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

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

To: The Commission

APPLICATION FOR REVIEW

NDS ON VIDEO RELAY SERVICES, INC.

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Summary

On June 30, 2004, the Bureau released its Rate Order. The Rate Order adopted on an interim basis the proposed TRS rates previously recommended by the National Exchange Carrier Association (“NECA”). Hands On seeks review of the Rate Order.

The bases for review are several fold. First, as the Rate Order itself admits, the methodology NECA used in formulating its rate recommendation was flawed and violated FCC Rule Part 65's methodology. Second, even while acknowledging that it must compile additional data to arrive at fair TRS compensation rates, the Rate Order still fails to comply with Part 65's methodology for calculating a rate of return on investment. Third, the Rate Order totally failed to acknowledge significant evidence of NECA's arbitrary and capricious treatment of provider costs as evidenced by Hands On's open discussion of adjustments NECA made to its costs that were on their face irrational, which NECA refused to explain, or which were made in direct contradiction to the procedure NECA claimed to have followed in reviewing provider cost data. Fourth, although the Rate Order holds out the promise of meetings with the Bureau to dispute any erroneous adjustments NECA might have made, such meetings fail to offer any meaningful opportunity to contest NECA's adjustments since NECA failed either to delineate its adjustments in its submission, and indeed admitted it had not adequately explained those adjustments, and never even advised the Bureau of the specific adjustments made. Fifth, the Rate Order admits it is predicated on the Bureau's view that the rate for video relay service (“VRS”) is irrelevant to concerns about the quality of the service itself. Such a callous disregard of the interests of the deaf/hard of hearing and speech disabled require this Commission to step in and correct the Bureau's erroneous course. For each of these reasons, review and reversal of the Bureau's Rate Order is in the public interest.

Not only is review warranted in this case. This situation presents an emergency warranting immediate Commission action. This is because the Bureau admits that the TRS rates set the Rate Order fail to compensate adequately providers for the costs of TRS. *Rate Order* at 38. In fact, as we show herein, the Bureau understates significantly the degree to which the Rate Order inadequately compensates VRS providers. That being the case, VRS providers have no choice but to degrade their service or suffer financial loss. Although the Bureau may shrug degraded VRS service off as irrelevant since VRS is not a mandatory service, *see Rate Order* at para. 46, we do not think this Commission should so lightly disregard the more than 1,000 comments it has received from deaf/hard of hearing and speech disabled persons and the views of many members of Congress pleading with the FCC not to allow further degradation of VRS service.

Continued degradation of VRS service to deaf/hard of hearing and speech disabled persons represents an immediate, concrete harm to those persons least able to shoulder that harm. That harm is irreparable since it is a denial of telecommunications service. Given that irreparable harm, as we show in the concurrently filed request for stay, an immediate stay of the reduction of the TRS rates is warranted to maintain the status quo to prevent further injury to deaf/hard of hearing and speech disabled consumers of VRS. Each of the traditional elements supporting issuance of a stay are present in this case: (1) irreparable harm to deaf/hard of hearing and speech disabled persons; (2) the lack of substantial harm to third parties; (3) the likelihood of success on the merits; (4) and the public interest in not further degrading service to deaf/hard of hearing and speech disabled persons. *See Hands On's Emergency Request for Stay*, filed concurrently herewith. Accordingly, the Commission should grant review and stay the effectiveness of the Bureau's Rate Order pending

resolution of the issues relating to the VRS funding mechanism set forth in CG Docket 03-123, and the issues raised herein with respect to the Bureau's Rate Order.

