

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Publix Network Corporation; Customer)
Attendants, LLC; Revenue Controls)
Corporation; SignTel, Inc.; and Focus Group,)
LLC)
)
Order to Show Cause and)
Notice of Opportunity for Hearing)

EB Docket No. 02-149
File No. EB-01-TC-092
NAL/Acct. No. 200232170003
FRN: 0004-3412-51

**ORDER TO SHOW CAUSE AND
NOTICE OF OPPORTUNITY FOR HEARING**

Adopted: June 12, 2002

Released: June 19, 2002

By the Commission:

I. INTRODUCTION

1. In this Order to Show Cause and Notice of Opportunity for Hearing, we find that an evidentiary hearing is required to determine whether (1) the Commission should revoke the operating authority of the Publix Companies,¹ (2) the Publix Companies and the principal or principals of the Publix Companies should be ordered to cease and desist from any future provision of interstate common carrier services without the prior consent of the Commission, (3) the Publix Companies are entitled to any of the telecommunications relay services ("TRS") fund monies that they requested or received from the TRS Fund, and (4) a forfeiture against any or all of the Publix Companies is warranted and, if so, the amount of the forfeiture.

2. As set forth in detail below, it appears that the Publix Companies may have unlawfully obtained over six million dollars in payments from the TRS Fund by means of a scheme to create the appearance that they were operating a legitimate telecommunications relay service. Moreover, in perpetrating this scheme, the Publix Companies appear to have made repeated misrepresentations to the Commission and to have violated a number of the statutorily-

¹ For purposes of this order, the Publix Companies refers to Publix Network Corporation ("Publix"), Customer Attendants, LLC ("Customer Attendants"), Revenue Controls Corporation ("RCC"), SignTel, Inc. ("SignTel"), and Focus Group, LLP ("Focus Group").

mandated requirements and the Commission's rules relating to the TRS Fund and to the provisioning of TRS.

II. BACKGROUND

A. Statutory and Regulatory Background

3. Telecommunications relay services were created to bring to those with a hearing or speech disability the benefits of universal service that had hitherto been unavailable to that segment of the public by "provid[ing] the ability for an individual with 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."² To accomplish this, TRS employs a communications assistant ("CA") who functions as, in effect, a translator between the person with a hearing or speech disability, who is typically communicating via a text telephone ("TTY"), and an individual without any such disability, who is using a standard telephone. A TRS call may be initiated by the TTY user or the standard telephone user. A caller can dial either a toll free number or 711 to access a TRS center. The CA will answer and process the call. After the caller gives the CA the number of the person to be called, the CA places the call to that person. The CA's responsibility is to type to the person with the TTY and speak to the person with the standard telephone, relaying exactly what is spoken or typed by each party.³ For interstate TRS, callers pay only the cost of the long-distance telephone call as if the call were placed directly between the telephones. They do not pay for the TRS service. TRS providers recover their costs of providing this service through the TRS Fund.⁴

4. The Act requires each common carrier providing voice transmission services to provide TRS in accordance with the standards set forth in Section 64.604 of the Commission's rules.⁵ Carriers may do this either by providing TRS directly, or by contracting with a TRS provider. Section 64.604 of the Commission's rules established the TRS Fund,⁶ currently administered by the National Exchange Carrier Association ("NECA"), which reimburses TRS providers for the costs of providing interstate TRS.⁷ Carriers providing interstate telecommunications services must contribute to the TRS Fund on the basis of interstate end-user telecommunications revenues.⁸

² 47 C.F.R. § 64.601(7).

³ *Id.* § 64.601(5).

⁴ *Id.* § 64.604(c)(5)(iii)(E).

⁵ 47 U.S.C. § 225(c).

⁶ 47 C.F.R. § 64.604(c)(5)(iii).

⁷ *Id.* § 64.604(c)(5)(ii).

⁸ *Id.* § 64.604(c)(5)(iii)(A).

5. Payments from the TRS Fund to TRS providers are based on schedules of payment formulae that NECA files annually with the Commission.⁹ These formulae are based on total monthly interstate TRS minutes of use (“MOU”),¹⁰ defined as the MOU for completed interstate TRS calls placed through a TRS center beginning after call set-up and concluding after the last message call unit.¹¹ TRS providers are eligible to receive payments from the TRS Fund only if they are: (1) TRS facilities operated under contract with and/or by certified state TRS programs pursuant to Section 64.605; (2) TRS facilities owned by or operated under contract with a common carrier providing interstate services pursuant to Section 64.604; or (3) interstate common carriers offering TRS pursuant to Section 64.604.¹² To receive payments, TRS providers must submit monthly reports of interstate MOU to NECA.¹³

6. As required by the Act,¹⁴ the Commission has established mandatory minimum standards for all TRS providers.¹⁵ Congress mandated certain of these standards, such as the requirement to operate every day for 24 hours per day and the prohibition on keeping records of or disclosing the content of TRS calls.¹⁶ The Commission’s implementing rules also cover matters such as training, typing speed, and communication competence for the CAs. Besides employee qualifications, TRS hardware and access requirements are outlined, as well as reporting functions, payments, contribution computation, and complaint procedures.¹⁷

B. Background of the Case

7. The Publix Companies have, since 1999, been collecting reimbursements from the TRS Fund for purportedly providing TRS service eligible for compensation under the Commission’s rules. The Publix Companies began operating what they described as a TRS center in January 1999 and began submitting MOU reports to NECA in February of that year.¹⁸ From that period until April 2001, the Publix Companies submitted 8,014,815 MOU to NECA as a basis for payment from the TRS Fund. The last billing statement they sent to NECA for

⁹ *Id.* § 64.604(c)(5)(iii)(E).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* § 64.604(c)(5)(iii)(F).

¹³ *Id.* § 64.604(c)(5)(iii)(E).

¹⁴ 47 U.S.C. § 225(d)(1)(A)-(G).

¹⁵ 47 C.F.R. § 64.604.

¹⁶ 47 U.S.C. § 225(d)(1)(C), (F).

¹⁷ Several of the requirements in Section 64.604 were modified by the Commission in 2000. See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140 (2000).

¹⁸ Publix Network is the entity within the Publix Companies that reports financial and operating data to NECA.

compensation from the TRS Fund was dated August 13, 2001, and covered purported TRS MOU for July 2001. The Publix Companies have received reimbursements in excess of \$6 million.¹⁹

8. A random audit of the Publix Companies' TRS operations by NECA²⁰ in 2001 raised significant questions of whether their relay operations qualified them for the TRS Fund payments that they had requested and received. The relay operation did not appear to function as a public TRS center in compliance with the requirements of the Act and the Commission's rules. For instance, a typical TRS center would handle hundreds to thousands of calls daily, but the Publix Companies' relay operations appeared to handle only a small number of calls, virtually all between employees of the Publix Companies. It appears that all of the telephone calls in the daily call reports were between 9:00 a.m. and 5:00 p.m., Monday through Friday, even though the Commission's rules require TRS providers receiving reimbursements to provide service 24 hours a day, seven days a week. The average length of the calls was about 50 times longer than those reported by other TRS providers, and the volume of minutes the Publix Companies were reporting was also suspicious. At the time of the NECA audit, the Publix Companies' reported volume of minutes had risen to approximately 500,000 monthly. For 2000, only Sprint and AT&T, large TRS providers with multiple state contracts and centers, reported more minutes. This was particularly striking given that the Publix Companies' TRS contact information apparently never had been published in the Telecommunications for the Deaf, Inc. Blue Book, the national directory of TTY and TRS numbers, and the Publix Companies had made little apparent effort at advertising. These, and other concerns about compliance with the Commission's mandatory minimum standards and billing inaccuracies, led NECA to contact the FCC regarding possibly fraudulent activity and violations of the Act and the Commission's rules.

