

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

In the Matter of	)	
	)	
Telecommunications Relay Services	)	
And Speech-to-Speech Services for	)	CC Docket No. 98-67
Individuals with Hearing and Speech	)	
Disabilities	)	
	)	
Petition for Clarification of WorldCom, Inc.	)	
_____	)	

**REPLY OF SPRINT**

Sprint Corporation ("Sprint"), on behalf of the Telecommunications Relay Service ("TRS") operations of its subsidiary, Sprint Communications Company L.P., and pursuant to the procedures set forth in Section 1.429 of the Commission's Rules, 47 U.S.C. §1.429, hereby respectfully submits its reply to the comments of Hamilton Relay Inc. ("Hamilton") opposing Sprint's Petition for Limited Reconsideration filed April 24, 2003 in the above-captioned proceeding.<sup>1</sup> As set below, Hamilton's arguments are totally without merit.

Sprint's petition requested reconsideration of the Commission's *Order on Reconsideration* (FCC 03-46) released March 14, 2003 (*Reconsideration Order*) to the extent

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<sup>1</sup> In addition to Hamilton, the major organizations representing the interests of the deaf and hard-of-hearing community -- Telecommunications for the Deaf ("TDI"), National Association of the Deaf ("NAD"), Self Help for Hard of Hearing ("SHHH"), and Deaf and Hard of Hearing Consumer Advocacy Network ("DHHCAN") (collectively Joint Commenters) -- filed comments on May 16, 2003 urging the Commission to grant Sprint's petition. WorldCom Inc. d/b/a MCI ("MCI") filed a petition for reconsideration on May 16, 2003 seeking comparable relief to that sought by Sprint. MCI explained that such relief was warranted for the reasons raised by Sprint in its petition as well as on other grounds.

that the such *Order* “den[ie]d] cost recovery to those IP Relay providers who have been providing IP Relay, prior to the effective date of this *Order*, without meeting all of the applicable TRS mandatory minimum standards, including those concerning HCO [Hearing Carry Over] and 900 number services.” *Reconsideration Order* at ¶1. Sprint asked the Commission “to allow compensation to all entities providing IP Relay (also referred to herein as Internet Relay) services, without regard to the HCO and 900 (or pay-per-call) service requirements, from the effective date of its *Declaratory Ruling and Second Further Notice of Rulemaking*, 17 FCC Rcd 7779 (2002) (*Internet Relay Ruling*) forward.” Sprint Petition at 1. Sprint demonstrated that the relief was justified on several grounds. These included:

- the fact that the legal precedent<sup>2</sup> primarily relied upon by the Commission to refuse to correct its erroneous findings in the *Internet Relay Ruling nunc pro tunc* were inapposite (Petition at 11-12);
- the fact that the Commission’s denial of retroactive relief requested by Sprint was at odds with findings by the Commission in other decisions involving the provision of TRS (Petition at 12-14);
- the fact that the Commission routinely grants retroactive waivers upon finding that the public interest so requires (Petition at 14-17);
- the fact that when an agency’s rules are based upon erroneous findings -- and the Commission acknowledged in the *Reconsideration Order* that its findings as to the feasibility of providing pay-per-call and HCO services via Internet Relay were incorrect -- the agency has the ability to correct such errors on a retroactive basis (Petition at 8; 17-18);
- the fact that it would be arbitrary and capricious to deny Sprint compensation for providing Internet Relay service during the period in question because Sprint could not as a technical matter provide one-line HCO and pay-per-call services when other entities received compensation for providing Internet Relay during the same period even though,

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<sup>2</sup> *Bowen v. Georgetown University Hospital*, 109 S.Ct. 468 (1988), and the Commission’s decision in *McElroy Electronics Corp.*, 10 FCC Rcd 6762 (1995).

like Sprint, such entities could not provide what was technically infeasible to provide (Petition at 18-20);<sup>3</sup> and

- the fact that the public interest overwhelmingly favored granting the waivers *nunc pro tunc* (Petition at 20-24).

