

FOIA MARKER

**This is not a textual record. This is used as an
administrative marker by the William J. Clinton
Presidential Library Staff.**

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Domestic Policy Council

Series/Staff Member: Diana Fortuna

Subseries:

OA/ID Number: 12029

FolderID:

Folder Title:

ADA [Americans with Disabilities Act] - FCC [Federal Communications Commission]

Stack:

S

Row:

97

Section:

3

Shelf:

1

Position:

2

BOSTON UNIVERSITY PUBLIC INTEREST LAW JOURNAL

VOLUME 1

WINTER 1991

NUMBER 1

CONTENTS

DEDICATION

- MARY JOE FRUG AND THE PUBLIC INTEREST *Martha Minow* 1

COMMENTARY

- LAWYERS AND THE PUBLIC INTEREST *Archibald Cox* 5

- *THE AMERICANS WITH DISABILITIES ACT: WHAT IT MEANS
TO ALL AMERICANS *Dick Thornburgh* 15

- THE AMERICANS WITH DISABILITIES ACT: TIME FOR
CELEBRATION, OR TIME FOR CAUTION? *Allan H. Macurdy* 21

- IN PURSUIT OF THE PUBLIC INTEREST:
THE MASSACHUSETTS EXPERIENCE *Edward F. Hennessey* 39

- CRITICAL LAWYERING: TOWARD A NEW PUBLIC
INTEREST PRACTICE *Louise G. Trubek* 49

ARTICLES

- THE ROLE OF COMPETITION IN MAKING
GRANTS FOR THE PROVISION
OF LEGAL SERVICES TO THE POOR *Gerry Singen* 57

- IN THE WAKE OF *CARDOZA-FONSECA*:
DOCTRINAL PUZZLES IN ASYLUM LAW *Mark M. Hager* 119

- THE NEW PUBLIC INTEREST LAW: FROM OLD THEORIES
TO A NEW AGENDA *Lois H. Johnson* 169

POINT/COUNTERPOINT

TOPIC: WHETHER LAW SCHOOLS SHOULD REQUIRE STUDENTS TO
PROVIDE SOME AMOUNT OF FREE LEGAL SERVICES TO INDIGENTS.

- IN FAVOR: *PRO BONO* AND LEGAL
EDUCATION *Michael Caudell-Feagan* 193

- OPPOSED: FORCED *PRO BONO* FOR
LAW STUDENTS IS A BAD IDEA *Alan M. Slobodin* 199

BOOK REVIEW

- THE POOR IN COURT, by Susan E. Lawrence
Reviewed by *Vincent Luizzi* 205

THE AMERICANS WITH DISABILITIES ACT: WHAT IT MEANS TO ALL AMERICANS*

BY
DICK THORNBURGH**

It has now been almost three decades since the Civil Rights Act of 1964 first became law. Many of us who participated in those heady, often dangerous, days within the movement can well remember how men and women of good will from all racial, religious, and ethnic strains united and fought valiantly to overcome the systematic denial of the blessings of freedom in our American society.

Though we all remain dedicated to that goal, there is an inevitable tendency toward differing views, even rising dispute, and sometimes faction, the more distant we are from those early days when basic advances were made. No great awakening ever kept everybody "up" forever. We have had more than our share of such dispute over civil rights legislation this year — largely because the bill¹ is embroiled in good faith conflict over what many regard as "legal technicalities."

I don't shun these legal arguments. I would be happy to discourse on "disparate treatment" of an individual, which we all agree the law should fully remedy, as opposed to "disparate impact" upon a group, which, by all past legal principle, the plaintiff must first prove to the court before any remedy is ordered. Just as the former can lead to injustice, the latter can lead to quotas. But as convinced as I am on those points, I see them as secondary to the next great leap forward in the civil rights movement that Congress enacted and President Bush signed into law this summer: the Americans with Disabilities

* Adapted from an address at the Emily Rose Peeke Lecture (N. Neal Pike Institute for the Handicapped, Boston University School of Law), September 14, 1990, Boston, Massachusetts. For a publication of a similar address given to the Temple University School of Law Conference on the Americans with Disabilities Act, see 41 Lab. L.J. 801.

The editors of the Boston University Public Interest Law Journal have made slight editorial changes to adapt what was given as an oral address to the printed format.

** The author is a former Attorney General of the United States.

¹ The Civil Rights Act of 1990 (S. 2104) was passed by the Senate on October 16, 1990 and by the House on October 19, 1990. It was vetoed by President Bush on October 22, 1990. Two days later, the Senate failed (by one vote) to override the veto. See 136 Cong. Rec. S16,562 (daily ed. Oct. 24, 1990). On October 30, 1991, the Senate approved a compromise civil rights bill by a vote of 93-5. President Bush has said that he will sign the bill. Frisby, *Senate Approves New Rights Bill*, Boston Globe, Oct. 31, 1991, at 1, col. 4.

Act (ADA).²

The impact of ADA is not disparate, but broadening, inclusive, and re-awakening. Do not let this bright moment in modern American history escape you. I can describe its coming impact upon our communal life in straightforward but startling terms.

Consider these demographic figures. Over thirty million Black Americans make up 12.3 per cent of our populace. Other minorities — just over eight million — comprise another 3.4 per cent. That total is a full 15.7 per cent of our entire population. But 43 million Americans with disabilities represent 17 per cent of the nation. So you have just seen those empowered by our civil rights laws in this country double. And though I take these figures from the *rolls* of potential beneficiaries under ADA, I definitely mean it when I say that *rights* are what have truly doubled.

Because each time civil rights are enlarged in this country, they extend over the whole of our society. *All* Americans, not just minorities, are involved in every new extension of such rights. The passage of ADA is truly another emancipation — not only for the 43 million Americans with disabilities who will benefit directly, but even more so for the rest of us — now free to benefit from the contributions which these Americans will make to our economy, our communal life, and our individual well-being.

Speaking for the Department of Justice, we eagerly accept the responsibility for framing the regulations necessary for both compliance with the Act and effective enforcement of its provisions. We accept this responsibility not as a burden, but as one more opportunity to further guarantee equal protection under the law for every citizen of this nation. And in the end, I do believe that is what makes us all the real beneficiaries of any progress on civil rights.

This was clearly understood by N. Neal Pike — a man unsighted since early in his life — when he set up the Institute for the Handicapped here at Boston University School of Law. He did not do so solely among the blind. He set up this Institute among the sighted as well, to pursue legal reform for those with disabilities by calling upon the abilities of those who devote their gifts of intellect to the law. He did so because he understood that, if we are truly to extend the boundaries of liberty for those with disabilities, all Americans must participate in that legal process.

A first priority, always, has been to provide physical access for the disabled. We are gathered right now in what was once Hayden Hall, built some 50 years ago with doors wide enough, by architectural chance, for those among us using wheelchairs. But we still would not be able to meet here today if Hayden Hall had not been retrofitted a year ago to become Tsai Hall. Notice how the aisles have all been ramped. Notice also how a new elevator has been ingeniously provided — this orchestra pit elevator. Brought to floor level, it opens up space in the auditorium for those members of the audience who have

² Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990).

#'s
accuracy

joined us, down front. Raised up one more level, it gives those using wheelchairs access to this stage, and I'm reassured that future plans for Tsai Hall include a proper stage elevator, designed to comply with the requirements of ADA.

That is now all part of a federal directive to widen the doors — a civil right became an architectural imperative. But not just physical doors — please understand — also the doors of opportunity for those with disabilities. And, among the broader public community, the doors of perception — so that we all recognize the right of people with disabilities to come in to mainstream society; to come in to the restaurant or concert hall or house of worship or movie theater, or aboard the bus; to come in, most particularly, to the work place, and, above all, to long-term prospects for a future life of hope and achievement.

This final widening of the doors through ADA comes after a long legal campaign. The Rehabilitation Act of 1973 was the first milestone, showing that doors could be physically widened, and other public access offered — but more importantly, that federal employment policy could accommodate those with handicaps. Then came the Education for the Handicapped Act two years later — Public Law 94-142 — which gave a new generation its great opportunity.

That Act set about teaching people with disabilities within the nation's mainstream school systems, guaranteeing an appropriate educational placement in the least restrictive setting. In the ensuing fifteen years, an unsighted person or somebody with impaired hearing or mental retardation or using a wheelchair could learn right alongside other, more able-bodied students. He or she could have started somewhere between kindergarten and twelfth grade and, by now, be all the way through college. This new generation overcame both its disabilities and the prejudices, often very sympathetic prejudices — the hardest to counter — that its disabilities aroused. Those in this new generation have received a high school education either by diploma or certificate of completion. Many have gone on to college and even advanced degrees. And yearly they are coming into the labor market — 150,000 strong. They are well-educated, well-motivated, well along in understanding what prospects life can really hold for them, and well up on the rights they are determined to secure for themselves under our Constitution.

They are the first generation of Americans with disabilities who will be, in every best sense, fully empowered in the 1990s. And they have now been guaranteed their civil rights under the Americans with Disabilities Act. To touch all its bases, ADA overcomes our past failure to eliminate attitudinal, architectural, and communications barriers in employment, transportation, public accommodations, public services, and telecommunications. In short, it widens all the doors I have spoken of, mandating true access for Americans with disabilities to mainstream society.

First and foremost, the ADA acts against job discrimination in the private sector. At present, 58 per cent of all men with disabilities, and 80 per cent of all women, are jobless. So long as unemployment continues to be the lifelong fate of two thirds of those with disabilities, we cannot break the bind of

clusive, and re-
history escape
in straightfor-

ack Americans
just over eight
5.7 per cent of
es represent 17
ed by our civil
gures from the
it when I say

ey extend over
are involved in
truly another
disabilities who
free to benefit
economy, our

responsibility
th the Act and
ibility not as a
qual protection
do believe that
civil rights.
unsighted since
capped here at
g the blind. He
eform for those
te their gifts of
we are truly to
Americans must

or the disabled.
built some 50
those among us
oday if Hayden
Notice how the
ator has been
o floor level, it
ience who have

5, 104 Stat. 327

national expenditure for dependence: at least \$169 billion annually - some even estimate as high as \$300 billion - approaching nearly four per cent of GNP.

The ADA requires — following Section 504 of the 1973 Rehabilitation Act — that the private employer make reasonable accommodation to the known mental or physical impairments of qualified disabled persons, so long as making that accommodation does not result in an undue hardship on the operations of the employer. Of course, this inevitably raises the concern: what extra hardship might be caused small businesses? That is why the ADA takes a phase-in approach that, over four years, will extend its provisions to cover all businesses with more than 15 employees.

As for businesses with less than 15 employees — if this new generation is all that it educationally appears to be, why shouldn't it be considered among other minorities for future hire, even in the absence of legal compulsion? A gain in education and brain power and "stick-to-it-ivity" could easily off-set the expense of putting in a ramp, or assisting an unsighted or hearing-impaired employee with telecommunication equipment — especially with computer and other technological advances in compensatory assistance.

The President's Committee on Employment of People With Disabilities has already done excellent work to show how any small business — from one to 1000 employees — can economically employ those "ready, willing, and available." And, as Attorney General, I have a role to play, under ADA, in offering technical assistance to any employer, large or small, ready to hire from this pool of people with disabilities. It seems highly unlikely that any small-business employer in a stressed labor market, skewed demographically toward minorities, is going to undervalue any group's potential contribution. A mind, whatever its limitations or the disability of the body, is still a terrible thing to waste.

The other great widening, under ADA, is in access to general accommodations and public transportation. None of our citizens should have to face preventable obstacles and inconveniences when they go out shopping, or to the movies. What is only a curb to most of us may seem like a rugged cliff to somebody using a wheelchair. Not long ago, we saw a quadriplegic actually scale El Capitan in Yosemite. Few of us with two sound arms and two sound legs could manage that feat. So surely we are ready to help some others conquer these slighter elevations.

ADA keeps the removal of physical barriers reasonably limited to what is "readily achievable," such as the removal of those here in Tsai Hall. Its forward-looking emphasis is on new construction, and it should at most add one per cent to construction costs. Elevators are always the rising exception. The ADA prudently requires that elevators be built in all new construction over three stories, but otherwise only in multi-level shopping malls and other three-story-and-under professional buildings designated by the Office of the Attorney General.

ADA also ends barriers that people with hearing impairments face in using the telephone through mandating the use of auxiliary aids such as non-voice

terminal devices. But auxiliary aids must not, ADA further states, cause an "undue burden." A restaurant should not, for example, have to provide menus in braille to blind patrons if the waiter is willing to read the menu — especially a French restaurant.

It is in public transportation that ADA requires a giant step toward physical access within the near-term future — that urban bus systems really kneel down, if you will. All newly built buses must be accessible to persons with disabilities. The ADA does not mandate retrofitting buses already in service. But 35 per cent of present urban buses are already accessible, and, for once, the potholes are on our side! Twelve years rattling around our city streets — and especially in Boston — is a long life for any old bus. Attrition and replacement will quickly bring total accessibility to the nation's inner city bus systems. Meanwhile, to make up for any lack of urban transportation for the disabled, the ADA mandates supplementary paratransit services — which 75 per cent of urban transit agencies happen to provide already.

Other public transportation systems — Amtrak, subways, rapid and light rail — are given up to twenty, sometimes thirty years to comply, but we can abide this delay because other ADA provisions largely accommodate the lifestyles of persons with disabilities. We should always be sensitive to the day-to-day living patterns of people with disabilities, and not treat either their rights or their lives in the abstract. What we should notice is that the most important ADA provisions are all of a piece, meeting the actual needs of a populace that lives in a particular, habituated, interactive way.

For example, a major focus of the ADA is against job discrimination. Only, where are the jobs? Increasingly, outside the city. But where have persons with disabilities largely chosen to live? Within the city. Why? Because that is where accessible apartments and condos are available in buildings already provided with elevators — including braille buttons on the operating panels — in neighborhoods where the shops are already retrofitted with ramps. Then how do persons with disabilities get to their place of work, once they gain employment? Only via accessible public urban transport.

Suddenly the right to a seat on the bus — an old, first cause of civil rights protests — is once again vital to the right of employment. Once, the civil rights struggle was about not being forced to sit in the back of the bus on the way to work. Now the struggle is to get on the bus, period, on the way to work. The ADA becomes, in this respect, the enabling act for this new generation of Americans with disabilities, and all those who come after.

We have seen this intertwining of jobs, public accommodation, and accessible transportation work out right in the nation's capital. In Washington, the traffic pattern followed by persons with disabilities happens to run both ways, particularly on the D.C. Metro. Some travel out of the city as private employees to jobs beyond the Beltway; others come into the central nexus of the U.S. Government as federal employees. But please remember, persons with disabilities originally had to bring suit to gain this access to the Metro.

Now they are accepted as travelling companions on the Metro. What has changed — but must change even more — is attitudes. I have seen this hap-

pen as a father emotionally and intimately involved in the life and future of a son who has a disability, and as a staunch advocate of civil rights for the disabled. "Ten years ago, you were a patient," says a friend of my wife, from this new generation. "Now you're a client. Formerly, they healed the body, and just left you. Now there is so much more understanding and long-term help." The ADA enacts certain accommodations for disabled Americans within the daily, social fabric to help ensure that understanding and long-term help. At the same time, it wisely tempers its punitive measures against those who — whether insensitively or inadvertently — traduce the rights of the disabled. It is social legislation to end barriers, not an instrumentality for continuous and acrimonious litigation.

Still, we do need some consciousness-raising about Americans with disabilities, especially since our mistaken attitudes are often so well-meaning and so ingrained. Every Christmas, for example, we all go through one viewing or another of Dickens' beloved *Christmas Carol*. When the tale begins to touch on the fate of Tiny Tim, I often think, frankly, of the need for a rewrite of that classic. In these 1990s, the first thing we should do is stop calling him Tiny. He ought to be Tim, for the rest of his life. And while it is good of Ebenezer Scrooge to take up Tim's case, and try to see that he is cured and throws away his crutch — supposing Tim doesn't, and physically never can? Then what Tim needs is school — as much education as he can absorb — and he should be allowed to keep his crutch beside his desk in the classroom. In fact, if Scrooge really wants to help, he might very well, as a small businessman with less than 15 employees (minus now even Marley), think hard about hiring young Timothy Cratchit after he graduates. And when Tim comes into work — maybe via a kneeling bus, and up a ramp at curbside — Scrooge should see that he can easily access that very high stool where Bob Cratchit once sat before him. That is how we keep that sorry vision of Tim's crutch left to stand forlornly in the fireplace corner from ever happening. What's it doing there, Tim? Bring it to work!

t

Battle Over Discrimination Against Disabled Is Opened

By STEPHEN LABATON

Special to The New York Times

WASHINGTON, Dec. 28 — Opening a campaign against employment discrimination by local governments, the Justice Department today sued the State of Illinois and the City of Aurora, charging that they violated a 1990 Federal law by illegally denying pension benefits to police officers and firefighters with disabilities.

Administration officials said the lawsuit, filed in Federal District Court in Chicago, was the first ever brought by the Justice Department against a municipal or state government under the 1990 law, the Americans With Disabilities Act.

The department's suit says Illinois and Aurora discriminated against the disabled by denying pension coverage to a police officer with diabetes and another having a chronic back condition.

Although pension experts said the Illinois pension rules that prompted the suit were unusual and perhaps even unique, department lawyers said they expected to use the Federal disabilities law with greater frequency in instances when the disabled were treated worse than healthy workers.

Separate Physical Exams

Under Illinois law, pension boards may deny benefits to any firefighter or police officer who does not pass a physical fitness examination separate from the one given to obtain the job and applying different criteria. But Federal officials said that it was illegal for the Aurora Police Pension Fund to use the state law as a basis for telling two police officers who had been suffering from diabetes and chronic back problems even before they had joined the force that they are ineligible for pensions when they retire. The law, which also applies to firefighters, was characterized as being discriminatory because it would deny benefits to the disabled even if they were injured while on duty and force to retire.

The lawsuit was filed after settlement discussions broke down, and today it prompted angry responses from state and city lawyers. They said they agreed with the principle that the pensions should not be denied to disabled municipal employees. But they also insisted that they had no control over local pension boards and that the Justice Department should have only the pension board as a defendant.

"Any pension board that violates the Americans with Disabilities Act should provide the remedy," said Roland W. Burris, the Illinois Attorney General. "Those people are not state employees. State government cannot provide the remedy in cases where local pensions allegedly are at fault."

Calls to the pension trustees were referred to the board's lawyer, Charles Atwell. He did not return telephone calls seeking comment, and his secretary said he was out of the country and could not be reached.

Mayor Invited Inquiry

Michael Weinstein, a lawyer for Aurora, said Mayor David Pierce had urged the pension board to admit the two police officers and had invited the

Justice Department to investigate the case.

"We agree with the view that the Americans With Disabilities Act applies and that being handicapped should not be a basis for withholding pension benefits," Mr. Weinstein said. But only two of the five pension trustees are selected by the Mayor, and therefore Mr. Pierce does not control the fund, Mr. Weinstein said. The other three trustees are selected by current and retired police officers.

Officials at the Justice Department said they were in the process of determining whether other states have similar exclusions and that more lawsuits were likely to be filed. But other experts in employee benefits said that the Illinois restrictions were unusual and that prosecutors would probably not find many comparable restrictions.

"I've never heard of anything like Illinois' restrictions," said Paul Yako-

Washington sends states and cities a warning.

boski, a research associate at the Employee Benefits Research Institute, a nonpartisan organization that examines benefits issues. "I'd be surprised if there were a lot of municipalities out there doing the same thing."

'This Is the Kickoff

Still, James C. Turner, the acting assistant attorney general in charge of the Civil Rights Division, said that six more cases were now under investigation and that more were likely to be filed in the coming months against cities and states that might be discriminating against the handicapped. He said he could not yet identify the subjects of the investigations.

"This is the kickoff of a new and expanding area of law enforcement, one that we take seriously," Mr. Turner said. "I would assume that there are many more cities than just Aurora that are involved in this."

Adopted in 1990, the Americans with Disabilities Act prohibits discrimination against the disabled. The act's enforcement provisions went into effect in July 1992, and although the Equal Employment Opportunity Commission has filed some cases using the act, it is only beginning to be used by prosecutors and civil rights advocates.

Mr. Turner said the diabetic officer was Kevin Holmes, who has been on the Aurora police force since 1985 but has been unable to obtain pension coverage. One of his lawyers, Anne Berleman, said he had filed a lawsuit against the state and city in February that is pending in Federal District Court in Chicago.

Because the officer with the back problems had not filed a lawsuit on his own, Justice Department officials refused to identify him.

PHOTOCOPY
PRESERVATION

BOSTON UNIVERSITY PUBLIC INTEREST LAW JOURNAL

VOLUME 1

WINTER 1991

NUMBER 1

CONTENTS

DEDICATION

- MARY JOE FRUG AND THE PUBLIC INTEREST *Martha Minow* 1

COMMENTARY

- LAWYERS AND THE PUBLIC INTEREST *Archibald Cox* 5

THE AMERICANS WITH DISABILITIES ACT: WHAT IT MEANS

- TO ALL AMERICANS *Dick Thornburgh* 15

- *THE AMERICANS WITH DISABILITIES ACT: TIME FOR
CELEBRATION, OR TIME FOR CAUTION? *Allan H. Macurdy* 21

IN PURSUIT OF THE PUBLIC INTEREST:

- THE MASSACHUSETTS EXPERIENCE *Edward F. Hennessey* 39

CRITICAL LAWYERING: TOWARD A NEW PUBLIC

- INTEREST PRACTICE *Louise G. Trubek* 49

ARTICLES

THE ROLE OF COMPETITION IN MAKING

GRANTS FOR THE PROVISION

- OF LEGAL SERVICES TO THE POOR *Gerry Singsen* 57

IN THE WAKE OF *CARDOZA-FONSECA*:

- DOCTRINAL PUZZLES IN ASYLUM LAW *Mark M. Hager* 119

THE NEW PUBLIC INTEREST LAW: FROM OLD THEORIES

- TO A NEW AGENDA *Lois H. Johnson* 169

POINT/COUNTERPOINT

TOPIC: WHETHER LAW SCHOOLS SHOULD REQUIRE STUDENTS TO
PROVIDE SOME AMOUNT OF FREE LEGAL SERVICES TO INDIGENTS.

IN FAVOR: *PRO BONO* AND LEGAL

- EDUCATION *Michael Caudell-Feagan* 193

OPPOSED: FORCED *PRO BONO* FOR

- LAW STUDENTS IS A BAD IDEA *Alan M. Slobodin* 199

BOOK REVIEW

THE POOR IN COURT, by Susan E. Lawrence

- Reviewed by *Vincent Luizzi* 205

THE AMERICANS WITH DISABILITIES ACT: TIME FOR CELEBRATION, OR TIME FOR CAUTION?

BY
ALLAN H. MACURDY*

INTRODUCTION

When President Bush signed the Americans with Disabilities Act (ADA)¹ on July 26, 1990, he proclaimed a new age: where "[e]very man, woman and child with a disability can now pass through once-closed doors into a bright new era of equality, independence and freedom."² After a long winter of struggle invisible to most citizens, the ADA provided a very public symbol of societal education and political success. We who have disabilities, along with our friends and allies, waged a public campaign for the Act, thrusting our ideas, our passion and our physical selves into the sight and imagination of legislators and the American people. Around the country we watched, counted heads, invoked higher powers and crossed fingers—and we succeeded. With great joy and pride, we saw our brothers and sisters shake hands with the President at the signing ceremony and heard him declare with fervor that the "shameful walls of exclusion are tumbling down."³

Our euphoria was understandable. But the job ahead—drafting and evaluating regulations, implementing enforcement and, hardest of all, changing attitudes—was daunting. Of course we had our doubts. We had met other "new ages" only to watch as our gains were washed away. In the movement we had learned bitter truths: beneficent motives are often the most harmful to rights;

* Staff Attorney, N. Neal Pike Institute for the Handicapped and Lecturer of Law, Boston University School of Law. B.A. Boston University 1983, J.D. Boston University School of Law 1986.

I am heartened to see the debut of the Public Interest Law Journal, and honored to be a participant. This essay is dedicated to my parents, William and Sarah Macurdy, who taught me that my worth was measured by my care for others, not by my physical limitations, and to my siblings James Macurdy and Anne Macurdy Pardee who never accepted that I had limits at all. Limits imposed by power and prejudice were at the heart of Mary Jo Frug's work, and it is to her memory that this essay also is dedicated. Taken from us in violence, she would have us eschew hate; though we are inconsolable, she would have us hope. I would also like to thank Martha Minow, Avi Soifer, Joe Singer, Fred Lawrence, and Harry Beyer, as well as Neal Pike, Cynthia Dunn, and for research assistance, Maria Frucci.

¹ Americans with Disabilities Act of 1990. Pub. L. No. 101-336, 104 Stat. 327 (1990).

² President's Remarks on Signing the Americans with Disabilities Act of 1990, 26 Weekly Comp. Pres. Doc. 1334 (July 26, 1990).

³ *Id.*

statutory protections wither without political mobilization; isolation breeds marginality and powerlessness. But doubts seemed misplaced on that sunny afternoon—indeed, almost ungrateful. Wasn't this our hour of triumph?

I. HISTORIES OF STRUGGLE

The passage of the ADA is due in large part to generations who struggled for human rights, especially in the challenge to racial segregation. With the Supreme Court imprimatur of *Brown v. Board of Education*,⁴ the civil rights movement achieved significant impact upon fundamental values, fashioned enforcement weapons and established, at least rhetorically, the role of antidiscrimination principles in public discourse. Whether prejudices were actually eliminated is less important than these basic facts: much of society will no longer tolerate racist remarks or support for overtly racist ideas; courts and legislatures have produced a myriad of federal and state civil rights decisions and statutes elaborating the demands of equality for people of different races; and the very language of equality now frames debate across the ideological spectrum, where once people talked of inherent differences or paternalistic protections.

A. *The Larger Civil Rights Movement*

The struggle for racial justice in law reaches at least as far back as the Reconstruction Era statutes.⁵ However, it is the legislation produced by "modern" civil rights legislation that lays the groundwork for the ADA. Most significant of these laws is the Civil Rights Act of 1964, outlawing discrimination based on "race, color, religion, or national origin" in places of public accommodations such as hotels, restaurants, and places of entertainment⁶ and by employers with at least fifteen employees.⁷ Also significant was the Fair Housing Act of 1968,⁸ which prohibited discrimination in public housing and was later amended to include disability in 1988.⁹

Challenges to racial oppression inspired and empowered minority activism, a rising feminist resurgence and a fledgling disability rights movement. By challenging discriminatory treatment, advocates set in motion events that would lead to legislative action on sex,¹⁰ age¹¹ and disability bias.¹²

⁴ 347 U.S. 483 (1954).

⁵ 42 U.S.C. §§ 1981, 1983, 1985 (1988).

⁶ 42 U.S.C. § 2000(a) (1988).

⁷ 42 U.S.C. § 2000(e) (1988) (as amended), more commonly known as Title VII.

⁸ 42 U.S.C. §§ 3601-3619 (1988).

⁹ Fair Housing Act Amendments of 1988, Pub. L. No. 100-480, 102 Stat. 1619 (1988), 42 U.S.C. §§ 3601-3619 (1988).

¹⁰ Sex discrimination, in fact, was added to the 1964 Act in a last minute attempt to defeat the legislation. 110 CONG. REC. 2577-2584 (1964). Subsequent cases have construed Title VII to prohibit sexual harassment in employment. See *Mentor Savings Bank v. Vinson*, 477 U.S. 57 (1986). For a fascinating twist on harassment, see Rob-

isolation breeds
d on that sunny
f triumph?

s who struggled
ation. With the
the civil rights
lues, fashioned
role of antidis-
s were actually
society will no
eas; courts and
rights decisions
different races;
the ideological
or paternalistic

ar back as the
uced by "mod-
DA. Most sig-
discrimination
public accom-
ment⁸ and by
the Fair Hous-
using and was

rity activism, a
ment. By chal-
ts that would

n as Title VII.

102 Stat. 1619

nute attempt to
cases have con-
mentor Savings
ment, see Rob-

For race, sex and age issues, the "modern" civil rights movement advocated rights from the start. In the courts and in federal agencies, discrimination was addressed in the language of rights: there were hearings, appeals, burdens of proof, causes of action. Though part of the enforcement structure concerned conditions under which federal financial assistance was available, the breadth of civil rights protection made clear that the duty of nondiscrimination was society's duty.¹³ For disability rights, however, legislative responses came more slowly, and in a different form.

B. Disability Legislation

The early congressional approaches to disability emphasized protection from harm and provision of services, rather than combating societal discrimination. The protectionist perspective, though connected to earlier views of women and blacks, arose naturally in the context of institutional reform. Often horrid conditions, lack of treatment, and burgeoning national interest in patient rights all contributed to reform litigation on behalf of those with developmental disabilities and mental illnesses.¹⁴

The first comprehensive disability legislation Congress enacted was the Rehabilitation Act of 1973.¹⁵ Under this act, federal contractors and recipients of federal funding are barred from discriminating against "otherwise qualified handicapped individuals" and are obligated to provide reasonable accommodations for those "handicapped" individuals.¹⁶ Although the Act was later broadened to cover Federal agencies as well, the Act has been typically employed to reach those institutions, such as state hospitals and rehabilitation commissions, which serve the most basic, subsistence needs of people with

ertson v. Jacksonville Shipyard, Inc., 55 Empl. Prac. Dec. (CCH) para. 40,535 (D. N. Fla. Jan. 18, 1991) (holding that displaying explicit pornographic photographs in the workplace constitutes sexual harassment).

¹¹ Age Discrimination in Employment Act of 1967, 81 Stat. 602, 29 U.S.C. §§ 621-634 (1988).

¹² See text accompanying notes 6-7.

¹³ The 1972 Amendments to Title VII, for example, extended coverage to employers with fifteen or more employees, state and local governments (42 U.S.C. § 2000(e)-2000(f) (1988)), educational institutions (42 U.S.C. § 2000(e)(1) (1988)), and the federal government (42 U.S.C. § 2000(e)(16) (1988)).

¹⁴ See, e.g., D. ROTHMAN & S. ROTHMAN, *THE WILLOWBROOK WARS* (1984). Claims of rights to protection and habilitation under the U.S. Constitution were upheld, at least for involuntarily placed residents, in *Youngberg v. Romeo*, 457 U.S. 307, 328 (1982), but a recent decision on affirmative duties, *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989), casts some doubt over that type of claim. For a discussion of affirmative rights under state constitutions, see Amicus Brief, Mass. Federation for Children with Special Needs, In the Matter of *McKnight*, decided on other grounds 406 Mass. 787, 550 N.E.2d 856 (1990) (on file with the author).

¹⁵ 29 U.S.C. § 794(a) (1988).

¹⁶ *Id.*

disabilities.

By 1975, Congress enacted the Developmental Disabilities Assistance and Bill of Rights Act,¹⁷ which provides federal funds for programs to educate or assist individuals with developmental disabilities and requires the creation of protection and advocacy systems and compliance with federal regulations. The Education for All Handicapped Children Act¹⁸ was also passed in 1975. This act entitled all children to a "free and appropriate public education" in the "least restrictive setting," thereby enshrining mainstreaming¹⁹ in law and public consciousness. As many as four million children who had been receiving no educational benefits would now be able to obtain an education from sometimes resistant school systems.²⁰

Mainstreamed public schools and special education prepared my generation for leadership in the rights movement, and the Rehabilitation Act changed the ways in which colleges and universities conducted business, enabling many individuals with disabilities to continue their education.²¹ The absence of national commitment to access and nondiscrimination, however, often limited the Rehabilitation Act to continued policies of paternal care. While individuals with disabilities may need to be protected and aided, such approaches reemphasize and perpetuate stereotypes of helplessness and incapacity, which in turn limit participation in society. Set in a system of education and human service programs, disability rights seemed only important within the narrow world of government benefits. Nondiscrimination was merely a manner in which services were provided, not a human rights duty. As women and Native Americans had been, "the disabled" would also be guided and helped; each would be protected and treated with solicitude, but not granted access to, or participation in, mainstream society.

II. THE ADA

Although not part of the celebration in 1964, individuals with disabilities now are part of the civil rights agenda, with its substantive rights and enforcement structures. For us, the potential change in our legal position is no less revolutionary than for women and people of color after President Johnson signed the 1964 Act.