APPLICATION FOR REVIEW

Hands On Video Relay Services, Inc. (“Hands On”), by its counsel, and pursuant to FCC Rule Section 1.115 applies for review of the Consumer & Governmental Affairs Bureau’s (“Bureau”) Order, DA 04-1999 (June 30, 2004) (“Rate Order”) lowering the rates paid for Telecommunications Relay Service (“TRS”). Hands On is separately filing a requests that the full Commission stay the effectiveness of the Rate Order thereby continuing in effect the TRS rates adopted for 2003-04 in the Commission’s June 30, 2004 Order on Reconsideration, FCC 04-137 in this proceeding.¹ In support, the following is shown:

¹ Hands On requests waiver of FCC Rule Section 1.115(f)’s 25 page limit for applications for review. The issues presented in this proceeding are both unusually complex and of great importance to the deaf/hard of hearing and speech disabled community. Full airing of these issues with sufficient detail requires exceeding the page limit. In other similar circumstances the Commission has found it in the public interest to grant waiver of the page limitation on petitions for reconsideration or applications for review to assure a complete record and thorough treatment of all issues. *See Development of Operational, Technical and Spectrum Requirements, For Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010*, 15 FCC Rcd 16844 (2000); *Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service*, 13 FCC Rcd 4776 (1997); *Amendment of Section 2.106 of the Commission's*

I. Questions presented for review.

1. Whether the Bureau erred in holding irrelevant the loss of quality of Video Relay Service (“VRS”) since the Bureau cut the rate of payment for VRS on June 30, 2003 to \$7.751?
2. Whether the Bureau erred in adopting NECA’s TRS payment rate recommendations given that the Bureau acknowledged that those recommendations failed to reimburse providers for all reasonable costs of providing TRS services.
3. Whether the Bureau erred in adopting NECA’s rate recommendation for VRS when NECA failed to obtain sufficient data to allow it to propose a rational, compensatory rate for functionally equivalent VRS?
4. Whether the Bureau erred in adopting NECA’s proposal VRS rate where the record lacked evidence NECA followed whatever guidance may have been included in the Bureau’s June 30, 2003 Interim Rate Order?
5. Whether NECA has been lawfully delegated authority to evaluate the reasonableness of providers’ costs?
6. Whether it was error for the Bureau to rubber stamp NECA’s proposed TRS rates without conducting any independent review of the cost exclusions NECA made?
7. Whether the procedure the Bureau now intends to follow with respect to excluded costs denies the public and providers due process of law?

II. Introduction.

On June 30, 2004, the Bureau released its Rate Order. The Rate Order adopted on an interim basis the proposed TRS rates previously recommended by the National Exchange Carrier Association (“NECA”).² Hands On seeks review of the Rate Order.³ The bases for review are several fold. First, as the Rate Order itself admits, the methodology NECA used in formulating its rate recommendation was flawed and violated FCC Rule Part 65's methodology. Second, even while acknowledging that it must compile additional data to arrive at fair TRS compensation rates, the Rate Order still fails to comply with Part 65's methodology for calculating a rate of return on investment. Third, the Rate Order totally failed to acknowledge significant evidence of NECA's arbitrary and capricious treatment of provider costs as evidenced by Hands On's open discussion of adjustments NECA made to its costs that were on their face irrational, which NECA refused to explain, or which were made in direct contradiction to the procedure NECA claimed to have followed in reviewing provider cost data. Fourth, although the Rate Order holds out the promise of meetings with the Bureau to dispute any erroneous adjustments NECA might have made, such meetings fail to offer any meaningful opportunity to contest NECA's adjustments since NECA failed either to delineate its adjustments in its submission, and indeed admitted it had not adequately

² See *Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate* (May 3, 2004) (“NECA Recommendation”). NECA's TRS Advisory Council, however, unanimously recommended that the FCC reject NECA's VRS rate recommendation. *Id.* at 19-20.