Hamilton does not specifically dispute Sprint's argument that the *Reconsideration Order's* reliance on *Bowen and McElroy* is misplaced. Rather, its challenge to Sprint's showing that the relief Sprint is seeking is fully justified by Commission and court precedent consists of the bare-bones statement that "Sprint offers no direct legal support for authorizing retroactive cost recovery for carriers that were not in compliance with Commission rules at the time that service was rendered." Opposition at 6. Hamilton simply ignores (1) the plethora of cases cited by Sprint and MCI demonstrating that Commission routinely grants retroactive waivers, including waivers enabling entities to receive retroactive payments that, but for the waiver, they would have not been entitled to receive; (2) the fact that the Commission waived the requirement that TRS services be able to handle coin-sent-paid calls from pay phones well after the date that TRS service (including coin-sent-paid) was required to be offered to the public without penalizing those TRS providers who did not offer coin-sent paid functionality as part of their TRS service before the waiver was granted; and (3) the court decisions cited by Sprint which allow agencies to correct errors on a retroactive basis so that the parties harmed by the error are put in the same economic position they would have been had the error not been made. Plainly, such decisions cannot be ignored, and the fact that Hamilton has done so demonstrates the weakness of its position.

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<sup>3</sup> Sprint explained that the best way to cure the discrimination here and the only way that would be consistent with the public interest would be to give the waivers granted by the *Reconsideration Order* retroactive effect so that all entities that provided Internet Relay Service during the period in question would be treated the same.

Hamilton does attempt to distinguish, in a footnote, the Commission's decision in *Rath Microtech v Electric Micro Systems, Inc.* (16 FCC Rcd 16710 (2001)) and the Commission's *Publix Show Cause Order* (17 FCC Rcd 11487 (June 19, 2002)), which both Sprint and MCI have cited in support of their reconsideration petitions. But its arguments in this regard are without merit. Hamilton claims, for example, that the Commission's decision in *Rath Microtech* is inapposite because the retroactive waiver which the Commission granted Electric Micro Systems ("EMS") did not harm anyone whereas Hamilton would be harmed by a decision to enable Sprint to recover its costs of providing Internet Relay service without one-line HCO and pay-per-call services before the Commission issued its *Reconsideration Order*. Opposition at fn. 13. Yet, as MCI points out, "[t]he retroactive waiver granted to EMS and its customers denied Rath Microtech the ability to market its elevator phones since EMS' phones did not have to be removed." MCI Petition at 22.

Moreover, the notion that Hamilton would be harmed by allowing Sprint to recover its costs of providing Internet Relay service during the period in question defies credulity. Certainly, enabling Sprint to recover its costs in this regard would not arbitrarily discriminate against Hamilton, for the simple reason that Hamilton opted not to provide Internet Relay service. Thus, contrary to Hamilton's argument (Opposition at 4-6), Hamilton cannot be considered similarly situated to those TRS providers, like Sprint and MCI, that chose to make this highly valuable service available to the deaf and hard-of-hearing community. Hamilton did not incur the costs that Sprint and MCI incurred.<sup>4</sup>

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<sup>4</sup> In this regard, Hamilton's reliance on *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) is misplaced. See Hamilton Opposition at 5 and fn. 12. The court in *Melody Music* questioned a Commission decision which treated similarly-situated Commission licensees

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Hamilton appears to suggest that the harm flows from what it claims are the anti-competitive market distortions that would be created by applying the waivers granted by the *Reconsideration Order* on a retroactive basis. Opposition at 10. But Hamilton offers no explanation as to why and how the market is distorted by allowing all entities that provided Internet Relay service in substantial compliance with the Commission's rules prior to the *Reconsideration Order* to recover their costs of service.

