Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of	)	
	)	
Information Collection Being Submitted to the Office of Management and Budget (OMB) for Emergency Review and Approval	)	OMB 3060-XXXX

COMMENTS OF HAMILTON RELAY, INC.

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Hamilton Relay, Inc. ("Hamilton Relay") respectfully submits this comment in response to the November 30, 2017 request filed by the Federal Communications Commission ("FCC") seeking approval of information collections under 47 C.F.R. § 64.604. *See* Information Collection Being Submitted to the Office of Management and Budget (OMB) for Emergency Review and Approval, 82 Fed. Reg. 57,448, 57,448 (Dec. 5, 2017) (seeking comment on the FCC's request).

It is important that OMB understand that the FCC's request is not a workaday request for authority to collect data needed to calculate rates under existing rules. Rather, the request is part of a broader effort to consider whether the agency should move from a competitive, market-based methodology to a regressive, cost-based methodology in calculating the compensation rates for providers of Internet-based Captioned Telephone Service ("IP CTS") for individuals who are deaf or hard-of-hearing. Hamilton Relay believes that the existing market-based methodology is the best, most efficient methodology for calculating that rate, and, in a recent

filing, explained that the FCC lacks approval from the OMB to collect the cost-related information necessary to move to a cost-based approach.[1]

Hamilton Relay appreciates the FCC's willingness to acknowledge that OMB approval is required before it may collect cost-related information.[2] Nevertheless, Hamilton Relay respectfully submits that the OMB should deny the FCC's request with respect to IP CTS cost data for at least four reasons. *See* 82 Fed. Reg. at 57,448 (soliciting comment on "whether the proposed collection of information is necessary for the performance of the functions of the [FCC], including whether the information shall have practical utility").

First, the FCC's request is premature. In seeking OMB approval but without explaining the reason for collecting the IP CTS data, the FCC is inviting the OMB to wade into an ongoing, unresolved FCC rulemaking about the proper method for calculating reimbursement rates for IP CTS. This rulemaking proceeding has been pending for more than four years, and the outcome of the proceeding will determine whether and to what extent the cost-related information sought by the FCC in this information collection request is even relevant to its statutory mandate. These critical questions should be decided based on a full rulemaking record at the FCC, not in this emergency proceeding at OMB. Until the FCC determines whether to deviate from a competitive, market-based ratesetting approach, OMB approval is inappropriate.

Second, the FCC's request is unnecessary. As the FCC has previously acknowledged, cost-related data is unnecessary and indeed irrelevant to calculating the market-based recovery rate that currently applies to IP CTS providers. There is accordingly no current need for the FCC

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[1] Hamilton Relay, Inc. Ex Parte Letter, CG Docket Nos. 13-24, 03-123 (filed Nov. 14, 2017) ("Ex Parte Letter").

[2] Letter from Mark Stephens, Managing Director, FCC, to Alexander Hunt, Chief, Information Policy Branch, Office of Information and Regulatory Affairs, Office of Management and Budget (Nov. 30, 2017) ("FCC Request For Approval Letter").

to collect the information that it seeks approval to collect. While the FCC may be interested in the information for purposes unrelated to the existing reimbursement scheme, the FCC has not explained what those purposes might be, and in any event a speculative interest in information does not make the information collection "necessary for the proper performance of the functions of the agency," 5 C.F.R. § 1320.9(a), and certainly cannot be categorized as an emergency.

Third, the FCC's information-collection form is vague and could be construed to exclude information that by law must be included in any final cost-based compensation rate. Hamilton Relay has raised these concerns in the ongoing rulemaking, but insofar as the OMB is implicitly being asked to weigh in on them now, it should deny the FCC's request rather than approve a vague and potentially unlawful information collection that will simply add to an already burdensome regulatory process.

Finally, even if the OMB were to conclude that approval is warranted, it should make clear that it is not retroactively curing or approving past collections of data by the FCC that were provided voluntarily and proceeded without OMB approval. OMB approval is required in *advance* of information collection. Accordingly, OMB should clarify that the FCC may not rely on earlier cost-information submissions to support any change in its rate-calculation methodology on a prospective basis.