¹⁷ 42 U.S.C. § 6001 (1988).

¹⁸ 20 U.S.C. §§ 1400-1485 (1988).

¹⁹ "Mainstreaming" originally referred to the integration of children with disabilities into classes with non-disabled children. The term has become a general one for any integration of individuals with disabilities into the larger society.

²⁰ See 20 U.S.C. § 1400(b) (1988).

²¹ NATIONAL CLEARINGHOUSE ON POSTSECONDARY EDUCATION FOR INDIVIDUALS WITH DISABILITIES. INFORMATION FROM HEATH (Vol. 10, No. 2, Special Insert, June 1991).

A. *Substantive Rights Created by the ADA*

In marked contrast to the warm and friendly atmosphere of "social legislation" embodied in the earlier needs/protection model, the ADA uses the cold adversarial language of suspect class and civil rights remedies. The congressional findings that introduce the ADA recognized the relationship between disability oppression and the lack of enforceable rights. Congress noted that individuals with disabilities faced ignorance and inequality, and "often had no legal recourse to redress . . . discrimination."²² People with disabilities clearly were viewed by Congress as constituting a "discrete and insular minority . . . subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society."²³

Although the ADA speaks of rights enforcement, it utilizes much of the definitional structure of the Rehabilitation Act and the 1988 Amendments to the Fair Housing Act. For purposes of the ADA's prohibition against discrimination, an "individual with a disability" is defined as a person with "a physical or mental impairment that substantially limits one or more of [that person's] major life activities . . . ; a record of such an impairment; or [a person who is] regarded as having such an impairment."²⁴ "Major life activities" can include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."²⁵ An individual's impairment is "substantial" if the individual is "restricted as to the conditions, manner, or duration" of performing an activity when compared to most people.²⁶

By far, the most significant and far-reaching difference between the ADA and the Rehabilitation Act is the increased scope of the prohibition on disability-based discrimination in employment. The Rehabilitation Act applies only to those employers with a federal nexus—federal funds, contracts, agencies. Title I of the ADA, however, prohibits employers with at least twenty-five employees (fifteen after four years), employment agencies, labor organizations and joint management-labor committees from discriminating against a "qualified individual with a disability . . . in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment."²⁷

The ADA defines a "qualified individual with a disability" as a person "with a disability who, with or without reasonable accommodation, can per-

²² ADA § 2(a)(4).

²³ ADA § 2(a)(7). For the first time, Congress has extended civil rights obligations to itself by prohibiting disability-based discrimination by the House, Senate and legislative agencies. *Id.* § 509. It is a good first step, but Congress should practice what it preaches for all other forms of discrimination as well.

²⁴ ADA § 3(2).

²⁵ S. REP. NO. 116, 101st Cong., 1st Sess. 22 (1989). The Report views people with AIDS/HIV as fitting within the defined limits on major life activities.

²⁶ *Id.* at 23.

²⁷ ADA § 102.

s Assistance and
ms to educate or
s the creation of
regulations. The
ed in 1975. This
education" in the
in law and pub-
been receiving no
from sometimes

d my generation
Act changed the
enabling many
The absence of
er, often limited
While individu-
uch approaches
capacity, which
tion and human
thin the narrow
y a manner in
men and Native
ad helped; each
ed access to, or

with disabilities
nts and enforce-
tion is no less
resident Johnson

with disabilities
eral one for any

OR INDIVIDUALS
cial Insert, June

form the essential functions of the employment position" held or desired.²⁸ What it means to be "qualified" has been much debated since passage of the Rehabilitation Act in 1973. That Act prohibits discrimination against an "otherwise qualified handicapped person." The definition of "otherwise qualified" was considered in 1979 by the Supreme Court in *Southeastern Community College v. Davis*.²⁹

Davis, a prospective nursing student who is deaf, was refused admittance to the college's nursing program because, in the view of the college, nurses can never be qualified if they cannot hear.³⁰ While at first glance the policy appears sensible—considering the demands for patient safety—there are roles for nurses where no safety issues arise, but where nursing training would be essential, such as nurse-administrator, non-clinical instructor or medical ethicist. Apart from this unduly narrow conception of nursing roles, a more significant fault of *Davis* is that the way in which Justice Powell supports the college's policy severely cramps the obligations imposed by section 504.

Section 504 on its face requires reasonable accommodation to the needs of an "otherwise qualified" handicapped person, so long as it does not impose an undue burden on the employer/program.³¹ Davis, joined by rights advocates, argued that "otherwise qualified" meant qualified with accommodations to her disability that were reasonable. Justice Powell, however, felt that section 504 did not require the school to change the essential character of its program, and therefore, "otherwise qualified" meant qualified "in spite of" her disability.³² Powell was probably unable to conceive of an accommodation that would be effective in this case, but by grounding the decision in the definition of "other-

²⁸ ADA § 101(8). A late amendment permits employers and employees to use a written description of the employment position — prepared before advertisement or interview — as evidence of the essential functions of the job. *Id.* This amendment creates a presumption of legitimacy for posted requirements, shifting the burden of proving a function is nonessential to the prospective employee. The point of employment provisions is to take apart the job description to expose those requirements not essential to the employment position. The amendment permits an employer — or factfinder — to avoid this disassembly, and the need to substantiate that each requirement is an "essential function". The ADA also bars the use of qualification standards and employment tests that tend to screen out individuals with disabilities. *Id.* § 102(b)(6). Current drug users are not "qualified" under the ADA, per § 104, and the ADA amends Section 504 of the Rehabilitation Act to remove them. As noted throughout the Act, a covered entity is not required to hire/retain an employee who poses a "direct threat". *Id.* § 103(b), defined as a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. *Id.* § 103(d)(3). An employer may remove an employee with a contagious disease from a job involving food handling only if that disease is published on a list of diseases that may be so transmitted, by the Secretary of Health and Human Services. *Id.* § 103(d)(1)-103(d)(3).

²⁹ 442 U.S. 397, 406-7 (1979).

³⁰ *Id.* at 401.

³¹ 29 U.S.C. § 794 (1988).

³² Davis, 442 U.S. at 406.

l or desired.²⁸
 passage of the
 against an "oth-
 wise qualified"
 in Community
 admittance to
 ge, nurses can
 ce the policy
 here are roles
 ing would be
 r or medical
 roles, a more
 l supports the
 ion 504.

o the needs of
 not impose an
 nts advocates,
 dations to her
 t section 504
 program, and
 r disability.³²
 hat would be
 on of "other-

oyees to use a
 ertisement or
 nendment cre-
 urden of prov-
 of employment
 ts not essential
 r factfinder —
 irement is an
 is and employ-
 b)(6). Current
 amends Sec-
 ut the Act, a
 direct threat",
 rs that cannot
 mployer may
 handling only
 nitted, by the

wise qualified," rather than in the nature of what accommodations were reasonable, he created a principle that threatened to undermine the obligation of accommodation—and therefore the obligation of non-discrimination—through a mechanistic formal equality. In effect, the essential functions of a job could expand to include most "major life activities,"³³ since no accommodations are needed by those who are qualified "in spite of" disabilities. To be called "equal" in a world of prejudice and physical barriers is substantively meaningless.

The ADA is structured in much the same way as the Rehabilitation Act, requiring reasonable accommodations which may include making existing facilities accessible, restructuring jobs, modifying work schedules, reassignment to an open position, or providing adaptive equipment and interpreters.³⁴ An employer need not accommodate where such accommodations impose "undue hardship."³⁵ Advocates can anticipate encountering the same types of conceptual and evidentiary problems in utilizing the ADA as had been at issue in much of the litigation over the Rehabilitation Act, particularly in employment.³⁶

Title II of the ADA prohibits disability-based discrimination in the provision of public services. The definition of "public entities" has been expanded to include not only entities receiving federal funds, but also state and local governments,³⁷ government departments and instrumentalities, public transit and commuter rail authorities and Amtrak.³⁸ In public transportation, the Act requires that new fixed-route buses be accessible unless no such buses are available, all new commuter rail cars be accessible, and that existing vehicles and stations be retro-fitted to make them accessible.³⁹ In addition, communications systems for emergency services such as police, fire or ambulance must be usable by individuals with hearing impairments through "telecommunications devices for the deaf" (TDDs).⁴⁰

The ADA bars discrimination in public accommodations through Title III.

³³ See note 25 *supra*, and accompanying text.

³⁴ ADA § 101(9).

³⁵ ADA §§ 102(b)(5)(A), 101(10). Factors include nature and cost of the accommodation, overall size and resources of the business and the type of business.

³⁶ Title I is effective as to employers with twenty five or more employees on July 26, 1992, and those with fifteen or more employees after July 26, 1994. ADA §§ 101(5)(a), 108.

³⁷ The ADA specifically removes the states' eleventh amendment immunities. See the discussion of ADA enforcement, notes 54-56 *infra*, and accompanying text.

³⁸ ADA § 201(1).

³⁹ ADA §§ 241-246. Paratransit services must be provided to those unable to ride buses/subways unless it can be demonstrated to the Secretary of Transportation that such services pose an "undue financial burden." ADA § 223.

⁴⁰ ADA § 401. See also H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 84-85 (1990); CONF. REP. NO. 596, 101st Cong., 2d Sess. 67-68 (1990). This provision eliminated the need for the Emergency Phone System Equal Access Act, H.R. 1690, 101st Cong., 1st Sess. (1989).

The ADA applies to individuals who own, lease, or operate privately owned places of public accommodation, including hotels, medical or legal offices, restaurants, theaters, retail establishments, places of public recreation and social service centers.⁴¹ The ADA requires reasonable modification of rules and policies, as well as the provision of auxiliary aids or services, unless the provision or modification would fundamentally alter the nature of the program or impose an undue burden.⁴² Furthermore, new construction for first occupancy and major renovations must now be accessible, unless "structurally impracticable."⁴³ Existing facilities must be made accessible if "readily achievable," that is "easily accomplishable and able to be carried out without much difficulty or expense."⁴⁴

Among Title III's most important contributions is the requirement that public transportation services provided by private entities be accessible. Title III accomplishes this gain by mandating that all vehicles, except cars, purchased thirty days after July 26, 1991, be accessible.⁴⁵ For the first time, federal law protects rights of free association of citizens with and without disabilities by banning discrimination against individuals because of their associations with disabled persons.⁴⁶ In short, Title III requires that the same opportunities to participate are provided to individuals with disabilities as are provided to others, and declares that relationships between us, those with disabilities and without, give value to both sides.

Relationships require communication, and Title IV facilitates such communication by requiring that telecommunications systems be accessible to individuals with hearing or speech impairments.⁴⁷ All local and long distance tele-

⁴¹ ADA § 301(7). Religious organizations, clubs, etc. that are exempt under Title II of the Civil Rights Act of 1964 are exempt under this title. ADA § 307. ADA § 307 Regulations will be developed by the Departments of Justice and Transportation, and access standards by the Architectural and Transportation Barriers Compliance Board. ADA § 306. Title III is effective after February 26, 1992 except no actions will be taken against businesses with fewer than twenty five employees and gross annual receipts of under \$1,000,000 before July 26, 1992, and those with fewer than ten employees and gross annual receipts of under \$500,000 before February 26, 1993. ADA § 310.

⁴² ADA § 302(ii)(iii). In cases involving exams or courses relating to applications, licensing, or certification for education, professional or trade purposes, a place or manner accessible to persons with disabilities must be offered. *Id.* at § 309.

⁴³ ADA § 303(a)(1).

⁴⁴ ADA § 301(9). Factors considered are the same as for undue hardship.

⁴⁵ ADA § 304. Title III does not apply to air carriers which are covered by the Air Access Carriers Act, 49 U.S.C. § 1374(c) (1986). Terminals, bus stations, and other centers for public transportation are covered by Title III.

⁴⁶ ADA § 302(b)(1)(E). This provision will be of great utility, particularly in those situations where fear, revulsion and overt bigotry drive the exclusion, such as discrimination against associates of individuals known or perceived to be HIV positive. Title III does contain a "direct threat" exception. *Id.* at § 302(b)(3).

⁴⁷ ADA § 401.

phone companies must provide intrastate and interstate communication relay services by July 26, 1993, at no greater charge than a direct-dial call with the same points of origin and termination.⁴⁸ Title IV amends the Communications Act of 1934⁴⁹ to extend the "universal service" obligation of the Federal Communications Commission to individuals with disabilities.⁵⁰ In addition, Title II requires all public service announcements funded or produced by the federal government to be close-captioned.⁵¹

B. *Enforcement Provisions of the ADA*

The substantive rights created by the ADA are by no means self-effectuating, thus it is in the ADA's enforcement provisions that we place our hopes and our anxieties. The Attorney General echoes earlier protectionist impulses when he notes that:

The ADA enacts certain accommodations for disabled Americans within the daily, social fabric to help ensure . . . understanding and long-term help. At the same time, it wisely tempers its punitive measures against those who—whether insensitively or inadvertently—traverse the rights of the disabled. It is social legislation to end barriers, not an instrumentality for continuous and acrimonious litigation.⁵²

Civil rights advocates have much bitter experience with the significance of calls to lay down the weapons of discord and to "reason together." President Bush's stated reason for veto of the 1990 Civil Rights Act—"[civil rights laws] should not be turned into some lawyer's bonanza encouraging litigation at the expense of conciliation, mediation or settlement"⁵³—is only the latest example of this phenomenon and complements the Administration's formalistic view that the goals of the rights movement have been accomplished. Unlike the Bush Administration, we can no longer place our trust in social progress and edification. Prejudice is by no means dead, and after the celebrations have ended we must get back to the nuts and bolts, micro-level task of protecting rights.

It must be said with great clarity and fervor that the ADA is a vehicle for the enforcement of disability-based violations of the Equal Protection clause of the fourteenth amendment.⁵⁴ Justice Powell's confusion over the Rehabilitation Act's foundation in the fourteenth amendment versus the Spending

⁴⁸ ADA § 401(d). States may also operate and enforce their own relay system so long as they meet all minimum FCC guidelines. 47 U.S.C. § 225. Title IV requires use of qualified operators trained in American Sign Language, deaf culture, typing, grammar and spelling. S. REP. NO. 116 at 81.

⁴⁹ 47 U.S.C. § 225.

⁵⁰ 47 U.S.C. § 225(b)(1). ADA § 401(d).

⁵¹ ADA § 402.

⁵² Thornburgh, *supra*, p. 20.

⁵³ *Current Developments*, BNA DAILY LABOR REPORT, May 18, 1990, at A-7.

⁵⁴ U.S. CONST. amend. XIV, §§ 1, 5.

Clause, in *Atascadero State Hospital v. Scanlon*,⁵⁵ left that statute unable to clear the states' eleventh amendment immunities.⁵⁶ The ADA amends federal statutes that for the most part do not face such immunity, and Title V specifically removes the states' eleventh amendment immunities.

Rights in employment issues under Title I of the ADA are enforced through the procedures and remedies of Title VII of the 1964 Civil Rights Act. As in other Title VII cases, plaintiffs are entitled to bring suit in state or federal court to gain injunctive relief, hiring or reinstatement, and limited back pay.⁵⁷ Initial relief may be had through the Equal Employment Opportunity Commission.⁵⁸ In the provision of public services, Title II specifies that enforcement can be attained through the remedies and procedures of Section 505 of the Rehabilitation Act, which includes suit in state or federal court.⁵⁹

Discrimination in public accommodations is dealt with through the remedies and procedures of Title II of the 1964 Civil Rights Act.⁶⁰ Thus, a disabled person who is discriminated against can bring an action for injunctive relief for violations of the public accommodations provisions of the ADA.⁶¹ In addi-

⁵⁵ 473 U.S. 334 (1985). For one lawyer's discussion of the incoherence of the Supreme Court's Tenth and Eleventh Amendment doctrine, see Macurdy, *Sources of Congressional Power to Affect the States* (1986) (unpublished manuscript on file with the author). See also, J. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES* (1987); Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L.J. 363 (1985); Field, *The Eleventh Amendment and Sovereign Immunity Doctrines*, 126 U. PA. L. REV. 515 (1977) (Part I) and 126 U. PA. L. REV. 1203 (1978) (Part II); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); and Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976).

⁵⁶ U.S. CONST. amend. XI reads:

"The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Since *Hans v. Louisiana*, 134 U.S. 1 (1890), the Eleventh Amendment has been interpreted to prohibit even "same-state" suits in federal court, i.e. not only are suits brought by citizens of Massachusetts against the state of New Hampshire prohibited, but suits by citizens of Massachusetts against the Commonwealth of Massachusetts are also not permitted. Civil rights laws, particularly where Congress explicitly overrides these immunities, usually are not limited by state immunity.

⁵⁷ ADA § 107.

⁵⁸ ADA § 106. See 56 Fed. Reg. 35,726 (1991) for the E.E.O.C. regulations.

⁵⁹ ADA § 203.

⁶⁰ ADA § 308(A)(1). See 42 U.S.C. § 2000a-3(a).

⁶¹ 42 U.S.C. § 2000a-3(a). Damages generally are not available in these cases. See, e.g., *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). Attorneys' fees are available to prevailing plaintiff. See, e.g., *Anderson v. Pass Christian Isles Golf Club, Inc.*, 488 F.2d 855 (5th Cir. 1974).

statute unable to
amends federal
Title V specifi-

forced through
rights Act. As in
state or federal
ted back pay.⁵⁷
portunity Com-
s that enforce-
Section 505 of
court.⁵⁹

h the remedies
us, a disabled
injunctive relief
DA.⁶¹ In addi-

herence of the
urdy, Sources of
ript on file with
STATES (1987);
vn, *State Sover-*
ed the Death of
v. Scanlon, 74
Immunity Doc-
v. 1203 (1978)
mmunity: A Rein-
mental Immuni-
ties in Controver-

extend to any
United States
n state."

ment has been
t only are suits
hire prohibited,
ssachusetts are
licitly overrides

regulations.

ese cases. See,
Attorneys' fees
tian Isles Golf

tion, the Attorney General may bring a civil action for civil penalties and damages where there has been a "pattern or practice of discrimination"⁶² or where the discrimination raises an issue of "public importance."⁶³ Telecommunications provisions are enforced by the FCC through the remedies, such as injunctions and civil damages, provided in the Communications Act.⁶⁴ "Willful" violations are criminal offenses, punishable by fines of up to ten thousand dollars and imprisonment.⁶⁵ Finally, Title V prohibits intimidation or retaliation for enforcement of rights,⁶⁶ and gives attorneys' fees to prevailing parties in administrative and judicial forums.⁶⁷

C. Further Implications of the ADA

The substantive and procedural rights outlined in the ADA have the potential to make great changes in our lives as individuals with disabilities, but its implications will affect some of our most troublesome societal questions. The controversies surrounding the AIDS epidemic, for example, reflect more than fear of contagion, but are symptomatic of this society's rejection of difference. Prejudice against individuals who are HIV positive is the starkest form of disability-based discrimination, existing wholly apart from any accommodations, and the ADA's provisions regarding public accommodations and services will play a growing role in defeating such discrimination.

Positive human developments engender fear and prejudice as well. Technological change and expanding medical expertise have enabled individuals with serious illnesses or injuries to live long, productive lives. While this means disability bias needs to be faced head on—as the ADA begins to do—there are more insidious developments that strike at the heart of human value and individual autonomy. Recent efforts to map the human genome i.e., to discover the functions of each human gene, have raised thorny ethical problems. These problems implicate privacy rights, threaten to vastly alter the balance of state-citizen power, and create the very real possibility of a quantum increase in the number of behaviors that should qualify as disability-based discrimination. For example, in the name of worker protection, often translated as minimizing tort exposure, companies are already testing for genetic disease markers that signal propensities for diseases common in specific industries. Businesses want to be able to refuse to hire in certain departments or to transfer workers to "safer" areas. All of these actions make distinctions between "qualified individual[s]" on the basis of a physiologic condition i.e., the presence, absence or state of specific genetic material, and can therefore be considered discriminatory under

⁶² ADA § 308(b)(1)(B).

⁶³ *Id.*

⁶⁴ ADA § 401(e). Injunctive relief is available through 47 U.S.C. § 205(a), and damages through 47 U.S.C. § 209.

⁶⁵ Criminal penalties may be found at 47 U.S.C. § 501.

⁶⁶ ADA § 503.

⁶⁷ ADA § 505.

the ADA.⁶⁸

Genetic testing is also used by insurance carriers to screen out individuals who have genetic markers consistent with a propensity to develop certain diseases, or even to pass on congenital conditions to potential offspring.⁶⁹ Though such screening is a device to weed out individuals with actual or perceived disabilities,⁷⁰ the ADA explicitly exempts insurance underwriting from the requirement of nondiscrimination.⁷¹ Insurers remain free to refuse coverage to anyone on the basis of "preexisting condition." The exemption of insurance companies from ADA coverage has devastating consequences to the disabled and for the overall effectiveness of the ADA.

For those of us with illnesses and impairments which require equipment, supplies, and daily medical support for substantial periods,⁷² the insurance exemption leaves intact the awful dilemma: get a job and lose Medicaid or "dependents" private insurance (coverage for disabled dependents of an eligible employee) in a system where no private insurer will provide new coverage, and expenses are impossible to manage on a salary below a corporate CEO's; or remain unemployed and keep Medicaid/"dependents" coverage.

As the Attorney General pointed out, 58% of men and 80% of women with disabilities are unemployed, and so long as they remain without work "we cannot break the bind of national expenditure for dependence: at least \$169 billion annually—some even estimate as high as \$300 billion—approaching nearly four per cent of GNP."⁷³ The main reason for unemployment among persons with disabilities, and for large federal expenditures, is the inability of

⁶⁸ While not specifically addressing disability, the Supreme Court, in *International Union v. Johnson Controls*, 111 S. Ct. 1196 (1991) recently decided a sex discrimination case illustrative of the dangers to rights posed by the protective role of medical prediction. The plaintiff brought a Title VII action claiming that a company policy barring women of child-bearing age from certain jobs in areas considered hazardous to female reproductive capacities or fetuses discriminates against women. Justice Blackmun, joined by Justices Stevens, Marshall, Souter and O'Connor reversed the Seventh Circuit which held that the company's fetal protection policy was justified as a "business necessity." 680 F. Supp. 309 (E.D. Wisc. 1988), *aff'd en banc*, 886 F.2d 871 (7th Cir. 1989). Regardless of the benevolent purpose of "fetal protection", the company's policy constitutes facial sex discrimination. In essence, Justice Blackmun rejected a return to the protective view of the "weaker sex," and the view that all group-based distinctions are valid so long as motives are pure.

⁶⁹ 39 EMORY L.J. 619 (1990) (issue devoted to genome issues).

⁷⁰ See, e.g., ADA §§ 102(b)(6), 302(b)(1).

⁷¹ ADA §§ 501(c)(1) (health insurance), 501(c)(2) (benefit plans based on state law), and 501(c)(3) (benefit plans not based on state law).

⁷² To provide a personal example, I am a wheelchair user who requires the use of portable ventilators, suction machines and a myriad of medical supplies. As this condition involves life-threatening respiratory deficits, 24 hour coverage is necessary, at tremendous cost. Although I am able to work a busy modified academic schedule, I must do so under severe income restraints in order to preserve that coverage.

⁷³ Thornburgh, *supra*, at 17-18.

out individuals
develop certain dis-
abling.⁶⁹ Though
actual or perceived
limiting from the
use coverage to
on of insurance
to the disabled

quire equipment,
the insurance
se Medicaid or
nts of an eligi-
new coverage,
porate CEO's;
age.

of women with
work "we can-
least \$169 bil-
—approaching
oyment among
the inability of

in International
sex discrimina-
role of medical
company policy
ed hazardous to
Justice Black-
rsed the Seventh
ified as a "busi-
6 F.2d 871 (7th
the company's
mun rejected a
all group-based

based on state

quires the use of
s. As this condi-
necessary, at tre-
chedule, I must
e.

these persons to obtain medical insurance. Until this society is ready to reorder its priorities and provide some form of universal health coverage, all invocations of a "new day" in this age of formalist resurgence will remain, for many of us, empty rhetoric.

More fundamentally, there are limits to the capability of any legal device to bring about changes in values, particularly in combating prejudice.⁷⁴ Our society is constructed, at least in part, around a reified norm of the ideally able-bodied or -minded individual, a binary simplification of reality that would relegate "them" (the "disabled") to a subordinate status, while obscuring "our" deviations from the norm itself (because no one is ever perfectly able at all times for all things). These differences often seem obvious to most observers and are therefore harder to deconstruct and discredit. Because we can "see" that Bob walks and Alice doesn't, demonstrating that characteristics attached to "not walking" are constructed by society, rather than physiology, runs counter to what we believe our eyes perceive.

In this respect, disability as a social phenomenon closely resembles distinctions associated with gender; that is, there is a core characteristic—Alice can't walk or Bob can't bear children—upon which stereotypes are grafted. Prejudice, however, is not an optic function, but occurs in the mind, associating images with attitudes in often ideological ways. Not walking is only different i.e., aberrant of the norm of ableness, because the society's ideology designates it as such.⁷⁵

Adherence to the perceived norm perpetuates this ideological model of human worth and subordination on the basis of disability—a model so deeply ingrained, so much a part of our attitudinal landscape, that it validates disability hierarchy as natural and neutral, often leading individuals with disabilities to participate in their own subordination, by equating their value with their nearness to the mythical norm.⁷⁶ To achieve a society where people are not defined and subordinated by their disabilities, where participation in culture,

⁷⁴ Clearly, disability-based prejudice must now be fought on an attitudinal battlefield mined with the boobytraps of ideology. As our visible successes mount we run the risk of society's loss of patience, and subsequent backlash, developments now thwarting progress on racial justice. Moreover, we face what Martha Minow describes as the "dilemma of difference": the more we intervene to remedy differences, the more profound those differences seem to become between us. See MINOW, MAKING ALL THE DIFFERENCE (1990).

⁷⁵ See, e.g., Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

⁷⁶ As Charles Lawrence has noted, "... law transmits ideological imagery that helps to preserve and legitimize existing power relationships. Those in power use the legal system to achieve results in individual legal disputes that maintain the status quo. What is less obvious, but perhaps more important, is the use of legal ideas to create and transmit utopian images that serve to justify that status quo. By representing reality in ideal terms, the law validates the socioeconomic setting in which legal decisions are made. The ideological imagery masks or denies the reality of oppressive or alienating social and economic relations and persuades us that they are fair." *Id.* at 325 n.30.

markets and public life is assured, ideologies of non-inclusion and value hierarchy must be dismantled.

III. THE FUTURE OF CIVIL RIGHTS AND THE ADA

Thirty years of civil rights enforcement have not yielded the results envisioned by the movement; progress on racism and sexism has bogged down. By many standards—income, health, shelter, education—the disparities between whites and blacks, men and women are widening.⁷⁷ Our streets and college campuses seethe with racial tension and sexual violence. Hate crimes against women, racial and ethnic minorities and homosexuals are again on the rise. Legislation seems unavailing. Discrimination and inequality seem unsolvable, and many citizens are immune to calls for justice and equality. Society has lost faith in its ability to effectuate its egalitarian goals.

The civil rights community has also witnessed the erosion of judicial and executive leadership on equality and human value. The Supreme Court has issued tortured interpretations of civil rights statutes over long-settled issues, often in obvious conflict with congressional intent.⁷⁸ Decisions of the last several years have endangered affirmative action and other remedies for discrimination.⁷⁹ Moreover, administrations have become agents of reaction, opposing established affirmative action plans,⁸⁰ arguing for restrictive interpretations of civil rights laws, and seeking appointments to key posts and judgeships for those hostile to civil rights enforcement.⁸¹ Public officials serve as lightning rods for backlash while proclaiming full support for equality. We are all equal now, they say, so no need exists for "special legislation."⁸²

⁷⁷ See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED* (1988); Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

⁷⁸ See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (holding that § 1981 does not prohibit racial harassment after contract formation).

⁷⁹ See *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) (holding that minority set asides for city contracts are discriminatory); *Martin v. Wilkes*, 490 U.S. 755 (1989) (permitting collateral attack on affirmative action decrees); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989) (shifting the burden of proof to the plaintiff in Title VII cases).

⁸⁰ See, e.g., *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

⁸¹ The Reagan Administration appointment of William Bradford Reynolds as civil rights chief of the Department of Justice, and the failed confirmation of Robert Bork as Associate Justice of the Supreme Court are major examples.

⁸² Nowhere is this attitude more apparent than in the December 12, 1990 pronouncement from the Department of Education that minority scholarships are probably unconstitutional. See Marriot, *Colleges Basing Aid on Race Risk Loss of Federal Funds*, N.Y. Times, Dec. 12, 1990, at A1, col. 1. After significant media attention, the President ordered a review, then appeared to disavow the Department's position, then only backed it partially. See Dowd, *President Orders Aide to Review New Minority Scholarship Policy*, N.Y. Times, Dec. 15, 1990, at A1, col. 5; Rosenthal, *White House Retreats on Ruling that Curbs Minority Scholarships*, N.Y. Times, Dec. 18, 1990, at

nd value hierar-

DA

he results envi-
gged down. By
arities between
ets and college
crimes against
ain on the rise.
em unsolvable,
ty. Society has

of judicial and
me Court has
g-settled issues,
of the last sev-
es for discrimi-
tion, opposing
erpretations of
judgeships for
e as lightning
e are all equal

renshaw, *Race*,
Antidiscrimination

9) (holding that

ng that minority
U.S. 755 (1989)
e Packing Co. v.
ntiff in Title VII

561 (1984).
eynolds as civil
Robert Bork as

12, 1990 prop-
ps are probably
loss of Federal
ia attention, the
s position, then
New Minority
l, White House
ec. 18, 1990, at

Three months after signing the ADA, President Bush vetoed the Civil Rights Act of 1990⁸³ which would have restored Title VII and Section 1981 to their condition prior to the bloodletting of the 1989 term when the Court eliminated punitive damages,⁸⁴ shifted the burden of proof to benefit employers (Title VII),⁸⁵ and restricted racial harassment claims to harassment occurring prior to contract formation (Section 1981).⁸⁶ Attorney General Thornburgh describes the Act as "embroiled in good faith conflict over what many regard as 'legal technicalities.'" Regrettably, these "technicalities" cut back on the effectiveness of both statutes.⁸⁷

More fundamentally, what does President Bush's veto of the 1990 Civil Rights Act indicate about the Administration's commitment to the principles of antidiscrimination and the specific objectives of the ADA? At its most concrete, the ADA addresses employment discrimination by extending the substantive rights and remedies of Title VII of the 1964 Civil Rights Act to claims of disability-based discrimination.⁸⁸ By vetoing the 1990 Civil Rights Act, the Administration endorsed Supreme Court decisions that shifted the burden of proof to the victim and eliminated punitive damages in Title VII cases.⁸⁹ Thus, both the Supreme Court and the Administration have made Title VII *disability* cases harder to prove, and have diluted the deterrent value of the statute.

Likewise, individuals with disabilities have been excluded from economic participation in this society, and are at the bottom of the economic ladder.

A1, col. 1; and DeWitt, *U.S. Eases College Aid Stand, But Not All the Way*, N.Y. Times, Dec. 19, 1990, at A1, col. 1. See also DePalma, *Educators Report Great Confusion on Minority Aid*, N.Y. Times, Dec. 20, 1990, at A1, col. 1. We are confused too.

⁸³ Congress fell one vote short of an override on October 24, 1990. See 136 CONG. REC. S16,562 (daily ed. Oct. 24, 1990).

⁸⁴ *Jett v. Dallas Independent School Dist.*, 491 U.S. 701 (1989).

⁸⁵ *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁸⁶ *Patterson*, 491 U.S. at 176.

⁸⁷ "The loss of surface cordiality on civil rights can be seen as more than 'Thornburghian' sibling rivalry, but as backlash eroding the foundation of rights enforcement from within the shining edifice of equality. Disputes over quota, disparate treatment versus disparate impact, harassment and burdens of proof do not simply reflect legal technicalities. Each is a symbol of reaction . . . The 'bogeyman' of quotas, invoked to appeal to emotional, latent majority fears [marks] a return to formal equality, a denial of the exclusion of entire races, women and individuals with disabilities. Burdens of proof are . . . seemingly technical rules that reflect commitment to social justice. A burden of proof is an allocation of power. In determining who bears the burden of presenting evidence, and persuasion, a society makes clear its priorities and the level of importance of human rights values." Remarks by Allan Macurdy, Press Conference in Support of the Civil Rights Act of 1990 (State House Steps, Boston) (Sept. 26, 1990).

