

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

In the Matter of	)	
	)	
Telecommunications Relay	)	
Services and Speech-to-Speech	)	CG Docket No. 03-123
Services for Individuals with	)	
Hearing and Speech Disabilities	)	
	)	

**REQUEST FOR STAY PENDING JUDICIAL REVIEW**

RUTH MILKMAN  
RICHARD D. MALLEN  
LAWLER, METZGER, MILKMAN & KEENEY, LLC  
2001 K St., N.W., Suite 802  
Washington, DC 20006  
Phone: (202) 777-7700  
Fax: (202) 777-7763

DONALD B. VERRILLI, JR.  
IAN HEATH GERSHENGORN  
MICHAEL B. DESANCTIS  
GINGER D. ANDERS  
JESSICA RING AMUNSON  
JENNER & BLOCK LLP  
601 13th Street, N.W., Suite 1200 South  
Washington, DC 20005  
Phone: (202) 639-6000  
Fax: (202) 639-6066

*Counsel for Sorenson Communications, Inc.*

January 28, 2008

## SUMMARY

Sorenson Communications, Inc. (Sorenson) hereby seeks a stay of Paragraphs 95 and 96 of the Declaratory Ruling in *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 22 F.C.C.R. 20140 (2007) (Order). These paragraphs sharply restrict the ability of telecommunications relay service (TRS) providers to communicate with their users for “any . . . purpose,” including when doing so would protect users’ life, safety, or welfare, and when doing so would inform TRS users about pending government proceedings that could have a substantial effect on their ability to communicate with the hearing community. Those restrictions constitute an egregious violation of the First Amendment and are, moreover, directly at odds with the mission of the Americans with Disabilities Act (ADA) to integrate deaf Americans into the “telecommunications mainstream.”

The constitutional problems with the restrictions in Paragraphs 95 and 96 are obvious. Those paragraphs limit a TRS provider’s ability to use customer information to “contact its customers” for “lobbying or any other purpose.” The limit on TRS’ providers’ ability to contact their customers about relevant issues pending at the Commission or Congress is a substantial restriction on political speech that strikes at the heart of the First Amendment. Of more practical concern, the restrictions sharply abridge a provider’s ability to engage in a range of important day-to-day commercial contacts with its users. Paragraphs 95 and 96 place Sorenson in legal jeopardy if, for example, it contacts its users, by email or any other means, to tell them how to make a 911 call or how to detect and avoid a scam in which fraudsters are misrepresenting themselves as associated with Sorenson. Such broad restrictions on protected commercial speech cannot stand, especially where, as here, the record reveals no substantial government interest advanced by the restrictions and no effort by the Commission to tailor its restrictions.

Making matters worse, the restrictions are directly at odds with Congressional policy. Under the ADA, as codified in Section 225 of the Communications Act of 1934, as amended (Act), the Commission is charged with making TRS available to “all” deaf and hard-of-hearing Americans, “to the extent possible and in the most efficient manner.” 47 U.S.C. § 225(b)(1). In order to make that goal a reality, TRS providers such as Sorenson must be permitted, among other things, to inform users of TRS about the range of services available to them, the dangers (such as vulnerability to scam artists) that might accompany those services, and developments at the Commission and Congress that might affect the availability of those services. Affording deaf users timely access to such information is critical to overcoming the barriers of bigotry and ignorance that historically have caused society to “isolate and segregate individuals with disabilities” and “relegate [them] to a position of political powerlessness in our society.” 42 U.S.C. § 12101(a)(2) & (a)(7).

In addition to these substantial problems on the merits, the equities require that the FCC grant a stay and maintain the status quo. Failure to do so will cause Sorenson irreparable harm. Not only are sweeping speech restrictions such as those that appear in Paragraphs 95 and 96 presumed to cause irreparable harm, but the Commission has promised to strip any providers that violate the broad restrictions in Paragraphs 95 and 96 of eligibility to receive compensation from the Interstate TRS Fund, a draconian punishment that threatens providers’ very economic viability. Moreover, in light of the clear mission of the ADA and substantial harms that Paragraphs 95 and 96 impose on the deaf community, a stay is plainly in the public interest.

In short, both the Constitution and sound policy militate against allowing the restrictions in Paragraphs 95 and 96 to take effect on February 19, 2008. The FCC should grant a stay, either to modify those provisions *sua sponte* or to permit judicial review to occur in an orderly fashion.

## TABLE OF CONTENTS

SUMMARY .....	i
TABLE OF CONTENTS.....	iii
I.    BACKGROUND AND PROCEDURAL HISTORY.....	2
II.   REASONS FOR GRANTING THE STAY .....	4
A.   SORENSEN HAS A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS .....	5
1.    Paragraphs 95 and 96 of the Declaratory Ruling Violate Sorenson’s First Amendment Rights .....	5
a.    Paragraphs 95 and 96 restrict “speech.” .....	6
b.    The Commission has failed to articulate a sufficiently overriding or substantial interest in suppressing this speech .....	7
c.    The restrictions in the Declaratory Ruling fail to adequately advance any asserted interest.....	9
d.    The restrictions in the Declaratory Ruling are not narrowly tailored .....	11
e.    The Tenth Circuit’s <i>U.S. West</i> decision confirms that the restrictions are unconstitutional .....	11
f.    The restrictions cannot be justified as “government speech.” .....	13
g.    To the extent the Commission did not intend Paragraphs 95 and 96 to apply broadly, those paragraphs are unconstitutionally vague.....	14
2.    The Adoption of the Prohibition on User Contacts Violated the Administrative Procedure Act.....	15
a.    Promulgation of Paragraphs 95 and 96 without any opportunity for notice and comment violates the APA.....	15
b.    The restrictions contained in Paragraphs 95 and 96 are arbitrary and capricious.....	18