I. Legal And Procedural Background

The Communications Act of 1934, as amended by the Americans with Disabilities Act of 1990 and other amendments (the "Act"), requires the FCC to ensure that interstate and intrastate "telecommunications relay services" are available to individuals with hearing and speech disabilities in the United States. 47 U.S.C. § 225(b)(1). A telecommunications relay service, or "TRS," is a telephone transmission service that "provide[s] the ability for an individual who is deaf, hard of hearing, deaf-blind, or who has a speech disability to engage in communication by

wire or radio with one or more individuals, in a manner that is functionally equivalent to the ability of a hearing individual who does not have a speech disability to communicate using voice communication services by wire or radio." *Id.* § 225(a)(3). Of particular relevance here, the Act requires the FCC to ensure that TRS is "available, to the extent possible and *in the most efficient manner*, to hearing-impaired and speech-impaired individuals in the United States," *id.* § 225(b)(1) (emphasis added), and requires the FCC to adopt regulations providing that the "costs caused by interstate [TRS] shall be recovered from all subscribers for every interstate service," *id.* § 225(d)(3)(B).

In 2007, the FCC issued an order establishing a methodology for calculating the compensation rates for providers of IP CTS, a text-based form of TRS for individuals with hearing disabilities. *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Declaratory Ruling, 22 FCC Rcd 20,140, 20,149–60 (2007) ("*2007 Order*"). The FCC agreed with Hamilton Relay that a market-based methodology would provide the best, most efficient means of determining the rate at which to compensate IP CTS providers. *See id.* at 20,141 n.5. Accordingly, the FCC adopted Hamilton Relay's proposed methodology, which sets the recovery rate as the average rate paid by individual states for competitively-bid contracts for analogous services. *Id.* at 20,158. This plan—the "Multistate Average Rate Structure" or "MARS" plan—remains in effect today.

In adopting the MARS plan, the FCC noted that the plan would "eliminat[e] the costs, burdens, and uncertainties associated with evaluating, correcting, and re-evaluating provider data." *2007 Order*, 22 FCC Rcd at 20,150. Thus, the FCC specifically held that providers of IP CTS "will no longer be required to file annual cost and demand data submissions with the Fund

administrator." *Id.* at 20,158 n.116. However, providers of other TRS technologies whose compensation could not be established based on market rates would need to continue submitting cost information to the Fund administrator out of which providers of interstate TRS are paid (the "Fund").

In 2013, the FCC issued a Further Notice of Proposed Rulemaking seeking comment on "whether and how to revise the current rate methodology" for IP CTS. *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 13,420, 13,422 (2013) ("*2013 Notice*"); *see id.* at 13,472-79. The *2013 Notice* noted that FCC was considering replacing the MARS plan with a "price cap regulatory approach" that would be calculated based on providers' cost data. *Id.* at 13,475. Around this time, the Fund administrator began requesting that IP CTS providers submit historical and projected cost and demand data on a voluntary basis. *See* FCC Request For Approval Letter at 2. However, the FCC never sought comment on the appropriate method for collecting such data, and never instituted any processes for ensuring that the data was reliable or being collected in a uniform manner from all providers. The same shortcomings were repeated in 2017, when the FCC directed IP CTS providers to submit such data using IP Relay and VRS cost categories, without any analysis as to whether such categories were appropriate for IP CTS. Indeed, the Commission has requested comments regarding which cost categories should be compensable for IP CTS, but has not reached any determinations about those issues. *See* 28 FCC Rcd at 13,478. Moreover, as the FCC has acknowledged, the forms used by the FCC to collect

VRS and IP Relay cost information do not have OMB approval numbers.[3] Hamilton Relay and every other IP CTS provider are on record opposing the Commission's rate proposal at various stages in the proceeding for a variety of legal, procedural, and prudential reasons. The FCC has not yet issued a decision.

The FCC's current request for OMB approval appears to be in response to a recent Hamilton Relay filing. On November 14, 2017, Hamilton Relay submitted the Ex Parte Letter to the FCC which outlined several problems with using a cost-based plan instead of the MARS plan. Among other things, Hamilton Relay explained that even though the Fund administrator has been collecting cost data from all TRS providers since the *2013 Notice* (including IP CTS providers compensated under the MARS plan), the record is insufficient to support a transition to cost-based rates for IP CTS providers. *See* Ex Parte Letter at 1–6. Hamilton Relay also pointed out that the Fund administrator's information collections were not approved by the OMB and that the form the Fund administrator uses to collect this cost-related information (the "Form") results in unreliable data collection by employing cost categories that are ambiguous, that have not been vetted through notice-and-comment rulemaking and may exclude legitimate costs, and that were originally designed for providers of a TRS technology that works very differently from IP CTS. *Id.* at 2–3.