⁸⁸ See notes 57-58 and accompanying text.

⁸⁹ See notes 83-85 and accompanying text.

Because the Supreme Court and the Administration, through its veto, refuse to recognize that prejudice has excluded minorities as a class⁹⁰ thus necessitating "class" remedies, disabled persons cannot overcome their subordination. Both the Court and the Administration are rooted in an understanding of discrimination as a product of intentional acts by "bad" individuals, rather than as majority advantage created through minority oppression, which has become so institutionalized as to be invisible. By emphasizing motive-based discrimination and requiring animus as an element of discrimination claims,⁹¹ the Administration sets the stage for failure and our bitter disappointment, because only rarely is disability-based discrimination intentional and the result of bad motive. Defendants in these cases are, as the Attorney General acknowledges, "those who—whether insensitively or inadvertently—traverse the rights of the disabled."⁹²

In vetoing the Civil Rights Act, the Administration denies the reality of group oppression in the lives of people with disabilities and seeks to recast the debate as a binary choice between discriminatory treatment of an individual and disparate impact upon a group of individuals with a common trait.⁹³ As the Attorney General put it:

I don't shun these legal arguments. I would be happy to discourse on 'disparate treatment' of an individual, which we all agree the law should fully remedy, as opposed to 'disparate impact' upon a group, which, by all past legal principle, the plaintiff must first prove to the court before any remedy is ordered.⁹⁴

This resistance to the group nature of prejudice and group-related remedies is not, however, a narrow issue of affirmative action, but marks a return to formal equality.

Like Justice Powell in *Bakke*⁹⁵ and Justice Bradley in the *Civil Rights*

⁹⁰ See generally, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (invalidating minority set-asides in city contracts); and *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989) (nearly eliminating disparate impact theory first expressed in *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)). The Court refused to recognize that disparate treatment is also a function of disparate impact. The Court also made collateral attacks on affirmative action decrees easier to accomplish in claims of reverse discrimination. *Martin v. Wilkes*, 490 U.S. 755 (1989).

⁹¹ See, e.g., *Wards Cove*, 490 U.S. 642 (1989); *Memphis v. Greene*, 451 U.S. 100 (1981); *Washington v. Davis*, 426 U.S. 229 (1976).

⁹² Thornburgh, *supra*, at 20.

⁹³ Like most polar alternatives, one choice is clearly privileged—here, the individual victim model. See generally Dalton, *Deconstructing Contract Doctrine*, 94 YALE L.J. 997 (1985); and KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1989). See also Freeman, *Antidiscrimination Law: The View From 1989*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 121, 125 (D. Kairys ed. 1990).

⁹⁴ Thornburgh, *supra*, at 15.

⁹⁵ *Regents of the University of California v. Bakke*, 438 U.S. 265, 300 (1978).

Cases,⁹⁶ the Bush Administration, like its predecessor, believes that the goals of the civil rights movement have been achieved, that it is time minorities learned to compete without special "help." This perspective was revealingly illustrated by the following question⁹⁷ asked of Mr. Thornburgh following his address, and his reply:

Question: The ADA states that people with disabilities are a discrete and insular minority subjected to a history of purposeful unequal treatment and relegated to a position of political powerlessness. By making this statement did Congress overturn the Supreme Court's ruling in *City of Cleburne v. Cleburne Independent Living Center*?⁹⁸

Answer: No. I think it's hard to envision that the Americans with Disabilities Act would have been on the books if the community of persons with disabilities was in a position of political powerlessness. I never saw a more effective effort to lobby and to secure passage of this legislation in my twenty years in public life.

That is, passage of this statute demonstrates that there has been no history of oppression, that there is no discrimination, and that there exists no continuing inequality.

If individuals with disabilities are not a "suspect class", disability-based distinctions challenged on equal protection grounds need *not* be subjected to strict scrutiny. Instead, the government must merely establish a rational relation between the law and a legitimate state purpose. Without strict scrutiny, the least important job requirement may legally exclude an individual from employment because it can be justified as a rational means of carrying out a legitimate business end. The exclusion would be valid even if a reasonable accommodation could overcome any inability to meet that job requirement, because the employer can almost always present a rational purpose for a requirement and therefore never reaches the accommodations issue. Like Justice Powell's test in *Davis*, mere rationality defines "qualified" however the employer wishes and vitiates the need for reasonable accommodations. The

⁹⁶ The Civil Rights Cases, 109 U.S. 3, 25 (1883).

⁹⁷ This question was posed by Linda Long, Esq., then with Greater Boston Legal Services, now with the Disability Law Center in Boston. The directness of the question reflects my friend's perspective as a disability rights lawyer in the trenches, as well as her tenacity and vision.

⁹⁸ 473 U.S. 432 (1985). Plaintiffs in *Cleburne* challenged a city zoning ordinance applied so as to exclude community residences for individuals with mental retardation. Justice White for the majority found that 'the mentally retarded' were not a suspect class for purposes of equal protection, necessitating application of heightened scrutiny, but overturned the ordinance, as applied, under the lower rationality standard. For a thoughtful discussion of *Cleburne* and what it reveals about difference ideology, see Minow, *When Difference Has its Home: Group Homes for the Mentally Retarded, Equal Protection, and Legal Treatment of Difference*, 22 HARV. CR.-CL. L. REV. 111 (1987).

Bush Administration already regards quotas as impermissible acts of discrimination on the basis of race or gender — are ramps and TDDs next?

So the Administration continues to undermine group remedies, but it can't have it both ways. It must not be permitted to take credit for the ADA and claim to be a "friend of civil rights," while taking down the structural supports of equality and human rights. In discussing "The Americans with Disabilities Act and What it Means to All Americans," the Attorney General emphasized the growth of freedom through civil rights achievements:

[I] definitely mean it when I say that *rights* are what have truly doubled.

Because each time civil rights are enlarged in this country, they extend over the whole of our society. *All* Americans, not just minorities, are involved in every new extension of such rights.

[The Department of Justice] accept[s] this responsibility. . . as one more opportunity to further guarantee equal protection under the law for every citizen of this nation. And in the end, I do believe that is what makes us all the real beneficiaries of any progress on civil rights.⁹⁹

He is exactly right, but this year his statement is double-edged. As individuals with disabilities, our success in defeating discrimination and its legacy is dependent upon our ability to maintain political influence as well as vigorous legal advocacy. We have influence only through our alliance with other civil rights constituencies; therefore, we may not sit quietly, basking in the ADA's new glow, while others lose protections. Not only are we affected directly now that these laws protect us as well, but, as importantly, we must recognize that we lose freedom when others are oppressed.

This year we have finally accomplished passage of the ADA, which extends mainstream civil rights protections to individuals with disabilities, in part through the enforcement mechanisms of Title VII. The ADA at last enables us to embrace our sisters and brothers in the struggle for civil rights for all peoples, but against a backdrop of weakening judicial and executive commitment to the core values of equality and human rights. Have we gained a seat on the bus, only to have the route discontinued?

⁹⁹ Thornburgh, *supra*, at 16.

rec'd 10-21

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN REPLY REFER TO:

Mr. Stanley Herr
Deputy Policy Fellow
Office of Domestic Policy Council
224 Old Executive Office Building
Washington, D.C. 20510

Dear Mr. Herr:

This letter is in response to your recent inquiry regarding an overview of the Commission's implementation of the Americans with Disabilities Act of 1990 (ADA).

During the past three years, the Commission's key ADA role has been the implementation of Title IV, "Telecommunications Relay Services" (TRS). TRS facilitates the ability of people with hearing and speech disabilities to use the telephone. TRS facilities contain specialized equipment and are staffed by trained communications assistants who relay conversation between people who use text telephones and people who use voice telephones. The full implementation of TRS across America marks a significant improvement to our nation's telecommunications infrastructure.

The Commission's rules set forth minimum operational, technical and functional standards for TRS. Examples of operational standards include the requirement that communications assistants (CAs) must be trained to meet the specialized needs of individuals with hearing and speech disabilities, and shall have sufficient skills in typing, grammar, spelling, and interpretation of typewritten American Sign Language. With regard to confidentiality, consistent with the obligations of common carrier operators, CAs are prohibited from disclosing the content of any relayed conversation regardless of content and from keeping records of the content of any conversation beyond the duration of the call. CAs are also prohibited from intentionally altering a relayed conversation. Further, CAs are prohibited from refusing single or sequential calls or limiting the length of calls, and TRS generally must be capable of handling any type of call. Technical minimum standards include the requirement that TRS must be capable of communicating in ASCII and Baudot (the two baud rates currently available to text telephone users), TRS must provide users with equal access to the long distance carrier of choice, and TRS must operate every day, 24 hours a day. Functional minimum standards include requirements that telephone companies assure that callers in their service areas are aware of availability of TRS through directories, billing inserts, and directory assistance, and that rates for TRS are functionally equivalent to voice telephone services.

With regard to rates, there are no extra fees or charges for using TRS. For toll calls, TRS users pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of the day, and the distance from the point of origination to the point of termination. If the point of origination and

termination are within a local area, the call is treated like any local telephone call regardless of the location of the TRS facility.

Forty-nine states, the District of Columbia, and Puerto Rico applied to the Commission for certification that their state TRS programs met or exceeded the minimum standards. The Commission reviewed each certification application and certified these fifty-one TRS programs for a period of five years. States may reapply for renewal one year prior to expiration. Each state TRS program is accessible through an 800 number, as are many interstate TRS facilities.

Pursuant to Title V of the ADA, the Commission also provides technical assistance on TRS, captioning, and other telecommunications-related disability issues. For example, the second edition of our TRS Handbook, a consumer guide to TRS, will be going to press in late October.

In conjunction with ADA implementation, the Commission has met and coordinated TRS issues with representatives of other nations. For example, representatives of Japan's Nippon Telephone and Telegraph Corporation met with Commission staff in order to learn more about relay service technology and implementation. Japan has, to a large degree, relied on facsimile technology for communication for its persons with disabilities, and is considering implementing a form of TRS. On the other side of the spectrum, Canadian telephone companies have provided relay services for over 12 years, and in August of this year Canadian regulators took the lead by adopting the use of N11 codes (three digit dialing sequences currently used for 911 or 411) for access to relay services. The Commission has before it a petition for nationwide use of N11 codes for TRS access.

In addition to TRS, the Commission has acted to facilitate access to closed captioning. The Commission amended its rules to implement the Television Decoder Circuitry Act of 1990. Effective July 1, 1993, all new television receivers with picture screens 13 inches or greater in diameter are required to be capable of displaying closed-captioned television transmissions using performance and quality standards developed by the Commission.

In addition, the Commission, through its Public Service Division, distributes publications and answers inquiries from the public regarding the ADA. Common Carrier Bureau representatives answer substantive and technical inquiries from states, consumers, businesses, coordinating agencies, and trade associations. The Commission participates in industry-wide conferences, the ADA Technical Assistance Coordinating Group, the National Task Force on Disability, and other forums relating to telecommunications services for persons with hearing and speech disabilities.

Because the Commission's role in the implementation of TRS is multifaceted and has evolved through a complex regulatory backdrop, we have prepared the attached summary. If you have any further questions regarding this matter, please do not hesitate to telephone me at (202) 634-1867, or our staff subject matter expert, Linda Dubroof, at (202) 634-1808.

Sincerely,

A handwritten signature in cursive script, reading "James R. Keegan".

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Attachments

The Americans with Disabilities Act of 1990
Title IV Implementation:

Telecommunications Relay Services
(TRS)

Summary: Title IV of the Americans with Disabilities Act (ADA) mandated that the Commission establish rules to govern operation and funding of both interstate and intrastate telecommunications relay services (TRS). The Commission's rules implementing nationwide TRS:

- require that each common carrier providing telephone voice transmission services shall no later than July 26, 1993, provide TRS.
- set operational, technical, and functional mandatory minimum standards for all TRS providers.
- create a state certification process for state wishing to establish their own intrastate TRS program.
- create a TRS Fund to recover interstate TRS costs not recovered through rates paid by service users.

Regulatory Background: Following the 1990 enactment of the ADA, the Commission required each common carrier that offers voice transmission services to provide telecommunications relay services throughout its service area no later than July 26, 1993. The Commission set mandatory minimum standards to govern the provision of the service. The Commission certified the TRS programs of 49 states, the District of Columbia, and Puerto Rico.

In July, 1993, the Commission created the TRS Fund, a shared-funding mechanism for recovering interstate TRS costs, estimated to be \$25 - 30 million annually. Commission rules require all interstate service providers to contribute .00047 percent of gross interstate revenues to the fund. The fund is administered by NECA for a two year term, and provides for payment to interstate TRS providers.

In September, 1993, the Commission approved the TRS Fund Administrator's payment formula, fund size, and payment schedule for the interstate TRS Fund. To date, 49 states, the District of Columbia and Puerto are certified and operate state TRS programs which meet or exceed national minimum standards. In Oklahoma, the only state which chose not to apply for certification, carriers have chosen Sprint to operate the state relay, scheduled to begin providing service on November 15, 1993. The FCC has commenced a formal investigation is pending in this matter.

The Commission published a technical assistance handbook entitled Telecommunications Relay Services Informational Handbook, in January, 1992. The handbook lists commonly used terminology and telephone numbers for state relay services. The second edition of the Handbook, The TRS Directory, will be available in late October, 1993.

Summary of FCC Action Pursuant to the ADA:

Notice of Proposed Rulemaking, 55 Fed. Reg. 50037 (Dec. 4, 1990); 5 FCC Rcd 7187 (1990).

Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Report and Order and Request for Comments, 6 FCC Rcd 4657 (July 26, 1991).

Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 1802 (February 25, 1993).

Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, Third Report and Order, 58 Fed. Reg. 39671 (July 26, 1993); 8 FCC Rcd 5300 (July 20, 1993).

FCC Form 431, TRS Fund Worksheet, July 1993, (OMB No. 3060-0536, expires 2/26/96).

Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, Second Order on Reconsideration and Fourth Report and Order, FCC 93-463 (September 29, 1993).

Clinton Presidential Records Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a publication.

Publications have not been scanned in their entirety for the purpose of digitization. To see the full publication please search online or visit the Clinton Presidential Library's Research Room.

Telecommunications Relay
Services - An Informational
Handbook

14pgs

Telecommunications Relay Services



An Informational Handbook

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

FCC 91-213
38199

In the Matter of

Telecommunications Services for)
Individuals with Hearing and)
Speech Disabilities, and the)
Americans with Disabilities Act)
of 1990)
CC Docket No. 90-571

REPORT AND ORDER
AND REQUEST FOR COMMENTS

Adopted: July 11, 1991

Released: July 26, 1991

By the Commission:

I. INTRODUCTION

1. By this action, the Commission is amending its rules to require that each common carrier providing telephone voice transmission services shall, no later than July 26, 1993, provide, throughout the area in which it offers service, telecommunications relay services (TRS)¹, individually, through

¹ TRS are defined as telephone transmission services that provide the ability for an individual who has a hearing or speech disability to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing or speech disability to communicate using voice communication services by wire or radio. This term includes services that enable communications between the user of a Text Telephone (TT) or other nonvoice terminal device and an individual who does not use such a device. The term "Telecommunications Device for the Deaf" (TDD), widely used in the past, has become a misnomer both because it is but one type of TT that employs graphic communication in the transmission of coded signals through a wire or radio communication system and because of its use of the identifier "Deaf." The terms Telecommunications Relay Services, TDD, TDD Relay Service, TDD Service and Dual Party Relay Service have been used synonymously at times in the Americans with Disabilities Act and by many TRS providers. However, the prospective use of the terms TDD, TDD Relay Service, TDD Service and Dual Party Relay Service is inappropriate because it entrenches current technology, a result contrary to the intent of

designees, through a competitively selected vendor, or in concert with other carriers. Further, we take this action in order to establish mandatory minimum standards for operational, technical, and functional procedures that shall be met in carrying out the requirement that common carriers provide the means for individuals with hearing or speech disabilities to engage in communication by wire or radio with individuals who do not have such disabilities in a manner that is functionally equivalent to the ability of individuals who do not have hearing or speech disabilities to communicate using voice communication services by wire or radio.

II. BACKGROUND

2. This proceeding was initiated by the passage of the Americans with Disabilities Act of 1990 (ADA), S.933, Pub. L. 101-336, 104 Stat. 327, 366-69 (July 26, 1990). The ADA's purpose is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, and to ensure that federal entities such as this Commission play a central role in enforcing the standards established in the ADA on behalf of individuals with disabilities. Specifically, in Title IV, the ADA mandates that the Commission ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to individuals in the United States with hearing and speech disabilities. Title IV of the ADA adds Section 225 to the Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq., (the Act). The intent of Title IV of the ADA is to further the Act's goal of universal service by providing to individuals with hearing or speech disabilities telephone services that are functionally equivalent to those provided to individuals without hearing or speech disabilities.

3. In order to fulfill the ADA's mandate, this Commission, on November 8, 1990, adopted a Notice of Proposed Rulemaking (NPRM) in this proceeding.² The NPRM proposed rules which implement the provisions of Title IV of the ADA. The ADA requires the Commission, within one year of the ADA's enactment, to prescribe necessary rules and regulations to carry out the requirements of Title IV, and prescribes that each common carrier providing telephone voice transmission services shall, no later than July 26, 1993, provide TRS. As an initial matter, the Commission proposed to permit carriers and states the time and flexibility to determine how best to comply with these new rules.

4. Sixty-one parties, made up of twenty-four state government entities, eight associations representing individuals with speech and hearing

Congress. Therefore, TRS shall be the operative term for relay services. See paras. 6-7 infra.

² See Notice of Proposed Rulemaking, CC Docket No. 90-571, 55 Fed. Reg. 50037 (Dec. 4, 1990); 5 FCC Rcd 7187 (1990). The Commission designated Subpart F of Part 64 of its rules as the appropriate location for the rules implementing the ADA. Subpart F of Part 64 currently provides rules for "Furnishing of Customer-Premises Equipment and Related Services Needed by Persons with Impaired Hearing, Speech, Vision or Mobility."

disabilities³, eight trade associations, two equipment manufacturers, and nineteen common carriers submitted comments or reply comments in response to the NPRM. A list of those parties filing the fifty-one comments and twenty-seven replies is contained in Appendix A.

III. DISCUSSION

5. The commenters were unanimous in strongly supporting the goals of the ADA and the efforts of the Commission in implementing the ADA in order to establish nationwide telecommunications relay services. Most of the commenters generally support the Commission's functional requirements, guidelines, and operational procedures for TRS; however, many commenters were divided on the precise requirements with regard to minimum operator standards, equal access, cost recovery mechanisms, and technical standards. Many commenters requested clarification of the proposed rules regarding confidentiality and call content, certification, complaint, and enforcement requirements. Based on the comments submitted in this proceeding and the specific requirements of Title IV of the ADA, we have addressed these issues seriatim and fashioned a comprehensive set of rules which (A) set forth terminology and definitions; (B) prescribe operational, technical, and functional minimum standards required of all TRS providers; and (C) delineate the state certification process. The rules are contained in Appendix B and outlined below.

A. Definitions and Terminology

6. Several of the commenters, particularly those organizations of and for persons with hearing and speech disabilities, propose terminology which accurately describes the services and equipment utilized in TRS and at the same time promotes national understanding and acceptance of persons with disabilities. The proposed terminology replaces all references to "impairments" with "disabilities" and stresses "person-first" usage whereby a person described as a "hearing-impaired person" will be identified as "a person with a hearing disability." Further, in order to avoid entrenching current technology, a result clearly contrary to the intent of Congress, the American Speech-Language-Hearing Association (ASHA) proposes that all references to "TDD relay," or "dual party relay service" be replaced by the term "TRS." Additionally, commenters propose that the term "communications assistant" (CA) replace "relay operator" or "operator," "Text Telephone" (TT) replace TDD, and the term "conversations" supersede "messages" in order to emphasize spontaneity and functionally equivalent use of telephone services. Further, in the interest of clarity, the commenters propose definitions of the terms American Sign Language (ASL), Voice Carry Over (VCO)⁴, Hearing Carry Over (HCO)⁵.

³ The National Center for Law and the Deaf (NCLD) comments incorporate the comments of seventy-one organizations representing and made up of individuals with hearing and speech disabilities.

⁴ VCO is a reduced form of TRS where the person with the hearing disability is able to speak directly to the other end user. The CA types the response back to the person with the hearing disability. The CA does not voice

American Standard Code for Information Interexchange (ASCII), and Baudot. See Appendix B.

7. Since the ADA mandates that the Commission require common carriers to provide functionally equivalent telephone access to persons with hearing and speech disabilities, it is essential that we adopt uniform terminology to describe the specialized services, equipment, and consumers of TRS. In light of these factors, we agree with the commenters that these modifications to the proposed terminology in the NPRM will enhance understanding of TRS, the disabled community of TRS users and further the goals of the ADA. Therefore, we are adopting the modifications to definitions recommended by many commenters.

B. Mandatory Minimum Standards

Operational Standards

8. Communications Assistant (CA) Standards. The NPRM proposed general operating requirements which include operational, technical and functional standards. Most of the commenters support the establishment of unique CA standards to facilitate TRS functions because, today, relay services are labor-intensive, and accurate and meaningful standards therefore translate into cost savings. CA tasks are divided into three categories serving three types of consumers: (1) Text/Voice transliteration serves people with hearing and speech disabilities who require their typed conversation to be spoken by the CA and the other person's spoken conversation to be typed by the CA; (2) Text transliteration or VCO serves people with hearing disabilities who require words spoken to them to be typed by the CA; and (3) Voice transliteration or HCO serves people with speech disabilities who require their typed conversation to be spoken by the CA. Commenters concur that all CAs should be familiar with hearing and speech disability cultures and languages⁶, TT etiquette, and the unique syntax of ASL. Further, commenters agree that relay systems should transmit conversations between the TT and voice caller in real time.⁷ Additionally, commenters urge that TRS callers should be provided with reasonably efficient access under projected calling volumes, so that the probability of a busy response due to CA unavailability will be comparable to the network availability a voice caller would typically experience in attempting to reach a party through the voice telephone network.

the conversation.

⁵ HCO is a reduced form of TRS where the person with the speech disability is able to listen to the other end user and, in reply, the CA speaks the text as typed by the person with the speech disability. The CA does not type any conversation.

⁶ Hearing and speech disability cultures and languages include ASL, Cued Speech, Fingerspelling, Manual English, Speechreading and Speech Amplification.

⁷ Real time refers to actual time of transmission as opposed to delayed transmission or stored conversation relayed at a later time.

9. With regard to typing standards and training, comments and replies reflect concerns regarding the availability of CA applicants and the cost of training. Commenters note that available labor pools differ from region to region and restrictive entry level skills may inhibit carriers from providing functionally equivalent, widely available relay services. Thus, although some commenters recommend various entry level typing speeds and training standards, and the NPRM proposed a 35 wpm minimum typing level, we modify the proposed rules to require TRS providers themselves to be responsible for requiring that CAs be sufficiently trained so as to effectively meet the specialized communications needs of individuals with hearing and speech disabilities. We expect that CAs will be trained to deliver the level of service demanded by the ADA, including competent skills in typing, grammar, spelling, interpretation of typewritten ASL, and familiarity with hearing and speech disability cultures, languages and etiquette. We realize that specialized needs (e.g., foreign language needs) may change over time or with new technological advances. Rather than articulate a low threshold of expectations, a safe harbor, we instead expect that TRS providers will deliver the excellent level of service all telephone consumers demand. Competition among TRS providers to attract customers to the service also should spur providers to achieve the highest quality service.⁸

10. With regard to the training of CAs and emergency calls, many commenters, including the Utah Public Service Commission (Utah), Ameritech Operating Companies (Ameritech), National Association of the Deaf (NAD), and Pacific Bell and Nevada Bell (Pacific Bell), request clarification of this issue because of potential liability and overlap with 911 services. Because 911 services are covered by Title II of the ADA⁹ and because we concur with commenters that CAs and providers should not be responsible for emergency calls and their resolution, we will require CAs to handle emergency calls like any other TRS calls. However, we encourage 911 services to provide facilities for direct TRS and TT calls and we strongly encourage TT and TRS users to access emergency 911 services directly.

11. Confidentiality and Conversation Content. The NPRM proposed that TRS CAs be prohibited 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. Most commenters concur that the proposed rule, without clarification, raises issues of criminal or civil liability of relay providers and possible conflicts of law. In particular, NCLD, United Telecommunications, Inc. (United), Central Telephone Company (Central), NYNEX, OPASTCO, MCI, Bell Atlantic Telephone Companies (Bell Atlantic), National Telephone Cooperative Association (NTCA), UltraTec, Inc., (UltraTec) and several state commenters including Virginia, State Corporation Commission (Virginia), Washington, State

⁸ We intend to monitor closely, through the complaint process and otherwise, the actual quality of relay services. If experience shows that imposition of additional minimum standards is required, we will not hesitate to prescribe such standards.

⁹ 42 U.S.C. § 12131 et seq.

Department of Social and Health Services (Wash), Indiana Utility Regulatory Commission (Indiana), Pennsylvania Public Utility Commission (Penn), and Colorado, The Deaf Organizations of (Colorado); as well as the Social Security Administration (SSA), concur that the intent of the ADA is to provide total confidentiality for relay calls regardless of content. However, most of these commenters propose that because Congress was unequivocal in its mandate that relay calls be kept confidential regardless of content, CAs and providers of TRS should be relieved from any and all liability for relaying calls.

12. Several commenters disagree with this interpretation and argue that the ADA does not mandate total confidentiality. For example, Oregon Independent Telephone Association (Oregon) argues that CAs should not be required to participate in obscene or harassing calls and Arizona Council of the Hearing Impaired (Arizona) contends that call content cannot be absolutely protected because criminal conduct in violation of public policy is not protected under state or federal law. Connecticut, State Department of Human Resources (Conn) proposes that after training on the legal parameters of obscenity and illegal calls, CAs would be able to use their own judgment to decide which calls to complete. Chillicothe Telephone Company (Chillicothe) argues that the proposed rule would make it difficult to attract and retain high quality trained CAs because of the delicacy of CA sensibilities. Deafness Education Advocacy Foundation, Inc., (DEAF) proposes an exception to the completion requirement of the ADA in circumstances where the called party is a non-consenting recipient of verbal sexual assault, and NTCA requests that we define the parameters of common carrier obligation to respond to subpoenas and testify under oath with regard to information gleaned in the course of TRS. Finally, we note that a number of states have recently enacted legislation addressing confidentiality and liability of CAs. For example, the legislatures of Tennessee and Texas have each enacted a statute that defines CAs as a conduit for the relayed conversation, prohibits the CA from disclosing or being compelled to disclose, through reporting or testimony or by subpoena, the contents of the conversation, and attaches a criminal penalty against any CA who discloses the contents of a conversation, unless the CA obtains the consent of each party to the conversation.¹⁰

13. Issues of confidentiality and liability are raised primarily by states and common carriers in cases where the carriers are required by state or federal law to report obscenity, harassment, child abuse, or criminal conversation. Relay services are unique in that, in the present technological environment, they utilize human CAs who see and hear private conversations while acting as transparent conduits relaying conversations without censorship or monitoring functions. Section 225(d)(1)(F) of the ADA requires the Commission to prescribe regulations that "prohibit relay operators 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." Under this provision, CAs, consistent with the obligations of common carriers, may

¹⁰ Legislature of the State of Tennessee, Oaths, Section 24-1-210 (July 1, 1990); Legislature of the State of Texas, House Bill No. 1132, Companion to SB No. 867, amending Section 1, Title 4, Human Resources Code, Section 82.001 (1991).

not divulge the content of any relayed conversation. The ADA prohibition of disclosure furthers the statutory purpose that TRS be functionally equivalent to regular telephone service. We believe that confidentiality is essential to the service, and that users of TRS can have confidence in the basic privacy of their conversations.¹¹

14. We note that the ADA does not expressly address the relationship between its prohibition of disclosure and other statutes that permit or require disclosure. Section 705(a) prohibits disclosure of any telephone conversation except under limited circumstances related to law enforcement.¹² The ADA's legislative history offers little guidance on the relationship between the ADA's nondisclosure provision and Section 705. We, therefore, are guided by the principle that "repeals [of federal statutes] by implication are not favored and will not be found unless an intent to repeal is clear and manifest." Rodriguez v. United States, 480 U.S. 522, 524 (1987). See also Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1018 (1984). Applying this case law, we find that there is no clear congressional intent to repeal the limited law enforcement exceptions to nondisclosure in Section 705 and that they, therefore, could apply to interstate and foreign relay service conversations.¹³ We emphasize, though, that except for these very limited exceptions, CAs are prohibited from divulging the content or existence of any relay

¹¹ See, e.g., Section 705(a) of the Communications Act which itself generally prohibits any person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio from divulging the existence or content of a telephone call except through authorized channels of transmission or reception.

¹² Section 705(a) provides, in pertinent part, that "Except as authorized by chapter 119, title 18, United States Code, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority." Relevant exceptions under title 18, which are incorporated into Section 705, may include 18 U.S.C. Sections 2511(2)(a)(i) (wire fraud) and (ii) (electronic surveillance).

¹³ We note that, by its terms, Section 705 applies only to interstate and foreign communications.

conversations,¹⁴ and that these limited exceptions are associated only with specific incidents of possible law violations, and will be extremely rare.

15. With reference to the liability and service obligations of CAs and providers of TRS, we believe that Congress, in adopting Section 225(d)(1)(E), intended relay operators to have the same service obligations as common carriers generally.¹⁵ It is well established that the common carrier obligation to provide service upon request set forth in Section 201(a) of the Act is not absolute and does not necessarily apply to service for an illegal purpose.¹⁶ As a practical matter, however, common carriers generally will not be criminally liable absent knowing involvement in unlawful transmissions. We have had occasion to address similar issues in connection with a different common carrier service. "[A]lthough telephone common carriers do not appear to enjoy absolute immunity from liability if their facilities are used for an illegal purpose, there must be a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions before any liability is likely to attach." Use of Common Carriers, 2 FCC Rcd at 2820. In addition, we stated that carriers must be "knowingly" involved to be

¹⁴ Any state statutes that conflict with ADA disclosure provisions generally would, however, be preempted by the ADA to the extent they affect relay communications. See *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986); *Capital Cities Cable v. Crisp*, 467 U.S. 691, 698-99 (1984). In this regard, we believe that the Section 705 exceptions permitting disclosure in response to subpoena or "demand of other lawful authority" apply only to authorized requests by government officials in connection with specific incidents of possible law violations. Accordingly, state statutes imposing general affirmative disclosure requirements are not consistent with Section 705 and, therefore, the ADA.

¹⁵ In adopting the final version of Section 225(d)(1)(E), the Conference Committee indicated that the provision "specifies that a relay operator is subject to the same standards of conduct that operators are subject to under the Communications Act of 1934." H.R.Rep. No. 558, 101st Cong. 2d Sess. at 78 (1990). As indicated in the Conference Report, the Senate acceded to the House amendment. That amendment added the words "failing to fulfill the obligations of common carriers by" to the Senate version of Section 225(d)(1)(E).

¹⁶ Use of a telephone for an illegal purpose means use of a telephone to commit or further a crime. See, e.g., *Palermo v. Bell Telephone Co. of Pennsylvania*, 415 F.2d 298 (3d Cir. 1969); *Delaware Sports Service v. Diamond State Telephone Co.*, 241 F. Supp. 847 (D. Del. 1965), *aff'd*, 355 F.2d 929 (3d Cir. 1966), *cert. denied*, 385 U.S. 817 (1966); *Telephone News System, Inc. v. Illinois Bell Telephone Co.*, 220 F.Supp. 621 (N.D. Ill. 1963), *aff'd*, 376 U.S. 782 (1964); *Andrews v. Chesapeake and Potomac Telephone Co.*, 83 F. Supp. 966 (D.D.C. 1949); *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, 2 FCC Rcd 2819 (1987) (Use of Common Carriers); *Humane Society v. Western Union International, Inc.*, 30 FCC 2d 711 (1971). As many of these decisions recognize, telephone common carriers are permitted to and often do have restrictions in their tariffs against use of their facilities for an unlawful purpose.

criminally liable. Id. We believe that CAs, in the normal performance of their duties, would generally not be deemed to have a "high degree of involvement or actual notice of an illegal use" or be "knowingly" involved in such illegal use. We also note that, as a practical matter, the extensive record in this proceeding suggests that actual incidents raising these questions will arise rarely, if ever.¹⁷

16. The NPRM proposed that CAs be prohibited from intentionally altering a relayed conversation. Most commenters concur that CAs should not be required to relay conversations verbatim where the user specifically requests summarization. We are persuaded by the comments that this exception has merit and modify the proposed rule accordingly.