On the other hand, competitive issues would be raised by the Commission's failure to grant the relief being requested by Sprint and MCI. For example, a TRS provider that might not be prepared to offer a new and highly innovative TRS service -- and it is not at all clear that Hamilton was fully prepared to provide Internet Relay service at the time the Commission's *Internet Relay Order* was issued -- would understand that all it needed to do to delay the introduction of the innovative service would be to raise some problem a provider of the innovative service may have in meeting a minimum requirement, no matter how minor, and insist that the provider not be compensated for the service. Faced with such challenge, the provider likely would not want to risk furnishing "free service" until the matter was sorted out, which could take several months at a minimum. This, in turn, would afford the company that was not prepared to offer the innovative service additional time to develop a competing service offering, denying the innovator the benefits of its innovation. As MCI points out, the Commission's finding in its *Reconsideration Order* at issue here would invite such anti-

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differently without justification. Again, because of Hamilton's decision not to provide Internet Relay service during the period in question, it is not "similarly situated" with entities like Sprint and MCI which did provide the service. Thus, the only discrimination at issue here is the treatment of Sprint *vis-à-vis* other carriers that were compensated for providing Internet Relay service without one-line HCO and pay-per-call capabilities prior to the *Reconsideration Order*. See Sprint Petition at 19-20.

competitive gaming. *See* MCI Petition at 22.

Hamilton's attempt to distinguish the Commission's *Publix Show Cause Order* is also unavailing. Hamilton argues that this order "is not applicable" because it involves an evidentiary hearing before an Administrative Law Judge to determine whether Publix is a legitimate TRS provider and eligible for compensation from the TRS fund. But the fact that this decision instituted a show cause proceeding does not mean it is of no precedential value. As is the case in any show cause proceeding, the Commission must articulate its interpretation of what statute, rule or order the target of the show cause order is said to have violated. *See* 47 U.S.C. 312(b). Thus, in the *Publix Show Cause Order*, the Commission held that "absolute compliance with each component of the [TRS] rules" was not necessary to enable an otherwise legitimate TRS provider to receive reimbursement from the TRS fund; that minor deviations from the rules do not justify the withholding of such reimbursement; and that the TRS provider remains eligible for compensation if it can show that it has "substantially complied" with the rules. 17 FCC Rcd at 11494-95 (¶19). Plainly, the Commission's holdings there, unlike the show cause order itself, cannot be considered tentative.

Hamilton also argues *Publix Show Cause Order* cannot be read as allowing a TRS provider to "ignore specific minimum standards and still claim substantial compliance with the Commission's rules."<sup>5</sup> Hamilton Opposition at fn. 13. But Sprint does not suggest that the

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<sup>5</sup> Users of Hamilton's Internet Relay cannot enter an international number on Hamilton's Internet Relay access page. Hamilton's restriction here may be based on the fact that the TRS Fund Administrator has informed all Internet Relay providers that pursuant to Commission directive, no provider will receive compensation for international calls through Internet Relay. Sprint believes that, under the circumstances, Hamilton's limitation is justified, assuming that Hamilton implemented the restriction after being informed by the TRS Fund Administrator that international Internet Relay calls would not be compensated by the TRS Fund. But Hamilton has

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*Publix Show Cause Order* gives the TRS Provider the discretion to simply “ignore” minimum requirements and still expect to receive compensation. Certainly, Sprint did not “ignore” the one-line HCO and pay-per-call minimum requirements. It told the Commission that it was impossible to provide such features with Internet Relay and sought a waiver.<sup>6</sup> Sprint’s point here is that the Commission’s *Publix Show Cause Order* stands for the premise that compliance with the Commission’s TRS rules can not be measured in rigid terms and instead involves an evaluation of whether the purpose of the “statute and policy objectives of the implementing rules,” 17 FCC Rcd at 11494 (¶19), are being satisfied by the offering of a TRS service that may not have all the “i’s dotted or the t’s crossed.” Sprint believes that the overwhelming acceptance by the TRS user community of Sprint’s Internet Relay offering without the one-line HCO and pay-per-call capability clearly demonstrates that Sprint’s offering met the goals of the Act and the Commission’s Rules.