³ Hands On is a contract provider of Video Relay Service (“VRS”) for two of the larger interstate telephone carriers, AT&T and MCI. In addition, it operates as a stand-alone VRS provider pursuant to certification from the State of Washington. Hands On commenced VRS operation in August of 2002 on a beta test basis, and commercial operation in December of 2002. Hands On now operates two VRS call centers. One is located at its corporate headquarters in Rocklin, CA. The second recently opened in Vancouver, Washington. As such, Hands On plainly has standing to request review of the Rate Order.

explained those adjustments, and never even advised the Bureau of the specific adjustments made. Fifth, the Rate Order admits it is predicated on the Bureau's view that the rate for video relay service ("VRS") is irrelevant to concerns about the quality of the service itself.⁴ Such a callous disregard of the interests of the deaf/hard of hearing and speech disabled persons is contrary to Section 225 of the Act and the established policy of this Commission. It require this Commission to step in and correct the Bureau's erroneous course. For each of these reasons, review and reversal of the Bureau's Rate Order is in the public interest.

III. Section 225 obligates the Commission to overturn the Bureau's adoption of NECA's 2004-05 VRS rate recommendation.

⁴ Although the Rate Order is flawed with respect to the determination of each TRS rate, this petition concentrates on issues relating to VRS. It is VRS service quality which has most suffered from the cuts in TRS rates and it is VRS service quality problems which have generated the overwhelming number of consumer complaints.

The Commission should review and reject the Bureau's rubber stamping of NECA's proposed rate recommendation for the same reasons the Telecommunications Relay Service Advisory Council unanimously rejected NECA's proposed VRS rate at its April 2004 meeting.⁵ Quite simply, the rate does not allow the provision to the deaf/hard of hearing and speech disabled community of functionally equivalent VRS in violation of Section 225 of the Communications Act of 1934, as amended.

- A. VRS service has suffered under the \$7.751 rate; it stands to reason it will only get worse at a payment rate of \$7.293.***

⁵ Conspicuously absent from the Bureau's Rate Order is any mention that the TRS Advisory Council unanimously rejected NECA's proposed VRS rate reduction and called on the FCC to continue in effect whatever rate was eventually adopted for the 2003-04 year, \$8.854. See NECA Recommendation at 19-20. Apparently in response to this rebuke, the staff drafted into the 2003-04 reconsideration order, an item seeking comment on the TRS Council's composition and role. 2003-04 Reconsideration Order at paras. 251-54. That heavy-handed action is distressing and can only serve to further lower this Commission's standing in the eyes of the deaf/hard of hearing and speech disabled and disabled communities.

Since the Bureau cut the VRS payment rate some 55 percent to \$7.7511 with less than 12 hours notice, effective July 1, 2003, significant portions of the deaf/hard of hearing and speech disabled community have been denied the functionally equivalent TRS service Section 225 of the Communications Act of 1934, as amended, requires. This portion of the deaf/hard of hearing and speech disabled community are those persons for whom American Sign Language is their primary means of communication. They have been denied functionally equivalent telecommunications service because the VRS payment rate of \$7.751 was inadequate to allow providers to provide quality, on demand, 24 hour VRS service. Prior to July 1, 2003, deaf/hard of hearing and speech disabled persons had available 24 hour service, seven days a week. Following the rate cut 24 hour service was eliminated. It has not returned. Prior to July 1, 2003, deaf/hard of hearing and speech disabled persons could access VRS with a wait time averaging no more than 20 seconds. Following the rate cut, wait times ballooned to several minutes, and sometimes are as long as 20-30 minutes.⁶ Prior to July 2003, VRS providers and carriers were making significant efforts to improve their product, including the video codec so that deaf consumers could be assured the highest quality video service on par with high quality audio service hearing persons receive over the public switched

⁶ Hands On's wait times have consistently averaged more than a minute since July of 2003, sometimes much more than a minute. Anecdotal evidence, both of record and not of record in this proceeding, indicates that certain other providers have much longer wait times. The FCC has stated that a deaf person's wait time for a communications assistant is equal to a hearing person's wait time for a dial tone. *See Telecommunications Relay Service*, 17 FCC Rcd 7779, 7780 (2002). Plainly, a one minute wait time for deaf/hard of hearing and speech disabled persons is not functionally equivalent to the instantaneous dial tone hearing persons receive 99 percent of the time.

telephone network (“PSTN”).⁷ Since July 2003, technological improvement has been largely stymied because providers lack sufficient funds to devote toward the improvement of the service.