9. On June 25, 2001, the Enforcement Bureau ("EB") issued a subpoena for documents to Publix Network ("EB Subpoena"), together with a letter of inquiry.²¹ On the same day, the CCB sent a letter to Publix Network questioning whether Publix Network was operating as a common carrier; questioning whether Publix Network was an eligible TRS provider operating pursuant to Section 64.604; rejecting Publix Network's method for calculating MOU for conference calls; stating that CCB had reason to believe that Publix Network's application for certification as a TRS provider may have contained false statements or misrepresentations;²² and notifying Publix Network that CCB had directed NECA to continue to withhold payments

¹⁹ From January 1999 through January 2001, NECA paid the Publix Companies \$6,649,370. For the months February through April, 2001, the Publix Companies requested payments totaling \$3,410,140 from the TRS Fund. NECA withheld payments on these and future requests. In June 2001, the Chief of the Common Carrier Bureau affirmed NECA's decision to withhold payment. See Letter from Dorothy T. Attwood, Chief, Common Carrier Bureau ("CCB"), Federal Communications Commission to Raanan Liebermann, President, Publix Network Corporation, June 25, 2001 ("*June CCB Letter*").

²⁰ See 47 C.F.R. § 64.604(c)(5)(C).

²¹ Letter from David H. Solomon, Chief, Enforcement Bureau, Federal Communications Commission to Raanan Liebermann, President, Publix Network Corporation, June 25, 2001.

²² See Publix's Application for Interstate TRS Facility Certification ("*Application*"), filed by Publix on April 6, 1998.

pending the outcome of EB's investigation of the Publix Companies' operations.²³ The Publix Companies responded to both EB and CCB on July 23, 2001. In its response to CCB, Publix Network stated that once it was given notice of CCB's concerns, it had "worked diligently to adjust its operations."²⁴ Publix Network further stated that its management believed that Publix Network had always been operating "in substantial compliance with the TRS minimum standards."²⁵ The Publix Companies also produced thousands of documents and a CD-ROM pursuant to the EB Subpoena.²⁶

10. Based on the NECA audit and on the responses received from the Publix Companies to the Commission's inquiries, it appears that the Publix Companies have collected millions of dollars in payments from the TRS Fund without actually having provided TRS services that would have qualified them for reimbursement. It appears that the Publix Companies did not actually provide TRS as defined by the Commission's rules, thus raising a threshold issue about their eligibility for compensation from the TRS Fund.²⁷ Moreover, there appears to be pervasive misconduct and violations of Commission rules by the Publix Companies. It appears that the Publix Companies violated numerous operational, technical, and functional requirements set forth in the Commission's TRS rules, submitted inflated bills for reimbursement and other false and inadequate data to the TRS Fund Administrator, and made repeated misrepresentations to the Commission. Considered in their totality, it appears that the actions of Publix Network and related companies may have constituted not only multiple, technical violations of the Act and the Commission's rules, but also a deliberate scheme to obtain TRS Fund payments for which these companies were not eligible. In view of the apparent pattern of pervasive misconduct and violations, it appears that the Publix Companies are not qualified, and should not be authorized, to operate as common carriers in the future.

III. DISCUSSION

²³ See June CCB Letter.

²⁴ *Id.* at 2.

²⁵ *Id.*

²⁶ See letter from Gerard J. Waldron, Esq. to David L. Hunt, Senior Attorney, Enforcement Bureau, Federal Communications Commission, July 23, 2001; letter from Dr. Raanan Liebermann, President, Publix Network Corporation, to David L. Hunt, Senior Attorney, Enforcement Bureau, Federal Communications Commission, July 23, 2001 ("*Publix Reply to EB Subpoena*"); letter from Gerard J. Waldron, Esq., to Sanford S. Williams, Staff Attorney, Common Carrier Bureau, Federal Communications Commission, July 23, 2001. ("*July Publix Letter to CCB*"). Documents produced with the *Publix Reply to EB Subpoena* are hereinafter referred to as "*Publix Response to EB Subpoena Request No.* [the request and page numbers will then be added for each citation] *July 23, 2001.*"

²⁷ If the Publix Companies are found not to be entitled to any portion of the monies that they have received from the TRS Fund, the Commission will follow its normal debt collection procedures to recover all such payments.

A. Whether the Publix Companies Collected Reimbursements Without Providing TRS within the Meaning of the Act and the Commission's Rules

11. TRS is 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. 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, speech-to-speech services, video relay services and non-English relay services. TRS supercedes the terms "dual party relay system," "message relay services," and "TDD Relay."²⁸

The Publix Companies are eligible to receive payments from the TRS Fund, if at all, only to the extent that they are an interstate common carrier "offering TRS pursuant to Section 64.604."²⁹ It appears that the services for which the Publix Companies have sought TRS Fund reimbursement fundamentally do not constitute TRS at all. Moreover, to the extent that any TRS was actually provided by the Publix Companies, it appears that it was not "TRS pursuant to § 64.604," because the Publix Companies did not substantially comply with the requirements of that rule.

1. Whether the service that the Publix Companies provided constituted TRS

12. The Commission's definition of TRS requires communication *between* an individual with a hearing or speech disability and an individual without any such disability. Communication solely between persons with hearing or speech disabilities does not meet this definition; nor does communication between individuals without any hearing or speech disability. As explained below, it appears that virtually all of the purported TRS calls for which the Publix Companies have sought reimbursement occurred solely between employees of the Publix Companies and that the CAs did not function as transliterators, but initiated and directed the calls to other employees of the Publix Companies. Thus these calls were, in effect, calls solely between persons with hearing or speech disabilities.

13. As described above, TRS is a service that allows persons with hearing or speech disabilities to communicate with those without any such disabilities. It appears that virtually none of the calls that the Publix Companies reported to NECA involved such a service. Instead, calls appear to have followed two patterns. In the first, the Publix Companies' CAs would place a call to several assistant developers ("ADs") who were in the employ of Dr. Raanan Liebermann, President of the Publix Network Corp., through Focus Group, and would ask the

²⁸ 47 C.F.R. § 64.601(7), *see also* 47 U.S.C. § 225(a)(3).

²⁹ 47 C.F.R. § 64.604(c)(5)(F)(3).