On November 30, 2017, in an apparent response to Hamilton Relay's Ex Parte Letter, the FCC submitted to OMB the emergency request at issue here. The request seeks OMB approval for the Fund administrator's collection of cost-related information from TRS providers, including

[3] FCC Request For Approval Letter, at 2 ("[T]here is no [OMB] control number on any of the Rolka Loube forms used for annual data submissions."). Rolka Loube is the entity contracted by the FCC to administer the TRS Fund.

those providing IP CTS. Hamilton Relay's concerns about the contents of the Form and the impropriety of a cost-based approach for IP CTS remain unaddressed.

II. The OMB Should Deny The FCC's Request.

Hamilton Relay appreciates the FCC's apparent efforts to address the procedural shortcomings identified in the Ex Parte Letter. Nevertheless, the FCC's request should be denied insofar as it relates to IP CTS cost data because the FCC has not yet addressed the significant substantive and procedural concerns raised by Hamilton Relay in opposition to any deviation from the market-based methodology for establishing annual IP CTS rates.[4] Moreover, until and unless the FCC decides to change this methodology based on a rational record, the cost-related information that the FCC seeks to collect is indisputably *irrelevant* to calculating the recovery rate for IP CTS. The FCC's methods for collecting information are also ambiguous, and may even arbitrarily exclude information that the FCC is legally required to consider. And in any event, the information the FCC has already collected, which was submitted voluntarily and without OMB approval, cannot be utilized to set rates. For any and all of these reasons, Hamilton Relay respectfully urges the OMB to deny the FCC's request.

A. The FCC's Request Is Premature.

As an initial matter, the FCC's request for OMB approval is procedurally inappropriate. For four years, the FCC has considered and received comments on whether to change the rate methodology for IP CTS providers, and if so, what the new rate methodology should look like. That proceeding is ongoing. It is thus premature for the FCC to ask the OMB to wade into that dispute in the context of this short, emergency proceeding.

[4] Providers' demand data is used to establish the annual contribution factor for contributors to the TRS Fund. Because demand data has a current regulatory use, Hamilton Relay does not object to the collection of this information at this time.

Just as judicial review is restricted to "'final agency orders' so as to 'avoid premature intervention in the administrative process,'" *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1349 (D.C. Cir. 2014), the OMB should decline to wade into this matter before the FCC has finally decided on the approach it will take to calculating rate recoveries for IP CTS providers. The propriety and necessity of the FCC's cost-related information collection is inextricably intertwined with the broader substantive questions at issue in the FCC's ongoing proceeding, including whether and to what extent the FCC's final rate-calculation methodology—whatever it may be—is reasonable and supported by the record. Hamilton Relay has raised significant concerns regarding the proper reimbursement methodology, and these questions should be decided in that proceeding using a full notice-and-comment process, not in the context of an emergency proceeding for OMB approval.

Premature involvement by the OMB risks, at a minimum, approving an information-collection process that imposes unnecessary burdens on IP CTS providers. *See infra* Part II.B. Because the propriety of the collection is so closely intertwined with substantive issues, OMB approval could also be misconstrued as substantive endorsement of a particular methodological approach. In light of the significant outstanding issues that the FCC still needs to address, OMB involvement is premature, and the FCC's request should be denied. *See Proposal to Create a New Air-to-Ground Public Telephone Network (PSTN) Interconnected Service (Notice of Proposed Rulemaking, Docket No. 88-96)*, Notice of OMB Action, ICR Ref. No. 198805-3060-002 (July 7, 1988) (disapproving information-collection request based on "areas of concern" that the OMB instructed the FCC to address "[a]t its final rulemaking stage")[5]; *see also Brucellosis Class Free States and Certified Brucellosis-Free Herds; Revisions to Testing and*

[5] https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=198805-3060-002.