⁷ The free NetMeeting software, a Microsoft product, is hopelessly outdated and inadequate to provide sufficient frames per second to achieve quality video relay service. In fact, Microsoft has ceased development and support of that software. See Network World Fusion, *In Brief: Microsoft drops gavel on NetMeeting* (Dec. 1, 2003) (www.nwfusion.com/news/2003/1201page6briefs.html); PC World, *Microsoft Retires NetMeeting* (Nov. 25, 2003) (www.pcworld.com/news/article/o.aid,113659,tk,dn112503x,oo.asp). Moreover, NetMeeting has difficulty penetrating firewalls. See *A Primer on using Microsoft NetMeeting* (www.wamware.com/tresources/netmeeting/primer.htm). That is why Sorenson uses its EnVision software, and Hands On employs its VideoSign software, both of which offer superior video quality compared to NetMeeting. NetMeeting also does not allow a sufficient number of frames per second to provide the full motion video necessary for reading finger spelling and conversing in ASL at

conversational speeds; nor does NetMeeting allow a full screen picture.

The degradation in VRS quality has not gone unnoticed by the deaf/hard of hearing and speech disabled community VRS serves. Since the Bureau's June 30, 2003, Interim Rate Order dropped the VRS rate to \$7.751 this docket has seen some 1,100 public comments. Virtually all those comments have informed the Commission of the tremendous utility to deaf/hard of hearing and speech disabled persons of VRS, and have implored the Commission to provide adequate funding for the service. Some 800 of those public comments have come since NECA recommended on May 3, 2004, dropping the VRS rate to \$7.293 -- a recommendation NECA's own TRS Advisory Council disavowed. Those 800 public comments since May 3, 2004 are virtually unanimous in begging the Commission not to reduce further the VRS rate in light of the serious service degradation VRS consumers have faced. Those public comments include submissions from the major deaf/hard of hearing and speech disabled consumer organizations, including TDI, Inc., National Association of the Deaf, Registry of Interpreters for the Deaf, and Norcal Center on Deafness as well as a multitude of submissions from individual deaf persons. Those public comments are predicated on one simple fact. If the VRS service provided at \$7.751 was inadequate, lowering the VRS payment rate to \$7.293 will only make the service worse. These public commenters in essence are calling on this Commission to perform a reality check.

This Commission must perform a reality check since NECA and the Bureau were either unwilling or unable to do so. If this Commission is truly concerned with providing the deaf/hard of hearing and speech disabled community with VRS that is functionally equivalent with the phone service provided hearing persons, it will conduct a full review of the 2004-05 VRS rate, and will increase that rate to a level that will in fact provide adequate, functionally equivalent VRS service.

That full review will show, as we show herein, that the NECA proposed and Bureau adopted 2004-05 VRS payment rate is flawed for several reasons.

First, NECA did not obtain sufficient information to formulate a rational, compensatory rate for functionally equivalent VRS service.

Second, to the extent the Bureau's 2003-04 Rate Order as affirmed by this Commission was an appropriate guide for NECA to follow, there is no evidence in NECA's rate filing that NECA appropriately followed whatever guidance it got from that order.

Third, it appears NECA and the Bureau see NECA as an independent judge of appropriate VRS expense items and thus the Bureau has authorized NECA to exclude cost items it deems unreasonable. This Commission, however, has never delegated this authority to NECA and this Commission has no statutory authority to make this delegation. NECA's action in rejecting expense items, therefore, is *ultra vires*, and cannot be upheld without a searching independent review by this agency. The Bureau certainly failed to conduct any such independent review of NECA's cost exclusions.