ADs several questions as per a prepared "script." The CAs and ADs engaged in these scripted conversations four to eight hours a day, five days a week. The ADs, however, were, according to the Publix Companies, all persons with hearing or speech disabilities, and thus required no TRS to communicate among themselves. Moreover, it appears that the CAs functioned as participants, indeed, initiators of these calls. However, "payments shall only be available for interstate TRS calls that *are placed by TRS users,*"³⁰ not calls placed by CAs, whose function under the rules is defined as transliterating "conversation between two end users of TRS."³¹ If, as it appears, the CAs were active participants in calls in which the only other participants were employees with a hearing disability, then the CAs were not transliterating conversation from text to voice to enable end users with a hearing disability to communicate with end users without such disabilities via TRS. Such calls do not meet the definition of TRS under the Commission's rules.

14. In the second pattern, it appears that a moderator was involved in the conference calls along with the CAs and ADs. These moderators were employees of Dr. Liebermann through another of the Publix Companies, SignTel. Apparently, the moderator would call as many as six CAs of the Publix Companies (or vice-versa), who in turn would usually contact as many as five ADs each.³² When a moderator was involved in the call, it appears that he or she would read out the questions per the script, and the CAs would type out via TTY the questions for the ADs. When the ADs responded, however, it appears that the responses were not always forwarded to the moderators. Thus, it appears that the moderator may have served only to create the appearance of actual relay service.

15. Calls such as those described above do not constitute TRS because they do not facilitate communications between persons with hearing or speech disabilities and persons without such disabilities. To the extent that the purported relay occurred between ADs with hearing or speech disabilities, as would have been the case on calls without moderators, these would have been nothing more than conventional text telephone conversations. No relay is necessary. Even when moderators were present, there is evidence that often the CAs did not relay any communications between the moderators and ADs, and if they did relay any information, it was simply a statement by the CA that all the ADs had finished a particular question, and that they were prepared to move to the next question as per the prepared script. If this was the case, then there was no TRS.³³ Moreover, to the extent that neither the moderator nor the AD had a hearing or speech disability, there was no legitimate TRS.

³⁰ *Telecommunications Relay Services, and the Americans with Disabilities Act of 1990*, Third Report and Order, 8 FCC Rcd 5300, 5305, ("Third Report and Order") (emphasis added).

³¹ 47 C.F.R. § 64.601(5).

³² It appears that not all of the conference calls that involved a moderator were placed by the moderator. There is evidence that often the CAs would call the ADs in anticipation of receiving a call from the moderator.

³³ Pursuant to Section 64.604(a)(2)(ii), end users can request that the CA provide a summary instead of a verbatim transliteration of the entire conversation. However, the evidence suggests that the simple responses the moderator received were part of the scheme to obtain monies illegally from the TRS Fund by creating the appearance of a relayed conversation. In other words, moderators were included in the end user (an AD) to CA to end user (the moderator) triangle to look more like legitimate TRS service.

16. We also note that these apparent rule violations are serious and go to the core of the statutory purpose. The intra-company service provided by the Publix Companies to themselves does not further the purpose of interstate TRS:

The intent of Title IV of the ADA is to further the Act's goal of universal service by providing to individuals with speech or hearing disabilities telephone services that are functionally equivalent to those available to individuals without disabilities.³⁴

The Act further serves this public purpose by requiring that common carriers make TRS part of their telecommunications services, either by providing TRS themselves or under contract to the public throughout the area in which they hold themselves out to the public for hire.³⁵ Congress placed the responsibility for providing TRS on common carriers in order to make TRS available to the general public to the greatest extent possible. The legislative history of TRS illustrates the public functions that TRS is intended to provide by extending public, universal service to the disabled community for whom telecommunications services were not available.³⁶ It does not appear that the Publix Companies provided any service that promoted this public purpose.

17. We thus direct the ALJ to determine whether the service for which the Publix Companies requested and received payments met the definition of TRS in the Act and the Commission's rules. Accordingly, we will specify an issue to determine whether the service for which the Publix Companies were reimbursed from the TRS Fund constituted TRS. If it did not, then the Publix Companies were not entitled to any payments from the TRS Fund.

2. Whether the Publix Companies Offered "TRS pursuant to Section 64.604"

18. The Commission's rules provide for TRS Fund payments to TRS providers only when they are "offering TRS pursuant to Section 64.604."³⁷ Even to the extent that the Publix Companies may arguably have provided some legitimate TRS, it appears that they may have violated many of the mandatory minimum standards required of TRS providers in Section 64.604. If the Publix Companies did not provide TRS "pursuant to Section 64.604," they would not be eligible for TRS Fund reimbursement.

19. We recognize that absolute compliance with each component of the rules may not always be necessary to fulfill the purposes of the statute and the policy objectives of the implementing rules, and that not every minor deviation would justify withholding funding from a

³⁴ *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, First Report and Order and Request for Comments, 6 FCC Rcd 4657, 4657 ("First Report and Order").

³⁵ 47 U.S.C. § 225(c).

³⁶ 136 Cong. Rec H2421-02, H2431 (1990).

³⁷ 47 C.F.R. § 64.604(c)(5)(iii)(F).

legitimate TRS provider. We therefore hold that a TRS provider is eligible for TRS Fund reimbursement if it has substantially complied with Section 64.604. This approach will allow a finding that an insignificant violation of the requirements of the implementing regulations does not render the Publix Companies ineligible so long as the Publix Companies have satisfied the underlying purposes of those requirements.³⁸

20. In making a determination whether the Publix Companies have substantially complied with Section 64.604, the ALJ must consider the statutory purpose of TRS, to provide telecommunications services to persons with hearing or speech disabilities that are the functional equivalent of those available to individuals without such disabilities, the policies underlying the particular regulation, and the practical effect of any violation in question on the achievement of these goals. We note that Congress, in crafting the statutory requirements, found certain features essential to ensure that TRS was in fact functionally equivalent to the telecommunications services generally available to the public. For example, in keeping with the public availability of such telecommunications services, the statute mandates that, under the rules, TRS must be available 24 hours a day, 7 days a week and requires an adequate back-up power source to ensure the continuity of service that is functionally equivalent to normal telephone service.³⁹ Also, in keeping with the restrictions against recording a telephone call, there is a prohibition against keeping a record of a TRS conversation beyond the duration of the call ensures that TRS provides the functionally equivalent element of privacy of ordinary telephone services.⁴⁰ The operational, technical, and functional standards in Section 64.604 are designed to ensure that the essential purposes and policy objectives of the statute are met. The standards governing CAs, for example, are intended to ensure that the CAs can provide smooth, rapid transliteration of conversation between the end users of TRS such that there is a seamless translation. The technical standards such as the requirement for “equal access to interexchange carriers,” are designed to ensure that TRS users have the “same access” to all such services “as voice users.”⁴¹ The functional standards, such as the requirement to maintain consumer complaint logs,⁴² to provide public access to information,⁴³ and to furnish true and adequate data” to the Fund Administrator⁴⁴ are designed to ensure the public accessibility, integrity, and functionality of the TRS system. The ALJ should determine, using the foregoing principles, whether the Publix Companies’ operations were in substantial compliance with the requirements of Section 64.604. To do so, the ALJ should first make findings on the specific issues raised below regarding

³⁸ See, e.g., *Hickel v. Oil Shale Corp.*, 400 U.S. 48 (1970); *Kent v. United of Omaha Life Ins. Co.*, 96 F.3d 803, 807 (6th Cir. 1996); *Donato v. Metropolitan Life Ins. Co.*, 19 F.3d 375, 382-83 (7th Cir. 1994); cf. *Cox Cable Tucson, Inc. v. Ladd*, 795 F.2d 1479, 1485-7 (9th Cir. 1986).