17. Types of Calls. The ADA's mandate to make available to all individuals in the United States a rapid, efficient nationwide communications service, and to increase the utility of the telephone system of the nation, charges the Commission with ensuring that interstate and intrastate TRS are available, to the extent possible and in the most efficient manner, to individuals with disabilities. The proposed rules provide that relay systems be capable of handling any type of call normally provided by carriers, such as non-coin sent-paid, third party number, calling card and collect calls. We concur with Telocator that one-way paging service does not constitute telephone voice transmission service within the scope of the ADA. With regard to cellular carriers, however, we conclude that the ADA requires that TRS be provided by all common carriers engaged in voice transmission service by wire or radio.

18. Many commenters, including NCLD, Arizona, the Iowa Utilities Board (Iowa), and Ohio, Public Utilities Commission (Ohio), agree that relay services should be capable of handling any type of call normally provided by carriers when technically feasible and that the burden be placed on the common carrier to prove infeasibility. The community of persons with disabilities and many state commenters assert that "type of call" includes full and complete access to recorded messages, voice mail, remote polling of personal answering machines, 3-way calling and any other service normally provided by common carriers. AT&T and UltraTec concur that relay services should relay international calls that originate or terminate in the United States provided that equipment of the foreign country is compatible with U.S. equipment. Contel Cellular Inc. (Contel) and McCaw Cellular Communications, Inc. (McCaw) notes that the definition of common carrier in the ADA would appear to include cellular carriers. United States Telephone Association (USTA), Tennessee Public Service Corporation (Tenn), Kansas Relay Service, Incorporated (KRSI), Southwestern Bell Telephone Company (SWBT) and NYNEX indicate that no problems are encountered in interstate billing to calling cards and 3rd party numbers of interstate collect calls; however, these commenters concur with the exception

¹⁷ Because Congress did not explicitly provide that the limited exceptions to nondisclosure of Section 705(a) and relevant provisions of the federal criminal code do not apply to CAs, there remains some ambiguity between those provisions and the ADA. We therefore urge that Congress clarify the language of Section 225(d)(1)(F) as to both confidentiality and liability.

in the proposed rule for coin-sent paid calls because of technical problems in rating the calls.¹⁸ NYNEX concurs with USTA, Cincinnati Bell Telephone (CBT), and Tenn that all calls should be relayed except audiotext calls and coin-sent paid calls.

19. In order to maintain the functional equivalency standard mandated by the ADA, we modify the proposed rules to require that CAs are prohibited from failing to fulfill the obligations of common carriers by refusing single or sequential calls or limiting the length of calls utilizing relay services.¹⁹ For the same reason, we require that TRS be capable of handling any type of call normally provided by the common carrier. The burden of proving infeasibility of handling any type of call will be placed on the carriers.²⁰ Questions will be addressed on a case-by-case basis.

Technical Standards

20. ASCII vs Baudot.²¹ In the NPRM, the Commission proposed that TRS shall be capable of communicating with both ASCII and Baudot formats. Commenting parties noted that both ASCII and Baudot are currently in use by TT users and existing TRS. Many commenters propose that TRS should be capable of handling both ASCII and Baudot with encouragement towards a gradual shift towards ASCII. GTE Service Corporation (GTE) urges that the Commission phase out, over time, the use of Baudot. NAD contends that a phase-out period of three years is reasonable. Despite the fact that most TTs use Baudot, the consensus of commenters is that ASCII is a superior code because it allows use

¹⁸ Hearing disabled pay phone users are unable to hear operator requests for additional coins as needed and are disconnected because operator requests for additional coins are not channeled through the CA. We note that recent technological advances may permit relay pay phone consumers to receive visual display messages from operators thereby eliminating this problem. Therefore, we conclude that there is no basis for a general exclusion of this type of telephone call from the requirements of the ADA.

¹⁹ See supra para. 15, and nn. 15-16.

²⁰ The provision of "enhanced" services offered by common carriers is not required under this provision, but provision of such services is encouraged if technically feasible. All commenters agree that the language of the ADA and the proposed rules permit providers of TRS to decline to complete a call because credit authorization is denied. We concur with this interpretation.

²¹ The Baudot format predates ASCII and employs a seven bit (a bit is the smallest unit of binary information) code, only five of which are information bits. Generally, Baudot TTs operate at the rate of 45.5 baud, which corresponds to 45.5 bits per second. The ASCII format employs an eight bit code, all of which are information bits. TTs using ASCII can operate at any standard transmission baud rate including 300, 1200, 2400, and higher. Personal computers with modems can be used as ASCII TTs in order to connect with TRS.

of personal computers as TT terminals, allows greater range of characters and, because it is a synchronous code, can be transmitted by standard computer modems without requiring special equipment. Although we are persuaded that a phase-out period for Baudot would be in the public interest since ASCII is, by all accounts, a superior technology, many persons who will rely on TRS have access only to Baudot terminals. ASCII devices are considerably more expensive than voice customer premises equipment, and we are reluctant to force Baudot users to purchase the more expensive equipment, especially if users have independent incentives to move to the more efficient technology voluntarily. Accordingly, while we urge both users and suppliers of TRS to facilitate the movement to ASCII, we will not deprive Baudot users of access to TRS. Therefore, we will adopt the rule as proposed.

21. Speed of Answer. The Commission, in the NPRM, proposed that 85% of all calls be answered within 10 seconds and that relay service begin within 30 seconds of answering. Thus, for 85% of all calls, the actual transfer of information begins within 40 seconds. These speed of answer criteria apply only to TRS, and are independent of network performance. In general, the common carriers commenting on this issue favor some relaxation of the proposed answer time, while other commenters either concur with the proposed rule or request more rigorous response requirements. New York State Telephone Association, Inc. (NYSTA) asserts that, within the speed of answer time requirement, time should be allocated for CA explanation of TRS to first time relay service users. No evidence has been presented to persuade us that the rule, as proposed, is neither feasible nor clear. We therefore conclude that our proposed standard will best meet our goal of providing relay services which are functionally equivalent to voice telephone services. Accordingly, we adopt the rule as proposed.

22. Equal Access to Interexchange Carriers (IXCs). The Commission, in the NPRM, proposed that TRS users should have access to their chosen IXC, and to all other operator services, to the same extent that such access is provided to individuals without speech and hearing disabilities. The NCLD and several carriers and state commenters concur with the proposed rule. Others, including AT&T, BellSouth Corporation (BellSouth) and Southern New England Telephone Company (SNET) argue that while it is an appropriate industry goal to provide relay customers access to the IXC of their choice, it may be difficult in the short term to offer this choice because it would not be economically or technically feasible. However, BellSouth suggests that new systems could be required to offer such access. Beehive Telephone Co., Inc. (Beehive), which provides relay services through its 800 numbers, proposes that the Commission specify AT&T as the carrier of last resort. AT&T contends that since the ADA requires all carriers to provide relay services, customers will have the opportunity to use interexchange TRS of their preferred carrier. A third group of commenters, including USTA, Virginia, Central, Tenn and California, Public Utilities Commission (Cal), request that the Commission defer any such requirement until a later time because it is not feasible for some states or carriers which have implemented relay services via a bidding process where one IXC or entity has elected to assume relay responsibility. Many of these commenters assert that this lower overall cost (via the bidding process) outweighs any of the advantages of equal access. If the proposed rule is adopted, these commenters argue, they will be forced to renegotiate existing

relay service contracts, a process which is costly, time consuming and could result in higher operational cost. Based on the comments, we will adopt the rule as proposed. States that have contracted with an IXC or other entity to provide interstate TRS may, at the time they apply for state certification of their TRS program, request a limited exemption from this rule by providing sufficient justification, including documentation of the contract, in their state application.

23. TRS Facilities. In the NPRM, the Commission proposed that TRS shall operate every day, 24 hours a day, and systems shall have adequate redundancy features, including uninterruptible power for emergency use, to assure continuity of operation. The ADA specifically provides that services operate every day for 24 hours per day and charges the Commission with the task of establishing minimum standards for achieving such service. Alexander Graham Bell Association for the Deaf, Inc. (AGB), in its comments, proposes that TRS should operate during power outages. Additionally, many commenters suggest that TRS facilities include adequate space and parking to accommodate CAs and management personnel, and that an outreach office be maintained to handle consumer complaints and inquiries. On the other hand, many state commenters request that we leave a great deal of flexibility to TRS providers in fashioning TRS facilities to meet the needs of the providers and the public. We have no basis for believing that TRS facilities generally will not be well designed and maintained. Therefore, we will not prescribe specific requirements for TRS facilities. However, as mandated by the ADA, we will require that TRS operate every day for 24 hours per day and that TRS providers maintain an auxiliary source of power which is functionally equivalent to normal central office auxiliary sources of power so that TRS continue to function during power outages.

24. Technology. All of the commenters were unanimously in favor of introducing new technology into TRS as it becomes proven and available. In its comments, Fon-Ex, Inc. (Fon-Ex) contends that it has developed a technology that is capable of providing relay services on an automated basis. As noted in the NPRM, automated systems have the potential of providing relay services in an efficient manner; however, at this time, speech to text conversion is still in the developmental stage. With regard to technologies already in use in several TRS, the associations representing persons with hearing and speech disabilities concur that implementation of VCO and HCO²² would result in tremendous savings both in time and cost to complete a conversation. Further, in its comments, Self Help for Hard of Hearing People, Inc. (SHHH) asserts that VCO and HCO directly link the caller and the call recipient in a functionally equivalent manner which reduces the average length of calls, and results in lower blockage rates. In order to enhance a more natural conversational flow and to lower average TRS costs, it is strongly recommended by these commenters that VCO/HCO be incorporated as a standard TRS technical requirement. In the NPRM, the Commission stated that no regulation set forth in its rules is intended to discourage or impair the development of improved technology that fosters the availability of telecommunications services to the disabled. We are persuaded that VCO and HCO, which are currently part of TRS in many states,

²² See supra nn. 4-5.

are essential to implement functionally equivalent TRS. Therefore, we modify the proposed rules and require VCO and HCO technology to be standard features of TRS. The burden of proving infeasibility of implementing VCO and HCO will be placed on the carriers.

Functional Standards

25. Complaint and Enforcement Procedures. The Commission, in the NPRM, proposed specific rules regarding referrals, jurisdiction and filing procedures for resolution of complaints alleging violations of proposed Section 64.605 of the rules. The ADA requires that the Commission resolve, by final order, a complaint alleging violation of this section within 180 days after the date such complaint is filed. Many commenters including Conn, Colorado, NCLD, and NYNEX concur that relay users should have access to a CA supervisor regarding on-line complaints via a separate consumer, toll-free hotline. Most state commenters propose that all TRS have a well publicized complaint procedure instantly available to any caller whose conversation is not completed by a CA. Many commenters representing persons with hearing or speech disabilities propose that individuals responsible for handling complaints should be individuals with disabilities and that a consumer advisory committee should be established to regulate the actions of TRS providers. Other commenters, particularly states which have already established relay services, and many of the carriers, propose that the Commission permit TRS providers great flexibility in determining how they will comply with the ADA and Commission rules. Commenters concur that TRS providers should be required to provide relay consumers with the same opportunity to file and be heard on complaints and enforcement issues as are voice consumers.

26. With regard to the complaint resolution process, NCLD asserts that, in the case of a complaint which the Commission refers to a state, the proposed rule fails to specify the amount of time the Commission may have to refer the complaint to the state. NCLD contends that this is a critical point of reference because, under the ADA, the 180-day period for a state to act on a complaint only begins to run after the state receives the complaint. Therefore, NCLD proposes that the Commission require that its referral of a complaint to the states occur within five business days. Second, NCLD proposes that the Commission's prescribed complaint procedure be expanded to include those situations where a state receives a complaint directly from an individual, rather than as a referral from the Commission. Finally, NCLD proposes that the Commission specify the precise Commission office to whom TRS complaints should be directed in order to avoid consumer frustration and misinformation.

27. We have considered the various comments and agree with the commenters that relay consumers should be afforded the same opportunity to file and be heard regarding complaints and enforcement issues as are all other telephone consumers.²³ Additionally, we are persuaded that a clarification of

²³ Access to a supervisor regarding on-line complaints via a separate toll-free hotline is one method by which TRS providers may fulfill the requirement to provide TRS users with functionally equivalent consumer access.

the referral procedure is warranted. Therefore, we adopt the proposed rules with the following modifications: we include the name of the Commission office which will process TRS complaints and expand our complaint procedures to include those situations where a complaint is sent directly to a state. Moreover, the Commission will assure that these complaints are referred to the states expeditiously.²⁴

28. Public Access to TRS Information. The Commission, in the NPRM, proposed that carriers, through publication in their telephone directories and otherwise, shall ensure that callers in their service areas are aware of the availability and use of TRS. In its comments, NCLD strongly advocates that relay services information be available in all telephone directories and through all directory assistance services offered in a given area. Further, NCLD proposes that TRS information be available in the form of written notice to the media, including television, radio and newspapers, and include information regarding availability and use of service, at least one time within 30 days after the effective date of July 26, 1993. Additionally, NCLD proposes that TRS information be included in carrier billing inserts to all subscribers, at least one time each year for the first three years of TRS operation. Colorado proposes that TRS providers be responsible for the distribution of information regarding TRS. We believe that public access to information regarding availability, use of service, and means of access, is critical to the implementation of TRS. Based on the comments, we modify the language of the proposed rules to include guidelines for the publication and dissemination of TRS information. Specifically, carriers, through publication in their directories, periodic billing inserts, placement of TRS instructions in telephone directories, through directory assistance services, and incorporation of TT numbers in telephone directories, shall assure that callers in their service areas are aware of the availability and use of TRS.

29. Rates. In the proposed rules, the Commission provides that TRS users pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from the point of origination to the point of termination. This requirement mirrors the language of the ADA. NCLD, in its reply comments, raises the question of toll discounts for long distance TRS calls. NCLD supports the comments of AT&T, Chillicothe, and USTA in their recognition that discounts for TRS users are not unprecedented and that it is unfair to ask relay users to wait until a reliable calculus has been developed before requiring discounts. NCLD proposes mandatory discounts to offset the inherently lengthier duration of TRS calls. NCLD concurs with several states including Cal, Ohio, Indiana and Florida, Public Service Commission (Florida), which request assurances from the Commission that they will be permitted to require toll discounts by carriers who provide TRS in their states. Three methods of calculating a relay discount have been proposed by parties to this proceeding, any of which would be supported by NCLD: (1) USTA proposes determining an adjustment factor by comparing the speed of

²⁴ As with formal complaints under Section 208 of the Act, a Section 225 complaint proceeding will be treated as a restricted proceeding under our ex parte rules. See 47 C.F.R. Section 1.1208.

transcription ultimately required with the prevailing speed of voice communications, i.e., higher typing speed = overall cost savings; (2) Cal proposes that AT&T's discount rate should be the minimum industry standard; and (3) Florida proposes that samples, taken at relay centers currently in operation, could be used to develop a factor for rating relay calls. In light of the delay factor inherent in TRS, NCLD strongly recommends that the Commission mandate toll discounts by July of 1993 and that these discounts should apply to the caller regardless of where the caller is when using the system, and not be limited to TT users, but be applicable to voice TRS and TT relay users.

30. We conclude that we do not have sufficient evidence to mandate toll discounts for long distance TRS at this time as part of our mandatory minimum standards. However, in order to provide this infant service and its providers with flexibility, in addition to requiring that TRS providers charge TRS users rates no greater than the rates paid for functionally equivalent voice communication services, we encourage IXC's to offer toll discounts to consumers as a competitive feature of service.²⁵

31. Cost Recovery and Jurisdictional Separation of Costs. Section 225(d)(3) of the ADA mandates that the Commission prescribe regulations governing the jurisdictional separation of costs for TRS. The Commission, in the NPRM, proposed that, where appropriate, costs of providing TRS shall be separated in accordance with the jurisdictional separation procedures and standards set forth in the Commission's regulations adopted pursuant to Section 410 of the Act. The proposed rules provide that costs caused by interstate TRS shall be recovered from all subscribers for every interstate service and costs caused by intrastate TRS shall be recovered from the intrastate jurisdiction. In their comments, the majority of commenters concur that existing accounting and separations rules are adequate to deal with interstate relay services and that a Joint Board proceeding is unnecessary and would substantially delay the implementation of TRS. Specifically, Ameritech, Pacific Bell, Texas Telephone Association (TTA), SNET, and SWBT contend that Parts 32, 36 & 69 of the Commission's rules are adequate to handle accounting and separations issues raised by the introduction of TRS. Further, SWBT states that there are two ways that relay services costs could be handled under the interstate accounting, separations and recovery rules: (1) if services are provided as non-regulated services or under contract, those costs will be removed prior to separations and will be recovered via non-regulated or contract rates; or (2) the services must be provided as tariffed services, which are subject to jurisdictional assignment of costs and will be distributed between interstate and intrastate based on relative usage. However, several state commenters, including Virginia, and Texas Public Utility Commission (Texas), expressed concern that the existing rules do not apply to non-regulated carriers. Similarly, Alabama, Public Service Commission (Alabama), Maryland, Public Service Commission (Maryland), and Rochester Telephone Corporation (Rochester) contend that current rules would create undue burdens on Local Exchange

²⁵ States are permitted to exceed the minimum standards with regard to rates, by requiring toll discounts by carriers who provide TRS in their states. See Appendix B, Section 64.605(b)(3).

Carriers (LECs) and would fail to recover costs from all interstate subscribers.

32. In their reply comments, the New York Senate (NY Senate) and the New York, State Department of Public Service (New York) urge the Commission to establish procedures promptly for cost recovery of interstate TRS because New York's interstate relay is currently experiencing fiscal problems. In its comments, NCLD proposes that, in order to extend universal telephone service to relay users, TRS costs should be treated as part of the cost of basic telephone service, integrating TRS costs into the normal operating expenses. Because this method would provide a flexible funding source which can fluctuate with costs of operations, it would eliminate the need for labelled relay charges on phone bills, and it allows costs to be distributed across all ratemaking proceedings. With regard to interstate costs, NCLD, Competitive Telecommunications Association (CTA) and District of Columbia, Public Service Commission (DC) support the concept of administering interstate costs through a centralized entity such as the National Exchange Carrier Association (NECA) and concur with many commenters that such an entity should be required to account to governmental bodies for funds under its charge, and provide speech and hearing disabled consumers direct access, via a TT line, to its offices.

33. In its reply comments, NECA notes that most parties commenting on this issue agree that the Commission's current separation rules are adequate. However, NECA is concerned that Part 36 will not apply to non-exchange carrier TRS providers. NECA favors an approach in which TRS providers would be reimbursed by NECA for interstate relay costs on the basis of a fixed amount for each relay call-minute, set annually and based on total projected service demand. This method would provide carriers with incentives to obtain large volumes of traffic, which they can only do if the price, quality and features of their services are attractive to TRS customers. NECA is currently responsible for administering a similar settlement mechanism for "average schedule" LECs. About 700 LEC study areas receive interstate settlements based on formulas (demand variables such as line counts or access minutes to simulate a full-scale study of LECs' costs), which are submitted annually to the Commission for approval. NECA asserts that it could gather data on interstate relay costs from a sample of relay centers and propose formulas based on those costs. If the Commission adopts this approach, NECA proposes that it will not itself be liable for any shortfalls in revenues, and states that criteria would need to be established for determining eligibility for receiving such settlements. The National Association of Regulatory Utility Commissioners (NARUC), in its reply comments, proposes that the Commission proceed with implementation of interstate relay services and if the Commission determines that costs are being misallocated, that the Commission refer the allocation issue to a Joint Board for further revisions of the rules.

34. It is not clear from the record how TRS ultimately will be provided by various carriers, what state programs will seek certification, what the costs of TRS will be and how these costs could best be recovered. In order to achieve the goals of the ADA without unnecessarily disrupting TRS as currently provided, we find at this time that current separations rules are adequate. Moreover, in order to provide universal telephone service to TRS users as mandated by the ADA, carriers are required to recover interstate TRS

costs as part of the cost of interstate telephone services and not as a specifically identified charge on subscribers' lines. However, the record is not adequate to determine a specific cost recovery mechanism at this time.

35. Therefore, we seek specific proposals from interested parties on cost recovery to be submitted to the Common Carrier Bureau no later than sixty days from the release date of this Report and Order. Responses to these proposals should be filed not later than 30 days thereafter. All proposals and other comments must reference CC Docket No. 90-571. In particular, parties should address various proposed funding mechanisms and both the advantages and disadvantages of each proposal, including relative administrative costs of various mechanisms, the likely relative costs that would be borne by various interstate carriers under each proposal, and the impact on quality, if any, of the proposals. We note that in this proceeding some commenters have argued that the costs associated with interstate relay services should be shared. These commenters must make a well reasoned showing that self-funding would be inappropriate. We are also especially interested in learning about different possible funding mechanisms from the experiences of the states.

C. State Certification

36. The ADA requires that common carriers providing voice transmission services provide TRS no later than July 26, 1993 and that common carriers will be considered in compliance with this mandate by providing, in compliance with the Commission's rules, intrastate and interstate TRS in any state that does not have a certified program; or by providing TRS, in compliance with the program certified under the Commission's certification rules, in a state that has a certified program. With regard to state certification, Section 225(f) of the ADA requires that a state choosing to establish a TRS program provide documentation to the Commission describing the program for implementing intrastate TRS and the procedures and remedies available for enforcing any requirements imposed by the state program. After the Commission reviews this documentation, the ADA provides that the Commission shall certify the state program if the Commission determines that the program makes available to individuals with hearing or speech disabilities, either directly, through designees, through a competitively selected vendor, or through regulation of intrastate common carriers, intrastate TRS in a manner that meets or exceeds the requirements of regulations prescribed by the Commission in its rules. Further, the ADA requires that the Commission determine that the program makes available adequate procedures and remedies for enforcing the requirements of the state program. The ADA grants the Commission the power to suspend or revoke such certification if, after notice and opportunity for hearing, the Commission determines that such certification is no longer warranted. However, in a state whose program has been suspended or revoked, the Commission shall take necessary steps to ensure continuity of TRS.

State Documentation

37. Many commenters, particularly the states, request clarification of the proposed rules regarding specific documentation procedures and they express concern as to whether they will have adequate time to prepare such

documentation. In light of these comments, we clarify the proposed rule on documentation to provide that documentation from the states shall be filed not later than October 1, 1992, prepared in narrative form, by the office of the governor or other office of the state empowered to provide TRS, and addressed to the Federal Communications Commission, Chief, Common Carrier Bureau, TRS Certification Program. All documentation submitted shall clearly describe the state program pursuant to the documentation requirements in the ADA. The Commission shall give public notice of the filing, including notification in the Federal Register, in order to inform the public of the states seeking certification.²⁶ The certification process requires no fee and certification shall remain in effect for five years. One year prior to the expiration of certification, a state may apply for renewal of its certification, and such renewal process will proceed in the same manner as certification, i.e., documentation of the state program pursuant to the requirements of the ADA.

Requirements for Certification

38. Most commenters concur that certification of states is a reasonable approach to nationwide TRS, provided that adequate time is given for states either to meet the requirements or to correct deficiencies. Pursuant to the ADA, the Commission, through the documentation procedure, will determine if a state program meets the requirements prescribed by the Commission. States applying for certification must submit documentation which:

(1) establishes that they meet or exceed all operational, technical and functional minimum standards contained in Appendix B under "Mandatory minimum standards";

(2) establishes that the program makes available adequate procedures and remedies for enforcing the requirements of the state program; and

(3) where a state program exceeds the mandatory minimum standards, the state must establish that its program in no way conflicts with other federal laws.

Suspension or Revocation of Certification

39. In its comments, NCLD proposes that consumers be permitted to participate in revocation proceedings and that specific time lines are necessary for such proceedings. NAD proposes that unacceptable performance by state TRS should be treated as a violation of contract and that penalties should be substantial. NYNEX argues that the Commission should not deny, suspend, or revoke certification for any reason beyond those delineated in the rules. We have considered the various comments and have concluded that the proposed rule on suspension or revocation of certification ensures that TRS users have notice and opportunity for hearing of such proceedings and provides

²⁶ Upon our release of the public notice, the certification proceeding will be treated as a non-restricted proceeding under our ex parte rules of 47 C.F.R. Section 1.1206.

for the continuation of TRS in the event that suspension or revocation of state certification results. Therefore, we will adopt the rule as proposed.

State Options

40. We concur with the state commenters and commenters representing persons with disabilities that many features beyond the mandatory minimum standards contained in the Commission's rules exist and may be incorporated by state TRS programs. Many commenters support the staffing of TRS with a number of CAs who have fluency in the dominant foreign language of their particular state. Similarly, many commenters request that TRS providers hire a sufficient number of male and female CAs in order for the TRS users to convey, through the CA, the appropriate tone of voice for personal or business conversations. TRS providers may consider providing these additional features in their service programs.

41. In its comments, BellSouth contends that it is essential to include continuing input from the speech and hearing disabled community. The Connecticut, State Office of Consumer Counsel (Conn OCC) concurs and emphasizes the need for involvement of this community at some level of the administration, management and operation of relay services. Further, UltraTec states that with regard to consumer participation, TRS should not handicap, intrude or control; rather they should empower individuals. We encourage all TRS providers to both include input from all consumers in implementation of TRS programs, and establish consumer advisory committees or boards, staffed at least partially by members of the speech and hearing disabled community. Additionally, in several states where TRS are available,²⁷ state programs supply TT equipment to persons with hearing and speech disabilities. In its reply comments, the American Foundation for the Blind (AFB) proposes that TRS providers explore ways in which telebraille equipment can be financed or loaned to persons who have vision and speech/hearing disabilities. We encourage other states to consider such equipment distribution programs.

42. Several commenters addressed the issue of whether there should be a single, nationwide number for TRS access. Many commenters, including Colorado, DEAF, Minnesota Public Utilities Commission (Minnesota), Wisconsin Department of Administration (Wisconsin), NCLD, and Indiana recommend that TRS should be accessed via a toll-free 800 number, preferably one established by Bellcore who administers the North American Numbering Plan. In its reply comments, NCLD notes that relay centers accessed by an 800 number may not be able to access other 800 numbers. We have reviewed the comments and studied the issue of a uniform access number for TRS and have determined that Bellcore has universally reserved 800-855-XXXX for TRS. However, 800 numbers are assigned to a particular carrier and this poses feasibility issues in the assignment of this universally reserved 800 number. Therefore, while we do not find it feasible at this time to establish a single, nationwide number for

²⁷ In thirty-one states some type of TRS are available. In 18 other states, TRS are operated privately.

TRS access, we encourage state systems and all other relay providers to use numbers that are easy for consumers to remember and would further the goal of nationwide access to TRS.

43. Other Matters. In the interest of clarity, certain editorial changes to the rules are being made as set forth in Appendix B.

44. Conclusion. We encourage states and carriers to move expeditiously in translating these mandatory minimum standards into operational relay services. They promise to enrich the lives of both persons with, and persons without, disabilities.

IV. PROCEDURAL MATTERS

45. Final Regulatory Analysis: Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 601, et seq., the Commission's final analysis in this Report and Order is as follows:

I. Need and purpose of this action:

This Report and Order amends the Commission's rules to require that each common carrier engaged in interstate and/or intrastate telephone voice transmission services shall, no later than July 26, 1993, provide telecommunications relay services throughout the area in which it offers service. The rule amendments are required by the Americans with Disabilities Act of 1990, which, inter alia, adds Section 225 to the Communications Act of 1934, as amended, 47 U.S.C. Section 225. The rules are intended to ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to persons in the United States with speech and/or hearing disabilities.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

No comments were submitted in direct response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered:

The Notice of Proposed Rulemaking in this proceeding offered several proposals and requested comments as well as the views of commenters on other possibilities. The Commission has considered all comments, and has adopted most of its proposals in addition to some alternatives recommended by commenters. The Commission considers its Report and Order to be the most reasonable course of action under the mandate of Section 225 of the Communications Act, as amended.

V. ORDERING CLAUSES

46. Accordingly, It is Ordered, That, pursuant to Sections 1, 4(i), 4(j), 201-205, 225 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), 154(j), 201-205, 225 and 403, Parts 0 and 64 of the Commission's Rules and Regulations ARE AMENDED as set forth in Appendix B hereof, effective 60 days after publication in the Federal Register.

47. It is Further Ordered, That specific proposals from interested parties on cost recovery shall be submitted to the Common Carrier Bureau, referencing CC Docket No. 90-571, no later than 60 days from the release date of this Report and Order, and responses to these proposals shall be filed not later than 30 days thereafter.

48. It is Further Ordered, That authority is delegated to the Chief, Common Carrier Bureau to implement the state certification and complaint process provided in the rules adopted herein, and to review specific proposals on cost recovery mechanisms submitted by interested parties.

49. It is Further Ordered, That, pursuant to the requirements of Section 604 of the Regulatory Flexibility Act, 5 U.S.C. 604, the Secretary shall (a) make copies of this Report and Order available to members of the public and (b) shall cause a summary of this Report and Order to be published in the Federal Register which shall include a statement describing how members of the public may obtain such copies. The Secretary shall also provide a copy of this Report and Order to each state utility commission.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties Filing Comments

Alabama, Public Service Commission
Alexander Graham Bell Association for the Deaf, Inc.
American Speech-Language-Hearing Association
Ameritech Operating Companies
Arizona Council of the Hearing Impaired
AT&T
Beehive Telephone Co., Inc.
Bell Atlantic Telephone Companies
BellSouth Corporation
California, Public Utilities Commission
Central Telephone Company
Chillicothe Telephone Company
Cincinnati Bell Telephone
Colorado, The Deaf Organizations of
Competitive Telecommunications Association
Connecticut, State Department of Human Resources
Contel Cellular Inc.
Deafness Education Advocacy Foundation, Inc.
District of Columbia, Public Service Commission
Florida, Public Service Commission
Fon-Ex, Inc.
GTE Service Corporation
Indiana Utility Regulatory Commission
Kansas Relay Service, Incorporated
Maryland, Public Service Commission
MCI Telecommunications Corporation
Minnesota Public Utilities Commission
National Association of the Deaf
National Center for Law and the Deaf
National Exchange Carrier Association
National Telephone Cooperative Association
NYNEX
Ohio, Public Utilities Commission
OPASTCO
Oregon Independent Telephone Association
Pacific Bell and Nevada Bell
Pennsylvania Public Utility Commission
Rochester Telephone Corporation
Self Help For Hard of Hearing People, Inc.
Social Security Administration
Southern New England Telephone Company
Tennessee Public Service Corporation
Texas Public Utility Commission
Texas Telephone Association
UltraTec, Inc.
United States Telephone Association
United Telecommunications, Inc.

Utah Public Service Commission
Virginia, State Corporation Commission
Washington, State Department of Social and Health Services
Wisconsin Department of Administration

Parties Filing Replies

American Foundation for the Blind
AT&T
Bell Atlantic Telephone Companies
BellSouth Corporation
Central Telephone Company
Chillicothe Telephone Company
Connecticut, State Department of Human Resources
Connecticut, State Office of Consumer Counsel
GTE Service Corporation
Iowa Utilities Board
McCaw Cellular Communications, Inc.
MCI Telecommunications Corporation
National Association of Regulatory Utility Commissioners
National Center for Law and the Deaf
National Exchange Carrier Association
National Telephone Cooperative Association
New York Senate
New York, State Department of Public Service
New York State Telephone Association, Inc.
NYNEX
Rochester Telephone Corporation
Southern New England Telephone Company
Southwestern Bell Telephone Company
Telocator
UltraTec, Inc.
United States Telephone Association
Virginia, State Corporation Commission

Appendix B

Parts 0 and 64 of the Commission's Rules and Regulations (chapter 1 of Title 47 of the Code of Federal Regulations, parts 0 and 64) are amended as follows:

Part 0 - COMMISSION ORGANIZATION

1. The authority citation for part 0 is revised to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

2. Section 0.91 is amended by adding new paragraph (m) to read as follows:

§ 0.91 Functions of the Bureau.