3. The Commission lacks statutory authority for the novel  
speech restrictions .....20

B. SORENSON WILL SUFFER IRREPARABLE HARM ABSENT  
A STAY .....21

C. A STAY WILL NOT INJURE OTHER PARTIES.....22

D. A STAY IS IN THE PUBLIC INTEREST.....23

CONCLUSION.....24

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

In the Matter of	)	
	)	
Telecommunications Relay	)	
Services and Speech-to-Speech	)	CG Docket No. 03-123
Services for Individuals with	)	
Hearing and Speech Disabilities	)	
	)	

**REQUEST FOR STAY PENDING JUDICIAL REVIEW**

Sorenson Communications, Inc. (Sorenson), pursuant to Sections 1.41 and 1.43 of the Commission's rules, hereby requests that the Federal Communications Commission (Commission or FCC) stay, pending judicial review, Paragraphs 95 and 96 of the Declaratory Ruling issued in the above-captioned proceeding. *See* 47 C.F.R. §§ 1.41, 1.43. Sorenson easily satisfies the requirements for a stay and respectfully requests that the Commission act on this request by February 11, 2008. If the request is not acted on by that date, Sorenson will seek a stay in the United States Court of Appeals for the Tenth Circuit, where Sorenson has already filed a Petition for Review (Case Nos. 08-9503 and 08-9507),<sup>1</sup> and where, as explained below, it is likely to prevail on the merits. Accordingly, the Commission should stay Paragraphs 95 and 96 of the Declaratory Ruling pending judicial review in the Tenth Circuit, or pending *sua sponte* modification of those paragraphs by the Commission.

---

<sup>1</sup> Although Sorenson seeks this stay pending judicial review, Sorenson firmly believes (as it has told the Commission) that the obvious flaws in Paragraphs 95 and 96 of the Declaratory Ruling warrant Commission action *sua sponte* without waiting for a court order. For the reasons presented herein, therefore, Sorenson urges the Commission to stay the Declaratory Ruling so that the Commission can itself modify that ruling, without the necessity of judicial intervention.

## **I. BACKGROUND AND PROCEDURAL HISTORY**

Sorenson is a provider of telecommunications relay services (TRS) to the deaf and hard-of-hearing community. Those services include Sorenson Video Relay Service® (VRS), which enables deaf callers to conduct video relay conversations with hearing people through a qualified American Sign Language (ASL) interpreter, and Sorenson IP Relay™, which allows users to place text-based relay calls from either a mobile device or a personal computer to a hearing person, through a communications assistant. Sorenson receives compensation from the Interstate TRS Fund for its provision of TRS services to the deaf community.

On July 31, 2006, the Commission issued a notice of proposed rulemaking seeking comment on “numerous issues relating to the cost recovery methodology used for determining the TRS compensation rates paid by the Fund, as well as the scope of the costs properly compensable under Section 225 and the TRS regime as intended by Congress.” *In re Telecommunications Relay Services and Speech-To-Speech Services for Individuals With Hearing and Speech Disabilities*, CG Docket No. 03-123, Further Notice of Proposed Rulemaking, 21 F.C.C.R. 8379, 8384 ¶ 7 (2006). In response to this notice, Sorenson submitted comments regarding these ratemaking issues and otherwise participated in the rulemaking proceeding. According to the docket, more than 7,000 individuals and entities submitted comments in this proceeding. *See* Comments Filed in CG Docket No. 03-123.

On November 19, 2007, the Commission issued its Order in *In re Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, FCC No. 07-186 (released Nov. 19, 2007), 73 Fed. Reg. 3197 (published Jan. 17, 2008), 22 F.C.C.R. 20140 (2007). The Order contains two distinct parts. The first part is an Introduction, Background, and “Report and Order.” In this Report and

Order, the Commission established cost recovery methodologies and then set specific compensation rates that govern the compensation of TRS providers such as Sorenson from the Interstate TRS Fund. By this request, Sorenson does not seek to stay, challenge, overturn, or delay implementation of any aspect of the Report and Order.

The second part of the TRS Order is a “Declaratory Ruling.” This portion of the TRS Order was adopted by the Commission *sua sponte*, with no opportunity for notice and comment. There was no petition for a declaratory ruling with respect to the issues addressed in the Declaratory Ruling, and there was no notice of proposed rulemaking.

The bulk of the Declaratory Ruling addressed issues related to TRS providers offering financial or other incentives to induce users to use the provider’s service to make calls. Sorenson supports the Commission’s goal of preventing providers from using improper financial or similar incentives to stimulate TRS demand. Sorenson thus does not take issue with much of the Declaratory Ruling. However, Paragraphs 95 and 96 go beyond these issues and restrict all TRS providers’ contacts with their users. It is this ruling that Sorenson challenges.

The restrictions contained in Paragraphs 95 and 96 of the Commission’s Declaratory Ruling are extraordinarily broad. Among other things, they limit the ability of TRS providers “to contact TRS users for lobbying or any other purpose.” *Order* ¶ 95. Thus, “a provider may not contact its customers, by an automated message, postcards, or otherwise, to inform them about pending TRS compensation issues and urge them to contact the Commission about the compensation rates.” *Id.* Moreover, TRS providers may not “use consumer or call data to contact TRS users,” and they similarly may not use consumer or call data to “in any way attempt to affect or influence, directly or indirectly, their use of relay service.” *Id.* And to top it off, any

provider that violates these overbroad restrictions is subject to severe penalties – they “will be ineligible for compensation from the Fund” and “may also be subject to other actions.” *Id.* ¶ 96.

These paragraphs were a bolt from the blue. The Commission had never indicated that it intended to address issues relating to TRS providers’ contact with their users in this rulemaking proceeding. Nor did the record indicate a need for such restrictions. And, of course, nothing in Paragraphs 95 and 96 suggests any factual basis for the restrictions.

