

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Telecommunications Relay Services and)	CG Docket No. 03-123
Speech-to-Speech Services for Individuals with)	
Hearing and Speech Disabilities)	
)	
Individual IP CTS Provider Cost and Demand)	
Data to be Placed in the Record Subject to)	
<i>Second Protective Order</i>)	

To: Secretary, FCC
For: Chief, Consumer and Governmental Affairs Bureau

OPPOSITION OF HAMILTON RELAY, INC.

Hamilton Relay, Inc. (“Hamilton”), by its counsel, submits this opposition in response to the *Public Notice* (“*Notice*”) issued by the Commission’s Consumer and Governmental Affairs Bureau (“Bureau”) in the above-captioned proceeding to secure clarification or modification of the *Second Protective Order* in this docket to adequately protect the third-party data contained in Exhibit 1-3.1.¹ In the *Notice*, the Bureau announced its intention to enter a confidential report by the interstate Telecommunications Relay Services (“TRS”) Fund Administrator (“Administrator”) into the record, including Exhibit 1-3.1, subject to the *Second Protective Order*.²

¹ *Individual IP CTS Provider Cost and Demand Data to be Placed in the Record Subject to Second Protective Order*, Public Notice, CG Docket No. 03-123, DA 18-495 (rel. May 14, 2018) (“*Notice*”); see also *Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Second Protective Order, 27 FCC Rcd 5914 (CGB 2012) (“*Second Protective Order*”).

² *Notice* at 1 (proposing to enter into the record a confidential version of Rolka Loube Associates LLC, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, CG Docket Nos. 03-123, 10-51 (filed May 4, 2018) (“*2018 TRS Rate Filing*”).

As an initial matter, Hamilton does not object to the use of a protective order to submit highly sensitive, commercial information to the record to inform the Commission’s decision-making.³ Rather, Hamilton is concerned that, as currently written, the 2012 *Second Protective Order* does not adequately protect the information contained in Exhibit 1-3.1. Although the Administrator submitted Exhibit 1-3.1 to the Commission, third parties – i.e., Internet Protocol Captioned Telephone Service (“IP CTS”) providers – supplied the information that has been compiled by the Administrator into Exhibit 1-3.1. The company-specific cost data in that Exhibit is proprietary and highly sensitive commercial information to IP CTS providers. Yet the *Second Protective Order* only treats the Administrator as the “Submitting Party.” IP CTS providers should have express rights to protect the information in Exhibit 1-3.1.

Specifically, the Bureau should modify the *Second Protective Order* to deem each IP CTS provider a “Submitting Party” of the information – with full notice and objection rights. In the alternative, a third protective order should recognize IP CTS providers as Third-Party Interest Holders. In addition, the Bureau should limit the copying of the information under an “Additional Copying Restricted” restriction. With these measures, the Bureau can best ensure that Exhibit 1-3.1 becomes part of the record while protecting against unauthorized disclosure.

³ Hamilton acknowledges that the Commission wishes to examine and consider the information collected by the Administrator in the context of the open IP CTS rulemaking and to do so, the information must be in the record. *See, e.g., Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962) (“The agency must make findings that support its decision, and those findings must be supported by substantial evidence.”); *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“an agency rule would be arbitrary and capricious if the agency has ... offered an explanation for its decision that runs counter to the evidence before the agency”). Hamilton also acknowledges that a protective order is the standard way that would allow the Commission to enter such confidential information into the record.

I. The Confidential Filing Contains Highly-Sensitive, Company-Specific Information that Would Harm Competition if Released

The confidential version of Exhibit 1-3.1 of the 2018 TRS Rate Report “includes Fund Year 2018-19 estimates for minutes, revenue, revenue requirements, profit, expenses, and the operating margin for *each IP CTS provider*.”⁴ The *Notice* correctly concludes that this highly sensitive, company-specific cost information should be treated as Highly Confidential under the protective order as it is exempt from public disclosure under the Freedom of Information Act exemption protecting confidential commercial or financial information.⁵

Due to the similarities in cost between CTS and IP CTS, the release of the information in Exhibit 1-3.1 to individuals beyond Outside Counsel and Outside Consultants would cause competitive harm to Hamilton as well as jeopardize the integrity of state CTS bidding processes.⁶ CTS is offered through individual state TRS programs that award contracts to individual CTS providers to offer CTS in their states.⁷ These contracts are bid on a competitive basis and awarded, in significant part, on the basis of the costs and prices the IP CTS providers present to states, balanced by the quality of the service each provider can deliver. The release of IP CTS cost information would reveal key business strategy information related to the bidding process because the costs of providing CTS are not materially different from the costs of

⁴ *Notice* at 1 (emphasis added).

⁵ *Id.*; 5 U.S.C. § 552(b)(4) (exempting from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential”).

⁶ See *Second Protective Order* ¶ 2 (defining “Outside Counsel” and “Outside Consultant”); *id.* at ¶ 7 (allowing Outside Counsel, Outside Consultants, and certain related employees to have access to protected information).