* * * * *

(m) Acts upon matters involving telecommunications relay services complaints and certification.

PART 64 - MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for part 64 is revised to read as follows:

Authority: Section 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 225, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 225 unless otherwise noted.

2. Subpart F of part 64 is revised in its entirety to read as follows:

Subpart F - Telecommunications Relay Services and Related Customer Premises Equipment for Persons with Disabilities

- 64.601 Definitions.
- 64.602 Jurisdiction.
- 64.603 Provision of services.
- 64.604 Mandatory minimum standards.
- 64.605 State certification.
- 64.606 Furnishing related customer premises equipment.
- 64.607 Provision of hearing aid compatible telephones by exchange carriers.
- 64.608 Enforcement of related customer premises equipment rules.

Subpart F - Telecommunications Relay Services and Related Customer Premises Equipment for Persons with Disabilities

§ 64.601 Definitions.

(a) As used in this subpart, the following definitions apply:

(1) American Sign Language (ASL): A visual language based on hand shape, position, movement, and orientation of the hands in relation to each other and the body.

(2) ASCII: An acronym for American Standard Code for Information Interexchange which employs an eight bit code and can operate at any standard transmission baud rate including 300, 1200, 2400, and higher.

(3) Baudot: A seven bit code, only five of which are information bits. Baudot is used by some text telephones to communicate with each other at a 45.5 baud rate.

(4) Common carrier or carrier: Any common carrier engaged in interstate communication by wire or radio as defined in section 3(h) of the Communications Act of 1934, as amended (the Act), and any common carrier engaged in intrastate communication by wire or radio, notwithstanding sections 2(b) and 221(b) of the Act.

(5) Communications assistant (CA): A person who transliterates conversation from text to voice and from voice to text between two end users of TRS. CA supersedes the term "TDD operator."

(6) Hearing carry over (HCO): A reduced form of TRS where the person with the speech disability is able to listen to the other end user and, in reply, the CA speaks the text as typed by the person with the speech disability. The CA does not type any conversation.

(7) Telecommunications relay services (TRS): Telephone transmission services that provide the ability for an individual who has a hearing or speech disability to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing or speech disability to communicate using voice communication services by wire or radio. Such term includes services that enable two-way communication between an individual who uses a text telephone or other nonvoice terminal device and an individual who does not use such a device. TRS supersedes the terms "dual party relay system," "message relay services," and "TDD Relay."

(8) Text telephone (TT): A machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system. TT supersedes the term "TDD" or "telecommunications device for the deaf."

(9) Voice carry over (VCO): A reduced form of TRS where the person with the hearing disability is able to speak directly to the other end user. The CA

types the response back to the person with the hearing disability. The CA does not voice the conversation.

§ 64.602 Jurisdiction.

Any violation of this subpart by any common carrier engaged in intrastate communication shall be subject to the same remedies, penalties, and procedures as are applicable to a violation of the Act by a common carrier engaged in interstate communication.

§ 64.603 Provision of services.

Each common carrier providing telephone voice transmission services shall provide, not later than July 26, 1993, in compliance with the regulations prescribed herein, throughout the area in which it offers services, telecommunications relay services, individually, through designees, through a competitively selected vendor, or in concert with other carriers. A common carrier shall be considered to be in compliance with these regulations:

(a) with respect to intrastate telecommunications relay services in any state that does not have a certified program under § 64.605 and with respect to interstate telecommunications relay services, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with § 64.604; or

(b) with respect to intrastate telecommunications relay services in any state that has a certified program under § 64.605 for such state, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the program certified under § 64.605 for such state.

§ 64.604 Mandatory minimum standards.

(a) Operational standards.

(1) Communications assistant (CA). TRS providers are responsible for requiring that CAs be sufficiently trained to effectively meet the specialized communications needs of individuals with hearing and speech disabilities; and that CAs have competent skills in typing, grammar, spelling, interpretation of typewritten ASL, and familiarity with hearing and speech disability cultures, languages and etiquette.

(2) Confidentiality and conversation content. Consistent with the obligations of common carrier operators, CAs are prohibited from disclosing the content of any relayed conversation regardless of content and from keeping records of the content of any conversation beyond the duration of a call. CAs are prohibited from intentionally altering a relayed conversation and must relay all conversation verbatim unless the relay user specifically requests summarization.

(3) Types of calls. Consistent with the obligations of common carrier operators, CAs are prohibited from refusing single or sequential calls or

limiting the length of calls utilizing relay services. TRS shall be capable of handling any type of call normally provided by common carriers and the burden of proving the infeasibility of handling any type of call will be placed on the carriers. Providers of TRS are permitted to decline to complete a call because credit authorization is denied. CAs shall handle emergency calls in the same manner as they handle any other TRS calls.

(b) Technical standards.

(1) ASCII and Baudot. TRS shall be capable of communicating with ASCII and Baudot format, at any speed generally in use.

(2) Speed of answer. TRS shall include adequate staffing to provide callers with efficient access under projected calling volumes, so that the probability of a busy response due to CA unavailability shall be functionally equivalent to what a voice caller would experience in attempting to reach a party through the voice telephone network. TRS shall, except during network failure, answer 85% of all calls within 10 seconds and no more than 30 seconds shall elapse between receipt of dialing information and the dialing of the requested number.

(3) Equal access to interexchange carriers. TRS users shall have access to their chosen interexchange carrier through the TRS, and to all other operator services, to the same extent that such access is provided to voice users.

(4) TRS facilities. TRS shall operate every day, 24 hours a day. TRS shall have adequate redundancy features functionally equivalent to the equipment in normal central offices, including uninterruptible power for emergency use. TRS shall transmit conversations between TT and voice callers in real time. Adequate network facilities shall be used in conjunction with TRS so that under projected calling volume the probability of a busy response due to loop or trunk congestion shall be functionally equivalent to what a voice caller would experience in attempting to reach a party through the voice telephone network.

(5) Technology. No regulation set forth in this subpart is intended to discourage or impair the development of improved technology that fosters the availability of telecommunications to persons with disabilities. VCO and HCO technology are required to be standard features of TRS.

(c) Functional standards.

(1) Enforcement. Subject to § 64.603, the Commission shall resolve any complaint alleging a violation of this section within 180 days after the complaint is filed.

(2) Public access to information. Carriers, through publication in their directories, periodic billing inserts, placement of TRS instructions in telephone directories, through directory assistance services, and incorporation

of TT numbers in telephone directories, shall assure that callers in their service areas are aware of the availability and use of TRS.

(3) Rates. TRS users shall pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from the point of origination to the point of termination.

(4) Jurisdictional separation of costs.

(i) General. Where appropriate, costs of providing TRS shall be separated in accordance with the jurisdictional separation procedures and standards set forth in the Commission's regulations adopted pursuant to section 410 of the Communications Act of 1934, as amended.

(ii) Cost recovery. Costs caused by interstate TRS shall be recovered from all subscribers for every interstate service. Costs caused by intrastate TRS providers shall be recovered from the intrastate jurisdiction. In a state that has a certified program under § 64.605, the state agency providing TRS shall, through the state's regulatory agency, permit a common carrier to recover costs incurred in providing TRS by a method consistent with the requirements of this section.

(5) Complaints.

(i) Referral of complaint. If a complaint to the Commission alleges a violation of this subpart with respect to intrastate TRS within a state and certification of the program of such state under § 64.605 is in effect, the Commission shall refer such complaint to such state expeditiously.

(ii) Jurisdiction of Commission. After referring a complaint to a state under paragraph (i), or if a complaint is filed directly with a state, the Commission shall exercise jurisdiction over such complaint only if:

(A) final action under such state program has not been taken within:

(1) 180 days after the complaint is filed with such state;
or

(2) a shorter period as prescribed by the regulations of such state; or

(B) the Commission determines that such state program is no longer qualified for certification under § 64.605.

(iii) Complaint procedures.

(A) Content. A complaint shall be in writing, addressed to the Federal Communications Commission, Common Carrier Bureau, TRS Complaints, Washington, DC 20554, or addressed to the appropriate state office, and shall contain:

- (1) the name and address of the complainant,
- (2) the name and address of the defendant against whom the complaint is made,
- (3) a complete statement of the facts, including supporting data, where available, showing that such defendant did or omitted to do anything in contravention of this subpart, and
- (4) the relief sought.

(B) Amended complaints. An amended complaint setting forth transactions, occurrences or events which have happened since the filing of the original complaint and which relate to the original cause of action may be filed with the Commission.

(C) Number of copies. An original and two copies of all pleadings shall be filed.

(D) Service.

(1) Except where a complaint is referred to a state pursuant to § 64.604(c)(5)(i), or where a complaint is filed directly with a state, the Commission will serve on the named party a copy of any complaint or amended complaint filed with it, together with a notice of the filing of the complaint. Such notice shall call upon the defendant to satisfy or answer the complaint in writing within the time specified in said notice of complaint.

(2) All subsequent pleadings and briefs shall be served by the filing party on all other parties to the proceeding in accordance with the requirements of § 1.47 of this chapter. Proof of such service shall also be made in accordance with the requirements of said section.

(E) Answers to complaints and amended complaints. Any party upon whom a copy of a complaint or amended complaint is served under this subpart shall serve an answer within the time specified by the Commission in its notice of complaint. The answer shall advise the parties and the Commission fully and completely of the nature of the defense and shall respond specifically to all material allegations of the complaint. In cases involving allegations of harm, the answer shall indicate what action has been taken or is proposed to be taken to stop the occurrence of such harm. Collateral or immaterial issues shall be avoided in answers and every effort should be made to narrow the issues. Matters alleged as affirmative defenses shall be separately stated and numbered. Any defendant failing to file and serve an answer within the time and in the manner prescribed may be deemed in default.

(F) Replies to answers or amended answers. Within 10 days after service of an answer or an amended answer, a complainant may file and

serve a reply which shall be responsive to matters contained in such answer or amended answer and shall not contain new matter. Failure to reply will not be deemed an admission of any allegation contained in such answer or amended answer.

(G) Defective pleadings. Any pleading filed in a complaint proceeding that is not in substantial conformity with the requirements of the applicable rules in this subpart may be dismissed.

§ 64.605 State certification.

(a) State documentation. Any state, through its office of the governor or other delegated executive office empowered to provide TRS, desiring to establish a state program under this section shall submit, not later than October 1, 1992, documentation to the Commission addressed to the Federal Communications Commission, Chief, Common Carrier Bureau, TRS Certification Program, Washington, DC 20554, and captioned "TRS State Certification Application." All documentation shall be submitted in narrative form, shall clearly describe the state program for implementing intrastate TRS, and the procedures and remedies for enforcing any requirements imposed by the state program. The Commission shall give public notice of states filing for certification including notification in the Federal Register.

(b) Requirements for certification. After review of state documentation, the Commission shall certify, by letter, or order, the state program if the Commission determines that the state certification documentation:

(1) establishes that the state program meets or exceeds all operational, technical, and functional minimum standards contained in § 64.604;

(2) establishes that the state program makes available adequate procedures and remedies for enforcing the requirements of the state program; and

(3) where a state program exceeds the mandatory minimum standards contained in § 64.604, the state establishes that its program in no way conflicts with federal law.

(c) Certification period. State certification shall remain in effect for five years. One year prior to expiration of certification, a state may apply for renewal of its certification by filing documentation as prescribed by paragraphs (a) and (b) of this section.

(d) Method of funding. Except as provided in § 64.604, the Commission shall not refuse to certify a state program based solely on the method such state will implement for funding intrastate TRS, but funding mechanisms, if labeled, shall be labeled in a manner that promote national understanding of TRS and do not offend the public.

(e) Suspension or revocation of certification. The Commission may suspend or revoke such certification if, after notice and opportunity for hearing, the

Commission determines that such certification is no longer warranted. In a state whose program has been suspended or revoked, the Commission shall take such steps as may be necessary, consistent with this subpart, to ensure continuity of TRS.

§ 64.606 Furnishing related customer premises equipment.

(a) Any communications common carrier may provide, under tariff, customer premises equipment (other than hearing aid compatible telephones as defined in part 68), needed by persons with hearing, speech, vision or mobility disabilities. Such equipment may be provided to persons with those disabilities or to associations or institutions who require such equipment regularly to communicate with persons with disabilities. Examples of such equipment include, but are not limited to, artificial larynxes, bone conductor receivers and TTs.

(b) Any carrier which provides telecommunications devices for persons with hearing and/or speech disabilities, whether or not pursuant to tariff, shall respond to any inquiry concerning:

(1) the availability (including general price levels) of TTs using ASCII, Baudot, or both formats; and

(2) the compatibility of any TT with other such devices and computers.

§ 64.607 Provision of hearing aid compatible telephones by exchange carriers.

In the absence of alternative suppliers in an exchange area, an exchange carrier must provide a hearing aid compatible telephone, as defined in part 68, and provide related installation and maintenance services for such telephones on a detariffed basis to any customer with a hearing disability who requests such equipment or services.

§ 64.608 Enforcement of related customer premises equipment rules.

Enforcement of §§ 64.606 and 64.607 is delegated to those state public utility or public service commissions which adopt those sections and provide for their enforcement.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FCC 93-104

In the Matter of

Telecommunications Services for)
Individuals with Hearing and)
Speech Disabilities, and the) CC Docket No. 90-571
Americans with Disabilities Act)
of 1990)

ORDER ON RECONSIDERATION, SECOND REPORT AND ORDER,
AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: February 19, 1993

Released: February 25, 1993

Comment Date: April 5, 1993

Reply Date: April 19, 1993

By the Commission:

I. INTRODUCTION

1. We have before us five petitions for reconsideration or clarification of policies and rules we recently adopted concerning telecommunications relay services (TRS) for individuals with hearing and speech disabilities, and the Americans with Disabilities Act of 1990 (the ADA).¹ For the reasons set forth below, we reaffirm that: (1) each common carrier providing telephone voice transmission services shall, not later than July 26, 1993, provide TRS throughout the area in which it offers services, either individually, through designees, through a competitively selected vendor, or in concert with other carriers; (2) TRS shall be capable of handling any type of call normally provided by common carriers and the burden of proving the infeasibility of handling any type of call is on the carriers; and (3) with limited exceptions

¹ See Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Report and Order and Request for Comments, 6 FCC Record 4657 (1991) (hereinafter TRS Order). The Request for Comments portion of this proceeding sought comments on interstate cost recovery mechanisms.

as provided in section 705(a) of the Communications Act and consistent with the obligations of common carrier operators, communications assistants (CAs) are prohibited from disclosing the content of any relayed conversation regardless of content. Finally, we order that interstate TRS costs shall be recovered utilizing a shared-funding mechanism and we propose rules setting forth this cost recovery plan.

II. BACKGROUND

2. In order to fulfill the ADA's mandate that the Commission ensure that interstate and intrastate telecommunications relay services² are available, to the extent possible and in the most efficient manner to individuals in the United States with hearing and speech disabilities, this Commission, on November 8, 1990, initiated a rulemaking proceeding.³ After consideration of the extensive public comments on our TRS proposals and the specific requirements of Title IV of the ADA⁴, we adopted the TRS Order. In the TRS Order, we fashioned a comprehensive set of rules which set forth terminology and definitions of TRS, prescribe operational, technical, and functional minimum standards required of all TRS providers, and delineate the state certification process.

3. Five petitions for reconsideration or clarification were filed following the release of our TRS Order. In response to the petitions, several parties filed comments.⁵ The TRS Order also requested additional comments on interstate recovery mechanisms, and the Commission has received comments from twenty-seven parties, consisting of seven state government entities, one association representing organizations serving individuals with speech and hearing disabilities, five common carrier associations, and twelve common carriers.⁶

III. DISCUSSION

² Telecommunications relay services (TRS) allows people with hearing and/or speech disabilities to use the telephone. TRS facilities are equipped with specialized equipment and staffed by communications assistants (CAs) who relay conversation between people who use text telephones and people who use traditional telephones.

³ See Notice of Proposed Rulemaking, CC Docket No. 90-571, 55 Fed. Reg. 50037 (Dec. 4, 1990); 5 FCC Rcd 7187 (1990).

⁴ See S.933, Pub. L. 101-336, 104 Stat. 327, 366-69 (July 26, 1990).

⁵ Appendix A lists the parties filing petitions for reconsideration and reply comments, as well as abbreviations used throughout this Order to refer to those parties.

⁶ Appendix B lists the parties commenting on interstate cost recovery, as well as abbreviations used throughout this Order to refer to those parties.

A. Provision of Services

4. Petitions and comments. In its petition, GTE requests that the Commission clarify the extent to which satellite carriers, which do not hold out telephone voice transmission services to the general public, would be affected by or excluded from coverage under the ADA requirements. GTE contends that domestic satellite carriers primarily provide customized interstate private network services to meet the specific needs of their customers and that such services should be considered excluded from the definition of telephone voice transmission services within the scope of the ADA. In support of this contention, GTE argues that satellite carriers do not maintain telephone directory assistance or publish telephone directories because they are not engaged in the business of providing interstate voice services to the general public. Further, GTE asserts that domestic satellite operators do not operate under existing separation rules and therefore the cost recovery method delineated in the TRS Order would not be applicable to domestic satellite operators.

5. Decision. Section 225(c) of the Communications Act of 1934, as amended (the Act) provides, in pertinent part, that "each common carrier providing voice transmission services shall, not later than 3 years after the date of enactment of this section, provide in compliance with the regulations prescribed under this section, throughout the area in which it offers service, telecommunications relay services, individually, through designees, through a competitively selected vendor, or in concert with other carriers...." Pursuant to section 225(a)(1) of the Act, "the term "common carrier" or "carrier" includes any common carrier engaged in interstate communication by wire or radio as defined in section 3(h) and any common carrier engaged in intrastate communication by wire or radio, notwithstanding sections 2(b) and 221(b)." Section 3(h) of the Act provides that "common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio" Under these provisions, all common carriers offering voice transmission services are within the scope of section 225 of the Act.

6. In the TRS Order, we concluded that the ADA does require that TRS be provided by all common carriers engaged in voice transmission service by wire or radio.⁷ Where satellite services are providing voice transmission services to the general public on a common carrier basis, the space station or its earth station facility is providing telephone voice transmission services as defined in the Act. However, to the extent that satellite service providers are not engaged in providing voice transmission services, these satellite service providers are not within the scope of section 225(c) of the Act, including prescribed cost recovery mechanisms. See paragraph 17, infra.

B. Coin-Sent Paid Calls

⁷ 6 FCC Rod at 4660.

7. Petitions and Comments. Ameritech, Bell Atlantic, Bell South, Pacific Bell, SNET, USTA, Sprint, and NYNEX contend that the Commission should exclude coin-sent paid calls (traditional coin service calls) from the mandatory minimum operational TRS standards because TRS is not currently connected to the Automated Coin Telephone System (ACIS) or the Traffic Operator Position System (TOPS), which are used for rating coin-sent paid calls on a "real-time" basis. In support of their contentions, petitioners state that a significant source of the technical difficulty of accommodating coin-sent paid text telephone calls⁸ arises because TRS is a relay service that involves two connections: the first from the calling party to the relay center, and the second from the relay center to the called party. Consequently, petitioners aver, TOPS can only rate the first leg of the call because the connection to TOPS terminates once the coin deposit is made, and the TOPS switch is not in place to rate the second leg of service, the actual call to the recipient. Many commenters contend that the TOPS system cannot be configured to stay on the connection because once the Communications Assistant (CA) has obtained the number desired by the calling party, the new destination number would override the original dialed number (the TRS facility). Requests for additional coins cannot be channeled through TRS to the caller because the connection between the caller and TRS is broken when TRS dials the caller's recipient. However, petitioners contend that eliminating the requirement for access to relay services via coin-sent paid calls will only minimally impede the use of coin phones for TRS users because alternate billing systems, such as credit cards, calling cards, collect or third number billing are available to permit TRS access from many coin pay text telephones. With regard to new technologies, Bell Atlantic argues that a large capital investment would be required to equip all pay telephones with visual displays⁹ and this would not solve the problems associated with the rating of pay text telephone calls. NYNEX and GTE assert that while coin-sent paid TRS calls are currently infeasible, they are willing to work to find solutions to these technical problems. However, they submit that resolutions of these problems may not occur before the TRS implementation deadline in July, 1993.

⁸ Pay text telephone calls are calls made from a coin-operated public telephone using the caller's own portable text telephone or from a coin-operated public telephone with a built-in text telephone such as those presently found in some airports and other public accommodations. See generally, Title III of the ADA: Public Accommodations, Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities; Final Guidelines, 36 CFR Part 1191, 56 Fed. Reg. 35408 (July 26, 1991), Amendment to Final Guidelines, 36 CFR Part 1191, 56 Fed. Reg. 45500 (September 6, 1991). These guidelines are provided by the Architectural and Transportation Barriers Compliance Board and explain accessibility requirements for public telephones, text telephones, curb cuts, counters and other public accommodations.

⁹ Bell Atlantic states that only a few of its 240,000 coin telephones are equipped with visual display technology and that "to provide this capability, payphone providers would have to retrofit or replace their payphones at a cost of at least tens of millions of dollars for Bell Atlantic alone." Petition at 2.

8. Decision. In the TRS Order, we concluded that in order to maintain the functional equivalency standard mandated by the ADA, TRS must be capable of handling any type of call normally provided by common carriers. See Section 64.604(a)(3) of the Commission's rules. Specifically, we found no basis for a general exclusion of coin-sent paid calls from the requirements of the ADA and charged the carriers with the burden of proving the infeasibility of handling any particular type of call. After reviewing the record before us, we do not find merit in petitioners' proposal that pay text telephone users be required to use a calling card or other alternative billing method other than coin-sent paid because this proposal would discriminate against persons with disabilities who do not use calling cards or who have not, for example, received permission from the call recipient or third party to reverse the charges. Thus, this proposal does not satisfy the functional equivalency standards mandated by the ADA.

9. With regard to petitioners' contentions regarding the infeasibility of text telephone coin-sent paid calls, we reiterate that technological advances are already beginning to solve many of the feasibility problems raised by petitioners. Recent advances in technology permit relay pay phone consumers to receive visual display messages from operators. Further, the proliferation of portable text telephones (TTs) and deployment of publicly available TTs under the Architectural and Transportation Barrier Compliance Board's (ATBCB) recently adopted standards¹⁰ will increase the use of pay text telephones. In their petitions, Bell Atlantic and Ameritech state that processing coin sent-paid calls for TRS customers could be handled by TRS facilities that have special coin-control and rating capabilities and operator services signaling, although the costs associated with developing and implementing this technology are unknown at this time. Merely stating an incompatibility between TRS and ACTIS without any analysis of alternative solutions does not meet the heavy burden carriers have to prove infeasibility of providing a service readily available to voice telephone users.

10. The Commission has stated its objective to avoid discouraging the development of improved technology that fosters the availability of telecommunications services to the disabled. See Section 64.604(b)(5) of the Commission's rules. To grant reconsideration of the coin-sent paid telephone issue without persuasive evidence of infeasibility would certainly impair and discourage the development of improved technology for pay text telephone services that some carriers seem to be undertaking. We conclude that petitioners have not presented persuasive evidence to justify a general exclusion from providing TRS in conjunction with coin-sent paid telephone calls or cause us to depart from the requirement that TRS be capable of handling any type of call normally provided by common carriers.

C. Audiotext Calls

¹⁰ Architectural and Transportation Barriers Compliance Board, Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities, 56 Fed. Reg. 35,408 (1991).

11. Petitions and Comments. In its petition, NYNEX requests that the Commission clarify its rules regarding the obligations of TRS providers when requested to relay user-billed audiotext calls utilizing prompt/response interaction. Specifically, NYNEX proposes that, consistent with section 64.604(a)(2) of the rules, a TRS provider may, upon request to handle a call to an audiotext service, notify the caller that she or he will be responsible for additional charges that may be incurred for each connection required to complete the call to an audiotext service using prompts. NYNEX states that to process an audiotext through each of the prompts, the CA may have to redial the audiotext service several times and the called party may be charged by the audiotext provider for each separate connection. In its comments, BellSouth concurs with NYNEX but notes that the issue is not one of willingness to relay calls to audiotext services but of providing notice to the calling party that additional end user charges may be imposed by the audiotext service provider for each connection. Therefore, BellSouth proposes that the Commission permit the TRS provider to notify the caller to all such user-billed audiotext charges imposed by the audiotext service provider for sequential connections. In its comments, GTE reiterates the arguments it raised in the TRS rulemaking proceeding regarding the issue of whether Congress intended audiotext services to be within the scope of the ADA. GTE contends that user-billed audiotext services are enhanced services specifically excluded in the TRS Order.

12. Decision. Section 64.604(a)(3) of the rules prohibits CAs from refusing single or sequential calls and requires TRS to be able to handle any type of call normally provided by common carriers. In the TRS Order, we stated that the provision of "enhanced" services offered by common carriers is not required under our rules but provision of such services is encouraged if technically feasible. We concur with GTE that "user-billed audiotext" services are "enhanced" services and therefore not required to be provided by TRS pursuant to the ADA. However, we encourage TRS providers to relay user-billed audiotext services and to provide notice to the calling party that additional end user charges may be imposed by the audiotext service provider if sequential connections are necessary to complete prompt/response interactions. We reiterate that non-user-billed audiotext services, recorded messages, remote polling of answering machines, and any other service normally provided by common carriers as basic services are required to be handled by TRS providers.

D. Confidentiality and Liability

13. Petitions and Comments. In the TRS Order, we stated that, with the limited exceptions related to law enforcement provided in section 705(a) of the Communications Act,¹¹ CAs would be prohibited from disclosing telephone

¹¹ Section 705(a) of the Communications Act provides, in pertinent part, that "except as authorized by chapter 119, title 18, United States Code, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person

conversations. We indicated that since there was no clear congressional intent to repeal the limited law enforcement exceptions to nondisclosure in section 705, the exceptions could apply to interstate and foreign relay service conversations.¹² We further stated that any state statutes that conflict with ADA nondisclosure provisions generally would be preempted by the ADA to the extent that they affect relay communications. Specifically, we indicated that state statutes would be preempted by the ADA to the extent that they impose general affirmative disclosure requirements that would not be consistent with section 705 and, therefore, the ADA.¹³

14. Finally, with respect to service and liability issues, we stated that Congress intended relay operators to have the same service obligations as common carriers generally. In this regard, we noted that the common carrier obligation to provide service is not absolute and does not necessarily apply to service for an illegal purpose. We noted, however, that criminal liability for completing an illegal call is imposed only where there is knowing involvement in unlawful use, and that CAs, in the normal performance of their duties, would generally not be deemed to be knowingly involved in such illegal use.¹⁴

15. In its petition, NYNEX requests that we amend section 64.604(a)(2) to codify that the section 705(a) exemptions to nondisclosure were incorporated into the ADA and to make clear that state disclosure requirements inconsistent with the ADA are preempted. With respect to the liability issues, NYNEX requests that we amend section 64.604(a)(2) to state that CAs "shall not be deemed" to be knowingly involved in any illegal conversations.¹⁵ USTA, Sprint and GTE support NYNEX's petition. NYNEX proposes language to amend section 64.604(a)(2) to clarify the rule and address its concerns.

16. Decision. To the extent that NYNEX and other commenters find section 64.604(a)(2) to be unclear with regard to the confidentiality provided under the ADA, the limited exemptions provided in section 705 of the Communications Act, and the preemption of conflicting state statutes, we shall amend the rule so that it expresses the obligations of CAs set forth in the TRS Order. We shall modify NYNEX's proposed language, however, to make it more accurately reflect these obligations. See paragraph 18, infra.

employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority."

¹² 6 FCC Rcd at 4660.

¹³ Id. at n. 14.

¹⁴ Id. at 4660 and nn. 15-16.

¹⁵ In the text of its petition, NYNEX requests us to codify our statement that CAs would "generally" not be deemed to knowingly be involved in illegal use, but the "generally" is dropped from its proposed rule amendment.

17. With respect to liability, we continue to believe a CA generally would not be deemed to be knowingly involved in illegal use. We will, however, amend the rule to reflect that there is an exception to the requirement to complete all calls where such completion would be inconsistent with federal, state or local law regarding use of telephone company facilities for illegal purposes.

18. Accordingly, we will adopt the following amended language to reflect the CA's confidentiality obligations and limited liability as set forth in the TRS Order:

(2) Confidentiality and conversation content. Except as authorized by section 705 of the Communications Act, 47 USC § 605, CAs are prohibited from disclosing the content of any relayed conversation regardless of content and from keeping records of the content of any conversation beyond the duration of a call, even if to do so would be inconsistent with state or local law. CAs are prohibited from intentionally altering a relayed conversation and, to the extent that it is not inconsistent with federal, state or local law regarding use of telephone company facilities for illegal purposes, must relay all conversation verbatim unless the relay user specifically requests summarization.¹⁶

E. Interstate Cost Recovery

19. Comments. In their comments, Ameritech, District of Columbia Public Service Commission (DCPSC), Sprint, National Center For Law and Deaf (NCLD), National Telephone Cooperative Association (NTCA), Pacific Bell (PacBell), Southwestern Bell (SW Bell), and Sprint propose a shared-funding mechanism rather than self-funding for interstate TRS cost recovery because they assert that self-funding would encourage disincentives including "splashing,"¹⁷ the reduction of their TRS to marginal levels, and the abandonment of existing toll discounts for TRS consumers. Many commenters that propose a shared-funding mechanism offer as an example the Universal Service Fund and Lifeline Assistance (USF & LA) funding mechanisms which utilize the National Exchange Carriers' Association (NECA) as administrator to bill IXCs having more than .05% of the total presubscribed access lines nationwide. NECA states that approximately 15 to 20 IXCs are billed under this mechanism. In its comments, MCI proposes a specifically identified charge on end users and generally supports a shared-funding approach. Many comments from the states and the hearing and speech disabled community support shared-funding because they support the use of a single 800 number accessed through the certified state TRS program to place both intrastate and interstate TRS calls. In its comments, NECA favors an approach in which TRS providers would be reimbursed by NECA for interstate relay costs on the basis of a fixed amount for each relay call-

¹⁶ The underlined language reflects the new language added for clarification.

¹⁷ "Splashing" in this context includes the practice where IXCs try to minimize their TRS costs by encouraging consumers to use other IXCs.

minute, set annually and based on total projected interstate service demand. NECA asserts that this method would provide carriers with incentives to obtain large volumes of traffic, which they can only do if the price, quality and features of their services are attractive to TRS customers. NECA asserts that it could gather data on interstate relay costs from a sample of relay centers and propose formulas based on those costs. Further, NECA notes that eligibility for reimbursement from the fund would not be related to whether or not the service provider paid into the fund; however, creation of the central fund would provide a mechanism for all interstate carriers to meet their individual obligation to provide TRS. If the Commission adopts this approach, NECA proposes that it will not itself be liable for any shortfalls in revenues, and states that criteria would need to be established for determining eligibility for receiving such settlements.

20. In their comments, Cellular Telecommunications Industry Association (CTIA) and AT&T¹⁸ propose self-funding as the most appropriate interstate cost recovery mechanism because it would capture all interstate services as required pursuant to the ADA and would not incur significant administrative costs. In its comments, AT&T defines self-funding as a mechanism in which each IXC incurs the cost of furnishing interstate TRS. Further, CTIA argues that self-funding will permit IXCs the flexibility to design their own interstate TRS to meet the needs of consumers in the most efficient manner. In their supplementary comments, MCI, NCLD, and Sprint assert that AT&T's self-funding proposal was driven, in part, by AT&T's aversion to using presubscribed lines (PSLs) for assessments in the USF & LA model, and because, except for the top twenty IXCs, all other IXCs, cellular carriers, resellers, and other parties providing interstate services would escape assessment for interstate TRS costs. With regard to commenters' concern about PSL billing, NECA acknowledges that not all interstate carriers or service customers would be billed TRS charges under the USF & LA model. However, NECA asserts that the Commission has specifically found that the current USF billing methodology provides a reasonable way of recovering USF and LA costs notwithstanding that only the largest carriers are billed. In Amendment of Part 69 of the Commission's Rules Relating to Assessment of Charges for the Universal Service fund and Lifeline Assistance, 4 FCC Rod 6134 (1989), aff'd mem. ALC Communications Corp. v. FCC (D.C. Cir. No. 90-1041, February 8, 1991), the Commission stated that the USF method "already captures almost 99% of the nation's presubscribed lines. Moreover, any advantage of raising the number of contributors could be quickly neutralized by the administrative and cost drawbacks of collecting fees from a more volatile population of IXCs."