Sorenson and other providers have contacted the Commission and its staff to voice their legal and practical concerns regarding the restrictions. For example, Hands On Video Relay Service has filed *ex parte* notices (dated December 12 and December 21, 2007, as well as January 22, 2008) describing meetings with the Commission staff and articulating a host of First Amendment and other concerns. Likewise, in an *ex parte* notice dated December 10, 2007, CSDVRS described a meeting with staff in which the parties discussed the scope of the Declaratory Ruling. And Sorenson, along with other TRS providers, sent the Commission a letter on January 11, 2008, suggesting revised language for Paragraphs 95 and 96 that that would address the Commission’s concerns about financial incentives without raising constitutional problems. To date, despite having ample opportunity to consider the relevant arguments, the Commission has not acted on any of the requests for relief or otherwise modified Paragraphs 95 and 96.

## **II. REASONS FOR GRANTING THE STAY**

The Commission assesses requests for a stay pending appeal utilizing the factors set forth in *Virginia Petroleum Jobbers Ass’n v. Federal Power Comm’n, Inc.*, 259 F.2d 921 (D.C. Cir. 1958) (“*Virginia Petroleum*”) and *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) (“*WMATA*”). *See, e.g., Regulation of*

*Prepaid Calling Card Services*, WC Docket No. 05-68, 22 F.C.C.R. 5652, 5654 (2007). Under these factors, the party seeking a stay must demonstrate the likelihood of success on appeal, the extent it will suffer irreparable harm, and whether the stay will harm other parties or the public interest. Even where the moving party has not established a likelihood that it will prevail on the merits, the Commission may decide to stay enforcement of its ruling if it finds that the movant has presented a “serious legal question” and that the other three factors weigh heavily in the movant’s favor. *WMATA*, 559 F.2d at 843. Here, the probability of success is high and the balance of harms tips sharply in favor of a stay.

**A. SORENSON HAS A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS**

Sorenson has a substantial likelihood of prevailing on the merits because Paragraphs 95 and 96 of the Declaratory Ruling blatantly violate Sorenson’s First Amendment rights by limiting Sorenson’s ability to engage in core political speech and to petition the government for redress of grievances. Moreover, Paragraphs 95 and 96 unconstitutionally restrict Sorenson’s ability to engage in protected commercial speech. The Commission has not shown any government interest in imposing these restrictions, much less the “overriding” interest that is necessary to survive scrutiny of restrictions of political speech, or the “substantial” interest that is necessary to survive scrutiny of restrictions on commercial speech. The restrictions plainly are not narrowly tailored and do not advance any government interest. In addition, these restrictions are procedurally flawed, outside the Commission’s jurisdiction, and are arbitrary, capricious, and otherwise contrary to law.

**1. Paragraphs 95 and 96 of the Declaratory Ruling Violate Sorenson’s First Amendment Rights.**

The Commission has struck at core political speech and the right of citizens to petition the government for redress by preventing TRS providers from contacting their users for purposes

of “lobbying” or “to inform [customers] about pending TRS compensation issues and urge them to contact the Commission.” *Order* ¶ 95. Likewise, the Commission has limited TRS providers’ ability to engage in commercial speech by inhibiting their use of consumer or call databases to contact their users for “any other purpose.” *Id.*

At the outset, these restrictions constitute a viewpoint-based restriction – the restrictions effectively restrict only the deaf community from advocating for services provided under 47 U.S.C. § 225, and do not restrict others who may lobby the Commission to limit or reduce such services. As such, they are virtually per se unconstitutional. *See, e.g., National Endowment for the Arts v. Finley*, 524 U.S. 569, 612 (1998).

But even if viewed as viewpoint neutral, the restrictions cannot stand. The Supreme Court has held that “[w]hen a law burdens core political speech, we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995). As to commercial speech, the government must “assert a substantial interest” and the “restriction must directly advance the state interest involved. . . . [I]f the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.” *Central Hudson Gas & Electric Corp. v. Public Service Comm’n of New York*, 447 U.S. 557, 564 (1980). Under either test, the restrictions are unconstitutional.

**a. Paragraphs 95 and 96 restrict “speech.”**

At the outset, the Commission cannot avoid the First Amendment concerns by arguing that the Declaratory Ruling does not preclude TRS providers from speaking, but merely limits their ability to “use a consumer or call database to contact TRS users.” *Order* ¶ 95. First, that argument is inconsistent with the plain text of the Declaratory Ruling, which extends beyond mere use of the database and provides expressly that “a provider may not contact its customers,

by automated message, postcards, or otherwise, to inform them about pending TRS compensation issues and urge them to contact the Commission.” *Id.*

Second, the Tenth Circuit rejected this exact argument in *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999). In *U.S. West*, the court considered the Commission’s restrictions on the use of customer proprietary network information (CPNI). The Commission advanced the argument that the restrictions “did not violate or even infringe” on First Amendment rights because they prohibited providers only from using data to target customers, and not from communicating generally with their customers. 182 F.3d at 1232. The Court found the Commission’s argument “fundamentally flawed.” *Id.* As the Court noted, “[e]ffective speech has two components: a speaker and an audience. A restriction on either of these components is a restriction on speech.” *Id.*; *see also id.* (holding that “a restriction on speech tailored to a particular audience, ‘targeted speech,’ cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience, ‘broadcast speech’”).

Thus, the Commission’s Declaratory Ruling plainly restricts speech.