Hamilton claims that “the inability to provide one-line HCO and 900 services cannot be viewed as ‘minor deviations’.” Hamilton Opposition at fn. 13. But Hamilton does not explain why this is so. As MCI points out, there is no “benchmark for determining what constitutes ‘minor deviation’ or ‘substantial compliance’,” and such determinations “would need to be done on a case-by-case basis.” MCI Petition at 16. Sprint believes that the facts of this case,

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neither sought nor received a waiver of the minimum requirement that Internet Relay users be able to place international calls. Thus, under the standard Hamilton advocates should be applied to Sprint and MCI, Hamilton would not be entitled to receive compensation for any of its Internet Relay calls. Hamilton has “ignored specific minimum requirements,” and cannot claim “substantial compliance with the Commission’s rules.”

<sup>6</sup> The *Internet Relay Ruling* held that “[i]n order to be certified and eligible for reimbursement, IP Relay must meet these minimum standards or request and receive waivers of the standards.” *Id.* at 7790 (¶33). Plainly this is what Sprint did. Nothing in this sentence suggests, however, that a TRS provider would be denied retroactive relief for providing Internet Relay service while its waiver request was pending.

especially the fact that demand for one-line HCO and pay-per-call services by users of conventional TRS relay was *de minimis* and there was no reason to expect that demand for these features would be any greater by users of Internet Relay, clearly establish that the inability of TRS providers to offer such features with Internet Relay was a “minor deviation.”

Finally, Hamilton insists that the Commission’s findings in the *Publix Show Cause Order* as to what constitutes compliance with the Commission’s TRS rules would create a “slippery slope” that would inevitably lead to degraded TRS service being provided to end users. Opposition at 12-13. If Hamilton is asking that the Commission to revisit its holding as to what is required under the TRS rules, it will need to file a petition asking the Commission to begin such undertaking. In this reconsideration proceeding, the Commission must apply the law as it is and not how Hamilton might wish it to be. *Cf. AT&T v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992).

As for Hamilton’s concern for end users, Sprint believes that such users -- or at least the organizations that represent their interests before various agencies including the FCC -- should speak for themselves. And, it is clear from the pleading filed by the Joint Commenters that the representatives of the deaf and hard-of-hearing community believe that the public interest requires granting the relief being requested by Sprint. Indeed, they are “grateful to Sprint and other similarly-situated carriers” for deciding to provide a service that has proven to be “well-received by deaf and hard-of-hearing individuals” notwithstanding the fact that the offering may not have been “in exact accordance with the Commission’s rules because HCO and 900 service issues were unresolved.” Comments at 5. They point out that the decisions of Sprint and others in this regard has “yielded a substantial public interest benefit by enabling deaf and hard-of-hearing individuals to access this new technology in a more timely manner than the

administrative process would have allowed.” *Id.* at 5. They recognize that “[h]ad Sprint and others waited for resolution of the HCO and 900 service issues, deaf and hard-of hearing individuals would have been unable to have additional choices of IP Relay providers until the effective date of the *Order on Reconsideration*.” And, they state that “it would be unjust to penalize specific carriers for taking action that had the positive effects of providing persons with disabilities equal access to technology as well as increase choices of service providers in a more timely manner than they otherwise would have received them.” *Id.*

Sprint agrees with Hamilton that the outcome of this case will determine whether those individuals who must depend on TRS for their communications will win or lose. But as the comments of the Joint Parties make clear, it is the position of Hamilton -- and not the position advanced by Sprint and MCI -- that threatens their ability to receive high quality and innovative TRS service in a timely fashion. Plainly, Hamilton’s view of where the public interest lies in this matter cannot be accepted.

For the reasons set forth above as well as in Sprint Petition’s for Reconsideration, Sprint respectfully requests the Commission to allow compensation to all entities providing Internet

Relay services, without regard to the HCO and 900 service requirements, from the effective date of its *Internet Relay Ruling*.

Respectfully submitted,

  
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June 26, 2003

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **REPLY OF SPRINT** was sent by electronic mail or by hand or by United States first-class mail, postage prepaid, on this the 26<sup>th</sup> day of June , 2003 to the parties on the attached list.

  
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June 26, 2003

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