³⁹ 47 U.S.C. § 225(d)(1)(C); see also 47 C.F.R. § 64.604(b)(4).

⁴⁰ 47 U.S.C. § 225(d)(1)(F); see also 47 C.F.R. § 64.604(a)(2)(i).

⁴¹ 47 C.F.R. § 64.604(b)(3).

⁴² *Id.* § 64.604(c)(1).

⁴³ *Id.* § 64.604(c)(3).

⁴⁴ *Id.* § 64.604(c)(5)(iii)(C).

whether and to what extent the Publix Companies met the operational, technical, and functional standards of Section 64.604. In light of those findings, the ALJ should then determine whether the Publix Companies substantially complied with Section 64.604, and therefore were entitled to receive payments for providing TRS pursuant to Section 64.604.

a. Operational Standards of Section 64.604(a)

21. Section 64.604(a) delineates certain mandatory minimum operational standards. It appears that the Publix Companies did not comply with the requirements of Sections 64.604(a)(1) and (2). The evidence before us suggests that the Publix Companies' CAs were not sufficiently trained to provide the level of service necessary to effectuate the purposes of the statute; that the Publix Companies retained records in violation of the statutorily mandated prohibition against keeping records past the duration of the call; that the Publix Companies' facilities were not available 24 hours a day, 7 days a week; and that the Publix Companies never provided equal access to interexchange carriers.

(i.) Communications Assistants

22. In providing traditional TRS, CAs must be sufficiently trained to meet the special communication needs of persons with hearing or speech disabilities, and must, *inter alia*, have competent skills in typing, grammar, spelling, and interpretation of typewritten American Sign Language.⁴⁵ It appears that most, or all, of the Publix Companies' CAs failed to meet these mandatory minimum qualifications. For instance, the Publix Companies' documents acknowledge that as of April 28, 2001, not one of the Publix Companies' CAs could type the required minimum of 60 words per minute.⁴⁶ Therefore, we will specify an issue to determine whether the Publix Companies complied with the requirements for communications assistants under the Commission's rules.

(ii.) Confidentiality and Conversation Content

⁴⁵ *Id.* § 64.604(a)(1).

⁴⁶ See *Publix Response to EB Subpoena Request No. 12, P002086, July 23, 2001*. The Publix Companies assert that they did improve on their CAs' typing skills, managing to change the failure rate under the 60-words-per-minute standard from 100 percent to 88 percent, and later improved further to a failure rate of 64 percent. *Id.*

23. 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, even if to do so would be inconsistent with state or local law."⁴⁷ However, in responding to the Enforcement Bureau's subpoena, the Publix Companies produced over 30 boxes containing verbatim transcripts of purported TRS conversations. We will assume here for the sake of argument that the conversations that the Publix Companies retained qualify as a "relayed conversation," although, as we have noted elsewhere in this order, it appears that they do not. We will therefore specify an issue to determine whether the Publix Companies kept records and or disclosed the content of relayed conversations in violation of 47 U.S.C. § 225(d)(1)(F) and 47 C.F.R. Section 64.604(a)(2)(i).

b. Technical Standards of Section 64.604(b)

(i.) Equal Access to Interexchange Carriers

24. Under the Commission's rules, individuals who use a TRS center are entitled to have access to their chosen interexchange carrier through the TRS center, and to all other operator services.⁴⁸ In our First Report and Order, we determined that there could be "only a limited exemption from this rule" for state certified entities that applied for an exemption as part of their application for state certification and provided "sufficient justification" for the exemption on the basis of a pre-existing contractual agreement.⁴⁹ We did not provide for any exemptions for common carriers who were operating TRS directly, rather than through a state certified program pursuant to such contractual agreement.⁵⁰ Publix Network's Application states that "Publix Network users [will] have access to their chosen interexchange carriers and all other operator services." The Publix Companies admit, however, that they have never met this requirement.⁵¹ Thus, it appears that the Publix Companies have violated Section 64.604(b)(3).⁵² To resolve this apparent conflict between Publix Network's certification to the Commission and its later admission and to determine whether the Publix Companies met the prescribed standard, we will specify and issue to determine whether the Publix Companies complied with Section 64.604(b)(3).

(ii.) TRS Facilities

⁴⁷ 47 C.F.R. § 64.604(a)(2)(i).

⁴⁸ *Id.* § 64.604(b)(3).

⁴⁹ *First Report and Order* at 4662.

⁵⁰ *Id.*

⁵¹ *See July Publix Letter to CCB*, p. 3.

⁵² 47 C.F.R. § 64.604(b)(3).

25. As mandated by the Commission's rules, TRS facilities must operate 24 hours a day, seven days a week, and must have redundancy features and an uninterruptible power source for emergency purposes.⁵³ Publix Network's Application states its facilities were "operational 24 hours a day, seven days a week."⁵⁴ The Publix Companies admit, however, that for most of the time they operated and as they currently operate, relay service was not available 24 hours a day, seven days a week.⁵⁵ The purported relay service appears to have been primarily open from 9:00 a.m. until 5:00 p.m., Monday through Friday, excluding some holidays. The Publix Companies contend that they have backup features and an uninterruptible power supply, but it appears that these facilities may be inadequate. Thus, it appears that Publix Companies' facilities were not in accord with the requirements set forth in Section 64.604(b)(4) of the Commission's rules. Accordingly, we will specify an issue to determine whether the Publix Companies complied with Section 64.604(b)(4).

c. Functional Standards of Section 64.604(c) - Public Access to Information

26. The Commission's rules require carriers to advertise the availability of their TRS facilities through "publication in their directories, periodic billing inserts, placement of TRS instructions in telephone directories, through directory assistance services, and incorporation of TTY numbers in telephone directories."⁵⁶ As we have stated, it is critical that TRS providers reach the widest possible potential user population in order to maximize the utility of TRS and to effectuate the goals of the Act and the ADA.⁵⁷ There is no evidence before us showing that the Publix Companies made efforts reasonably calculated to satisfy this requirement. Accordingly, we will specify an issue to determine whether the Publix Companies' complied with the requirements of Section 64.604(c)(3).

B. Whether the Publix Companies Violated Commission Rules by Providing Inaccurate Information to the TRS Fund Administrator

27. Section 64.604(c)(5)(iii) creates the TRS Fund as the cost recovery mechanism for provision of interstate TRS and appoints an Administrator, NECA, to oversee the collection and disbursement of funds in compliance with the Act and Commission's rules. NECA collects data from TRS providers in order to determine the costs of providing TRS, and the amount of the reimbursement to be provided. Under Section 64.604(c)(5)(iii)(C) of our rules, TRS providers must provide the Fund Administrator with true and accurate data.⁵⁸ This includes total TRS MOU, total interstate TRS MOU, total TRS operating expenses, and total TRS investment in

⁵³ *Id.* § 64.604(b)(4).

⁵⁴ Application at 5.

⁵⁵ See July Publix Letter to CCB at 4.

⁵⁶ 47 C.F.R. § 64.604(c)(3).

⁵⁷ *Third Report and Order* at 5300.