**b. The Commission has failed to articulate a sufficiently overriding or substantial interest in suppressing this speech.**

“Because of the importance of First Amendment speech protections, ‘the government bears the responsibility of building a record adequate to clearly articulate and justify’ [its] state interests.” *Utah Licensed Beverage Ass’n v. Leavitt*, 256 F.3d 1061, 1069 (10th Cir. 2001) (quoting *U.S. West, Inc.*, 182 F.3d at 1234). “Not only is this the government’s burden, but courts may not help; the Supreme Court has clearly stated that courts may not ‘supplant the precise interests put forward by the State with other suppositions.’” *Id.* (quoting *Edenfield v. Fane*, 507 U.S. 761, 768 (1993)).

Here, the Commission has identified no interest at all that might justify its restrictions on core political speech, let alone one that is “overriding.” Nor is any justification apparent. The ban on TRS providers’ informing their users about relevant Commission proceedings cannot be justified as, for example, a measure to “protect” the deaf community. Indeed, any assumption by the Commission that the deaf community does not want to be informed about proceedings before the Commission is paternalistic and contrary to the Americans with Disabilities Act. *See* 42 U.S.C. § 12101(a)(7) (discussing the fact that individuals with disabilities have been “relegated to a position of political powerlessness” based on “stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society”). It is also untenable as a factual matter. Deaf individuals comment frequently in FCC proceedings affecting them, and, indeed, they participated in substantial numbers in the rate order proceedings, filing thousands of individual comments.

Indeed, so far as the record reflects, the evident purpose of the restrictions in Paragraphs 95 and 96 is simply to relieve the Commission of the “burden” of hearing the views of the deaf community before it takes action that will have a substantial effect on that community. Needless to say, that interest is of no weight in the First Amendment calculus.<sup>2</sup>

The commercial speech restrictions fare no better. The Commission’s primary interest appears to be in preventing providers from using customer or call data to offer TRS users financial incentives to use the providers’ services to make unnecessary calls, *see Order* ¶ 96,

---

<sup>2</sup> Nor can the Commission invoke administrative convenience to stop the flow of postcards and emails from the deaf community. As the Supreme Court has held in another context, a “blanket burden on the speech of nearly 1.7 million [people] requires a much stronger justification than the Government’s dubious claim of administrative convenience.” *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 474 (1995). Moreover, administrative convenience cannot justify a viewpoint-based restriction such as the one here, which imposes a restriction only those who seek to serve the deaf community, and thus burdens only one side of the debate. *See Finley*, 524 U.S. at 612.

although even that interest is not precisely articulated in Paragraphs 95 and 96. Sorenson does not dispute that such an interest is substantial. But that interest provides no basis for preventing providers from contacting users for other reasons, such as to assist them with service issues, educate them about new service features, or inform them about potential misuse of the service by third parties. For example, Sorenson recently began offering Spanish-ASL services, which permit a deaf ASL user to communicate with a Spanish-speaking hearing person through an ASL interpreter. The Declaratory Ruling limits Sorenson's ability to send a mailing to its users informing them of the availability of this service. Likewise, Sorenson will be limited in its ability to inform its users of the changes to 911 services that may soon be adopted by the FCC. Sorenson would even be discouraged from sending an email to its users such as the warning it sent last year when it became aware of a scam being perpetrated on its customers by individuals who claimed that Sorenson users had won the "Sorenson Lottery" and then asked the users to provide their financial information so that lottery proceeds could be transferred to them. The Commission has no "substantial" interest in preventing communications such as this from occurring, yet that is exactly what its Declaratory Ruling will do.

**c. The restrictions in the Declaratory Ruling fail to adequately advance any asserted interest.**

Because the Commission has articulated no interest at all in restricting the political speech rights of TRS providers by preventing them from contacting users for purposes of "lobbying" or "to inform [customers] about pending TRS compensation issues and urge them to contact the Commission," *Order* ¶ 95, it cannot show that the restrictions at issue advance its interests. Moreover, to the extent the Commission has implicitly relied on "administrative convenience" to justify the restriction, that is insufficient. The Commission may not single out

the deaf community to advance that aim, especially in the absence of any record suggesting that the agency's "burden" of processing comments from the deaf community is unusually severe.

The Commission has similarly failed to justify its restrictions on commercial speech. The Supreme Court has stated that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983). This burden "is not satisfied by mere speculation or conjecture"; rather, the Commission "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71. The Court has cautioned that these requirements are "critical," for otherwise, the government "could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Id.*; see also *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995).

The Commission has not met its burden. It has "present[ed] no studies that suggest" that contacting users to inform, educate, or notify them about issues relating to TRS services provides financial incentives or otherwise causes TRS users to make unnecessary calls. *Edenfield*, 507 U.S. at 721. And "[t]he record does not disclose any anecdotal evidence . . . that validates the [Commission's] suppositions." *Id.* In fact, the record is devoid of evidence that a TRS provider's contacts with its users for purposes of education, information, or notification (such as those described herein) cause any harm. Nor is there any reason for the Commission to infer the existence of any harm. The restrictions apply even when there is no "disclosure" to anyone other than the TRS provider. And the prohibitions extend to all contacts with users, even ones (such as newsletters) where the invasion of privacy is trivial. There is simply no record evidence of harm.

**d. The restrictions in the Declaratory Ruling are not narrowly tailored.**

For many of the same reasons, the restrictions in the Declaratory Ruling are plainly not narrowly tailored; indeed, there is no tailoring at all. First, the restrictions create a flat ban on the use of databases to contact users, rather than an opt-in (as was the case with CPNI in *U.S. West*) or an opt-out (as in, for example, the do-not-call regulations). Second, the restrictions cover not just commercial speech such as marketing, but all speech, including core political speech such as lobbying the Commission or Congress. Third, the restrictions cover all forms of contact, including direct mail and email. If the Commission's interest is in preventing TRS providers from offering incentives to users to improperly pump up TRS call volume, then its regulations must be narrowly tailored to advance that interest. A prohibition on informing users about proceedings pending at the Commission, or on contacting users for any reason at all, is clearly overbroad.