Fourth, to the extent NECA lawfully has been delegated authority to exclude provider costs deemed unreasonable, providers' due process rights are violated since they have neither notice nor a meaningful opportunity to be heard on those exclusions, nor access to the information NECA used in making its cost evaluations. In this connection, the opportunity to appeal to the Bureau after the fact is illusory since the information NECA relied upon, and the cost adjustments it made have not been disclosed and made available for comment either from the public generally or from the providers whose costs were excluded.

Fifth, to the extent NECA was willing to explain its methodology to Hands On with respect to adjustments made to Hands On's costs, most of those adjustments were arbitrary and capricious, apparently the result of a lack of understanding of those items, or apparently result from an unintentional, but nevertheless invidious bias which serves to penalize start-up stand-alone operators such as Hands On in favor of integrated providers, carriers or larger diversified companies.

For each of these reasons and for all of them, the Commission can have no confidence in the Bureau's rubber stamping of NECA's 2004-05 VRS rate recommendation. In the absence of adequate data to fashion the appropriate rate at this time as an interim stop gap measure it is necessary for the Commission to continue the rate set by its June 30, 2004 order on reconsideration of the 2003-04 TRS rates until the Commission adopts clear and fair standards for the promulgation of TRS payment rates.

B. NECA did not obtain sufficient information to formulate a rational, compensatory rate for functionally equivalent VRS.

In fashioning its rate recommendation, NECA apparently was aware of the widespread dissatisfaction in the deaf/hard of hearing and speech disabled community with the quality of VRS service. Accordingly, when NECA announced its proposed VRS rate recommendation at the TRS Advisory Council meeting in April of 2004, it stated that no adjustment was made to video interpreter costs. That somewhat arbitrary, but nevertheless well intentioned decision, unfortunately was not sufficient to resolve VRS quality issues. First, to the extent other necessary expense items were rejected, the result nevertheless injures consumers by providing them inadequate service. This is because providers will still have to make these excluded expenditures, and will be forced to cut back on interpreter costs, which is one of the larger, if not the largest, VRS cost item.

A more fundamental problem, however, is that in obtaining interpreter related expenses, neither NECA nor the Bureau looked at the crucial issue of service quality. In response to a question from the audience at the April TRS Advisory Council meeting, NECA disclosed that the data it reviewed did not show the grade of service, i.e., the answer speed, for which providers were costing. This fact standing alone rendered NECA's analysis of provider costs an invalid apples to oranges comparison. And for this reason, the Bureau should have rejected NECA's rate recommendation and either sent it back for further study, or ordered an evidentiary hearing to set a proper rate.

The principal service quality problem facing VRS is answer speed. Answer speed flows directly from the number of video interpreters available to handle a call. An inadequate number of interpreters increases answer speed and results in dropped calls as consumers simply give up trying to make a call. Hands On acknowledges that answer speed currently is waived for VRS. That, however, is no reason for NECA, the Bureau or this Commission to be unconcerned with the VRS answer speed. Nor is it a reason for NECA not to examine the answer speed for which providers costed. Quite simply, if one or more providers costed inadequately to achieve their targeted answer speeds or costed for plainly inadequate answer speeds, the effect on the VRS rate recommendation would have been to lower the proposed rate and perpetuate the current state of inadequate VRS service. NECA should have required providers to disclose their target answer speeds so that it, the Bureau and this Commission could ensure that providers' proposed adequate staffing levels. If NECA is tasked with recommending the correct rate, that should require reviewing costs to ensure they are *adequate as well as ensuring they are not excessive*.