⁵⁸ 47 C.F.R. § 64.604(c)(5)(iii)(C).

general accordance with Part 32 of the Act.⁵⁹ The provision of true and accurate data by each interstate TRS provider is essential because these providers are compensated based on an average cost methodology. From the historical data and forecasts of expenses and demand submitted by each interstate TRS provider, the TRS Fund Administrator develops the compensation rate per minute, the projections of demand, and the TRS funding requirement for the coming year. The provision of false or inadequate data can thus have an overall effect on TRS Fund projections of demand, on compensation rates, and on funding requirements. A number of accounting inconsistencies and financial irregularities, however, suggest that the Publix Companies may have violated this rule by providing false and inadequate data to NECA. This bears directly both on the Publix Companies' compliance with the standards of Section 64.604 and on the Publix Companies' qualification to operate as a common carrier.

1. Inaccuracies in Reported Costs

28. It appears that cost items reported by the Publix Companies in the NECA-prescribed cost categories contained significant inaccuracies. For example, the Publix Companies reported automobile lease, operating, and maintenance expenses as "salaries." They also included a security system installed at Dr. Liebermann's home as "building maintenance" and software development and consulting as "engineering." The Publix Companies' largest actual expense, according to the work papers they provided to NECA, was for royalties on a "patent pending" conferencing technology for which SignTel was allegedly paid \$0.96 per minute.⁶⁰ Thus, if the Publix Companies are in reality one entity for purposes of this proceeding, then the largest TRS operating expense that they reported to NECA was for payments that they made to themselves for a license on developmental technology.

29. Moreover, because the Publix Companies apparently failed to follow proper accounting practices, there are additional issues raised about the accuracy of their reported data. The Publix Companies appear to be inconsistent in their accounting methodology as to whether they use the cash basis of accounting for their financial statements and record keeping, or the accrual basis, and this inconsistency affects the reliability, accuracy, and adequacy of the Publix Companies' reported data. In addition, we have been unable to ascertain whether certain expenses should have been allocated among the Publix Companies, and therefore cannot determine whether reported expenses were actually incurred for their relay operation. The relay operations were charged with all of the costs that likely should have been shared with or assigned to other entities within the Publix Companies structure. Under NECA and Commission guidelines, it is the Publix Companies' responsibility to demonstrate that expenses were not commingled, and that each reported expense relates exclusively to the communication service the Publix Companies purport to be TRS.⁶¹ The documentation provided by the Publix Companies

⁵⁹ *Id.*

⁶⁰ See *Publix Response to EB Subpoena Request No. 16, P002186-93, July 23, 2001* ("RCC/SignTel Agreements"). The two agreements are identical except that one pertains to RCC and the other to SignTel.

⁶¹ See 47 C.F.R. § 64.604(c)(5)(iii)(C). Further, Section 1001 of Title 18 of the United States Code requires that persons not knowingly and willfully make materially false, fictitious, or fraudulent statements or representations to a governmental entity. See 18 U.S.C. § 1001.

is such that we cannot now determine how the expenses relate to the purported relay service. The Publix Companies also reported extensive accounting and legal expenses related to the provision of their purported TRS service that may have been unrelated to their TRS operation. Other accounting anomalies include discrepancies between the accounts and the dollar values reported to NECA, when compared with Publix Network's general ledger, as well as various inconsistencies contained in the data it provided NECA during the audit.⁶² Accordingly, we will specify an issue to determine whether, and the extent to which, the Publix Companies reported inaccurate and inadequate financial and operating data to the Fund Administrator and whether, in light of those findings, the Publix Companies complied with the requirements of Section 64.604(c)(5)(iii)(C).⁶³

2. Inaccuracies in Reported MOU

30. It also appears that the Publix Companies may have billed the TRS Fund for excessive MOU (even assuming, *arguendo*, that they did provide legitimate TRS). First, it appears that they billed NECA for time prior to call set-up, and even for incomplete calls, in violation of the Commission's rules.⁶⁴ There is also evidence that the Publix Companies billed NECA for more MOU than electronically passed through the switch of Southern New England Telecommunications Corporation ("SNET"), its local and interexchange carrier.⁶⁵ In October 2000, for example, SNET calculated Publix Network's switch minutes at 485,859 minutes.⁶⁶ For that same month, Publix Network reported to NECA 515,101 MOU for TRS service (almost 30,000 minutes in excess of all the minutes that passed through the switch) and the Publix Companies were compensated from the TRS Fund based on that figure.

31. Moreover, the Publix Companies reported to NECA as TRS MOU the sum of all TRS MOU for each leg of a conference call as if each leg were separately reimbursable. This resulted in billing the TRS Fund for multiple MOU each time a CA provided a single minute of service. For instance, if there were four ADs on the call communicating through a single CA, the number of minutes would quadruple.⁶⁷ The Publix Companies contend that these conference call

⁶² For instance, the Publix Network's records indicate that its actual average per-minute expenses for 1999 and 2000 were \$0.642 and \$0.827 respectively. Yet, Publix Network also asserts that its charges include \$0.96 per minute royalty expense.

⁶³ See para 35, *infra*, for issue of whether the Publix Companies violated the requirements of Section 220(e) of the Act by providing false information on any TRS Fund Worksheet.

⁶⁴ See 47 C.F.R. § 64.604(c)(5)(iii)(E).

⁶⁵ See, e.g., *Publix Response to EB Subpoena Request No. 7, P000313, July 23, 2001*. Here, the record indicates that Publix Network reported more TRS MOU than actual minutes that passed through SNET's switch. Switch minutes are those minutes of time where a circuit is open or an electronic path is completed. Conversation minutes reflect actual call time when a conversation can occur.

⁶⁶ See *Publix Response to EB Subpoena Request No. 7, P000309, July 23, 2001*.

⁶⁷ For example, if there were a four-hour conference call with four ADs, the Publix Companies would report 960 TRS MOU (240 minutes X 4 ADs) to NECA for reimbursement, whereas they should have billed the TRS Fund for only 240 TRS MOU. This assumes, of course, that any of the TRS MOU reported by the Publix Companies were legitimate.

MOU were billed based upon Dr. Liebermann's understanding of how a long-distance conference call would be billed by an interexchange carrier, and argue that they employed a "reasonable interpretation" in their approach.⁶⁸ We have reviewed the Publix Companies' arguments in support of its interpretation of MOU allowable for conference calls and CCB's reasons for rejecting them. As discussed below, we have determined that CCB has set forth the correct view of how MOU for conference calls should be calculated and adopt their reasoning therein. We further find that the Publix Companies' arguments do not set forth a reasonable interpretation of our rules.

32. Under the Publix Companies' approach, the TRS provider would be reimbursed multiple times for each minute of labor of a single CA. The Publix Companies' analogy to conference call billing rates is not relevant to billing TRS MOU for conference calls under the TRS rules. As CCB has correctly stated in its correspondence with Publix Network:

[T]he price of a conference call, or any other call, is not a factor in determining reimbursement for TRS service. The individual placing the call is responsible for the call whether it is directly dialed or placed through TRS. TRS reimbursement does not include the cost of the call itself, but rather is based on and derived from the expense items listed in the annual TRS center data request.⁶⁹

The proper calculation of TRS-reimbursable MOU reflects the minutes of actual relay service, irrespective of how many callers are on the call. CCB correctly rejected the Publix Companies' argument that they reasonably determined that compensation for each leg of the call was allowable.