That is all the more true because the “governmental interest could be served as well by a more limited restriction.” *Central Hudson*, 447 U.S. at 564. For example, in their January 11, 2008 letter to the Commission, Sorenson and other TRS providers suggested replacement language for Paragraphs 95 and 96 that addresses the Commission's interest in preventing providers from using financial or other incentives to artificially stimulate call volume, but avoids the constitutional issues raised by the Commission's current language. The existence of such readily available and effective alternatives confirms that the Commission's “excessive restrictions cannot survive.” *Id.*

**e. The Tenth Circuit's *U.S. West* decision confirms that the restrictions are unconstitutional.**

Case law from the Tenth Circuit – which governs Sorenson's judicial challenge – confirms that the restrictions here are unconstitutional. In *U.S. West*, the Tenth Circuit addressed

the Commission's restrictions on the use of CPNI. The Commission, as part of the implementation of 47 U.S.C. § 222 (governing the privacy of certain customer information) had restricted the ability of telecommunications providers to use CPNI to market to any customer a category of service to which the customer did not already subscribe, unless the customer approved. The Tenth Circuit invalidated the regulations under the First Amendment.

The unconstitutionality of the instant restrictions follows *a fortiori* from *U.S. West*. Indeed, in every way the restrictions here are less defensible than those in *U.S. West*.

- *U.S. West* involved only commercial speech (marketing of services), whereas the restriction here affects both commercial speech and core political speech (lobbying) that is at the very heart of what the First Amendment protects.
- The restrictions at issue in *U.S. West* allowed customers to “opt-in” and permitted providers to use their CPNI, whereas the Commission’s Declaratory Ruling here creates a flat ban on contacting users, even if those users have expressly requested that their providers keep them informed about issues related to their TRS services.
- The Commission had a plausible statutory hook for its CPNI restrictions – 47 U.S.C. § 222 – whereas such a statutory hook is completely absent here.<sup>3</sup>
- The FCC adopted the CPNI regulations following extensive notice and comment that resulted in a substantial record; here, there was no opportunity for comment and no record whatsoever to justify the restrictions.

*U.S. West* thus makes clear that the restrictions in Paragraphs 95 and 96 of the Declaratory Ruling cannot stand.

**f. The restrictions cannot be justified as “government speech.”**

Finally, Paragraphs 95 and 96 of the Declaratory Ruling cannot be defended as a reasonable restriction on government-funded speech. To begin with, the speech is not

---

<sup>3</sup> The Commission has held that TRS providers such as Sorenson are not subject to Section 222 because they do not provide “telecommunications services,” and thus they are not “telecommunications carriers” subject to Section 222. See *In re Telecommunications Relay Services And Speech-To-Speech Services For Individuals With Hearing And Speech Disabilities*, 15 F.C.C.R. 5140, ¶¶ 79-81 (2000).

government-funded. *See, e.g., Chamber of Commerce of the United States v. Lockyer*, 463 F.3d 1076, 1098-1100 (9th Cir. 2006) (Beezer, J., dissenting), *cert. granted*, 128 S. Ct. 645 (U.S. Nov. 20, 2007) (No. 06-939). But even if it were, the Commission’s flat prohibition on the ability of TRS providers to contact their users, without leaving providers even the option of using private funds to do so, is patently unconstitutional under well-established Supreme Court doctrine. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 199 (1991) (discussing unconstitutionality of restrictions placed on the “recipient of the subsidy, rather than on a particular [government] program or service”); *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984); (restriction held unconstitutional where it “barred [recipient of federal funds] from using even wholly private funds to finance [the prohibited] activity”); *cf. Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 548 (1983).

Nor can the speech be justified as merely a condition on receipt of federal funds, because requiring providers to forego substantial First Amendment rights as a condition of receiving the vast majority of their revenue clearly amounts to an unconstitutional condition. Under the Supreme Court’s “modern ‘unconstitutional conditions’ doctrine[,] . . . the government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit.” *Board of County Comm’rs v. Umbehr*, 518 U.S. 668, 674 (1996) (internal quotation marks and alteration omitted). As shown above, the government could not directly impose these restrictions on TRS providers’ freedom of speech, and neither may it impose them indirectly by attaching conditions to its funding. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 548-49 (2001) (“Where private speech is involved, even [the government’s] antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government’s own interest.”). Moreover, the Commission’s condition on

its funding is particularly egregious here because it was imposed long after Sorenson and other TRS providers entered the business, depriving them of any true voluntary decision to accept the government conditions. *Cf. South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (“[W]e have required that if Congress desires to condition the States’ receipt of federal funds, it must do so unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation.”).

**g. To the extent the Commission did not intend Paragraphs 95 and 96 to apply broadly, those paragraphs are unconstitutionally vague.**

Finally, Sorenson notes that the Commission cannot salvage its unconstitutional restrictions without offering clear guidance that narrows their scope. The prohibition on the use of customer information is extraordinarily broad, disallowing a vast array of potential contacts with TRS users: TRS providers may not use customer information “for lobbying or any other purpose,” “for any purpose other than handling relay calls,” or “to affect or influence, directly or indirectly, [customers’] use of relay service.” *Order ¶¶ 95-96; cf. Alaska Right To Life Committee v. Miles*, 441 F.3d 773 (9th Cir. 2006) (use of both “direct” and “indirect” to describe conduct encompassed the full universe of possible conduct), *cert. denied*, 127 S. Ct. 261 (2006). To the extent that the Commission believes that this seemingly limitless prohibition extends more narrowly than the text indicates, the regulation is unconstitutionally vague, because it is impossible for “people of ordinary intelligence” to have confidence that they understand the limitations in the broad language that the Commission has employed. *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *see also Grayned v. City of Rockford*, 408 U.S. 104, 107 (1972).