21. Decision and proposed rules. The majority of commenters propose a shared-funding mechanism for interstate TRS cost recovery. These commenters assert that a self-funding mechanism would provide incentives for carriers to handle fewer relay calls, to degrade relay calling quality, to migrate relay customers to other carriers, and to restrict relay to only their presubscribed customers. We agree with these commenters.

¹⁸ See Supplementary Comments of AT&T.

22. In order to provide universal telephone service to TRS users as mandated by the ADA, carriers are required to recover interstate TRS costs as part of the cost of interstate telephone services and not as a specifically identified charge on end user's lines. Thus, MCI's proposal to assess such a charge is not feasible. Further, the ADA requires interstate costs to be recovered from all subscribers of every interstate service. Therefore, we reject MCI's proposal and we determine, based on the overall record, that shared-funding will be the best interstate TRS cost recovery mechanism because it spreads the financial liability to all subscribers of every interstate service.¹⁹ Therefore, we find that a shared-funding mechanism shall be utilized for interstate TRS cost recovery and we propose rules for a shared-funding plan as set forth in Appendix D. Based upon the record before us, we further find that existing accounting and separations rules should be adequate to deal with interstate TRS and that a Joint Board proceeding at this time is unnecessary.

23. Shared-funding proposal. The proposal we make for shared-funding, while drawing on our experience with various NECA pools, is intended to create strong incentives for TRS providers to offer high quality, innovative service at a reasonable cost. First, under our proposal, TRS providers will report to a fund administrator their interstate revenue requirements for the provision of TRS, as well as interstate TRS minutes of use. The fund administrator would use the data to calculate a national average rate to recover the total interstate TRS revenue requirement. That rate would be used to provide settlements to TRS providers from the fund administrator.

24. We tentatively conclude that this portion of our proposal will create strong incentives for TRS providers to offer high quality, innovative services at reasonable cost. To the extent a TRS provider's costs are high relative to the industry average, this proposal permits payment based only on the average cost. By employing the use of historical data, the plan discourages cost padding. Moreover, by compensating TRS providers based on actual relay minutes, those TRS providers who provide excellent service to the public and thereby generate strong demand, will benefit.

25. One potential problem with this proposal, however, concerns the use of a compensation mechanism based on an average. For example, to the extent a rolling average is used, the mechanism would consistently generate a set of TRS providers who were not fully compensated each year, even if these providers were reasonably efficient. We therefore seek comment on alternative ways to calculate a national average rate, such as freezing the national average rate for some period of time, or other price cap mechanisms that would avoid the problems discussed above. We also seek comment on our tentative decision to

¹⁹ Moreover, we believe that a shared-funding approach can be designed in such a way that the risk sharing aspects of pooling can be de-emphasized to promote innovation and high quality relay services among competitive TRS providers. See paragraph 23, infra.

require all TRS providers to report cost data and minutes of use data to the fund administrator, as opposed to NECA's suggested alternative of using a sample of TRS providers' costs.

26. With respect to the relationship between the fund administrator and the common carriers who contribute to the fund, we tentatively find that assessments made by the fund administrator should be based on the common carrier's pro rata share of interstate revenues. This proposal will require all interstate common carriers to report interstate revenues to the fund administrator, many of whom have never reported revenues to this Commission. We have tentatively selected this alternative because the other method suggested by commenters, a pro rata measure of presubscribed lines, fails to conform to the requirements of the ADA in that the class of carriers required to pay for relay service is broader than those carriers with presubscribed lines. We seek comment on the feasibility of requiring all common carriers subject to the ADA to report interstate revenues to the fund administrator, and whether the administrator should play a role in enforcing compliance with this rule.

27. Because of its experience in administering the USF and LA programs, we propose that NECA act as administrator of a TRS Fund. Parties may propose specific rules and plans in response to our proposal or propose parties other than NECA to administer the pool, but we emphasize that such plans and proposals must explain why they are superior to the proposal made in Appendix D. They also must provide sufficient specificity to be implemented by July 26, 1993. Regardless of the administrator and plan chosen, we will carefully review all aspects of the administrator's performance after two years of operation to determine whether any changes are appropriate. Comments on our proposed rules as well as other specific plans filed by any interested administrators, shall be filed no later than April 5, 1993. Reply comments shall be filed no later than April 19, 1993. All comments must reference CC Docket No. 90-571.

IV. CONCLUSION

28. For the reasons set forth above, we find that each common carrier providing telephone voice transmission services shall, not later than July 26, 1993, utilizing a shared-funding mechanism for interstate cost recovery, provide throughout the area in which it offers services, TRS, individually, through designees, through a competitively selected vendor, or in concert with other carriers. We further reaffirm that TRS shall be capable of handling any type of call normally provided by common carriers and the burden of proving the infeasibility of handling any type of call will be placed on the carriers, and that consistent with the obligations of common carrier operators, and with limited exceptions as provided in Section 705(a) of the Communications Act, CAS are prohibited from disclosing the content of any relayed conversation regardless of content.

V. PROCEDURAL MATTERS

29. Final Regulatory Analysis: Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 601, et seq., the Commission's final analysis in this Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking is as follows:

I. Need and purpose of this action:

This Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking further amends the Commission's rules to require that each common carrier engaged in interstate and/or intrastate telephone voice transmission services shall, no later than July 26, 1993, provide telecommunications relay services throughout the area in which it offers service. The rule amendments are required by the Americans with Disabilities Act of 1990, which, inter alia, added Section 225 to the Communications Act of 1934, as amended, 47 U.S.C. Section 225. The rules are intended to ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to persons in the United States with speech and/or hearing disabilities.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

No comments were submitted in direct response to the Regulatory Flexibility Analysis in the Report and Order and Request for Comments.

III. Significant alternatives considered:

The Report and Order and Request for Comments in this proceeding offered several proposals and requested comments as well as the views of commenters on other possibilities. The Commission has considered all comments, and has adopted most of its proposals in addition to some alternatives recommended by commenters. The Commission considers its Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking to be the most reasonable course of action under the mandate of Section 225 of the Communications Act, as amended.

IV. Initial Regulatory Flexibility Act Analysis on the Further Notice of Proposed Rulemaking

This is a nonrestricted notice and comment rulemaking proceeding. Ex Parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. Sections 1.1202, 1.1203 and 1.1206(a).

We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined in section 601(3) of the Regulatory Flexibility Act. The Secretary shall send a copy of this Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking including the certification to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(A) of the

Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1981).

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before April 5, 1993 and reply comments on or before April 19, 1993. To file formally in this proceeding, interested parties must file an original and four copies of all comments, reply comments, and supporting documents with the reference number "CC Docket 90-571" on each document. If interested parties want each Commissioner to receive a personal copy of comments, interested parties must file an original plus nine copies. Interested parties should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street, N.W., Washington, DC. Copies of comments and reply comments are available through the Commission's duplicating contractor: International Transcription Service, Inc. (ITS, Inc), 2100 M Street, N.W., Suite 140, Washington, DC 20037, (202) 857-3800.

VI. ORDERING CLAUSES

30. Accordingly, It is Ordered, That, pursuant to Sections 1, 4(i), 4(j), 201-205, 225 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), 154(j), 201-205, 225 and 403, Part 64 of the Commission's Rules and Regulations IS AMENDED as set forth in Appendix C hereof, effective 60 days after publication in the Federal Register.

31. It is Further Ordered, That, the petitions for reconsideration filed by Ameritech Operating Companies, Bell Atlantic Telephone Companies, Bell South Corporation, GTE Service Corporation, and NYNEX Telephone Companies ARE DENIED IN PART and GRANTED IN PART.

32. It is Further Ordered, That, pursuant to 47 U.S.C. §154(i), notice is hereby given of our intent to adopt the rules proposed in Appendix D.

33. It is Further Ordered, That, pursuant to the requirements of Section 604 of the Regulatory Flexibility Act, 5 U.S.C. 604, the Secretary shall cause a summary of this Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking to be published in the Federal Register which shall include a statement describing how members of the public may obtain such copies. The Secretary shall also provide a copy of this Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking to each state utility commission and to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Petitions for Reconsideration

Petitions

Ameritech Operating Companies (Ameritech)
Bell Atlantic Telephone Companies (Bell Atlantic)
Bell South Corporation (Bell South)
GTE Service Corporation (GTE)
NYNEX Telephone Companies (NYNEX)

Reply comments

Bell South
GTE
Pacific Bell
Southern New England Telephone Company (SNET)
Sprint
United States Telephone Association (USTA)

APPENDIX B

Comments on Interstate Cost Recovery

American Telephone and Telegraph Company *
Ameritech Operating Companies *
Bell Atlantic Telephone Companies *
BellSouth Corporation
California Public Utilities Commission
District of Columbia Public Service Commission
Florida Public Service Commission
GTE Service Corporation
Maryland Public Service Commission
MCI Telecommunications Corporation *
National Exchange Carrier Association *
National Telephone Cooperative Association *
New York Telephone Company and New England Telephone and Telegraph
Pennsylvania Public Utility Commission
Rochester Telephone Corporation
Scott J. Rafferty **
Southwestern Bell **
Sprint *
Telecommunications for the Deaf, Inc.
Vermont Department of Public Service

Reply Comments

American Telephone and Telegraph Company
Ameritech Operating Companies
BellSouth Corporation
Cellular Telecommunications Industry Association
District of Columbia Public Service Commission
GTE Service Corporation
Maryland Public Service Commission
MCI Telecommunications Corporation
Missouri Public Service Commission
National Association of Regulatory Utility Commissioners
National Center For Law and Deaf, et. al. *
National Exchange Carrier Association
National Telephone Cooperative Association
New York Telephone Company and New England Telephone and Telegraph
Pacific Bell *
Rochester Telephone Corporation
Southern New England Telephone Company
Sprint
United States Telephone Association

* Filed Supplementary Comments

** Filed only Supplementary Comments

APPENDIX C

Part 64 of the Commission's Rules and Regulations (chapter 1 of Title 47 of the Code of Federal Regulations, part 64) is amended as follows:

PART 64 - MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for Part 64 continues to read as follows:

Authority: Section 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 225, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 225 unless otherwise noted.

2. Section 64.604(a) (2) and section 64.604(c) (4) are revised as follows:

64.604 Mandatory minimum standards.

(a) Operational standards.

(1) * * *

(2) Confidentiality and conversation content. Except as authorized by section 705 of the Communications Act, 47 USC § 605, CAs are prohibited from disclosing the content of any relayed conversation regardless of content and from keeping records of the content of any conversation beyond the duration of a call, even if to do so would be inconsistent with state or local law. CAs are prohibited from intentionally altering a relayed conversation and, to the extent that it is not inconsistent with federal, state or local law regarding use of telephone company facilities for illegal purposes, must relay all conversation verbatim unless the relay user specifically requests summarization.

(b) * * *

(c) Functional standards.

(1) * * *

(2) * * *

(3) * * *

(4) Jurisdictional separation of costs.

(i) * * *

(ii) Cost recovery. Costs caused by interstate TRS shall be recovered from all subscribers for every interstate service, utilizing a shared-funding cost recovery mechanism. Costs caused by

intrastate TRS shall be recovered from the intrastate jurisdiction. In a state that has a certified program under section 64.605, the state agency providing TRS shall, through the state's regulatory agency, permit a common carrier to recover costs incurred in providing TRS by a method consistent with the requirements of this section.

APPENDIX D

Proposed Rules

Part 64 of the Commission's Rules and Regulations (chapter 1 of Title 47 of the Code of Federal Regulations, part 64) is proposed to be amended as follows:

PART 64 - MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for Part 64 continues to read as follows:

Authority: Section 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 225, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 225 unless otherwise noted.

2. Section 64.604(c) (4) is proposed to be amended to read as follows:

(c) Functional standards.

(1) * * *

(2) * * *

(3) * * *

(4) Jurisdictional separation of costs.

(i) General. Where appropriate, costs elements for the provision of TRS shall be categorized and separated between jurisdictions on a basis consistent with Part 36 of the Commission's rules and in accordance with the jurisdictional separation procedures and standards pursuant to section 410 of the Communications Act of 1934, as amended.

(ii) Cost recovery. Costs caused by interstate TRS shall be recovered from all subscribers for every interstate service, utilizing a shared-funding cost recovery mechanism. Costs caused by intrastate TRS shall be recovered from the intrastate jurisdiction.

(iii) Telecommunications Relay Services Fund. Effective July 26, 1993, an Interstate Cost Recovery Plan, hereinafter referred to as the TRS Fund, shall be administered by the National Exchange Carriers Association (association).

(a) Assessments. A charge that is expressed in dollars and cents shall be assessed upon all common carriers that offer interstate telecommunications services on the basis of their relative share of nationwide interstate revenues for common carrier services.

(b) Carrier assessment computations. The charge shall be computed by the association on a semi-annual basis by dividing one-twelfth of the projected annual TRS Fund revenue requirement by the total proportionate share of each carrier's interstate revenues. Beginning on August 1, 1993, the

association shall bill and collect the charge on a monthly basis. The formulations shall be designed to compensate TRS providers for reasonable costs of providing interstate TRS. The association shall file schedules of charges and settlement formulations by June 1, 1993 to be effective July 26, 1993.

(c) Data collection. TRS providers shall provide the association the true and adequate data necessary to compute charges, revenue requirements and settlements. True and adequate data shall include interstate message revenue, total interstate switched traffic minutes of use, total TRS minutes of use, total interstate TRS minutes of use, TRS operating expenses, TRS interstate investment, and other information necessary for the association to compute the charge and settlements. Information required to be provided to the association shall be filed with the association on June 30 and December 30 of each year, except for the first such submission, containing data calculated as of December 31, 1992, which shall be filed on May 1, 1993. Data filed on June 30 shall be calculated as of December 31 of the preceding year, and data filed on December 30 shall be calculated as of June 30 of the same year. The association shall have the authority to examine, verify and audit billing data received from TRS providers as necessary.

(d) The TRS Fund will be subject to a yearly audit.

(e) Settlements. TRS Fund settlements shall be distributed to TRS providers based on total interstate TRS minutes of use. TRS minutes of use for purposes of interstate cost recovery under the TRS Fund is defined as the minutes of use for completed calls beginning after call set-up and concluding after the last message call unit. All TRS providers including providers who are not interexchange carriers, local exchange carriers, or certified state relay providers, must submit reports of interstate TRS minutes of use to the association in order to receive settlements. TRS providers receiving settlements shall be subject to Parts 32 and 36 of the Commission's rules for purposes of the TRS fund plan. The association shall establish procedures to verify settlement claims, and may suspend or delay payments to TRS providers if directed by the Commission to do so.

(f) TRS providers eligible for receiving settlements from the TRS Fund are:

- (1) state certified TRS programs operating pursuant to Section 64.605; or
- (2) TRS facilities owned by or operated under contract with a common carrier providing interstate services; or
- (3) interstate common carriers.

(g) Any eligible TRS provider as defined in section (f) of this section shall notify the association of its intent to participate in the TRS interstate cost recovery plan sixty (60) days prior to submitting reports of TRS interstate minutes of use in order to receive settlements for interstate TRS services.

(h) Association reporting and filing requirements. The association shall perform all filing and reporting functions required under

section 69.603 and shall conform TRS Fund reports and filings to meet the reporting and filing specifications for the Universal Service Fund.

(i) The association's performance and this plan shall be reviewed by the Commission after two years to determine whether any changes are necessary.

* * *

Part 69 of the Commission's Rules and Regulations (chapter 1 of Title 47 of the Code of Federal Regulations, part 69) is proposed to be amended as follows:

PART 69 - ACCESS CHARGES

1. The authority citation for Part 69 is not modified.
2. Section 69.613 is proposed to be added to read as follows:

The association shall administer the Telecommunications Relay Services Fund (TRS Fund), including the direct billing to and collection of associated revenues on a monthly basis, or other basis pursuant to section 64.604(c) (4) (iii) (a), and the distribution of these revenues to eligible TRS providers pursuant to section 64.604(c) (4) (iii) (f).

* * * * *

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

Telecommunications Relay)
Services, and the Americans with) CC Docket No. 90-571
Disabilities Act of 1990)

THIRD REPORT AND ORDER

Adopted: July 15, 1993

Released: July 20, 1993

By the Commission: Commissioner Barrett issuing a statement.

I. INTRODUCTION

1. By this action, the Commission amends its rules to provide that interstate telecommunications relay services (TRS) costs shall be recovered utilizing a shared-funding mechanism pursuant to the funding plan set forth in Appendix B, and outlined below.

II. BACKGROUND

2. In order to fulfill the mandate of the Americans with Disabilities Act of 1990 (ADA) that the Commission ensure that interstate and intrastate telecommunications relay services¹ are available, to the extent possible and in the most efficient manner to individuals in the United States with hearing and speech disabilities by July 26, 1993, this Commission, on November 8, 1990, initiated a rulemaking proceeding.² After consideration of the extensive public comments on our TRS proposals and the specific requirements of Title IV of the ADA³, we adopted a Report and Order

¹ Telecommunications relay service (TRS) allows people with hearing and/or speech disabilities to use the telephone. TRS facilities are equipped with specialized equipment and staffed by communications assistants (CAs) who relay conversation between people who use text telephones and people who use traditional telephones.

² See Notice of Proposed Rulemaking, CC Docket No. 90-571, 55 Fed. Reg. 50037 (Dec. 4, 1990); 5 FCC Rcd 7187 (1990).

³ See S.933, Pub. L. 101-336, 104 Stat. 327, 366-69 (July 26, 1990).

(TRS Order).⁴ In the TRS Order, we fashioned a comprehensive set of rules which set forth terminology and definitions of TRS, prescribed operational, technical, and functional minimum standards required of all TRS providers, and delineated the state certification process. Additionally, the TRS Order requested further comment on interstate TRS cost recovery.

3. On February 19, 1993, in an Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking (TRS II)⁵, the Commission resolved five petitions for reconsideration, adopted a shared-funding mechanism for interstate TRS cost recovery, and proposed a specific plan establishing a TRS interstate cost recovery fund (TRS Fund).⁶ In response to its request for comments on the TRS Fund, the Commission received twenty-three comments and seventeen reply comments.⁷ In this order the Commission imposes annual and other reporting requirements on TRS providers and TRS Fund contributors to implement shared-funding.

III. DISCUSSION

A. The TRS Fund Administrator

4. Comments. In TRS II, the Commission proposed that, effective July 26, 1993, the interstate cost recovery TRS Fund be administered by the National Exchange Carrier Association, Inc. (NECA).⁸ Further, the Commission proposed that NECA's performance and the TRS Fund would be reviewed by the Commission after two years to determine whether any changes are necessary.⁹ In their comments, Ameritech, AT&T, BellSouth, NARUC, NCLD, NYNEX, Robinson,

⁴ Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Report and Order and Request for Comments, 6 FCC Rcd 4657 (1991) (TRS Order).

⁵ Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking, 8 FCC Rcd 1802 (February 25, 1993), (hereinafter TRS II).

⁶ See TRS II at Appendix D.

⁷ Appendix A lists the parties filing comments and reply comments, as well as abbreviations used throughout this Order to refer to those parties.

⁸ TRS II at Appendix D, Section 64.604 (c)(4)(iii).

⁹ TRS II at Appendix D, Section 64.604 (c)(4)(iii)(i).

Sprint, SWB, USTA, and GTE support the Commission's proposal to appoint NECA as administrator of the TRS Fund because they assert that NECA has demonstrated experience with administering pooling mechanisms, and this experience will keep administrative costs low. Most of the commenters supporting this proposal further propose that NECA keep the TRS Fund separate from its other functions. Specifically, USTA proposes that the TRS fund be established as an escrow account and not commingled with other funds.¹⁰ Further, NARUC, NCLD, and Robinson, in their comments, propose that an advisory committee, comprised of representatives from the interstate service industry, TRS providers, individuals with hearing and speech disabilities, state programs, the fund administrator, and the Commission, be established to monitor interstate TRS compliance and address telecommunications issues related to TRS.

5. In their comments, MCI, ACTA, GCI, and Allnet strongly oppose the selection of NECA as administrator of the TRS Fund because they contend that NECA is associated with one specific industry group (local exchange carriers), and that NECA has demonstrated an inability to control administrative costs in its performance as administrator of other pools. Specifically, MCI proposes that the Commission adopt a self-funding mechanism for the first year of TRS implementation, then utilize a pooling mechanism, with the administrator selected through a competitive bidding process. MCI asserts that this alternative would give TRS providers an extension of time in which to gain experience providing this new telecommunications service. As a second alternative, MCI proposes that NECA act as interim administrator for two years, requiring NECA to submit to the Commission annual reports reflecting actual and projected administrative costs. After this interim period, MCI proposes that the Commission transfer the task to a competitively selected bidder. Further, MCI proposes that the administrator of the fund be a not-for-profit entity, paid on a flat, monthly fee basis because this arrangement would eliminate any incentive to overcharge contributors and the administrator would return or carry-over any excess funds to the TRS Fund.

6. In their reply comments, GTE reiterates that NECA should be selected as administrator because NECA has improved its record as a fund administrator, and lowered its administrative costs in administering other pools.¹¹ Many commenters assert that MCI's self-funding approach would needlessly delay implementation. In its reply comments, NECA asserts that dramatic changes have occurred in its organization since 1988, and that it has demonstrated the

¹⁰ Comments of USTA at 9.

¹¹ Reply comments of GTE at 13.

high level of competence necessary to act as TRS Fund administrator.

7. Decision. Because of its experience in administering other pooling arrangements, including the USF and Lifeline Assistance programs, and because a broad cross-section of interested parties commenting in the record support the shared-funding mechanism and the selection of NECA, NECA shall act as interim administrator of the TRS Fund. MCI's self-funding alternative was thoroughly examined in TRS II and rejected. However, we are persuaded that MCI's proposal that NECA serve an interim term as administrator and report its administrative costs to the Commission on an annual basis is an appropriate approach. Therefore, we shall review NECA's performance after two years. Further, we will entertain proposals by other parties interested in functioning as future administrator of the TRS Fund and shall solicit comment and alternative proposals. Further, we direct NECA to report annually to the Commission an itemization of monthly administrative costs which shall consist of all expenses, receipts, and payments associated with the administration of TRS Fund. The administrator shall file a cost allocation manual (CAM)¹² with the Commission, and shall provide the Commission full access to all data collected pursuant to the administration of the TRS Fund. We further require that the administrator shall be subject to a yearly audit by an independent certified accounting firm and by the Commission, if the Commission so requests. The administrator is further required to keep the TRS Fund separate from all other funds under the control of the administrator.

8. We find merit in the proposal of NCLD, Robinson, and NARUC that there be an advisory committee to monitor TRS cost recovery issues. We find that as part of its administrative function, NECA should establish such a committee and consider guidance from its members on TRS issues. Therefore, we further direct NECA to establish a non-paid, voluntary advisory committee of persons from the hearing and speech disability community, TRS users (voice and text telephone), interstate service providers, state representatives, and TRS providers. Each group shall select its own representative to the committee. The committee will meet at reasonable intervals (at least semi-annually) in order to monitor TRS cost recovery matters. NECA's annual report to the Commission shall include a discussion of advisory committee deliberations. We find that with these additional safeguards in place, NECA is uniquely placed to effectuate timely and efficient implementation of the TRS Fund.

¹² This manual will describe the accounts and procedures the administrator will use to segregate and allocate the costs of administering the TRS Fund from its other operations.

B. Contributions to the TRS Fund

9. Comments. The Commission, in TRS II, proposed that a charge would be assessed on all common carriers that offer interstate telecommunications services on the basis of their relative share of nationwide interstate revenues for common carrier services.¹³ In their comments, Ameritech, Bell Atlantic, BellSouth, USTA, MCI, SWB, NECA, and GTE generally support the Commission's proposal that contributions to the fund be based on relative share of interstate revenues. However, these commenters request clarification as to what constitutes interstate telecommunications services. Specifically, Sprint, NYNEX, MCI, Ameritech, Bell Atlantic, BellSouth, and USTA propose that the Commission clarify that revenues from access charges and end-user line charges be excluded from the fund because inclusion of access revenues will cause double-billing and subscriber line charges do not constitute interstate service revenues, rather they are flat rate charges that do not reflect usage of interstate service. Further, these commenters propose that the Commission require TRS Fund contributions from providers of every interstate service including resellers, cellular carriers, interstate alternative access and special access, packet-switched, WATS, 800, private dedicated, international¹⁴, satellite, and interstate intraLATA service providers. NCLD, Robinson, and USTA propose that the widest possible scope of interstate service providers should contribute to the fund including all current and future interstate providers of end-to-end or intermediate transport, whether common carrier or non-common carrier, pursuant to the language of the ADA on cost recovery.

10. In its comments, NECA proposes that the Commission clarify that contributions should be billed based on interstate revenues that are booked in accounts 5100-5169 of the Uniform System of Accounts, 47 CFR § 32.5100-5169, which would not include access revenues which NECA concurs would cause double billing of services. NECA asserts that contributions should be made by resellers and that the Commission's rules should be modified to require facilities-based carriers to exclude revenues associated with resold services. NECA further proposes a "banding" mechanism for use with interstate service providers that have revenues below a certain amount. NECA and other commenters propose the banding mechanism in order to avoid administrative burdens for small carriers and high administrative costs for the administrator of the fund. NECA proposes that the administrator would bill a flat rate

¹³ TRS II at Appendix D, Section 64.604 (c)(4)(iii)(a).

¹⁴ Sprint argues that international services should be included because TRS providers will be compensated by the administrator for international TRS minutes of use.

on a quarterly or annual basis if the contributor's share is de minimis.

11. In their comments, AT&T, ACTA, and GCI propose that contributions to the fund be based on a pro-rata share of interstate traffic minutes because they contend that this is a more equitable method of calculation than contributions based on gross interstate revenues. CTIA, in its comments, asserts that cellular services are essentially intrastate, that less than 1% of the cellular industry revenue is from interstate services, and that cellular carriers lack information required to determine their pro rata share of interstate services. Therefore, CTIA proposes that the banding alternative be utilized for cellular carriers. BellSouth, McCaw, USTA, and GTE concur with NECA and CTIA and propose that a banding mechanism be utilized where the pro rata share of gross interstate revenues would generate less than a \$100 yearly contribution to the fund.

12. Decision. In order to provide universal telephone service to TRS users as mandated by the ADA, Congress ordered the Commission to prescribe regulations providing generally that costs caused by interstate telecommunications relay services should be recovered from all subscribers to every interstate service. Commenters proposed that we clarify and define with specificity the persons who would be required to contribute to the TRS Fund. Congress may have contemplated that the Commission might recover the cost for the interstate telecommunications relay service through the imposition of a fixed monthly charge on residential customers,¹⁵ similar to the subscriber line charges assessed on subscribers to local telephone service under Part 69 of the Commission's rules,¹⁶ even though doing so would not seem to capture "all subscribers to every interstate service." Representatives of the hearing impaired find this cost recovery mechanism objectionable,¹⁷ and we do not choose to use such a

¹⁵ See House Conference Report No. 101-558, June 26, 1990, 101st Cong., 2nd Sess., at para. 67, where the Conference Committee removed the Senate bill's prohibition on such monthly subscriber line charges as a mechanism for funding a telecommunications relay system.

¹⁶ See 47 C.F.R. § 69.104. The subscriber line charge or end user common line charge is imposed upon all end users that subscribe to local exchange telephone service, Centrex, or semi-public coin telephone service to the extent they do not pay carrier common line charges. That charge is billed pursuant to interstate tariffs filed by all carriers that provide local exchange telephone service. See 47 C.F.R. § 69.2(hh).

¹⁷ See e.g., comments of NCLD summarized in TRS Order, note 4, supra, at para. 32.

mechanism. However, we believe that we can accomplish the goals of the Act by having NECA recover these costs from all common carriers that provide interstate service.¹⁸ USTA argues that in the July 12, 1990 House Conference Report on Pub. Law 101-336, the Conference Committee stated that the costs of interstate relay service should be "recovered from all subscribers for every interstate service, even those businesses that have private telecommunications systems".¹⁹ We believe that recovering interstate relay costs from all common carriers who provide interstate service on the basis of their interstate revenues will accomplish this goal. It appears that Congress intended the term "private telecommunications systems" to mean private networks provided by common carriers, such as AT&T's Tariff 12 offerings. These networks, therefore, will be included in the cost recovery process.²⁰ Nothing in the legislative history indicates that Congress intended the term "private telecommunications systems" to mean facility-based private networks owned and operated by private carriers or private entities.²¹ Accordingly, we direct that for the purposes of funding interstate TRS, interstate service includes, but is not limited to, the interstate portion of: cellular telephone and paging, mobile radio, operator services, personal communications service (PCS), access (including subscriber line charges), alternative access and special access, packet-switched, WATS, 800, 900, message telephone (MTS), private line, telex, telegraph, video, satellite, international, intraLATA, and resale services, provided by common carriers.

13. Some commenters assert that it is inappropriate to require contributions from providers of resale services, access services, or cellular services. Some commenters suggest that double payment would occur if both resold and underlying services are subject to contribution. These commenters assert that double

¹⁸ The common carriers, of course, would in turn recover these costs from their subscribers.

¹⁹ See USTA Reply Comments at 3-4, citing House Conference Report No. 101-596, July 12, 1990, 101st Congress, 2d Session. "Private telecommunications system" is not further defined or described.

²⁰ We agree with USTA that "the Commission should not view the funding base as being static; rather, it is a continuing evolutionary process, with new players being added from time to time." See USTA Reply Comments at 4.

²¹ We note that when these interstate private facilities interconnect with the public switched telephone network, they will generally pay either interstate access charges or a special surcharge pursuant to Section 69.115 of the Commission's rules. They will, in this manner, add to the interstate revenue base.

payment results because the charge for the resold service would presumably cover the contribution for the resold service as well for the underlying services. However, current accounting requirements do not separate carrier revenues for services provided to resellers from services provided to final customers. Similarly, current accounting requirements do not separate the cost of underlying service obtained for resale from other carrier costs. For most carriers, the cost of identifying double counting would probably exceed the contribution associated with any double counting. Even if the rules exempted resold service from contribution, it is unlikely that all customers would, in effect, end up making equal proportionate contributions, because most interstate rates are not calculated on a cost plus basis, but rather, are shaped by market forces. Accordingly, the potential unfairness of double counting is not sufficient to justify excluding access or resale services from contribution. This treatment also is consistent with the purpose of the ADA which is to recover the costs of TRS from all providers of interstate services.

14. In its comments, NECA argues that most subscriber line charges are capped, and that any contribution attributed to subscriber line charges would, in fact, be recovered from users of other interstate access service. We do not find merit in NECA's incremental cost argument. Our general approach is to identify all interstate common carrier services, and to assess a contribution factor against the revenue from those services. All carriers subject to Part 32 of the Commission's rules will record TRS contributions in their books of account in the manner prescribed by the Uniform System of Accounts. Federal subscriber line charges are billed to the public to recover at least part of the interstate costs of providing the local loop. Therefore, we find this is an interstate service for purposes of recovering TRS costs.

15. With regard to cellular service providers, we find no basis upon which to exclude revenues from interstate cellular services. We find that all interstate revenue associated with cellular service shall be subject to TRS contribution.

16. Based upon the record before us, we find that contributions shall be based on each interstate service provider's relative share of gross interstate revenues subject to contribution as modified above. We reject the proposals of AT&T, ACTA, and GCI. While a calculation based upon minutes of use could provide an accurate measure of a service provider's share of switched services, this method would not account adequately for services that utilize dedicated facilities, and would not encompass various types of new services offered by traditional and emerging carriers. Accordingly, contributors shall calculate their contribution to the TRS fund as the product of their subject revenues for the prior calendar year and a contribution factor determined by the Commission. For efficiency of administration, we modify our

proposed rules to incorporate a minimum yearly contribution of \$100. Thus, each subject carrier must contribute at least \$100 per year. Service providers whose annual contributions total less than \$1,200 must pay the entire contribution at the beginning of the contribution period. Service providers whose contributions total \$1,200 or more may divide their contributions into equal monthly payments.

