. Br. 57. While that is true, [material redacted] Sorenson's [material redacted] minutes per month fall within Tier III, and NECA's data show that Tier III costs are significantly lower than those falling within the other tiers. Given the Commission's longstanding policy that rates should reflect costs, it made sense that higher-cost providers should be reimbursed at a higher rate.

Sorenson next complains that NECA's data do not accurately reflect the actual costs of providing service (Br. 57), but that reiteration of its earlier argument to the same effect fares no better a second time. (*see* pp. 37-40, *supra*).

Sorenson further asserts that "on its face" the tier system "makes no sense" because "it is unclear why the FCC would choose to pay any other provider more"

[7] The declaration supplied by Sorenson's expert, Michael Pelcovits, does not undermine this conclusion. Br. 58-59. Even if the declaration provided some support for the elimination of tiers, the contrary NECA data strongly support their retention. And, where the administrative record contains evidence that could justify either of two conclusions, the Court "may not displace the agency's choice between two fairly conflicting views." *Zoltanski v. FAA*, 372 F.3d 1195, 1200 (10th Cir. 2004) (quotation marks and citation omitted). The Commission therefore acted within its discretion in concluding that the evidence was insufficient to justify a departure from the tier system. *Interim Rate Order* ¶17 (Joint App. at ___).

than it pays the lowest cost provider. Br. 55. In 2007, when it adopted tiers (in part due to Sorenson's own suggestion), the Commission explained that new entrants to the VRS market typically have higher costs. A tier system thus would "ensure … that in furtherance of promoting competition, the newer providers will cover their costs, and the larger and more established providers are not overcompensated …" *2007 TRS Order*, 22 FCC Rcd at 20163. That policy remains valid. In any event, the Commission's pending review of the entire VRS program specifically will consider the issue of tiers. In the meantime, in a one-year interim order, the Commission "need not address all problems in one fell swoop." *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 86 (D.C. Cir. 2001).

Finally, Sorenson claims that the tier structure places it at a "tremendous disadvantage compared to all of its competitors." Br. 54. But that claim fails because it ignores the cascading nature of the tier regime, under which every similarly situated VRS provider is paid exactly the same per-minute rate. Thus, under the interim rates, Sorenson is paid $6.24 per minute for its first 50,000 minutes of VRS service and $6.23 per minute for the next 450,000 minutes. And any other provider that is large enough to provide Tier III minutes will be paid exactly what Sorenson earns for those minutes. Indeed, Sorenson arrives at allegedly inequitable payment disparities only by comparing apples (providers principally covered by Tiers I and II) with oranges (Sorenson itself, given that its

minutes largely fall within Tier III). Payment disparities that correspond to differences in service are inherent in any tier system and fairly reflect the established cost differentials. Moreover, Sorenson has little reason to complain: even though it has lower than average provider costs, it is compensated at Tier I and II rates for calls that fall within those tiers and therefore is *overcompensated* relative to smaller providers for those calls. *Order Denying Stay Motion*, 25 FCC Rcd at 9119 ¶14.

* * *

In sum, the Commission acted within its broad discretion in setting interim VRS rates while it completes its comprehensive review of the entire VRS program. In setting rates, "the Commission is authorized to make a 'rational legislative-type judgment,'" *WJG Telephone Co.*, 675 F.2d at 388-89, and it made such a judgment here.

CONCLUSION

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

STATEMENT REGARDING ORAL ARGUMENT

We believe that oral argument will assist the Court in resolving the issues in this case.

Respectfully submitted,
Austin C. Schlick
General Counsel

Peter Karanjia
Deputy General Counsel

Richard K. Welch
Deputy Associate
General Counsel

Joel Marcus
Counsel

Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740 (telephone)
(202) 418-2819 (fax)

Christine A. Varney
Assistant Attorney General

Catherine G. O'Sullivan
Robert J. Wiggers
Attorneys

United States
Department of Justice
Washington, D.C. 20530

November 8, 2010

PUBLIC VERSION – SEALED MATERIAL REDACTED

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SORENSON COMMUNICATIONS, INC. PETITIONER V. FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA Respondents	)	NOS. 10-9536 AND 10-9560

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 11357 words.

JOEL MARCUS
COUNSEL
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

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IN THE UNITED STATES COURT OF APPEALS
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Sorenson Communications, Inc., Petitioner,

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Federal Communications Commission
and United States of America, Respondents.

CERTIFICATE OF SERVICE

I, Joel Marcus, hereby certify that on November 8, 2010, I directed that the foregoing Uncited Preliminary Answer Brief of Respondents be served on counsel for the petitioner listed below by First Class U.S. Mail and by electronic mail.

Christopher J. Wright
Timothy J. Simeone
Joseph C. Cavender
Wiltshire & Grannis LLP
1200 Eighteenth Street, N.W.
Suite 1200
Washington, D.C. 20036
Counsel for: Sorenson Communications, Inc.

Joel Marcus