**2. The Adoption of the Prohibition on User Contacts Violated the Administrative Procedure Act.**

Wholly apart from their constitutional infirmities, the restrictions adopted in Paragraphs 95 and 96 of the Declaratory Ruling also are invalid under the Administrative Procedure Act (APA) because the Commission did not promulgate them using notice-and-comment procedures, and because the restrictions are arbitrary and capricious.

**a. Promulgation of Paragraphs 95 and 96 without any opportunity for notice and comment violates the APA.**

The FCC's ruling is a quintessential example of a general, prospective rule that, under the APA, can be adopted only after notice and comment: it was issued *sua sponte*, applies to all TRS providers, and takes away a previously held right. It is also the type of rule for which the APA's requirements of reasoned deliberation are especially necessary: it burdens a constitutional right, and has wide-ranging effect on the provision of essential services to the deaf and hard-of-hearing public. Yet the FCC issued its ruling without providing any notice to the affected parties, much less any opportunity to comment.

Although the FCC has labeled its "no contacts" rule a declaratory ruling, which is technically an adjudication under the APA, *see* 5 U.S.C. § 554(e), it is the intent and effect of agency action, rather than the label that the agency gives to it, that are "decisive." *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 416 (1942); *see also State Corp. Comm'n of Kansas v. FCC*, 787 F.2d 1421, 1428 (10th Cir. 1986). An agency that intends to create "the effects of a rule, not of an adjudication" may not "avoid the requirement of notice-and-comment rulemaking simply by characterizing its decision as an adjudication." *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994).

Here, the "no contacts" ruling has the critical characteristics of a rule: it drastically alters a "regime of rights and duties," *Kansas*, 787 F.2d at 1428, and is "of general ... applicability and

future effect designed to implement, interpret, or prescribe law or policy,” 5 U.S.C. § 551(4): Before the FCC took action, all TRS providers could use their customer databases to contact users for a variety of purposes; after the Commission’s ruling, all TRS providers are restricted in their interactions with users, regardless of the provider’s past practices or individual circumstances.<sup>4</sup> *See Yesler*, 37 F.3d at 448-49 (HUD action retracting a right to pre-eviction hearings for “all public housing tenants” was a rule because it “affected the rights of a broad category of individuals”).

Because the Commission’s action is in effect a rule that alters the rights of a class of entities, the Commission was required to provide the “procedural safeguards of formal

---

<sup>4</sup> Though the FCC suggested in its Declaratory Ruling that two earlier decisions had indicated that customer contact might be improper in all circumstances, *see Order* ¶ 95, that is not the case. The first of the cited decisions stands for the unremarkable proposition that TRS providers may not “use their customer database to contact prior users of their service and suggest, urge, or tell them to make more VRS calls.” *See Federal Communications Commission Clarifies that Certain Telecommunications Relay Services (TRS) Marketing and Call Handling Practices are Improper and Reminds that Video Relay Service (VRS) May Not be Used as a Video Remote Interpreting Service*, CC Docket No. 98-67, CG Docket No. 03-123, Public Notice, 20 F.C.C.R. 1471 (Jan. 26, 2005) (2005 PN). Like the no-incentives directive, this no-urging directive is narrowly tailored to prevent providers from artificially increasing TRS usage. The second precedent cited by the Commission, the 2000 TRS Order, is similarly narrow. *Telecommunications Relay Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Report and Order and Further Notice of Proposed Rulemaking, 15 F.C.C.R. 5140, 5175, ¶ 83 (Mar. 6, 2000). In that order, the Commission found that “customer profile” information collected by an exclusive statewide vendor of TRS was not subject to the CPNI protections of section 222 of the Act; the Commission therefore directed outgoing statewide vendors to transfer that information to new vendors. In adopting this requirement, the Commission sought to protect “the reasonable privacy expectations of the TRS users,” and accordingly prohibited providers from using the profile information “for any purpose other than the provision of TRS.” 2000 TRS Order ¶ 83. The Commission has never suggested that this expectation would apply to entities other than statewide vendors or information other than “customer profile” data; nor has the Commission ever suggested that its holding in 2000 would have the effect of broadly restricting providers’ ability to communicate with users for any purpose. Finally, although the 2005 PN questioned “whether there are any circumstances in which it is appropriate for a TRS provider to contact or call a *prior* user of their service,” 2005 PN at 1473 n.9 (emphasis added), that rhetorical question has no force of law, and in any event ignores the many circumstances, including those described herein, in which it is appropriate for a provider to contact a TRS user.

rulemaking” set forth in Section 553 of the APA. *Kansas*, 787 F.3d at 1428; 5 U.S.C. § 553(b)-(c). But not only did the Commission fail to provide notice-and-comment procedures, it neglected to provide *any* notice or process. Its Further Notice of Proposed Rulemaking gave no indication of any intent to rule on TRS providers’ right or ability to contact users, and the Commission never sought comments regarding user contacts. *See id.* The Commission’s failure to do so directly contravenes the policies underpinning the requirement of notice and comment – to “assure fairness and mature consideration of rules of general application.” *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (plurality) (disapproving NLRB’s use of adjudication to establish a prospective rule without notice and comment).<sup>5</sup>

Compounding the problem, the Commission failed to provide even the minimal notice required in informal adjudicatory proceedings. Agencies engaged in adjudication must provide “some sort of procedures for notice [and] comment” in order to create a record adequate for judicial review. *See Indep. U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 926 (D.C. Cir. 1982) (invalidating ruling because “even in an informal adjudication parties have a right to be informed of and comment on” an agency’s ruling); *Am. Airlines, Inc. v. Dep’t of Transp.*, 202 F.3d 788, 796-97 (5th Cir. 2000) (upholding ruling because agency “specified the legal issues on which it would rule [and] allowed the parties to submit comments”). As a result of the complete lack of any such procedures here, there is no administrative record supporting the ruling, and the FCC has deprived TRS providers and the deaf community of core First Amendment rights

---

<sup>5</sup> Although the *Kansas* court upheld the Commission’s discretion to use adjudication rather than rulemaking, the court was careful to note that the Commission had “issued its order only after providing public notice and an opportunity for the interested parties, including *Kansas*, to comment.” 787 F.2d at 1428; *see also New York State Comm’n on Cable Television v. FCC*, 669 F.2d 58, 62 n.9 (2d Cir. 1982) (“The FCC’s choice of a declaratory ruling in this case, *after notice and an opportunity for comments by interested parties*, was not an abuse of discretion.” (emphasis added)).

without any notice or opportunity to be heard. “All standards of fairness and due process in administrative law preclude such” a result. *Lewis*, 690 F.2d at 926.

