

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

In the Matter of)
)
Telecommunications Relay Services)
for Individuals with Hearing and Speech) CC Docket No. 98-67
Disabilities, and the Americans with)
Disabilities Act of 1990)

To: Chief, Consumer & Governmental Affairs Bureau

COMMENTS OF HAMILTON RELAY, INC.

Hamilton Relay, Inc. (“Hamilton”), by its attorneys, hereby submits its comments in response to the National Exchange Carrier Association’s (“NECA”) proposed payment formula and fund size estimate for the interstate Telecommunications Relay Services (“TRS”) Fund for the period July 2004 through June 2005.¹ For the reasons set forth below, Hamilton opposes NECA’s decision to use a rate of return analysis to calculate the reimbursement rates for traditional TRS, Speech to Speech (“STS”), Internet Protocol (“IP”) Relay, and Video Relay Services (“VRS”). In addition, Hamilton believes that the Commission would be obligated under the Administrative Procedure Act to initiate and complete a rulemaking proceeding before it may abandon its historical compensation methodologies in favor of another methodology such as the rate of return methodology. Finally, Hamilton urges the Bureau to instruct NECA to revise its

¹ NECA Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, CC Docket No. 98-67 (filed May 3, 2004) (“NECA Filing”); *see also* FCC Public Notice DA 04-1258 (rel. May 4, 2004).

proposed compensation rates so that they are calculated in a manner consistent with the methods used in previous years.

I. A Rate of Return Analysis Should Not Be Applied to the Competitive TRS Market

The Commission's rules provide for payments from the interstate TRS Fund to compensate eligible TRS providers for their reasonable costs of providing interstate TRS.² In previous years, NECA has proposed, and the Bureau has approved as reasonable, a compensation rate based on the cumulative average cost per interstate minute for each TRS service. "Average cost" in prior years was deemed to include research and development costs and a fair markup to cover other relay expenses.

In this year's filing, NECA has removed those costs from its calculation, and instead has adopted the 11.25% rate of return analysis first referenced by the Bureau in the *June 30th Order* to calculate the interim VRS compensation rate.³ NECA also has taken the unprecedented step of using a surrogate of the 11.25% rate of return analysis to calculate the proposed compensation rates for traditional TRS, STS and IP Relay services. Hamilton is already on record as being opposed to the use of rate of return analysis with respect to VRS because of the incompatibility

² 47 C.F.R. § 64.604(c)(5)(iii)(E).

³ NECA Filing at 6-7; *see also Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Order*, CC Docket No. 98-67, DA 03-2111 (CGA Bur. June 30, 2003) ("*June 30th Order*").

between rate of return and competitive, voluntary services such as VRS.⁴ Hamilton hereby incorporates those comments by reference.

Hamilton also opposes the adoption of rate of return analysis with respect to traditional TRS, STS and IP Relay. While it is clear that the use of a rate of return analysis is inappropriate with respect to a competitive service such as VRS and IP Relay, where consumers may choose from several nationwide providers, it is abundantly clear that rate of return is wholly irrelevant with respect to traditional TRS. Traditional TRS is a competitively bid service with profit margins set by a competitive marketplace. Moreover, as the Bureau noted in the *June 30th Order*, there is “a significant amount of historical data to assist [the Bureau] in reviewing the providers’ submitted projected traditional TRS demand and cost recovery data.”⁵ The Bureau has determined in previous years that this data accurately reflects the costs associated with the provision of TRS, and it should do so again this year.⁶

Rate of return regulation is nearly an anachronism in today’s competitive telecommunications industry. Traditionally, rate of return regulation guaranteed a return on investment so that a monopoly carrier with a geographically designated area could serve all customers within that area without fear of being uncompensated for required infrastructure costs. The competitive TRS industry is wholly dissimilar. Like the cellular and interstate interexchange carrier (“IXC”)

⁴ See Comments of Hamilton Relay, Inc., CC Docket No. 98-67 (filed Aug. 26, 2003) (“Hamilton August 2003 Comments”).

⁵ *June 30th Order*, para. 25.