⁷ To Hamilton’s knowledge, all CTS providers currently offering CTS to states also provide IP CTS.

providing IP CTS.⁸ That is, competitors would better understand the exact costs and strategies other bidders use, gaining an advantage and defeating the confidential and robust competitive RFP processes used in many states.

II. The *Second Protective Order* Provides Insufficient Protection for IP CTS Providers' Information

The protections set forth in the 2012 *Second Protective Order*, designed for first-party filings in the video relay services context, would not sufficiently protect the information contained in Exhibit 1-3.1. To meet the “high bar [for] the disclosure of confidential documents,”⁹ the Bureau should clarify or modify the *Second Protective Order*, or issue a third protective order, to afford IP CTS providers the full rights of “Submitting Parties” under the *Second Protective Order* – as well as adopt copying restrictions.¹⁰

By concluding that IP CTS providers are Submitting Parties, or designating IP CTS providers as Third-Party Interest Holders, the Bureau would ensure that IP CTS providers have access to the “critical” notice and objection protections with respect to the confidential information and ensure that “the information disclosed is absolutely necessary to the process.”¹¹

⁸ See, e.g., Coleman Bazelon, Patrick Holder, and Brent Lutes, *Economic Analysis of IP CTS Provision Costs and Rate Setting*, at 5 (Nov. 8, 2017) attached to *Ex Parte* Letter from David A. O'Connor, Counsel for Hamilton Relay, Inc., to Marlene H. Dortch, CG Docket Nos. 03-123, 13-24 (Nov. 9, 2017).

⁹ *In the Matter of Tribune Media Company (Transferor) and Sinclair Broadcast Group, Inc. (Transferee) Consolidated Applications for Consent to Transfer Control*, Order, 32 FCC Rcd 5799 n.6 (MB 2017) (citing *CBS Corp. v. FCC*, 785 F.3d 699 (D.C. Cir. 2015)).

¹⁰ *Second Protective Order* ¶ 2 (“‘Submitting Party’ means a person who submits a Stamped Highly Confidential Document.”).

¹¹ See *CBS Corp. v. FCC*, 785 F.3d 699, 702 (D.C. Cir. 2015) (calling the ability for “interested third parties” to object to disclosure a “critical” protection when a third-party’s information may be disclosed subject to a protective order in the context of a Commission proceeding); *id.* at 706 (explaining that “disclosure is proper only if the information disclosed is absolutely necessary to the process”).

Both the FCC Bureaus and the D.C. Circuit (reviewing the FCC’s actions) have recognized third-party interests with respect to sensitive information in Commission proceedings, particularly in proceedings subsequent to the issuance of the *Second Protective Order*.¹² For example, the D.C. Circuit observed that providing third-party access to merger applicant contracts could provide business pricing information to a competitor of the third-party, changing the competitor’s behavior as a result of Commission action.¹³ Given the Administrator’s past actions with respect to the information at issue, IP CTS providers themselves must be given the opportunity to understand and, if appropriate, object *prior to* disclosure of Exhibit 1-3.1.¹⁴ Deeming IP CTS providers “Submitting Parties” or Third-Party Interest Holders, with full notice and objections rights, would provide these important protections.

The *Second Protective Order* also relies upon the Submitting Parties to identify certain information as “highly confidential” and mark further sensitive information with the legend “Additional Copying Restricted.”¹⁵ The *Notice* designates the confidential version of the *2018 TRS Rate Filing* as “Highly Confidential,”¹⁶ but did not expressly apply the “Additional Copying Restricted” legend to Exhibit 1-3.1. The Bureau should take all reasonable steps to prohibit any

¹² See, e.g., *CBS Corp. v. FCC*, 785 F.3d 699, 701-02 (D.C. Cir. 2015) (“[R]ecognizing that its disclosure decisions could have significant collateral consequences, the Commission has long worked to ensure that confidential materials are as protected as possible—while also serving the public’s interest in meaningful merger review—by using protective orders.”); *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89, Protective Order, DA 18-544 (rel. May 23, 2018) (protecting the rights of third parties in the context of a rulemaking); *Comprehensive Review of the Part 32 Uniform System of Accounts*, Protective Order, 31 FCC Rcd 3599 (WCB 2016) (same).

¹³ *CBS Corp. v. FCC*, 785 F.3d at 701.

¹⁴ See *id.* at 702 (noting that agency and judicial review can “prevent[] hasty and potentially ill-conceived disclosure decisions”).

¹⁵ *Second Protective Order* ¶ 6.

¹⁶ *Notice* at 1.

further inappropriate disclosures of the information contained in Exhibit 1-3.1, including the application of additional copying restrictions with respect to Exhibit 1-3.1.

III. Conclusion

For the reasons set forth above, the Bureau should deem IP CTS providers as Submitting Parties under the *Second Protective Order* and only enter the confidential version of the *2018 TRS Rate Filing* into the record with the “Additional Copying Restricted” legend, or issue a third protective order with these protections.

Respectfully submitted,

HAMILTON RELAY, INC.

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