**b. The restrictions contained in Paragraphs 95 and 96 are arbitrary and capricious.**

Under the APA, 5 U.S.C. § 706(2), an administrative decision is arbitrary and capricious if, *inter alia*, the agency has “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 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 of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Furthermore, when issuing a decision, the Commission is required to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The restrictions contained in Paragraphs 95 and 96 of the Declaratory Ruling cannot withstand scrutiny under this standard. In fact, those restrictions are arbitrary and capricious for at least five reasons.

First, the Commission provided *no* explanation as to why it adopted the relevant speech restrictions, much less the reasoned or satisfactory explanation that the law requires.

Second, the Commission failed to cite any factual or record evidence that might justify the speech restrictions, and, as a consequence, the Commission utterly failed to articulate a rational connection between the (non-existent) facts found and the choices made in Paragraphs 95 and 96. *See State Farm Mutual Auto. Ins. Co.*, 463 U.S. at 43.

Third, the speech restrictions are much broader than any prior FCC precedent, including the two decisions misleadingly cited by the Commission in Paragraph 95. *See supra* note 4.

Fourth, the Commission did not clearly identify any policy goals that the sweeping restrictions might serve, and, in any event, the restrictions are much broader than is necessary to serve any policy the Commission may have intended to advance. As explained above, for instance, if the Commission was trying to deter providers from artificially stimulating TRS usage, or was trying to protect the reasonable privacy expectations of TRS users, then the Commission easily could have adopted directives that are narrowly tailored to achieve those ends, rather than the blanket proscriptions that actually appear in Paragraphs 95 and 96.

Finally, the Commission clearly failed to consider an important aspect of the problem: the fact that its decision will have far-ranging consequences on the ability of TRS providers to communicate important information to TRS users regarding their service, such as new features, service issues, or warnings. Indeed, the Commission offered no consideration of the trade-offs that would inevitably be involved in “protecting” the privacy of the deaf community in the manner it has chosen. *Cf. United States Telecom Ass’n v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002) (noting that courts expect “some confrontation of the issue and some effort to make reasonable tradeoffs” from the Commission). For example, the speech restrictions would deter providers from telling users about 911 developments, even though the Commission has at least twice stated that “TRS users should be informed as to how emergency calls will be handled.” *2000 TRS Order* ¶ 99; *see also In re Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 13 F.C.C.R. 14187, 14203 ¶ 41 (1998) (“[W]e believe that TRS users should be informed as to how emergency calls will be handled by any TRS center.”).

For all of these reasons, the speech restrictions set forth in Paragraphs 95 and 96 are arbitrary and capricious and therefore cannot pass muster under the APA.

**3. The Commission lacks statutory authority for the novel speech restrictions.**

Finally, the Commission lacks statutory authority to prohibit TRS providers from using customer information to contact users for “lobbying or any other purpose” because that restriction exceeds the Commission’s mandate to “ensure that [TRS] services are available ... to hearing-impaired and speech-impaired individuals in the United States.” 47 U.S.C. § 225(b)(1); *see Am. Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005) (agency may regulate only pursuant to express grants of authority or ancillary jurisdiction based on these express grants). Section 225 of the Act contains but a single speech-restrictive provision, which prohibits providers from “disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of the call.” 47 U.S.C. § 225(d)(1)(F). And Section 705 of the Act simply prohibits providers from disclosing “the existence, contents, substance, purport, effect, or meaning” of any relayed communication, subject to certain exceptions. 47 U.S.C. § 605(a). Neither provision confers authority on the Commission to impose the broad speech restrictions at issue here, and Sorenson is aware of no other provision in the Act that might do so.

Moreover, Congress’s express delegation (in Sections 225 and 705(a)) of authority to regulate disclosure of certain limited information related to TRS service and the corresponding absence of any express delegation here strongly suggests that Congress did not intend to allow the Commission to issue the broad regulations it has promulgated here. *See Motion Picture Ass’n of Am., Inc. v. FCC*, 309 F.3d 796, 805-06 (D.C. Cir. 2002) (refusing to infer grant of authority to regulate video descriptions from statutory silence, where Congress explicitly granted authority to regulate similar activities); *see also U.S. West*, 182 F.3d at 1229-30, 1236

(describing grant of authority in § 222). That suggestion is particularly strong here, where the regulations at issue curtail protected speech, because such regulations require careful balancing of the constitutional concerns. *Cf. Motion Picture Ass'n*, 309 F.3d at 805 (holding that Commission's authority must be construed narrowly in context of regulations implicating protected speech, because "Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating" speech). The Commission's restrictions thus cannot stand.

**B. SORENSON WILL SUFFER IRREPARABLE HARM ABSENT A STAY.**

It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Summum v. Pleasant Grove City*, 483 F.3d 1044, 1055 (10th Cir. 2007) ("Deprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary injunction."), *petition for cert. filed*, 76 U.S.L.W. 3289 (U.S. Nov. 20, 2007, No. 07-665); *Community Communication Co. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981) (where First Amendment rights are threatened, irreparable harm is presumed). This is true whether the speech is treated as commercial, or as core political speech "subject to the highest scrutiny." *Summum*, 483 F.3d at 1055-56; *see also Utah Licensed Beverage Ass'n*, 256 F.3d at 1076.