⁶ See, e.g., *Telecommunications Relay Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, Order, CC Docket No. 90-571, DA 02-1166 (rel. May 16, 2002).

industries, which are not subject to rate of return regulation and whose carriers' profits are unregulated, the TRS industry operates with the presumption that the field is competitive. Indeed, that is the case. Consumers and carriers may obtain TRS service from no fewer than 14 providers. Traditional TRS is competitively bid on a contract-by-contract basis, and IP Relay and VRS are competitively selected by consumers. This competition precludes TRS providers from distorting the market by offering consumers and other carriers multiple relay service options.

Furthermore, a rate of return analysis fails to estimate and anticipate traffic sensitive operating costs, such as those which characterize relay services, and thus should not be applied to the relay market. TRS providers' operating expenses are extremely volatile and constantly change based on call volumes and labor costs. By placing a disproportionately greater emphasis on capital costs, as opposed to traffic sensitive operating costs, rate of return analysis provides a distorted estimate of the true costs of providing TRS, thereby underestimating the compensation rates for relay providers. For all of these reasons, rate of return analysis should not be applied to competitive TRS services, and Hamilton therefore opposes the compensation rates generated by NECA for 2004-2005.

II. The ADA Does Not Preclude Fair Markups on TRS Services Provided to Carriers

Any reduction in TRS providers' tax allowances and profit margins is neither described nor authorized by the Americans with Disabilities Act ("ADA") or the Communications Act. Title IV of the ADA requires all common carriers to provide

relay services.⁷ To comply with this requirement, a carrier may provide TRS “individually, through designees, through a competitively selected vendor, or in concert with other carriers.”⁸ Competitively selected relay vendors do not provide TRS because of any inherent statutory requirement that they do so. Rather, the services are provided under contract to common carriers, with the expectation that the TRS providers will recover their costs, including a reasonable profit.

Indeed, the vast majority of carriers, in order to gain efficiencies, choose not to provide TRS services directly to the public, but instead collectively contract with TRS vendors through a competitive bidding process, either under the auspices of a state Public Service Commission or on a private contractual basis. Carriers contract with TRS providers to ensure the carriers’ compliance with the ADA. TRS providers are thus simply contractors hired to fulfill the statutory requirement that carriers comply with the ADA. In this regard, a TRS provider is in the same position as a construction contractor hired to build wheelchair-accessible ramps for building owners to ensure the owners’ compliance with the ADA. Those construction contractors include a fair markup on their services. Similarly, TRS providers include a fair markup, and such markups are consistent with the ADA. The ADA does not limit in any way a TRS vendor’s profit margin, either through an 11.25% rate of return on investment or by any other means. Accordingly, Hamilton opposes any decision to eliminate or reduce profit margins and income taxes from the proposed rate calculation.

⁷ Codified at 47 U.S.C. § 225.

⁸ *Id.* § 225(c).

III. If Adopted, NECA's Proposed Compensation Rates Will Stifle Competition

As noted, the compensation rates proposed by NECA were calculated without including income tax and profit margin data submitted by TRS providers.⁹ Instead, NECA inexplicably elected to use a 1.4% “monthly factor” and a 40% “income tax allowance,” without any written Commission guidance or approval whatsoever. Hamilton strenuously opposes NECA’s compensation methodology because it jeopardizes the ADA’s promise of functionally equivalent access and will stifle competition. Hamilton predicts that the implementation of a rate of return and NECA’s other arbitrary percentages, which may not accurately reflect a provider’s costs, will discourage new market entrants and will cause TRS vendors to exit the market, leaving relay users with fewer choices in providers, and fewer TRS services offered by providers. Moreover, the use of an arbitrary 11.25% rate of return fails to fairly compensate relay providers, whose costs and capital structures vary widely. Indeed, NECA admits that it does not maintain TRS providers’ capital investment data, and therefore its rate of return analysis is arbitrary and irrational *ab initio*.¹⁰

IV. Consumers Will Be Harmed if NECA's Proposed Rates Are Adopted

Hamilton submits that the greatest impact of NECA’s proposed rate changes will be felt by the consumer. TRS providers naturally will seek to reduce costs in

⁹ NECA filing at 6.