Certification Requirements, Notice of OMB Action, ICR Ref. No. 201008-0579-004 (July 9, 2012) (disapproving information-collection request "[u]ntil such time as [a] final rule is in place" addressing comments "questioning both the burden and the practical utility of the information being required").[6]

B. The FCC's Request Is Unnecessary.

OMB regulations require an agency proposing a collection of information to "certify (and provide a record supporting such certification) that the proposed collection of information … [i]s *necessary* for the proper performance of the functions of the agency, including that the information to be collected will have *practical utility*." 5 C.F.R. § 1320.9(a) (emphases added). The FCC's information request does not meet that standard.

As the FCC previously recognized, one of the virtues of the MARS plan is that it does *not* require the submission of individual providers' cost data. *See 2007 Order*, 22 FCC Rcd at 20,158 n.116. Thus, the FCC acknowledges that "[u]ntil relatively recently, IP CTS providers were not required to submit cost data because the [IP CTS] compensation rates was [sic] determined under the Multistate Average Rate Structure (MARS) Plan." Ex Parte Letter at 2.

Critically, this is still true today. Compensation rates for IP CTS providers *continue* to be set under MARS, which does not require any consideration of cost data. Although the FCC has an open proceeding which seeks comment on whether to change this methodology, that proceeding has been ongoing for more than four years, and IP CTS providers continue to be compensated based on rates that are set under MARS. Because the FCC uses MARS to set reimbursement rates for IP CTS providers, collecting cost data from these providers is unnecessary for the FCC to fulfill its statutory mandate. *See* 47 U.S.C. § 225(b)(1). The FCC's

[6] https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201008-0579-004.

own statement supporting OMB approval ("FCC Supporting Statement") recognizes that this data request is not costless for providers; the FCC estimates it will take each provider 50 hours to complete the Form.[7] Even that 50-hour estimate is arbitrary because it is predicated on costs and cost categories for IP CTS providers that have not been approved in a formal rulemaking proceeding. As Hamilton has noted in previous comments filed with the FCC, various material costs of providing IP CTS are not necessarily being included in any of the cost categories permitted by the FCC for VRS and IP Relay, and thus the total cost calculations for IP CTS are producing arbitrary results. Finally, the FCC has not adequately explained how the total annual burden hours associated with this information collection could be reduced from 28,085 hours[8] to "only 5,537" hours,[9] particularly given the fact that the previous total burden hours did not include estimated burdens for gathering and calculating historical and projected IP CTS cost data.

In sum, unless and until the FCC decides to change its current rate-setting methodology for IP CTS, the data that the FCC proposes to collect from IP CTS providers is *irrelevant* to rate-setting, and the FCC has not provided any other justification for why it needs this data. Thus, Hamilton Relay questions the appropriateness of burdening IP CTS providers with the unnecessary costs associated with this information collection request. For this reason, too, the FCC's request should be denied.

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[7] *See* FCC Supporting Statement at 7-8 (Dec. 2017). The FCC's Supporting Statement also calculates a total "in-house" cost for all of the collections of information for which it seeks approval of $251,330.50, *see id.* at 15–16, far more than the $9,000 total annual cost reported in its Federal Register Notice. *See* 82 Fed. Reg. at 57,448. Indeed, the total "in-house" costs for data collections from Internet-based TRS providers alone are calculated to be $41,184. FCC Supporting Statement at 7-8.

[8] 79 Fed. Reg. 23,355, 23,356 (Apr. 28, 2014).

[9] FCC Request for Approval Letter, at 3; *see also* FCC Supporting Statement at 15-16.

C. The FCC's Request Relies On An Unapproved Form That Is Vague And May Unlawfully Exclude Relevant Information.

Even if the OMB were amenable to the FCC's information collection request in principle, it should not approve the specific means by which the FCC has proposed to collect that information. The Form that the FCC has used to collect IP CTS providers' cost and demand data—and, if the OMB grants approval, the form the FCC will likely continue to use—employs unclear and inappropriate cost categories. Rather than asking providers to provide the cost data reflected in their own accounting records, the Form defines a long series of complicated cost categories and prohibits providers from including costs outside of these categories.[10] Some of these cost categories are fairly straightforward, but others are defined in unclear and even unlawful ways. While Hamilton Relay would much prefer for these issues to be resolved in the pending proceeding before the FCC, *see supra* Part II.A, Hamilton Relay respectfully submits that the OMB should not approve the FCC's request without confirming that the information the FCC seeks to collect is clearly and lawfully defined.