As noted above, Sorenson contacts its users for a variety of purposes, including to inform them of newly available services and to warn them of third-party scams involving TRS services. All of these activities are clearly protected by the First Amendment, and just as clearly are prohibited by the Commission's ruling. The inability to engage in these activities will cause Sorenson irreparable harm in the absence of a stay.

Moreover, even apart from the presumptive harm here, the restrictions at issue will cause concrete harms to Sorenson's business. For example, the inability of Sorenson to warn its users of scams or other abusive practices could well result in the substantial and irrevocable loss of user goodwill, as users attribute to Sorenson the fraudulent activity of the actual perpetrators of the scam. *See, e.g., Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1262-64 (10th Cir. 2004) (citing cases). Similarly, the inability of Sorenson to notify its users of new services deprives Sorenson of the goodwill that results from Sorenson's continuing efforts to provide its users a comprehensive array of services – such as 911 and Spanish-ASL services – that advance the congressional aims set forth in Section 225.

Finally, if Sorenson or any other provider were to inadvertently violate the overbroad and vague restrictions set forth in Paragraphs 95 and 96, it could become subject to the draconian penalties prescribed by the Commission – “ineligib[ility] for compensation from the Fund” and possibly “other actions.” *Order* ¶ 96. This would threaten providers' economic viability.

**C. A STAY WILL NOT INJURE OTHER PARTIES.**

Nor will a stay pending appeal have a “serious adverse effect on other interested persons.” *Virginia Petroleum*, 259 F.2d at 925. A stay will simply preserve the status quo among TRS providers and users, in which providers are permitted to contact users for purposes other than offering improper incentives to make relay calls. The Commission has not cited any harm to any party that arises from any user contacts other than those involving “financial and similar incentives,” *Order* ¶ 96, or, arguably, infringement of user privacy. But Sorenson does not challenge the prohibition on contacting users for call-pumping purposes, nor does Sorenson seek to contact users in ways that violate their reasonable privacy expectations. The stay, therefore, will simply permit contacts that are not harmful to any party. *See WMATA*, 559 F.2d

at 843 (other-party factor favored a stay where there was “little indication that a stay pending appeal [would] result in substantial harm to either appellee Commission or to other tour bus operators”).

Moreover, far from harming any parties’ interests, a stay of the ruling would further the interests of other TRS providers, all of whom share Sorenson’s need – and entitlement – to engage in legitimate, TRS-related contacts with users. It will also serve the interests of the deaf consumers who rely on TRS services and therefore benefit from providers’ ability to communicate important information to them.

**D. A STAY IS IN THE PUBLIC INTEREST.**

Finally, the public interest requires a stay. At the outset, because the challenged ruling abridges providers’ and users’ First Amendment rights, staying its enforcement is clearly in the public interest. *See Sumnum*, 483 F.3d at 1055 (“We have held that preliminary injunctions which further plaintiffs’ free speech rights are not adverse to the public interest.”); *Christian Legal Society v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) (“[I]njunctions protecting First Amendment freedoms are always in the public interest.”).

Granting the stay is also in the public interest because it will eliminate the restrictions and burdens that Paragraphs 95 and 96 impose on the deaf community. Those paragraphs impair the ability of that community to learn about and make known its views on issues of overwhelming importance that are pending before the Commission and Congress; it hinders them from hearing about new TRS services that will expand their ability to communicate; and it restricts them from learning about fraud and other scams aimed at the deaf community. A stay is thus the only way to alleviate these harms.

Section 225 itself, as well as other provisions in the ADA, confirms that the stay is in the public interest. In Section 225, Congress sought “to increase the utility of the telephone system of the Nation,” and to ensure that TRS services are provided “in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.” 47 U.S.C. § 225. Likewise, in the ADA, Congress found that “society has tended to isolate and segregate individuals with disabilities” and to treat them as an “insular minority.” 42 U.S.C. § 12101(a)(2) & (a)(7). To help eradicate this discrimination, the Commission should not impede providers’ efforts to keep users informed on TRS-related matters. It is only by a stay that TRS providers will be able to ensure that deaf people continue to receive critical information in a timely fashion, and continue to have access to the same effective telecommunications services – including the right to receive information about 911 access, scams, and other important TRS-related issues – as hearing people. And it is only with a stay that TRS providers will be able to continue to provide their services in an efficient manner. The public interest, as articulated by Congress, thus requires a stay.

### CONCLUSION

For the reasons stated above, the Commission should issue a stay of Paragraphs 95 and 96 of its Declaratory Ruling pending judicial review. Sorenson respectfully requests that the Commission act on this request by February 11, 2008, so that Sorenson may seek a stay in the Tenth Circuit in time for the Court to act before the effective date of the Declaratory Ruling.

Respectfully submitted,

RUTH MILKMAN  
RICHARD D. MALLEN  
LAWLER, METZGER, MILKMAN & KEENEY, LLC  
2001 K St., N.W., Suite 802  
Washington, DC 20006  
Phone: (202) 777-7700  
Fax: (202) 777-7763

/s/ Donald B. Verrilli, Jr.  
DONALD B. VERRILLI, JR.  
IAN HEATH GERSHENGORN  
MICHAEL B. DESANCTIS  
GINGER D. ANDERS  
JESSICA RING AMUNSON  
JENNER & BLOCK LLP  
601 13th Street, N.W., Suite 1200 South  
Washington, DC 20005  
Phone: (202) 639-6000  
Fax: (202) 639-6066

*Counsel for Sorenson Communications, Inc.*

Date: January 28, 2008