33. Thus, it appears that the Publix Companies billed MOU that include minutes where there was no actual relay (*i.e.*, including call set up or time after the end of relay service), and charged multiple times for the same relay service. In addition, it appears that the Publix Companies deliberately kept the telephone connections open between the ADs and the CAs, even when no communication was actually occurring. In other words, it appears that the Publix Companies generated idle air time intentionally designed to inflate MOU. Any MOU generated as a result of such a practice would not constitute minutes of use within the Act and the Commission's rules. Similar schemes have been held to be non-compensable where the purpose of the activity was merely to generate payments. For example, the Commission has stated that the use of an autodialer in order to generate payphone compensation by calling toll free numbers billed to the called party would not only be a violation of the Act and Commission's rules, but could also constitute wire fraud.⁷⁰ The North Carolina Public Utilities Commission has held non-compensable the minutes of use generated by the maintenance of open switches 23 hours and 59

⁶⁸ See July Publix Letter to CCB at 5.

⁶⁹ See June CCB Letter; see also Letter from Maripat Brennan, Director of Fund Administration, NECA to Raanan Liebermann, CEO, Publix Network Corporation, May 10, 2001 ("May 10 NECA Letter").

⁷⁰ See, e.g., *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, (1996) at 20574-75.

minutes a day for the sole purpose of generating minutes of use for reciprocal compensation.⁷¹ The North Carolina Commission looked behind the mechanical generation of minutes of use to whether there were actual end users of the services.⁷² By analogy to these precedents, we direct the ALJ to determine whether the MOU generated by creating idle air time were compensable MOU. As noted above, we believe that the activities conducted by the Publix Companies did not constitute TRS and that consequently the Publix Companies were not entitled to any payments from the TRS Fund. Nevertheless, assuming *arguendo*, that legitimate TRS service was offered by the Publix Companies, we instruct the ALJ, using the standards governing calculation of MOU as stated herein, to determine the extent to which the Publix Companies overbilled NECA for MOU or whether any additional payments are due to the Publix Companies.

C. Whether the Publix Companies Made Intentional Misrepresentations or Willful Material Omissions to the Commission

34. Commission applicants, permittees, and licensees may not “in any response to Commission correspondence or inquiry, or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.”⁷³ It appears that the Publix Companies may have violated this rule or otherwise engaged in misrepresentations or lack of candor on multiple occasions.⁷⁴ For example, Publix Network’s Application to be certified as a TRS provider states that “Publix Network TRS meets all of the FCC’s operational, technical and functional minimum standards set forth in 47 C.F.R. Section 64.604, and in some respects exceeds those standards.”⁷⁵ As discussed above, this appears to be false. Moreover, as discussed above, the Publix Companies repeatedly told the Commission that their relay facilities were operational 24 hours a day, seven days a week, but, as the Publix Companies admit, that does not appear to have been true between the time of the application and the NECA audit.⁷⁶ In addition, Publix Network’s Application states that the relay service offers consumers equal access to interexchange carrier of choice, and that too appears to be inaccurate. Other apparent violations of the mandatory minimum standards are discussed above. Given the apparent pervasive pattern of violations of the Act and Commission’s rules at issue here, it appears that these inaccurate statements may have been intentional and thus constitute unlawful misrepresentation or lack of candor. Accordingly, we will specify an issue to determine the

⁷¹ *BellSouth Telecommunications, Inc. v. US LEC of North Carolina Inc.*, 201 PUR 4th 58, 89-91 (2000).

⁷² *Id.* at 88.

⁷³ 47 C.F.R. § 1.17.

⁷⁴ We note that, by definition, misrepresentation and lack of candor involve intent. See *Trinity Broadcasting of Florida, Inc. et al.*, Initial Decision, 10 FCC Rcd 12,020, 12,063 (1995); *Cannon Communications Corp. et al.*, Decision, 5 FCC Rcd 2695, 2700 (1990); *MCI Telecommunications Corp.*, Order and Notice of Apparent Liability, 3 FCC Rcd 509, 512 (1988); *Fox River Broadcasting, Inc., et al.*, Order, 93 FCC 2d 127, 129 (1983).

⁷⁵ Application at 2.

⁷⁶ See, eg., July Publix Letter to CCB at 4.

extent to which the Publix Companies made misrepresentations or willful material omissions, or lacked candor, to the Commission or its agents.

35. It appears that the Publix Companies may also have violated a specific requirement that TRS providers report true and accurate information to the Fund Administrator as part of their duty to complete required FCC reporting forms used by the Administrator to determine annually the compensation rates for TRS. All carriers are required to complete the Telecommunications Reporting Worksheet, FCC Form 499-A annually, ("Worksheet") in order to enable the TRS Administrator to collect the necessary funding to compensate the TRS providers. Section 220(e) of the Act imposes a duty of truthfulness and accuracy in accounting matters on common carriers. Carriers filing false information are subject to fine or imprisonment as specified in Section 220(e) of the Act. It appears from the evidence that the Publix Companies may have failed to submit a number of annual reports required under the Act, and may have willfully provided false information or willfully neglected or failed to provide correct information on their 2001 Worksheet. We therefore will specify an issue to determine the extent to which the Publix Companies filed false information on this or any other Worksheet that they submitted to the Fund Administrator.

36. As a general matter, it appears that the Publix Companies may have engaged in a pervasive pattern of misrepresentation in order to obtain payments from the TRS Fund. There is evidence that they may have provided a sham service which they denominated TRS but which may have been nothing more than self-directed calls among employees of closely related corporate entities. It appears that rather than providing actual TRS between legitimate end users, employees initiated calls to other employees, and that the calls may have contained periods in which there was no conversation but vast amounts of dead time intended solely to increase MOU for future reimbursement. It appears that the Publix Companies deliberately inflated the MOU they reported to NECA by including minutes where there was no actual relay (*i.e.*, including call set up or time after the end of relay service); charging for more minutes than passed through the SNET switch; billing multiple times for the same relay service; and deliberately generating MOU by "dotting" to keep the lines open when there was no conversation. The deliberate manipulation of MOU or deliberate misrepresentations regarding the "TRS" services being provided in order to obtain or increase payments from the TRS Fund would not only violate the Act and Commission rules but could also constitute criminal behavior.⁷⁷ We direct the ALJ to consider the totality of the evidence and determine whether there was a pervasive pattern of misrepresentation or lack of candor.

D. Whether the Publix Companies Should Remain Authorized to Act as a Common Carrier

37. It appears that the Publix Companies engaged in a pervasive pattern of rule violations and misrepresentations in order to obtain millions of dollars in payments from the TRS

⁷⁷ See, e.g., *United States v. Henny*, 527 F.2d 479 (9th Cir. 1976), *cert. denied* 425 U.S. 991 (1976) (wire fraud found when carrier attempted deliberately to inflate payments from a long distance toll settlement pool by, among other things, misreporting length of calls, inflating the number of calls, and reporting free employee calls as compensable revenue generating toll calls).