For example, the Form instructs providers to report *only* those research and development costs that "relat[e] to meeting the non-waived mandatory minimum standards."[11] It is unclear which costs this limitation is meant to exclude. If this instruction allows only research and development costs that are necessary to meeting the mandatory minimum standards, it would exclude practically *all* research and development costs: In order to be eligible for reimbursement, providers must *already* be meeting the mandatory minimum standards, and therefore any research they do would by definition be unnecessary to meet the current standards.

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[10] *See generally* Rolka Loube, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, Appendix B: Interstate TRS Fund Annual Provider Information (Provider Data Collection Form & Instructions) at 6–19 (filed May 2, 2017) ("Provider Data Collection Form").

[11] *See* Provider Data Collection Form at 14-15.

See 47 C.F.R. § 64.404(c)(5)(iii)(E)(4). Even putting this interpretation aside, it is unclear how providers are to determine whether research and development projects "relat[e] to meeting the non-waived mandatory minimum standards."[12] IP CTS providers are already researching ways to use automated speech recognition technology to provide service more efficiently, and the data request form does not specify whether these costs should be reported.[13] Hamilton Relay has raised these issues in the ongoing FCC proceeding. *See* Ex Parte Letter at 4.

If the data request form does exclude research and development costs—particularly costs related to cost-saving research—this exclusion is unlawful. Research that would enable IP CTS providers to offer their service more efficiently in the long run will reduce providers' costs and ultimately should reduce the burden on the TRS Fund. There is thus no sensible reason to exclude these costs from consideration. Moreover, the FCC is specifically prohibited from "discourag[ing] or impair[ing] the development of improved technology," 47 U.S.C. § 225(d)(2), and it is difficult to imagine how the FCC could do more to discourage the development of improved technology than explicitly excluding the costs of researching and developing that technology. Hamilton Relay has raised this issue in the ongoing FCC proceeding too. *See* Ex Parte Letter at 4. These substantive problems with the FCC's information-collection processes warrant denial of the FCC's request.

D. The OMB Cannot Retroactively Approve The FCC's Prior Collections Of Information.

As Hamilton Relay has explained and the FCC admits, the Fund administrator has collected cost-related information since 2013 without OMB approval, apparently in violation of

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[12] *See id*.

[13] *See*, *e.g.*, MachineGenius, Inc., Internet-Based TRS Certification Application (filed October 13, 2017) at 7; VTCSecure, LLC, Internet-Based TRS Certification Application (filed May 26, 2017) at 3; CaptionCall, LLC, Ex Parte Letter, at 1–2 (filed September 7, 2017).

the Paperwork Reduction Act ("PRA"). *See* FCC Request For Approval Letter, at 2. Even if the OMB were inclined to grant the FCC's request to authorize collection of IP CTS provider cost data going forward—as explained above, it should not, *see supra* Parts II.A–.C—the OMB cannot retroactively cure collections unlawfully performed without its approval.

The FCC's letter requesting expedited OMB approval effectively concedes that previous collections of cost data from IP CTS providers violated the PRA. In its letter, the FCC notes that after an "exhaustive review," the FCC could find only one relevant OMB authorization, which covers, among other things, the information-collections issued to states in order to apply the MARS plan. *See* FCC Request For Approval Letter at 2. The FCC could not find "any PRA supporting statement covering IP CTS, VRS, and IP Relay cost and demand data." *Id.* Because the OMB did not approve the FCC's requests for IP CTS providers' cost data, these collections of information were conducted unlawfully. *See* 44 U.S.C. § 3507 ("An agency shall not conduct or sponsor the collection of information unless in advance of the adoption or revision of the collection of information … the [OMB] Director has approved the proposed collection of information …."); 5 C.F.R. § 1320.5.

The OMB cannot retroactively cure these unlawful collections of information, and even if it could, the data collected by the FCC would remain unreliable and arbitrary. The PRA expressly requires OMB approval "*in advance*" of the relevant collection of information. 44 U.S.C. § 3507 (emphasis added). And the FCC has not identified anything in the PRA that authorizes the OMB to approve unlawful collections of information that have already taken place. For this reason, the cost data the FCC has acquired by information requests it admits were made without OMB authorization cannot be used to set policy.

III. Conclusion

For the foregoing reasons, the OMB should deny the FCC's approval request.

Respectfully submitted,

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