17. Initial contributions to the TRS Fund are due September 26, 1993. The Commission has developed a "TRS Fund Worksheet," which shall be published in the Federal Register to enable contributors to determine their contributions. Upon approval by the Office of Management and Budget, a Public Notice will be issued, indicating how copies may be obtained. In order to facilitate timely filing, the proposed TRS Fund Worksheet is included herein as Appendix D. The worksheet will direct each carrier to provide identification information and revenue data, to calculate a TRS contribution, and to file the worksheet and contribution with the FCC TRS Fund Administrator. The worksheet shall be certified to by an officer of the contributor, and subject to verification by the Commission or the administrator at the discretion of the Commission. Contributors' statements in the worksheet shall be subject to the enforcement provisions of the Act.

18. Carriers are to provide gross revenues by 10 categories of revenues. These categories represent major types of telecommunications services. Carriers will report gross revenues, rather than interstate revenues, because gross revenues can be traced to a carrier's books of account. Carriers are required to estimate the percentage of each revenue category that arises from interstate service.

C. Computation of Fund Contributions

19. Comments. In TRS II, we asked for comment regarding the feasibility of requiring all carriers subject to the ADA to report interstate revenues to the fund administrator and on whether the administrator should play a role in enforcing compliance with such a rule.²² Several commenters expressed concern that much of the information to be collected by a fund administrator in order to determine the calculations for fund contributions is confidential and proprietary in nature. Specifically, ACTA, AT&T and USTA, in their comments, request that the Commission prescribe uniform protective agreements, to be used in the same manner as those used in tariff investigations. MCI proposes that the data collected for calculation of fund contributions by NECA be held confidential for one year. In its comments, NECA proposes that filings associated with contributions not be treated as tariff filings because the

²² TRS II, at 11.

administrator will not be offering TRS service. Further, NECA proposes that the proposed rules be modified to require that the administrator shall keep all data obtained from TRS providers and contributors confidential, shall not use such data except for purposes of administering the TRS Fund, and shall not disclose such data in company-specific form unless directed to do so by the Commission.

20. Decision. As noted above, and in order to lessen administrative burdens on contributors to the fund and the fund administrator, we modify the proposed rules to require that all providers of interstate services calculate their TRS contributions in accordance with the TRS Fund Worksheet. The contributor shall file the TRS Fund Worksheet, along with any amounts due, with the fund administrator. The Commission shall have full access to all data received by the administrator. Requests for Commission nondisclosure can be made under 47 C.F.R. § 0.459. The Commission will base a carrier's contribution on the ratio of the expected TRS payments to interstate service revenues subject to contribution, which shall be calculated on the basis of information provided by the administrator.

21. The contribution factor to be used in the TRS Fund Worksheet for the initial contribution period, July 26, 1993 through April 26, 1994, is .00047. This factor is based on the ratio of expected costs for providing interstate TRS for one year and the expected interstate revenue base. The National Exchange Carrier Association (NECA), the interim TRS Fund administrator, estimates a first year funding requirement of \$30 million based on their estimate of 14 to 17 million minutes of interstate TRS service, a payment of about \$1.705 per interstate TRS minute, administrative expenses of about \$312,000, development costs of about \$567,000, and uncollectibles of \$800,000. Appendix C estimates a 1992 interstate revenue base of \$63,464 million. Accordingly, a contribution of \$0.00047 for each dollar of interstate revenue should provide adequate TRS funding. To allow for the uncertainties in estimating both costs and reportable revenues, the initial contribution period provides TRS funding for 9 months, while the contribution rate is based on expected TRS funding requirements for 12 months.

22. This calculation is necessarily inexact. In the event that contributions exceed TRS payments and administrative costs, the contribution factor for the following year will be adjusted by an appropriate amount, taking into consideration projected cost and usage changes. In the event that contributions are inadequate, the fund administrator may request authority from the Commission to borrow funds commercially, with such debt secured by future year TRS contributions. In such event, the contribution factor for the following year's contributions shall be increased by an appropriate amount. Further, we find merit in NECA's proposal regarding confidentiality and require that the fund administrator keep all

data obtained from TRS providers and contributors confidential, not use such data except for purposes of administering the TRS Fund, and not disclose such data in company-specific form unless directed to do so by the Commission.

D. Data Collection and Payments to Providers

23. Comments. In TRS II, the Commission proposed that TRS providers give the administrator true and accurate data necessary to compute payments to providers, including total TRS minutes of use, total interstate TRS minutes of use, TRS operating expenses, TRS interstate investment, and other information necessary to compute charges and payments to providers. Further, the Commission tentatively determined that TRS providers would be permitted to recover interstate TRS costs based on a national average TRS interstate minute of use rate.²³ In their comments, Sprint, USTA, Ameritech, MCI and NECA fully support the average national rate proposal because it encourages carriers and providers to develop cost-effective measures in order to meet or better the average compensation rate.²⁴ Further, the majority of commenters agree that all providers should report costs to the fund administrator as proposed, rather than have the administrator sample providers in order to establish the rate. All commenters agree that cost data submissions for the first year of the plan should be clarified with regard to the proposed requirements for notification of intent to receive payments from the TRS Fund. BellSouth contends that payments to providers should be based on actual costs, not on national average rates. DCPSC proposes a high cost fund subsidy for high cost TRS jurisdictions because, DCPSC argues, minute cost may increase if volume increases, and this may create a disincentive for the provision of quality TRS.²⁵

24. In the proposed rules, the Commission defined TRS "minutes of use" as the minutes of use for completed calls beginning after call set-up and concluding after the last message call unit. See TRS II, Appendix D, Section 64.604(c)(4)(iii)(e). However, MCI proposes that the full cost of providing TRS minutes of use should include call attempts, ring-no-answer and busy signals, call set-up time, and caller information for first-time users because this would be functionally equivalent to network processing of voice calls. AT&T and the majority of commenters oppose MCI's proposal and recommend that administrative calls including handling billing inquiries, customer service and the

²³ TRS II at Appendix D, Section 64.604 (c)(4)(iii)(c) and (e).

²⁴ See Comments of Sprint at 5.

²⁵ The proposals of BellSouth and DCPSC received no support from other commenters to this proceeding.

provision of information be excluded from the definition of "minutes of use" because allowing for such compensation would create a perverse economic incentive for inefficiency by rewarding additional call set-up time.²⁶

25. In its comments, NECA concurs with AT&T's contentions and further proposes that payments should only be available for calls that are actually billed to end-users. NECA further proposes that all TRS providers be required to submit true and accurate data to NECA, and that the Commission enable NECA to request that the Commission take action to investigate any alleged failure to comply with the rules. In its reply comments, NECA proposes that, except for the first year of the fund, the administrator file, on October 1, payment schedule formulas to be effective for one year periods beginning January 1. NECA asserts that this approach would lessen administrative burdens on NECA and TRS providers by reducing the number of data collections and filings to one per year. With regard to administrative costs, NECA proposes that the administrator recover its administrative expenses solely from the TRS Fund, before payments are disbursed from the Fund.

26. In its comments, NCLD proposes that payments should only be distributed to TRS providers that are in compliance with the minimum standards set forth in Section 64.604 of the Commission's rules. NYNEX, Hamilton and MCI propose that the Commission revise Section 64.604(c)(4)(iii)(f) to permit actual providers of state TRS programs to receive payments. Specifically, Hamilton proposes that the Commission modify the rule to reflect that state contract TRS providers selected by the state can submit data to NECA and NECA may make payments directly to that contractor.

27. In TRS II, the Commission proposed that TRS providers receiving payments shall be subject to Parts 32 and 36 of the Commission's rules for purposes of the TRS fund plan.²⁷ Many of the commenters propose that special guidelines be established for jurisdictional apportionment based on actual minutes of use because standard Part 36 categories identifying TRS service may not exist. Specifically, AT&T proposes that in lieu of reliance on Parts 32 and 36 procedures, the Commission should allow TRS providers to report to the administrator those costs that are incremental to the costs those carriers incur in providing intrastate TRS service. SWB contends that the separations rules contained in Parts 32 and 36 of the rules are understood and suitable and that AT&T's incremental cost proposal is flawed because it would shift the burden of support for the TRS infrastructure to the intrastate subscriber. Most commenters state that TRS providers should not be subject to the separations and accounting rules of Parts 32 and

²⁶ Reply comments of AT&T at 9.

²⁷ TRS II, Appendix D, Section 64.604 (c)(4)(iii)(e).

36 because many providers have never been subject to these rules, and requiring them to be subject to these rules will increase the cost of providing TRS.²⁸ Instead, these commenters propose that the Commission's rules exclude TRS costs from the separations process and establish a simple allocation procedure. Many commenters concur with the alternative proposal of an abbreviated procedure, if it contains acceptable safeguards, in order to avoid heavy administrative burdens. NARUC disagrees with other commenters and urges the Commission to establish a Joint Board, pursuant to Section 410(c) of the Act, or alternatively, establish an advisory committee pursuant to Section 410(b), to monitor the implementation of the ADA.

28. In its comments, NECA agrees that the imposition of Parts 32 and 36 accounting requirements on TRS providers will present significant administrative burdens for TRS providers, the administrator and the Commission. Because it may not be feasible for TRS providers to conform their accounts to this methodology, NECA proposes that a data request will establish comparable account definitions and procedures reasonably structured to meet TRS needs.²⁹ Sprint concurs with NECA's approach and proposes that Parts 32 and 36 requirements should not be imposed on TRS providers that do not currently use them.

29. Decision. Based upon the record before us, we first determine that TRS providers shall be permitted to recover interstate TRS costs based on a national average TRS interstate minutes of use rate. We are persuaded by commenters that the proposed rule defining "minutes of use" is appropriate and will encourage providers to develop efficient and cost-effective TRS programs. We note that "minutes of use" is used as the allocator for operator services in part 36 of the Commissions rules. Second, we find that payments shall only be available for interstate TRS calls that are placed by TRS users and that only TRS providers in compliance with the mandatory minimum standards set forth in Section 64.604 and specific eligibility set forth in Section 64.604 (c)(4)(iii)(f) of the Commission's rules shall be eligible for TRS Fund payments. These rules are designed to prevent double payment. We are persuaded by Hamilton and others to modify the rules to reflect that TRS providers selected by the state can submit data to the administrator and the administrator may make payments directly to those contractors.

30. Third, based on the record, we direct the administrator to fashion a form that is consistent with Parts 32 and 36 procedures reasonably tailored to meet the needs of TRS providers

²⁸ See e.g., Comments of AT&T, BellSouth, GCI, MCI, NECA, and McCaw.

²⁹ See Comments of NECA, Appendix C-10.

who would otherwise not be subject to part 32 of the rules. Further, we find that existing accounting and separations rules should be adequate to deal with the provision of interstate TRS by subject service providers and, therefore, a Joint Board proceeding at this time is unnecessary.³⁰ Lastly, TRS providers will report to the fund administrator accurate and true data as set forth in section 64.604, and the fund administrator shall use the data to calculate a national average TRS minutes of use rate in order to distribute payments to TRS providers. The rate calculated by the administrator shall be subject to Commission approval and the Commission shall have authority to audit providers and access to all data, including carrier specific data, collected by the fund administrator. The fund administrator shall have authority to audit TRS providers reporting data to the administrator.

IV. CONCLUSION

31. For the reasons set forth above, we conclude that the TRS Fund will create strong incentives for TRS providers to offer high quality, innovative services at reasonable cost. Moreover, by compensating TRS providers based on actual interstate relay minutes of use, TRS providers who provide excellent service to the public and generate strong demand for TRS will be reasonably compensated by all subscribers of every interstate service. We further conclude that the TRS Fund will further the goal of the ADA to provide functionally equivalent telephone service for all Americans.

V. PROCEDURAL MATTERS

32. Final Regulatory Analysis: Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 601, et seq., the Commission's final analysis in this Third Report and Order is as follows:

I. Need and purpose of this action:

³⁰ Section 410(c) of the Communications Act of 1934, as amended, requires the Commission to refer to a Joint Board any proceeding regarding the jurisdictional separation of common carrier property and expenses between intrastate and interstate operations, which the Commission institutes pursuant to a notice of proposed rulemaking. We are not proposing any changes to the existing separations rules for subject carriers, and are requiring NECA's cost recovery form to be consistent with Parts 32 and 36. Finally, consistent with NARUC's views, we are directing NECA to establish an advisory committee, to include state regulatory officials.

This Third Report and Order further amends the Commission's rules to require that each common carrier engaged in interstate and/or intrastate telephone voice transmission services shall, no later than July 26, 1993, provide telecommunications relay services throughout the area in which it offers service. The rule amendments are required by the Americans with Disabilities Act of 1990, which, inter alia, added Section 225 to the Communications Act of 1934, as amended, 47 U.S.C. Section 225. The rules are intended to ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to all Americans.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

No comments were submitted in direct response to the Regulatory Flexibility Analysis in the Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking.

III. Significant alternatives considered:

The Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking in this proceeding offered several proposals and requested comments as well as the views of commenters on other possibilities. The Commission has considered all comments, and has adopted most of its proposals in addition to some alternatives recommended by commenters. The Commission considers its Third Report and Order to be the most reasonable course of action under the mandate of Section 225 of the Communications Act, as amended.

The Secretary shall send a copy of this Third Report and Order including the certification to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(A) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1981).

VI. ORDERING CLAUSES

33. Accordingly, It is Ordered, That, pursuant to Sections 1, 4(i), 4(j), 201-205, 225 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), 154(j), 201-205, 225 and 403, Part 64 of the Commission's Rules and Regulations IS AMENDED as set forth in Appendix B hereof, effective on the date a summary of this order is published in the Federal Register.³¹

³¹ We find good cause for making the rule amendments effective on less than 30 days notice because Title IV of the ADA requires TRS implementation by July 26, 1993.

34. It is Further Ordered, That the TRS Fund Worksheet, July 1993 is hereby adopted, and the worksheet will be published in the Federal Register.

35. It is Further Ordered, That, pursuant to the requirements of Section 604 of the Regulatory Flexibility Act, 5 U.S.C. 604, the Secretary shall cause a summary of this Third Report and Order to be published in the Federal Register which shall include a statement describing how members of the public may obtain such copies. The Secretary shall also provide a copy of this Third Report and Order to each state utility commission and to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

LIST OF COMMENTERS

Allnet Communications Services, Inc. (Allnet)**
America's Carriers Telecommunications Association (ACTA)
American Public Communications Council (APCC)*
American Telephone and Telegraph Company (AT&T)*
Ameritech Operating Companies (Ameritech)
Bell Atlantic Telephone Companies (BellAtlantic)*
BellSouth Corporation (BellSouth)*
Cellular, Inc. (Cellular)**
Cellular Telecommunications Industry Association (CTIA)*
Deafness Education Advocacy Foundation (DEAF)
District of Columbia Public Service Commission (DCPSC)
GE American Communications, Inc. (GE)*
General Communications, Inc. (GCI)
GTE Service Corporation (GTE)*
Hamilton Telephone Company (Hamilton)
McCaw Cellular Communications, Inc. (McCaw)**
MCI Telecommunications Corporation (MCI)*
National Association of Regulatory Utility Commissioners (NARUC)
National Center for Law and Deafness, Telecommunications for the
Deaf, Inc. and the National Association of the Deaf (NCLD)*
National Exchange Carrier Association (NECA)*
New York Telephone Company and New England Telephone and Telegraph
(NYNEX)*
Kenneth Robinson (Robinson)
Southwestern Bell (SWB)*
Sprint Corporation (Sprint)*
Telecommunications Resellers Association (TRA)
United States Telephone Association (USTA)*

* Filed Reply Comments

** Filed Reply Comments only

APPENDIX B

Part 64 of the Commission's Rules and Regulations (chapter 1 of Title 47 of the Code of Federal Regulations, part 64) is amended as follows:

PART 64 - MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for Part 64 continues to read as follows:

Authority: Section 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 225, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 225 unless otherwise noted.

2. Section 64.604(c)(4) is amended to read as follows:

(c) Functional standards.

(1) * * *

(2) * * *

(3) * * *

(4) Jurisdictional separation of costs.

(i) * * *

(ii) * * *

(iii) Telecommunications Relay Services Fund. Effective July 26, 1993, an Interstate Cost Recovery Plan, hereinafter referred to as the TRS Fund, shall be administered by an entity selected by the Commission (administrator). The initial administrator, for an interim period, will be the National Exchange Carrier Association, Inc.

(a) Contributions. Every carrier providing interstate telecommunications services shall contribute to the TRS Fund on the basis of its relative share of gross interstate revenues as described herein. Contributions shall be made by all carriers who provide interstate services, including, but not limited to, cellular telephone and paging, mobile radio, operator services, personal communications service (PCS), access (including subscriber line charges), alternative access and special access, packet-switched, WATS, 800, 900, message telephone service (MTS),

private line, telex, telegraph, video, satellite, intraLATA, international and resale services.

(b) Contribution computations. Contributors' contribution to the TRS fund shall be the product of their subject revenues for the prior calendar year and a contribution factor determined annually by the Commission. The contribution factor shall be based on the ratio between expected TRS Fund expenses to total interstate revenues. In the event that contributions exceed TRS payments and administrative costs, the contribution factor for the following year will be adjusted by an appropriate amount, taking into consideration projected cost and usage changes. In the event that contributions are inadequate, the fund administrator may request authority from the Commission to borrow funds commercially, with such debt secured by future year contributions. Each subject carrier must contribute at least \$100 per year. Service providers whose annual contributions total less than \$1,200 must pay the entire contribution at the beginning of the contribution period. Service providers whose contributions total \$1,200 or more may divide their contributions into equal monthly payments. Contributions shall be calculated and filed in accordance with a "TRS Fund Worksheet," which shall be published in the Federal Register. The worksheet sets forth information that must be provided by the contributor, the formula for computing the contribution, the manner of payment, and due dates for payments. The worksheet shall be certified to by an officer of the contributor, and subject to verification by the Commission or the administrator at the discretion of the Commission. Contributors' statements in the worksheet shall be subject to the provisions of Section 220 of the Communications Act of 1934, as amended. The fund administrator may bill contributors a separate assessment for reasonable administrative expenses and interest resulting from improper filing or overdue contributions.

(c) Data collection from TRS Providers. TRS providers shall provide the administrator with true and adequate data necessary to determine TRS fund revenue requirements and payments. TRS providers shall provide the administrator with the following: total TRS minutes of use, total interstate TRS minutes of use, total TRS operating expenses and total TRS investment in general accordance with Part 32 of the Communications Act, and other historical or projected information reasonably requested by the administrator for purposes of computing payments and revenue requirements. The administrator and the Commission shall have the authority to examine, verify and audit data received from TRS providers as necessary to assure the accuracy and integrity of fund payments.

(d) The TRS Fund will be subject to a yearly audit performed by an independent certified accounting firm or the Commission, or both.

(e) Payments to TRS Providers. TRS Fund payments shall be distributed to TRS providers based on formulas approved or modified by the Commission. The administrator shall file schedules of payment formulas with the Commission. Such formulas shall be designed to compensate TRS providers for reasonable costs of providing interstate TRS, and shall be subject to Commission approval. Such formulas shall be based on total monthly interstate TRS minutes of use. TRS minutes of use for purposes of interstate cost recovery under the TRS Fund are defined as the minutes of use for completed interstate TRS calls placed through the TRS center beginning after call set-up and concluding after the last message call unit. In addition to the data required under subsection (c) above, all TRS providers, including providers who are not interexchange carriers, local exchange carriers, or certified state relay providers, must submit reports of interstate TRS minutes of use to the administrator in order to receive payments. The administrator shall establish procedures to verify payment claims, and may suspend or delay payments to a TRS provider if the TRS provider fails to provide adequate verification of payment upon reasonable request, or if directed by the Commission to do so. TRS Fund administrator shall make payments only to eligible TRS providers operating pursuant to the mandatory minimum standards as required in Section 64.604, and after disbursements to the administrator for reasonable expenses incurred by it in connection with TRS Fund administration. TRS providers receiving payments shall file a form prescribed by the administrator. The administrator shall fashion a form that is consistent with Parts 32 and 36 procedures reasonably tailored to meet the needs of TRS providers. The Commission shall have authority to audit providers and have access to all data, including carrier specific data, collected by the fund administrator. The fund administrator shall have authority to audit TRS providers reporting data to the administrator.

(f) TRS providers eligible for receiving payments from the TRS Fund are:

(1) TRS facilities operated under contract with and/or by certified state TRS programs pursuant to Section 64.605; or

(2) TRS facilities owned by or operated under contract with a common carrier providing interstate services operated pursuant to Section 64.604; or

(3) interstate common carriers offering TRS pursuant to Section 64.604.

(g) Any eligible TRS provider as defined in section (f) of this section shall notify the administrator of its intent to participate in the TRS Fund thirty (30) days prior to submitting reports of TRS interstate minutes of use in order to receive payment settlements for interstate TRS, and failure to file may exclude the TRS provider from eligibility for the year.

(h) Administrator reporting, monitoring, and filing requirements. The administrator shall perform all filing and reporting functions required under Section 64.604 (c)(4)(iii)(a) through (j), inclusive. Beginning in 1994, TRS payment formulas and revenue requirements shall be filed with the Commission on October 1 of each year, to be effective for a one-year period beginning the following January 1. The administrator shall report annually to the Commission an itemization of monthly administrative costs which shall consist of all expenses, receipts, and payments associated with the administration of TRS Fund. The administrator is required to keep the TRS Fund separate from all other funds administered by the administrator, shall file a cost allocation manual (CAM), and shall provide the Commission full access to all data collected pursuant to the administration of the TRS Fund. The administrator shall establish a non-paid, voluntary advisory committee of persons from the hearing and speech disability community, TRS users (voice and text telephone), interstate service providers, state regulatory representatives, and TRS providers, which will meet at reasonable intervals (at least semi-annually) in order to monitor TRS cost recovery matters. Each group shall select its own representative to the committee. The administrator's annual report shall include a discussion of advisory committee deliberations.

(i) Information filed with the administrator. The administrator shall keep all data obtained from contributors and TRS providers confidential, shall not use such data except for purposes of administering the TRS Fund, and shall not disclose such data in company-specific form unless directed to do so by the Commission. The Commission shall have access to all data reported to the administrator, and authority to audit TRS providers.

(j) The administrator's performance and this plan shall be reviewed by the Commission after two years.

(k) All parties providing services or contributions or receiving payments under this section are subject to the enforcement provisions specified in the Communications Act, the Americans with Disabilities Act, and the Commission's rules.

* * *

Appendix C: Calculation of the TRS Fund Contribution Factor

	Reportable Revenue (Millions)	% Interstate	Interstate Revenue (Millions)
Total Toll Revenue 1/	\$71,803	55%	\$39,492
Interstate Access 2/	\$23,254	100%	\$23,254
Cellular 3/	\$5,131	14%	\$718
 Total Subject Revenue			 \$63,464
 First Year Fund Requirement			 \$30
 Contribution Rate 4/			 0.00047

1/ 1991 Total toll service revenues from the "Long Distance Market", March 26, 1993, plus 3.5% annual growth. The 55% allocation is based on the ratio of interstate dial equipment minutes to total toll dial equipment minutes as reported in the "Monitoring Report", CC Docket No. 87-339, May 1993.

2/ From the 1991/1992 Statistics of Communications Common Carriers.

3/ 1990 Cellular and other radio telephone revenues reported in the "Annual Survey of Communications Services: 1990", by the U.S. Department of Commerce, plus 20% annual growth. The 14% allocation is based on the ratio of interstate dial equipment minutes to total dial equipment minutes.

4/ Carriers with interstate revenues of less than \$212 thousand will pay \$100. Carriers with interstate revenues exceeding \$2539 thousand can pay monthly.

Appendix D

TRS Fund Worksheet

Subject to OMB approval

Expires
Estimated Average
Burden Hours Per
Response: 2 hours.

**Instructions for Completing the
Worksheet for Calculating and Filing Carrier Contributions
to fund Interstate Telecommunications Relay Service (TRS).
July 1993**

NOTICE TO INDIVIDUALS

Section 64.604(c)(4)(iii) of the Commission's Rules requires all carriers providing interstate service to complete this worksheet and to contribute funding for interstate Telecommunications Relay Services (TRS). The collection of information and fees stems from the Commission's authority under the Communications Act of 1934, Sections 4, 48, 48 Stat. 1066, as amended, 47 U.S.C. 154 unless otherwise noted. Interpret or apply Sections 201, 211, 218, 219, 220, 225 48 Stat. 1073, 1077, as amended; 47 U.S.C. 201, 211, 218, 219, 220, 225. The data in the report will be used to ensure that carriers properly fund interstate TRS. Selected information provided in the worksheet will be made available to the public in a manner consistent with the Commission's Rules. All carriers providing interstate telecommunications service must file this worksheet.

The foregoing Notice is required by the Privacy Act of 1974, P.L. 93.579, December 31, 1974, 5 U.S.C. 552(a)(e)(3), and the Paperwork Reduction Act of 1980. P.L. 96-511, Section 3504(c)(3).

Public reporting burden for this collection of information is estimated to average 2 hours per response including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the reporting burden to the Federal Communications Commission,

FCC 431
July 1993

Office of Managing Director, Washington, DC 20554, and the Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction project (3060), Washington, DC 20503.

I. Introduction.

On July 15, 1993, the Commission adopted rules that require all providers of interstate telecommunications services to contribute to the provision of TRS based on their proportionate share of gross interstate revenues. Section 64.604(c)(4)(iii) directs carriers to calculate and file their contribution in accordance with TRS Fund Worksheet.

... Contributions shall be calculated and filed in accordance with a "TRS Fund Worksheet", which will be prepared and published in the Federal Register. The worksheet sets forth information that must be provided by the contributor, the formula for computing the contribution, the manner of payment, and due dates for payments.

II. Filing Requirements and General Instructions.

A. Who must file.

All common carriers providing interstate telecommunications services within the United States must file this worksheet. For this purpose, the United States is defined as the conterminous United States, Alaska, Hawaii, American Samoa, Baker Island, Guam, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Island, Navassa Island, the Northern Mariana Islands, Palmyra, Puerto Rico, the U.S. Virgin Islands, and Wake Island.

For the purpose of calculating TRS contributions, interstate telecommunications service includes, but is not limited to the interstate portion of the following types of services: cellular telephone and paging, mobile radio,

operator services, personal communications service (PCS), access (including Subscriber Line Charges), alternative access and special access, packet-switched, WATS, 800, 900, message telephone service (MTS), private line, telex, telegraph, video, satellite, international, intraLATA, and resale services. **Carriers that provide only intrastate service need not file.** Note, however, that all local exchange carriers provide interstate access services, and must file.

Entities may not file summary reports for more than one carrier. Each legal entity that provides interstate telecommunications service must file separately. All affiliates or subsidiaries should identify the ultimate controlling parent or entity in Block 1, Line (1-b) -- Holding Company.

B. When and Where to File

The 1993 TRS contribution period will fund interstate TRS provided between July 26, 1993 and April 30, 1994. Monthly contributions for the 1993 TRS contribution period must be received by the 26th of each month for September 1993 through March 1994. A revised TRS Worksheet will be released for the 1994 TRS contribution period. The revised TRS Worksheet will have instructions for payments due April 26, 1994 through March 26, 1995.

The legal name of the carrier should be shown on all checks exactly as it appears on the completed TRS Fund Worksheet. **Do not mail the TRS worksheet or TRS contribution checks to the FCC.** Payments must be received by the FCC TRS Fund Administrator -- the National Exchange Carrier Association (NECA) -- no later than the dates indicated below. The filing schedule is as follows:

Mailing Address	Worksheet Due September 26, 1993	Payments Due September 26, 1993 through March 26, 1993 *
NECA TRS P.O. Box 360090 Pittsburgh, PA 15251-6090		Check **
NECA FCC TRS Fund Administration 100 South Jefferson Rd. Whippany, NJ 07981 Telephone: 201-884-8000	Completed Worksheet	Photocopy of check **
* Carriers whose total 1993 TRS contribution is less than \$1200 must pay the total amount to the FCC TRS Fund Administrator no later than September 26, 1993. Carriers whose total 1993 TRS contribution is \$1200 or greater may elect to make seven equal monthly payments with the first payment due to the FCC TRS Fund Administrator no later than September 26, 1993. ** Carriers are encouraged to contact the FCC TRS Fund Administrator to make arrangements for Electronic Funds Transfer.		

C. Rounding of Numbers

All information provided in the worksheet, except the signature, should be neatly printed in ink or typed. Reported revenues in block 2, column (b) may be rounded to the nearest thousand dollars. Regardless of rounding, **all dollar amounts must be reported in whole dollars.** For example, \$2,271,881.93 could be reported as \$2,271,882 or as \$2,272,000, but could not be reported as \$2272 thousand or \$2.272 million.

Percentages reported in block 2, column (c) should be rounded to the nearest whole percent. For example, if the ratio of interstate to total revenue was .4269155, then the figure 43% should be reported. Percentages between 0% and 1% should be reported as 1%.

Interstate revenues are calculated as total revenues in column (b) times the percentage shown in column (c). Calculated interstate revenues should be rounded to the nearest whole dollar and entered in column (e). Similarly, the total contribution (block 3, line (18)) and amounts enclosed with the filing (block 3, line (19)) should be rounded to the nearest whole dollar.

D. Compliance

Carriers failing to file the TRS Worksheet in a timely fashion are subject to the fines prescribed in Section 219(b) of the Communications Act of 1934 (the Act). Carriers filing false information are subject to fines or imprisonment as specified in Section 220(e) of the Act. Carriers failing to contribute in a timely fashion are subject to fines prescribed in Section 503(b) of the Act. In addition, Section 64.604(c)(4) of the Commission's Rules authorizes the FCC Fund Administrator to bill a carrier for reasonable costs, including legal fees, that are caused by improper filing of the worksheet or overdue TRS contributions.

III. Specific Instructions.

A. Block 1: Carrier Identification

Block 1 of the TRS Fund Worksheet requires identification information, including: the legal name of the carrier; the holding company or controlling entity, if any; the principal name under which the company conducts carrier activities; and, the complete mailing address of the corporate headquarters. In addition, Block 1 requests a telephone number that can be used for customer inquiries. Information provided in Block 1 will be published by the Common Carrier Bureau in the "Long Distance Carrier Locator".

B. Block 2: Carrier revenue for calendar year 1992

1. Column (b)

Provide gross revenues for all telecommunications services. Gross revenues consist of total revenues billed to customers with no allowances for uncollectibles. For international services, gross revenues consist of gross revenues billed by U.S. carriers with no allowances for settlement payments. Gross revenues should also include any surcharges on communications services that are billed to the customer and either retained by the carrier or remitted to a non-government third party under contract. Gross revenues should exclude taxes and any surcharges that are not recorded as revenue, but which are instead remitted to government bodies.

Report carrier revenues using the categories shown in column (a) of Block 2. Carriers required to use the Uniform System of Accounts (USOA) prescribed in Part 32 of the Commission's rules should base their response on their USOA account data. Other carriers should divide gross revenues based on the following descriptions.

Line (5) -- Local exchange service -- should include the basic local service revenues of local exchange carriers except for local private line revenue, access revenues, and revenues from providing mobile or cellular services to the public. Line (5) should include Account 5001 -- basic area revenue; Account 5002 -- Optional extended area revenue; Account 5003 -- Cellular mobile revenue (revenue to the local exchange carrier for messages between a cellular customer and another station within the mobile service area); Account 5050 -- Customer premises revenue; Account 5060 -- Other local exchange revenue; and, Account 5069 -- Other local exchange revenue settlements. Line (5) should also include amounts in Account 5004 -- Other mobile services revenue -- that were derived from connecting with mobile service carriers.

Line (6) -- Local private line service -- should include revenues from providing local services that involve dedicated circuits, private switching arrangements and/or predefined transmission paths. Line (6) should include amounts recorded in Account 5040 -- Local private line revenue.

Line (7) -- Mobile radio, cellular, and paging -- should include revenues from the provision of mobile radio, cellular, and paging services to the public. Line (7)

should also include amounts in Account 5004 -- Other mobile services revenue -- that were derived from providing service directly to the public.