Fund to which they were not entitled. It thus appears that the continued operation of the Publix Companies as a common carrier may not serve the public convenience and necessity within the meaning of Section 214 of the Act. We therefore direct the ALJ to determine whether the Publix Companies' blanket Section 214 authorization should be revoked; such revocation would make the Publix Companies ineligible as a common carrier for future compensation from the TRS Fund. Further, in light of the egregious nature of the Publix Companies' apparently unlawful activities, we direct the ALJ to determine whether specific Commission authorization should be required for the Publix Companies, or the principal or principals of the Publix Companies, to provide any interstate common carrier services in the future.⁷⁸

E. Whether the Publix Companies are Entitled to Any Portion of the Payments from the TRS Fund that They Requested or Received

38. If the Publix Companies did not provide interstate TRS within the meaning of the Act and the Commission's rules or did not substantially comply with the mandatory minimum standards required under the Act and the rules, then, as a matter of law, they were and are not entitled to payment from the TRS Fund. In addition, the Publix Companies are entitled to reimbursement from the TRS Fund for MOU only as properly calculated under our rules and accurately reported. Accordingly, the ALJ is to determine, in light of the evidence adduced, whether the Publix Companies are entitled to all or any portion of the payments that they requested or received from the TRS Fund. If the ALJ determines that the Publix Companies did not provide interstate TRS within the meaning of the Act and the Commission's rules or did not substantially comply with Section 64.604 for any period of time for which Publix Companies reported MOU and requested reimbursement from the TRS Fund, then, as a matter of law, the ALJ must conclude that, for any such periods of time, the Publix Companies were not entitled to any such payments. Therefore, to the extent that the ALJ determines that the Publix Companies were eligible for any TRS Fund reimbursements, the ALJ must determine the number of MOU for which Publix Companies are entitled to receive payment from the TRS Fund, based on the number of MOU reported by Publix Companies for such period, but to exclude duplicative billings for multiple legs of conference calls, reported MOU that cannot be documented or verified, or any other improperly reported MOU.

F. Whether Piercing the Corporate Veil is Appropriate

39. It appears that the Publix Companies are, for legal purposes, one and the same, and that they should be jointly liable for any penalties and/or forfeitures and/or reimbursements that may result from a hearing. The FCC has found several criteria useful in determining

⁷⁸ See *CCN, Inc., et al.*, Order to Show Cause and Notice of Opportunity for Hearing, 12 FCC Rcd 8547 (1997).

whether to “pierce the corporate veil.” The seminal case was decided in 1969, where the Commission stated:

The fact that GTI and GTEC are separate corporate entities is not determinative. Where the ownership of stock is used to dominate and control the subsidiary in such a manner and to such extent that it becomes a mere agency or instrumentality of the parent, the separate corporate entities may be disregarded. Furthermore, separate corporate structures may be ignored where the purpose of a statutory scheme or regulation would otherwise be frustrated. The critical question, therefore, is whether the conduct of the . . . corporations in the light of the relationship which exists among them requires that the legal concept of separate corporate identities be disregarded in order to preserve the integrity of section 214 and to prevent the respondents from defeating the purpose and objective of the statutory provisions for certification.⁷⁹

Other criteria include: (1) a common identity of officers, directors and shareholders; (2) sharing the same principal offices; (3) closeness of relationship between entities.⁸⁰

40. In this case, it appears that Dr. Liebermann runs the affiliated entities in question with little or no regard to corporate identity. For instance, most of the expenses for his companies are paid from a single account. Other expenses are often paid from his personal checking account. For example, two agreements between Publix Network and RCC, and between Publix Network and SignTel provide for a number of arrangements between Publix Network and these companies that relate to how expenses are paid and how Publix Network compensates RCC/SignTel for “conferencing technology.” Both agreements require RCC and later SignTel to “perform accounting and transact payments for Publix [Network].”⁸¹ Evidence supports the proposition that this is exactly what RCC and SignTel did. It also appears that Dr. Liebermann’s companies may have shared common officers, directors, and/or shareholders.

41. The use of different office locations by Dr. Liebermann’s companies is relatively new. It appears that at one time, both the CAs and the moderators were located in the same building. Even if these entities are now located in different offices, such a change is not dispositive. In the *Mansfield Journal* case, the two entities in question were separate corporations located over fifty miles apart. The court held that the Commission could base its finding that the entities were under common control upon the “true locus of control” because of the high level of control exercised by the owners of both entities.⁸² Here, it appears that the true

⁷⁹ *Petition by Telecable Corp. to Stay Construction or Operation of a CATV System in Bloomington and Normal, Ill.*, Decision, 19 FCC 2d 574, 587 (1969) (footnotes omitted).

⁸⁰ *See generally Petition by Dimension Cable TV, Inc., Morrisonville, N.Y., to Stay Construction or Operation of a CATV System Near Plattsburg, N.Y.*, Memorandum Opinion and Order, 27 FCC 2d 43 (1971).

⁸¹ *See RCC/SignTel Agreements.*

⁸² *See Mansfield Journal Co. v. FCC*, 180 F.2d 28, 37 (D.C. Cir. 1950) (“*Mansfield Journal*”).

locus of control was with Dr. Liebermann, sole owner of the entities in question, whether these companies operated in the same building or were miles apart.

42. It is also no defense if Dr. Liebermann's contends that his companies, other than Publix Network, are not common carriers. The United States Court of Appeals for the Fifth Circuit held that activities of non-common carrier affiliates may be imputed to the common carrier parent.⁸³ It appears that Dr. Liebermann's other entities were critical for his operation. In conversations between Dr. Liebermann's counsel and Commission Staff, counsel does not hide the fact that the monies received from the TRS Fund went through Publix Network and into SignTel, and represented most, if not all, of SignTel's revenues. The goals of the Communications Act and our rules would be frustrated if the Commission cannot hold these affiliated entities responsible, because it appears that funds from the TRS Fund were transferred directly from the purported TRS provider, Publix Network, to these affiliated entities, and that any reasonable chance for recovery of such funds if wrongdoing is found, or payment of any forfeiture is imposed upon Dr. Liebermann, could well require the assets of his affiliated entities. Accordingly, we will specify an issue to determine whether, and to the extent which, in light of the legal standards set forth above, the Publix Companies should be considered one and the same entity for purposes of this proceeding, for purposes of issuing any forfeiture order, and/or for purposes of any debt collection action that may ensue as a result of this proceeding.

IV. CONCLUSION

43. In light of the totality of the information now before us, an evidentiary hearing is required to determine whether the continued operation of the Publix Companies as a common carrier would serve the public convenience and necessity within the meaning of Section 214 of the Act. Further, due to the potentially egregious nature of the Publix Companies' apparently unlawful activities, they will be required to show cause why an order to cease and desist from the provision of any interstate common carrier services without the prior consent of the Commission should not be issued. In light of the apparent violations outlined above, it also appears that a forfeiture should be levied against the Publix Companies. Moreover, because our investigation has raised substantial questions whether the Publix Companies are entitled to any of the payments that they have received and requested from the TRS Fund, we will specify an issue to determine the extent to which the Publix Companies are eligible for any payments.