¹⁰ Calculating a rate of return requires a carrier’s actual costs of capital and equity. *See Prescribing the Authorized Unitary Rate of Return for Interstate Services of Local Exchange Carriers*, Notice Initiating a Prescription Proceeding and Notice of Proposed Rulemaking, CC Docket No. 98-166, FCC 98-222, 13 FCC Rcd 20,561, 20,563, para. 2 (1998). NECA admits that it lacks such information for TRS providers. NECA Filing at 7.

direct proportion to reduced revenues, and this may lead providers to cut staff, operating hours, voluntary services and other expenditures, or perhaps to abandon service altogether, resulting in an overall poorer quality of service for the consumer. No one, least of all the consumer, will be best served by adopting unrealistically low compensations rates for valuable relay services.

Moreover, NECA's proposed rates do not accurately reflect the costs involved in providing innovative, voluntary new services such as IP Relay and VRS, and as a result providers may cease offering such services. As NECA notes, IP Relay is an extraordinarily popular service with consumers, and NECA projects that there will be nearly four times more IP Relay minutes than traditional interstate TRS minutes in the coming year.¹¹ The Commission should encourage providers to continue offering these innovative services, and indeed the Commission is mandated by the ADA to ensure that its regulations do not "discourage or impair the development of improved [TRS] technology."¹² Stripped of any allowed costs for research and development and fair markup, NECA's proposed compensation rates will likely discourage any further TRS innovation and impair providers' ability to develop improved technologies for consumers. Hamilton therefore encourages the Commission to reject NECA's proposed compensation rates and direct NECA to use the formula relied upon and approved in previous years.

¹¹ NECA filing at 10, 12.

¹² 47 U.S.C. § 225(d)(2).

V. The Commission Must Complete A Rulemaking Proceeding Prior to Modifying the Existing TRS Compensation Framework

Finally, as Hamilton and others have noted, the Bureau acted without authority when it adopted a rate of return analysis to lower the VRS compensation rate in the *June 30th Order*.¹³ NECA's extension of the rate of return analysis to other TRS services, absent Commission direction and absent a rulemaking proceeding by the Commission, is similarly impermissible. The Bureau's adoption of NECA's rates would only compound the problems created by the Bureau's *June 30th Order* and furthermore would violate the Administrative Procedure Act.¹⁴ Hamilton submits that the completion of a notice and comment rulemaking is necessary before any modification to the TRS cost recovery framework may be effected.¹⁵ Indeed, the courts require a notice and comment period prior to the adoption of such legislative rule changes.¹⁶ Until such a proceeding is initiated and completed, the Bureau is obligated to direct NECA to rely upon the methodology employed in previous years.

¹³ See, e.g., Hamilton August 2003 Comments, at 2; Sprint Petition for Reconsideration, at 11 (filed July 30, 2003).

¹⁴ 5 U.S.C. § 553.

¹⁵ For example, the Commission could initiate a Second Further Notice of Proposed Rule Making in *Telecommunications Relay Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 01-371, 16 FCC Rcd 22,948, para. 34 (rel. Dec. 21, 2001).

¹⁶ *Fertilizer Inst. v. United States E.P.A.*, 935 F.2d 1303, 1307 (D.C. Cir. 1991) (“[A]n agency cannot go beyond the text of a statute and exercise its delegated powers without first providing adequate notice and comment.”).

VI. Conclusion

It is important to note that this proceeding is no longer limited to the calculation of compensation rates for voluntary relay services such as VRS. NECA's proposed rates, if adopted, will impact all aspects of relay services, including core traditional TRS rates. Hamilton appreciates the efforts undertaken by NECA to submit its proposed cost formula, and recognizes that NECA may have felt compelled to employ a rate of return analysis. However, for the reasons set forth above, Hamilton urges the Bureau to affirm that anachronistic rate of return regulation has no place in the competitive TRS market, and to reject the proposed compensation rates by directing NECA to re-calculate the rates using the guidelines followed and approved in previous years.

Respectfully submitted,

HAMILTON RELAY, INC.

/s/ David A. O'Connor

David A. O'Connor

Reginal J. Leichty

Holland & Knight LLP

2099 Pennsylvania Ave., NW

Suite 100

Washington, DC 20006

Tel: 202-955-3000

Fax: 202-955-5564

Its Attorneys

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