Line (8) -- Alternative access, PCS & other -- should include all other local service revenues, including revenues for competitive access providers, personal communications services (PCS), etc. Line (8) should include Account 5200 -- Miscellaneous revenue.

Long distance revenues include intrastate, interstate, and international long distance services. Divide long distance revenues between access service, operator service, other switched service, long distance private line services, and all other long distance services.

Line (9) -- Interstate access -- should include revenues in Account 5081 -- End User revenue; Account 5082 -- Switched access revenue; and, Account 5083 -- Special access revenue. Only local exchange carriers should be reporting data in line (9).

Line (10) -- Intrastate access -- should include revenues in Account 5084 -- State access revenue. Only local exchange carriers should be reporting data in line (10).

Line (11) -- Operator service -- should include all credit card calls, person to person calls, and calls with alternative billing arrangements such as third number billing and collect calls. Operator service revenues should include all toll traffic from coin, accommodation and prison telephones.

Line (12) -- Non-operator switched toll service -- should include amounts from Account 5100 -- Long distance message revenue -- except for amounts reported in Line (11). Line 12 includes WATS, 800, 900, "WATS like" and similar service.

Line (13) -- Long distance private line service -- should include revenue from dedicated circuits, private switching arrangements, and/or predefined transmission paths, extending beyond the basic service area. Line (13) should include Account 5120 -- Long distance private network revenue.

Line (14) -- All other long distance -- should include all other revenues from providing long distance communications services. Line (14) should include Account 5160 -- Other long distance revenue.

Total the figures in column (b) for Line (5) through Line (14) and enter this amount in Line (15b). This should represent the total communications revenues for the company.

2. Column (c) and Column (d)

For each entry in Line (5) through Line (14), estimate the percentage of revenues in column (b) that are for interstate and/or international service, and enter this percentage in Column (c). Interstate revenues include all revenues received for calls that do not originate and terminate in the same state. For example, if a cellular carrier collects a fixed amount of revenue per minute of traffic, and 10% of minutes are interstate, then interstate revenues would include 10% of the per minute revenues.

Wherever possible, carriers should calculate the percentage of total revenues that are interstate by using information from their books of accounts and other internal data reporting systems. Carriers who cannot calculate a percentage by using information from their books of accounts and other internal data reporting systems, may elect to rely on a special study to estimate the percentages. Place a check mark in Column (d) if the percentage shown in column (c) was based on a special study.

3. Column (e)

Multiply the gross revenues reported in column (b) by the interstate percentages reported in column (c), putting the results in column (e). The sum of the figures in column (e), lines (5) through (14), should be entered in line (15e).

C. Block 3: Calculation of Contribution

Use block 3 in the worksheet to calculate the TRS contribution for the period July 1993 through April 1994. Total interstate revenues from line (15e) should be

copied to line (16). This amount must be multiplied by the Contribution Rate shown in line (17), with the result entered in line (18). The contribution rate is 0.00047 for the 1993 filing year.

If the result of the calculation is less than \$100, then the total contribution for the period July 1993 through March 1994 is \$100. If the total contribution is less than \$1,200, then the carrier should remit the total contribution with the worksheet. If the total liability is equal to or greater than \$1,200, then the carrier may elect to make 7 equal monthly payments. The monthly contribution should be calculated as the amount in line (18) divided by 7.0, rounded to the nearest whole dollar. Enter the amount of the September 26, 1993 fund contribution in line (19). If the carrier elects to make monthly contributions, the six additional monthly contributions must be received by the 26th of succeeding months, October 1993 through March 1994.

Section II - B above provides directions for mailing the completed TRS Fund Worksheet and checks for amounts due to the FCC Fund Administrator. Carriers who check the box in line (19) will receive monthly payment reminders. These reminders will be mailed to the address shown in line (3). Failure to receive a reminder notice will not justify late payment.

The seven payment schedule specified above is adopted for transition purposes. On April 26, 1994, carriers will file a worksheet using data for calendar 1993. Carriers whose contributions are \$1,200 or greater will be allowed to make 12 equal payments to fund TRS for May 1994 through April 1995.

D. Block 4: Certification.

An officer of the fund contributor must examine the data provided in the TRS Fund Worksheet and certify that the information provided therein is accurate. In addition, the fund contributor should provide the name of a contact person who can provide clarifications, if necessary, and who could serve as the first point of contact in the event that either the FCC or the FCC Fund Administrator should choose to audit information provided by the company.

Annual TRS Fund Worksheet

Subject to OMB Approval

Expires

(Please read instructions before completing)

Estimated Average Burden Hours Per Response: 2 hours

Block 1: Carrier Identification

1a Legal Name of Carrier	
1b Holding Company	
2 Principal Name for Carrier Activities	
3 Complete Mailing Address of Carrier Corporate Headquarters	
4 Telephone # for Customer Inquiries	() -

Block 2: Carrier revenue for calendar year 1992

(a)	Gross Revenues (b)	% interstate (c)	Special study (d)	Interstate Revenues (e) = (b) x (c)
Local Services				
5 Local exchange service	\$	%		\$
6 Local private line service	\$	%		\$
7 Mobile radio, cellular, and paging	\$	%		\$
8 Alternative access, PCS & other	\$	%		\$
Long Distance				
9 Interstate access	\$	100 %		\$
10 Intrastate access	\$	0 %		\$ 0
11 Operator service	\$	%		\$
12 Non-operator switched toll service	\$	%		\$
13 Long distance private line service	\$	%		\$
14 All other long distance	\$	%		\$
15 Total lines 5 through 14	\$			\$

Block 3: Calculation of Contribution

16 Interstate Revenues from Line 15e	\$
17 Contribution Rate:	x 0.00047
18 Total CONTRIBUTION for July 1993 through March 1994: line 16 x line 17 [if line 16 is greater than \$0 then the minimum contribution is \$100]	\$
19 Contribution to be paid this month: [Enter the amount from line 18 if it is less than \$1200. Otherwise, the contributor may divide line 18 by 7.0 to calculate equal monthly contributions.] Check here for monthly billing reminders -----> ☐	\$

Block 4: CERTIFICATION

I certify that I am an officer of the carrier named above, that I have examined the foregoing report and that to the best of my knowledge, information and belief, all statements of fact contained in this worksheet are true and that said worksheet is an accurate statement of the affairs of the above named carrier for the period January 1, 1992 through December 31, 1992.

20 Printed Name of Officer	
21 Position with carrier	
22 Signature	
23 Date	
24 Contact Person	
25 Telephone Number of Contact Person	() -

Mail checks to: NECA TRS P.O. Box 360090 Pittsburgh, PA 15251-6090 For additional information call NECA 202-884-8000
Mail worksheet and photocopy of checks to: NECA - FCC TRS Fund Administration 100 South Jefferson Rd. Whippany, NJ 07981

Persons making willful false statements in the worksheet can be punished by fine or imprisonment under the Communications Act, 47 U.S.C. 220 (e).

FCC 431
July 1993

July 15, 1993

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

Re: Telecommunications Relay Services, and the Americans with Disabilities Act of 1990 [CC Docket No. 90-571]

In this Third Report and Order, the Commission adopts a shared-funding mechanism to recover interstate telecommunications relay services (TRS) costs. My vote to adopt this item should not be misconstrued as indicating general support for shared-funding mechanisms. Rather, I believe their use should, in general, be limited to services with clearly identified social benefits, and to instances where other funding mechanisms would not adequately serve the public interest. Use of a shared-funding mechanism to recover TRS costs meets these tests.

My second concern is that the TRS fund be administered in as efficient, reliable and accountable a manner as possible. The National Exchange Carrier Association (NECA) will function as administrator of the TRS fund for an interim two year period. I support the Order's provisions that there be a full assessment of NECA's performance as interim administrator, and that there be full opportunity for other entities to be considered as permanent TRS fund administrator.

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 93-463
Washington, D.C. 20554

In the Matter of
Telecommunications Relay Services,
and the Americans with Disabilities
Act of 1990

)
) CC Docket No. 90-571
)
)

**SECOND ORDER ON RECONSIDERATION AND
FOURTH REPORT AND ORDER**

Adopted: September 28, 1993

Released: September 29, 1993

By the Commission:

I. INTRODUCTION

1. On August 4, 1993, pursuant to Section 64.604 (c)(4)(iii) of the Commission's Rules, 47, C.F.R. 64.604, the Telecommunications Relay Services (TRS) Interim Fund Administrator, the National Exchange Carrier Association, Inc. (NECA) filed its proposed payment formula, fund size, and payment schedule for purposes of administering the interstate TRS Fund.¹ This Memorandum Opinion and Order approves the payment formula, fund size, and payment schedule for the TRS Fund.

2. Further, we have before us petitions for reconsideration, and a request for stay of policies and rules we recently adopted concerning the TRS Fund.² For the reasons set forth below, we take the following actions: (1) We reaffirm that interstate service, for purposes of TRS funding includes, but is

¹ See Public Notice, No. 34406 (August 11, 1993).

² See Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Third Report and Order, 58 Fed. Reg. 39671 (July 26, 1993); 8 FCC Rcd 5300 (1993). (hereinafter TRS III). Appendix A lists the parties filing comments and reply comments, petitions for reconsideration or stay, as well as abbreviations used throughout this Order to refer to those parties.

not limited to, the interstate portion of: cellular telephone and paging, mobile radio, operator services, personal communications service (PCS)³, access (including subscriber line charges), alternative access and special access, packet-switched, WATS, 800, 900, message telephone (MTS), private line, telex, telegraph, video, satellite, international, intraLATA, and resale services, provided by common carriers. (2) We clarify that TRS Fund contributions may be treated as exogenous costs under price cap regulation. (3) We reiterate that existing accounting and separations rules should be adequate to deal with the provision of interstate TRS by subject service providers and that a Joint Board proceeding at this time is unnecessary. (4) We clarify that the administrator shall reimburse committee members for the reasonable costs incurred in attending advisory committee meetings. (5) We dismiss the request for stay filed by IDB.

II. BACKGROUND

3. The Americans with Disabilities Act of 1990 (ADA) requires that the Commission ensure that interstate and intrastate telecommunications relay services⁴ are available, to the extent possible and in the most efficient manner to individuals in the United States with hearing and speech disabilities by July 26, 1993. In order to fulfill this mandate, the Commission, on November 8, 1990, initiated a rulemaking proceeding.⁵ After considering extensive public comment, and the specific requirements of Title IV of the ADA⁶, the Commission adopted a Report and Order

³ We note that on September 23, 1993, the Commission initiated a rulemaking proceeding to address to what extent PCS should be considered a private or common carrier service. See Implementation of Title VI of the Omnibus Budget Reconciliation Act of 1993, Notice of Proposed Rulemaking (regulatory treatment of mobile services, including personal communications services, under revised Section 332 of the Communications Act).

⁴ Telecommunications relay service (TRS) permits persons with and without hearing and speech disabilities to communicate using the telephone. TRS facilities are equipped with specialized equipment and staffed by communications assistants (CAs) who relay conversation between people who use text telephones and people who use traditional telephones.

⁵ See Notice of Proposed Rulemaking, CC Docket No. 90-571, 55 Fed. Reg. 50037 (Dec. 4, 1990); 5 FCC Rcd 7187 (1990).

⁶ See S.933, Pub. L. 101-336, 104 Stat. 327, 366-69 (July 26, 1990).

(TRS Order).⁷ In the TRS Order, the Commission fashioned a comprehensive set of rules which set forth terminology and definitions of TRS, prescribed operational, technical, and functional minimum standards required of all TRS providers, and delineated the state certification process. On February 19, 1993, in an Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking (TRS II),⁸ the Commission resolved five petitions for reconsideration, adopted a shared-funding mechanism for interstate TRS cost recovery, and proposed a specific plan establishing a TRS interstate cost recovery fund. On July 20, 1993, the Commission adopted a Third Report and Order (TRS III) which adopted rules implementing the TRS Fund.⁹

III. DISCUSSION

A. TRS Fund Rates and Schedules

4. Comments. Section 64.605(e) of the Commission's rules requires the TRS Fund administrator to file with the Commission schedules of payment formulas that are designed to compensate TRS providers for reasonable costs of providing interstate TRS. Pursuant to Section 64.605(e), NECA filed a proposed payment formula, fund size and payment schedule for purposes of administering the interstate TRS Fund.

5. In its filing, NECA proposes that the Commission approve the rate of \$1.705 as the average payment per interstate minute of use. NECA projects, based on applying the nationwide average rate to total estimated interstate annual demand, that nationwide interstate annual costs for 1993 will be between \$24 million and \$29 million. Further, NECA states that administrative expenses are estimated to be approximately \$312,000 annually, plus start-up costs of approximately \$567,000, that uncollectibles are estimated at 3% annually, and that all NECA expenses associated with TRS will be accounted for on a "keep-cost" basis and charged only to the TRS Fund.¹⁰ NECA projects the TRS Fund size, including

⁷ Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Report and Order and Request for Comments, 6 FCC Rcd 4657 (1991) (TRS Order).

⁸ Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking, 8 FCC Rcd 1802 (February 25, 1993), (hereinafter TRS II).

⁹ TRS III, supra, n. 2.

¹⁰ NECA Filing at 9.

growth in TRS expenses and demand, NECA TRS administrative expenses and an additive for uncollectibles, to be between \$25 million and \$31 million. NECA further proposes that the payment formula set forth in its filing is to remain in effect through December 31, 1994, and that in succeeding years, NECA will file its TRS payment formulas, and associated data with the Commission on October 1, to be effective for a one-year period beginning each January 1, as prescribed in Section 64.604(c)(4)(iii)(h) of the rules. Finally, NECA proposes that eligible TRS providers shall begin receiving disbursements from the TRS Fund on or about November 1, 1993, and initial payments will cover the service period from July 26, 1993, through August 31, 1993. In its filing, NECA proposes that TRS providers be required to report to NECA actual interstate minutes of use for this period no later than September 14, 1993, and thereafter, providers report usage for each monthly service period by the tenth work day of the succeeding month.¹¹ The payment formula, rate, and fund size proposals of NECA are virtually unchanged from estimates considered in TRS III, and are unopposed.

6. In its comments, AT&T, the sole commenter on the NECA filing, proposes three technical modifications to NECA's reporting schedule proposal and general administration of the TRS Fund. Specifically, AT&T's proposes (1) that NECA's proposal be modified to provide for adjustments of the payment amount at six month intervals during the initial period of TRS Fund operation through December, 1994; (2) that NECA should be required to invest contributions in interest bearing securities and that fund contributors be credited with the interest earned on their fund payments as an offset to any future payment obligations; and (3) that NECA's proposed reporting schedule be modified to permit TRS providers to compile information from their normal records systems.¹² AT&T asserts that this reporting schedule modification should not affect the schedule proposed by NECA for disbursements to TRS providers.

7. In its reply comments, NECA concurs that the TRS Fund's performance requires close scrutiny and may require revision. However, NECA asserts that a scheduled revision of the payment formula would require a completely new "cost and demand data" collection from TRS providers, and that, absent clear evidence that TRS providers were not being compensated adequately at the payment level approved by the Commission for that calendar year, NECA would not recommend mandating a burdensome data collection to recalculate the formula. With regard to investment and earnings of TRS fund contributions, NECA agrees that undistributed contributions must be wisely invested and intends to invest undistributed contributions in secure interest-bearing

¹¹ See NECA filing at Exhibit 3.

¹² See AT&T Comments, Exhibit A.

securities. NECA states that interest on investments of any excess contributions will be used to reduce future TRS Fund requirements. With regard to the reporting schedule, NECA proposes to revise its proposed schedule to require that TRS demand be reported no later than the fifteenth work day of the month succeeding the associated service period, and will distribute a revised schedule to TRS providers to reflect this modification, if approved by the Commission.

8. Decision. We have reviewed the TRS Fund size, rate and payment schedule proposed by NECA and the comments of AT&T regarding administrative matters and reporting schedules. Pursuant to Section 64.604(c)(4)(iii) of the Commission's rules, we approve the proposed rate of \$1.705 as the rate of payment to TRS providers per interstate minute of use. This rate will remain in effect through December 31, 1994. For succeeding years, the fund administrator is required to file its TRS payment formulas, and associated data with the Commission on October 1, to be effective for a one-year period beginning the following January 1, as prescribed in Section 64.604(c)(4)(iii)(h) of the rules. Eligible TRS providers shall begin receiving disbursements from the TRS Fund on or about November 1, 1993, and initial payments will cover the service period July 26, 1993, through August 31, 1993.

9. With regard to the reporting and payment schedule, we find merit in AT&T's proposed revision, and recognize that NECA has found administrative reasons to revise its reporting schedule to reflect TRS providers report actual interstate minutes of use for each monthly service period by the fifteenth work day of the succeeding month.¹³ We recognize that September 15, 1993 has passed and, therefore, require that for the service period from July 26, 1993, through August 31, 1993, TRS providers report usage to NECA no later than October 1, 1993, if they wish to be reimbursed by November 1, 1993. We note, however, that TRS providers can report usage for this period until October 28, 1993, in order to be reimbursed by December 1, 1993.

B. Petitions for Reconsideration

10. Petitions. In their petitions for reconsideration of TRS III, Ameritech, NYNEX, and SWB request that the Commission reconsider the definition of gross revenues and exclude revenues received by local exchange carriers (LECs) for the provision of interstate access service, which is the basis for TRS contributions. Specifically, Ameritech contends that requiring LECs to contribute on the basis of access service revenues,

¹³ The modifications proposed by AT&T regarding interim changes in the payment formula and general administration of the TRS Fund were fully considered and resolved in TRS III at paragraphs 21 and 22.

including subscriber line charges (SLCs), creates inefficiency and unnecessary administrative costs because it results in double billing for those costs. In the alternative, Ameritech requests that the Commission state that TRS costs will receive exogenous cost treatment under price cap regulation because TRS costs were imposed by the legislative requirement of the ADA and therefore, are beyond the control of carriers. Ameritech notes that these TRS costs are imposed on common carriers providing interstate services and therefore uniquely affect LECs.¹⁴ In its petition, NYNEX asserts that double billing results in unnecessary transaction costs including the costs of LECs gathering data and preparing the TRS Fund Worksheet, submission and processing by NECA, applying for exogenous cost treatment, and recovery from IXC's.

11. In its petition, CompTel proposes that the Commission exclude payments made by carriers to other common carriers for interstate transmission service and for interstate access, because to do otherwise, it contends, would lead to double payment by many carriers, particularly resale carriers. In its petition, Telocator contends that paging carriers should not be required to contribute to the TRS Fund because paging service does not constitute telephone voice transmission service and paging carriers do not have to provide interstate TRS.¹⁵

12. In its petition, NARUC requests that the Commission reconsider its decision not to refer the separations issues raised in the TRS Fund proceeding to a Joint Board. NARUC asserts that a Joint Board proceeding is necessary to assure fair cost allocation between the interstate and intrastate jurisdictions. Further, NARUC requests that the Commission clarify that the costs of participation incurred by members of the TRS advisory committee be covered by the TRS Fund administrator, and that the Commission clarify that "state representatives" are representatives of state public utility commissions.

13. In its petition for reconsideration,¹⁶ IDB requests that the Commission reconsider the inclusion of video and audio program distribution services in the definition of gross revenues for purposes of TRS contributions.¹⁷ Specifically, IDB argues that inclusion of revenues from video and audio program distribution

¹⁴ See Ameritech petition at 3.

¹⁵ Petition of Telocator at 2.

¹⁶ IDB filed a petition for stay pending reconsideration. In light of our consideration of IDB's reconsideration petition here, we dismiss the stay request because it is moot.

¹⁷ IDB does not request a stay of the requirement to contribute based on its revenue from interstate telephone services.

services is arbitrary and capricious because it is not supported by Section 225(d)(b)(B), and that the Commission failed to provide adequate notice of its intent to include these services in the TRS contribution base.¹⁸

14. In its opposition, USTA asserts that the Commission was neither arbitrary nor capricious in its decision to include all interstate services, including audio and video, in the interstate contribution requirement of the TRS Fund. In support of its assertion, USTA argues that the explicit language of the statute requires that costs caused by interstate TRS be recovered from all subscribers for every interstate service.¹⁹ USTA contends that the term "interstate service" is intended to be broad and comprehensive and is not ambiguous. Further, USTA asserts that all interested parties had ample notice and opportunity for comment in the Commission's February 25, 1993, further notice (TRS II) seeking comment on a proposed shared-funding mechanism for interstate TRS cost recovery. USTA argues that to the extent IDB chose not to participate in TRS II, it should not be allowed to litigate the same issue in a petition for stay.

15. Decision. As stated in TRS III, in order to provide universal telephone service to TRS users as mandated by the ADA, Congress ordered the Commission to prescribe regulations providing generally that costs caused by interstate telecommunications relay services should be recovered from all subscribers to every interstate service.²⁰ We believe that recovering interstate relay costs from all common carriers who provide interstate service on the basis of their interstate revenues will accomplish this goal. In TRS III, we defined, for the purposes of funding interstate TRS, that interstate service includes, but is not limited to, the interstate portion of: cellular telephone and paging, mobile radio, operator services, personal communications service (PCS), access (including subscriber line charges), alternative access and special access, packet-switched, WATS, 800, 900, message telephone (MTS), private line, telex, telegraph, video, satellite, international, intraLATA, and resale services, provided by common carriers. Some petitioners assert that it is inappropriate to require contributions from providers of resale services and access services. Petitioners argue that double payment would occur if both resold and underlying services are subject to contribution. These petitioners assert that double payment results because the charge for the resold service would presumably cover the contribution for the resold service as well for the underlying services. Petitioners' assertions regarding access, resale, and

¹⁸ Petition for Stay at 2.

¹⁹ Opposition of USTA at 2.

²⁰ See TRS III at paragraph 12.

paging were considered at length in TRS III.²¹ Petitioners now contend that requiring contributions based on these interstate services creates inefficiencies and administrative costs.

16. The petitioners have not presented any arguments that would undermine our previous conclusion that Congress intended that subscribers to "every" interstate service, including access and other resold services, be required to contribute to the support of telecommunications relay services. The clear language of the statute is broad and all-inclusive: "costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service. . ." 47 U.S.C. Section 225(d)(3). Congress gave no indication that any individual interstate service should be exempt from this requirement. Indeed, it would be nearly impossible to adopt the petitioners' approach to implementing the statute's cost recovery provisions. Under their interpretation, the Commission would continually be called upon to make decisions about whether a particular interstate service was composed of any underlying service that may have already made some contribution to the TRS Fund. We would also be required to decide whether it should be the underlying service or the resold service that should be required to contribute, and we would have to determine what portion of each service was not resold. As we move to a network of networks, such line-drawing would be next to impossible. More importantly, it would be inconsistent with the broad purpose of the statute, which is to require contributions from all subscribers to every interstate service.

17. We also disagree with Telocator's argument that interstate paging services should be exempt from the contribution requirement because paging services are not voice services subject to the "provision of services" requirement set forth in Section 225(c) of the Act.²² The Act clearly distinguishes between the obligation to provide TRS service, which applies only to "telephone voice transmission services," and the obligation to contribute to the cost recovery for those services, which applies to "all subscribers for every interstate service" without limitation. 47 U.S.C. Sections 225(c), 225(d)(3). Nothing in the ADA's legislative history would suggest that Congress meant to apply its cost recovery provisions to subscribers of interstate voice services only.

18. We are persuaded by petitioners to clarify that for TRS fund contributors regulated under price cap regulation, contributions may be treated as exogenous costs for the purposes

²¹ Id. at paragraphs 9-16.

²² We note that although paging itself is not a voice service, some persons will use TRS centers to initiate pages.

of calculating the price cap index. We make this finding pursuant to Section 61.45(d) of the Commission's rules, which grants exogenous treatment to any cost the Commission shall permit or require, plus a list of specifically enumerated exogenous costs.²³ As the Commission recently stated, exogenous costs are selected based upon whether the cost is beyond the carrier's control and not otherwise reflected in the price cap formula, *i.e.*, in the measure of inflation less productivity growth.²⁴ In the case of TRS fund contributions, carriers make a persuasive showing that these amounts are beyond their control. First, contributions are a requirement of the ADA as implemented by this Commission. Second, carriers are unable to control the actual level of these costs because fund contributions are made as a straight percentage of gross interstate revenues, a percentage amount imposed pursuant to this docket. While gross revenues is a statistic that reflects a number of business decisions over which the carrier has control, the percentage figure that determines their contribution is a regulatory decision, similar to the levy of a tax. Fund contributions are also not likely to otherwise be reflected in the price cap formula because, while all businesses must comply with other titles of the ADA, fund contributions are unique to common carriers and are in addition to the other obligations imposed on all businesses by the ADA.²⁵ Moreover, rate recognition of TRS fund contributions ensures that interstate ratepayers participate in the fund, as Congress intended. Finally, grant of exogenous cost treatment is consistent with the overall price cap incentive structure in that only the fund contribution amounts outside of carrier control are exogenous, not costs associated with the carrier's own decisions about how to configure service arrangements for TRS.

19. With regard to the petition of NARUC, we reiterate our findings in TRS III that existing accounting and separations rules should be adequate to deal with the provision of interstate TRS by subject service providers and, therefore, a Joint Board

²³ See, *e.g.*, Provision of Access for 800 Service, CC Docket No. 86-10, 8 FCC Rcd 907 (1993) (granting exogenous treatment of costs associated with the implementation of basic 800 data base service based on "highly unusual circumstances" surrounding the Commission's implementation of 800 data base).

²⁴ Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employer's Accounting for Postretirement Benefits Other than Pensions," 8 FCC Rcd 1024 (1993).

²⁵ TRS Fund contributions are analogous to taxes levied solely on telecommunications providers, which we have held to be exogenous.

of calculating the price cap index. We make this finding pursuant to Section 61.45(d) of the Commission's rules, which grants exogenous treatment to any cost the Commission shall permit or require, plus a list of specifically enumerated exogenous costs.²³ As the Commission recently stated, exogenous costs are selected based upon whether the cost is beyond the carrier's control and not otherwise reflected in the price cap formula, *i.e.*, in the measure of inflation less productivity growth.²⁴ In the case of TRS fund contributions, carriers make a persuasive showing that these amounts are beyond their control. First, contributions are a requirement of the ADA as implemented by this Commission. Second, carriers are unable to control the actual level of these costs because fund contributions are made as a straight percentage of gross interstate revenues, a percentage amount imposed pursuant to this docket. While gross revenues is a statistic that reflects a number of business decisions over which the carrier has control, the percentage figure that determines their contribution is a regulatory decision, similar to the levy of a tax. Fund contributions are also not likely to otherwise be reflected in the price cap formula because, while all businesses must comply with other titles of the ADA, fund contributions are unique to common carriers and are in addition to the other obligations imposed on all businesses by the ADA.²⁵ Moreover, rate recognition of TRS fund contributions ensures that interstate ratepayers participate in the fund, as Congress intended. Finally, grant of exogenous cost treatment is consistent with the overall price cap incentive structure in that only the fund contribution amounts outside of carrier control are exogenous, not costs associated with the carrier's own decisions about how to configure service arrangements for TRS.

19. With regard to the petition of NARUC, we reiterate our findings in TRS III that existing accounting and separations rules should be adequate to deal with the provision of interstate TRS by subject service providers and, therefore, a Joint Board

²³ See, *e.g.*, Provision of Access for 800 Service, CC Docket No. 86-10, 8 FCC Rcd 907 (1993) (granting exogenous treatment of costs associated with the implementation of basic 800 data base service based on "highly unusual circumstances" surrounding the Commission's implementation of 800 data base).

²⁴ Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employer's Accounting for Postretirement Benefits Other than Pensions," 8 FCC Rcd 1024 (1993).

²⁵ TRS Fund contributions are analogous to taxes levied solely on telecommunications providers, which we have held to be exogenous.

proceeding at this time is unnecessary.²⁶ Section 410(c) of the Communications Act of 1934, as amended, requires the Commission to refer to a Joint Board any proceeding regarding the jurisdictional separation of common carrier property and expenses between intrastate and interstate operations, which the Commission institutes pursuant to a notice of proposed rulemaking. We are not proposing any changes to the existing separations rules for subject carriers, and are requiring NECA's cost recovery form to be consistent with Parts 32 and 36 of our rules. With regard to NARUC's request for clarification of the composition of the advisory committee, we stated clearly that the committee was to include state regulatory officials. See TRS III at n. 30. Lastly, we do not oppose the proposal of NARUC that we clarify that the administrator of the TRS Fund may reimburse advisory committee members for the reasonable costs incurred in attending advisory committee meetings because doing so may permit some groups to participate who may not otherwise be able to do so. We expect the administrator to limit reimbursement to two persons per representative group,²⁷ be based upon requests by participants for reimbursement, and result in de minimis reimbursement costs. The administrator is required to report these costs pursuant to section 64.604(c)(4)(iii)(h) of the rules.

20. We also reject IDB's assertion that video and audio program distribution services by satellite or otherwise, should be excluded from the TRS revenue base. In TRS III, we concluded, after a thorough review of the legislative history, that private networks provided by common carriers are included in the cost recovery process, and as stated above, the statute requires that costs be recovered from subscribers of every interstate service and does not, for purposes of cost recovery, limit recovery to subscribers of telephone or other voice services. In response to IDB's Administrative Procedures Act²⁸ notice argument, we have solicited comments throughout this TRS proceeding on, inter alia, provision of service requirements, cost recovery, mandatory minimum TRS standards, and state certification procedures. With respect

²⁶ Pursuant to Sections 36.2(e) and 36.376 of the Commission's rules, the contributions for interstate TRS, as well as any similar billed amounts that might be incurred solely for intrastate TRS, are to be categorized as "All Other Customer Services Expense," Category 3, and are to be directly assigned to the appropriate jurisdiction.

²⁷ Pursuant to Section 64.604(c)(4)(iii)(h) of the rule, the advisory committee includes representatives from the hearing and speech disabled community, voice TRS users, text telephone TRS users, interstate service providers, state regulatory officials, and TRS providers.

²⁸ 5 U.S.C. Section 553.

to defining subject carriers, we did not in any way limit our discussion to voice services. On the contrary, in the NPRM portion of TRS II, at Appendix D, the proposed rules stated that the contribution would be "assessed on all carriers that offer interstate telecommunications services."²⁹ We concur with USTA that IDB has had notice of cost recovery issues and ample opportunity to comment.

IV. CONCLUSION

21. For the reasons set forth above, we conclude that the TRS Fund payment formula, fund size, and payment schedule will create strong incentives for TRS providers to offer high quality, innovative services at reasonable cost. Moreover, providers of TRS will be reasonably compensated by all subscribers of every interstate service. We further conclude that the TRS Fund will further the goal of the ADA to provide functionally equivalent telecommunications services for all Americans.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to Section 225 of the Communications Act, 47 U.S.C. §§ 225, that \$1.705 is the rate of payment to TRS providers per interstate minute of use, that it will remain in effect through December 31, 1994, and that in succeeding years, the fund administrator is required to file its TRS payment formulas, and associated data with the Commission by October 1, to be effective for a one-year period beginning each January 1, as prescribed in Section 64.604(c)(4)(iii)(h) of the rules. Eligible TRS providers shall begin receiving disbursements from the TRS Fund on or about November 1, 1993, and initial payments will cover the service period July 26, 1993, through August 31, 1993.

23. IT IS FURTHER ORDERED, that the petitions filed by Ameritech Operating Companies, NYNEX, National Association of Regulatory Utility Commissioners, Southwestern Bell Corporation, Competitive Telecommunications Association, Telocator, and IDB Communications Group, Inc. ARE GRANTED in part as discussed in this Order and ARE OTHERWISE DENIED.

²⁹ See Proposed Section 64.604(c)(4)(iii)(a).

24. IT IS FURTHER ORDERED, that the petition for stay filed by IDB Communications Group, Inc. IS DISMISSED.

25. IT IS FURTHER ORDERED, that this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Attachment A

LIST OF COMMENTERS

TRS Fund Administration

AT&T

National Exchange Carriers Associations, Inc. (NECA) *

Petitions for Reconsideration
of the Third Report and Order

Ameritech

Competitive Telecommunications Association (CompTel)

IDB Communications (IDB)

National Association of Regulatory Utility Commissioners (NARUC)

NYNEX

Southwestern Bell Corporation (SWB)

Telocator

Petition for Stay

IDB Communications (IDB)

United States Telephone Association (USTA) (Opposition to Stay)

* Filed Reply Comments