V. ORDERING CLAUSES

44. ACCORDINGLY, IT IS ORDERED that, pursuant to Sections 4(i) and 214 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 214, the principal or principals of the Publix Companies ARE DIRECTED TO SHOW CAUSE why the operating authority bestowed on the Publix Companies pursuant to Section 214 of the Communications Act of 1934, as amended, should not be REVOKED.

⁸³ *General Telephone Co. of the Southwest, et al., v. United States and FCC, et al.*, 449 F.2d 846, 855 (5th Cir. 1971).

45. IT IS FURTHER ORDERED that, pursuant to Section 312(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 312(b), the principal or principals of the Publix Companies ARE DIRECTED TO SHOW CAUSE why an order directing them TO CEASE AND DESIST FROM THE PROVISION OF ANY INTERSTATE COMMON CARRIER SERVICES without the prior consent of the Commission should not be issued.

46. IT IS FURTHER ORDERED that the hearing shall be held at a time and location to be specified by the Chief Administrative Law Judge in a subsequent order. The ALJ shall apply the conclusions of law set forth in this Order to the findings that he makes in that hearing, upon the following issues:

- (a) to determine whether the service the Publix Companies provided met the definition of TRS under Section 225(a)(3) of the Act and Section 64.601(7) of the Commission's rules;
- (b) to determine whether the Publix Companies violated Section 64.604(a)(1) of the Commission's rules;
- (c) to determine whether the Publix Companies violated Section 225(d)(1)(F) of the Act and Section 64.604(a)(2)(i) of the Commission's rules;
- (d) to determine whether the Publix Companies violated Section 64.604(b)(3) of the Commission's rules;
- (e) to determine whether the Publix Companies violated Section 64.604(b)(4) of the Commission's rules;
- (f) to determine whether the Publix Companies violated Section 64.604(c)(3) of the Commission's rules;
- (g) to determine whether the Publix Companies violated Section 64.604(c)(5)(iii)(C) of the Commission's rules;
- (h) to determine whether the Publix Companies violated Section 64.604(c)(5)(iii)(E) of the Commission's rules;
- (i) to determine whether the MOU generated by the Publix Companies constituted MOU compensable by the TRS Fund;
- (j) to determine whether the Publix Companies violated Section 220(e) of the Act by not filing true and accurate data in FCC Form 499-A;
- (k) to determine whether the Publix Companies engaged in a pervasive pattern of misrepresentation or lack of candor;
- (l) to determine whether the Publix Companies misrepresented or willfully

omitted facts in written materials submitted to the Commission, in violation of 47 C.F.R. Section 1.17;

- (m) to determine whether, with respect to the issues (a) through (l) specified above, the Publix Companies knew or should have known that they were committing such violations, whether they acted with the intention of violating a known duty; and whether they acted negligently, or with gross neglect of a known duty;
- (n) to determine whether the Publix Companies substantially complied with the requirements of 47 C.F.R. Section 64.604;
- (o) to the extent that the ALJ finds that the Publix Companies were eligible for any TRS Fund reimbursements they requested or received, to determine the number of MOU for which the Publix Companies were entitled to receive reimbursement from the TRS Fund;
- (p) to determine, in light of all the foregoing, whether Publix Network's authorization to operate as a common carrier should be revoked;
- (q) to determine whether, in light of all the foregoing, Publix Network, the Publix Companies, and/or its principals should be ordered to cease and desist from the provision of any interstate common carrier services without the prior consent of the Commission;
- (r) to determine whether, in light of the evidence adduced pursuant to the foregoing issues, Publix Network, Publix Relay, SignTel, RCC, Customer Attendants, Focus Group, and any other related company under the control and direction of Dr. Raanan Liebermann, should, for purposes of this proceeding, be considered one and the same entity.

47. IT IS FURTHER ORDERED that the Chief, Enforcement Bureau, shall be a party to the designated hearing. Pursuant to Section 312(d) of the Communications Act of 1934, as amended, both the burden of proceeding and the burden of proof shall be upon the Enforcement Bureau as to issues (a) through (r) inclusive.

48. IT IS FURTHER ORDERED that, to avail themselves of the opportunity to be heard, the principal or principals of the Publix Companies, pursuant to Section 1.91(c) of the Commission's rules, SHALL FILE with the Commission within 30 days of the mailing of this Show Cause Order a WRITTEN APPEARANCE stating that a principal or other legal representative from the Publix Companies will appear at the hearing and present evidence on the matters specified in the Show Cause Order. If the Publix Companies fail to file a written appearance within the time specified, the Publix Companies' right to a hearing SHALL BE DEEMED TO BE WAIVED. In the event that the right to a hearing a hearing is waived, the Presiding Judge, or the Chief, Administrative Law Judge if no Presiding Judge has been designated, SHALL TERMINATE the hearing proceeding as to that entity and CERTIFY this

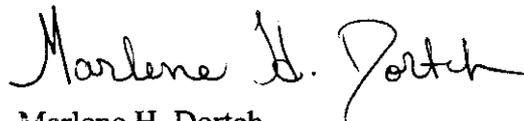
case to the Commission in the regular course of business, and an appropriate order shall be entered.

49. IT IS FURTHER ORDERED that, irrespective of the resolution of the foregoing issues, the ALJ shall determine, pursuant to Section 503(b)(3)(A) of the Act, 47 U.S.C. § 503(b)(3)(A), whether an Order of Forfeiture shall be issued against any or each of the Publix companies and their principal(s) for having willfully and/or repeatedly violated Sections 1.17, 64.601(7), 64.604(a)(1), 64.604(a)(2)(i), 64.604(b)(3), 64.604(b)(4), 64.604(c)(3), 64.604(c)(5)(iii)(C), and/or 64.604(c)(5)(iii)(E) of the Commission's rules, 47 C.F.R. §§ 1.17, 64.601(7), 64.604(a)(1), 64.604(a)(2)(i), 64.604(b)(3), 64.604(b)(4), 64.604(c)(3), 64.604(c)(5)(iii)(C), and/or 64.604(c)(5)(iii)(E) and/or Sections 220(e), 225(a)(3) and 225(d)(1)(F) of the Act, 47 U.S.C. §§ 220(e), 225(a)(3) and 225(d)(1)(F). For each violation, the maximum potential forfeiture liability for the parties, joint and separately, shall be the statutory maximum of \$120,000 per violation up to a total of \$1,200,000 for each continuing violation committed by a common carrier. This figure is set based upon the seriousness of the alleged violations, the continuing nature of the alleged violations, the apparent culpability of each party, the information available to us concerning the financial condition of each party, and the ability of each party to profit from the alleged rule and/or statutory violations.

50. IT IS FURTHER ORDERED that this document constitutes a NOTICE OF OPPORTUNITY FOR HEARING pursuant to Section 503(b)(3)(A) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b)(A), for the potential forfeiture liability outlined above.

51. IT IS FURTHER ORDERED that a copy of this ORDER TO SHOW CAUSE AND NOTICE OF OPPORTUNITY FOR HEARING shall be sent by certified mail, return receipt requested, to Dr. Raanan Liebermann, Publix Network Corporation, 79 Bayard Avenue, North Haven, CT 06473, and Gerard Waldron, Esq., Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C., 20004.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