This is not a mere academic concern. In its review of Hands On's 2003-04 cost data, the Bureau advised Hands On that its projected interpreter staffing level for 2004 was inadequate to handle the number of minutes it had projected. The Bureau was correct. That prompted Hands On to devise a software program to project interpreter staffing levels and to tie those staffing levels to a targeted answer speed. In submitting its proposed interpreter staffing costs to NECA for 2004-05, Hands On used this interpreter staffing program, costing for a 20 second answer speed for 80 percent of calls, and reporting this fact to NECA. It chose that proposed answer speed, approximately twice the 10 second (85 percent) answer speed specified in the TRS rules, in light that the Commission has waived the answer speed requirement for VRS and in light of its experience that video calls take a few seconds longer for equipment handshake than it does for text-based relay. Without similar data from the other providers, however, NECA had no basis to assume that the rate it proposed would provide adequate VRS service.

So the fact is that NECA cannot tell this Commission what service level to expect from its \$7.293 VRS rate. More importantly, this Commission cannot tell the deaf/hard of hearing and speech disabled community what VRS service level it can expect. Without knowing this information, the Commission cannot set the 2004-05 VRS rate to meet Congress's requirement for functionally equivalent telecommunications service. The Commission must therefore reject the \$7.293 VRS payment rate NECA recommended, and either send it back to get the data needed to set a rate that will provide functional equivalent service, or get the data itself by holding an evidentiary hearing.⁸

⁸ NECA did obtain from providers projected occupancy and utilization data. With work, that data could have been reviewed to arrive at an approximation of projected answer speed. However, NECA for reasons which are not apparent, chose not even to include that occupancy and

utilization data in its rate submission. So there was no way from review of the NECA Rate Submission that the Bureau could have made its statutorily mandated finding that the proposed rate would provide functionally equivalent service.

Remarkably, the Bureau’s Rate Order callously disregards consumer complaints directed at the quality of VRS service as “not relevant here” and speculates that the degraded service “likely” results from supply and demand factors due to the significant increase in demand for VRS by deaf/hard of hearing and speech disabled consumers and the need of providers to hire additional interpreters.⁹ The flaws in that rationalization, discussed in detail below, are numerous, substantial and obvious. These flaws call for this Commission to step in on an emergency basis, and continue the 2003-04 VRS rate of \$8.854 until this Commission can fashion a valid rate setting methodology for VRS that assures deaf/hard of hearing and speech disabled persons telecommunications service functionally equivalent to the telephone service available to hearing persons.

⁹ Rate Order at n.117.

First, the record in this proceeding lacks any evidence indicating a shortage of qualified interpreters, much less the substantial evidence this agency is required by law to apply to its decision making. To the contrary, there is overwhelming evidence that the lack of adequate interpreters for VRS -- which has resulted in wait times far in excess of the FCC's standard for TRS services -- results not from a lack of interpreters generally but from a lack of funds to hire and pay interpreters. The Bureau and this Commission have been told time and again that following the June 2003 rate cut, providers laid off staff and cut interpreter salaries. Hands On did not cut interpreters because it could not find any or because it was receiving too many calls. Hands On cut interpreters because the VRS payment rate was slashed so low that Hands On could not afford to pay all the interpreters it needed. Hands On did not cut the salaries of its staff, including interpreters, because there was too much demand for its service. It cut their salaries -- and in doing so lost valued employees -- because it lacked sufficient funds to pay them because the Bureau slashed the VRS payment rate down to \$7.751 with 12 hours' notice. Now the Bureau has cut the payment rate to \$7.293, providing even less money to pay interpreters. Hands On and other providers have been up front with the Bureau in advising that they cannot hire interpreters, not because interpreters are unavailable, but because the VRS compensation rate is inadequate.¹⁰

Second, it does not take a rocket scientist to understand what has happened with VRS. It is true that VRS minutes increased substantially in 2001, 2002 and 2003. It is also true that this trend continues into 2004 and will likely trend beyond that time as broadband access continues to grow.

¹⁰ Compounding this problem is that the interpreter community has lost faith in the FCC. Interpreters believe they have no job security because of the perception of arbitrary cuts in the VRS payment rate. A corresponding loss of morale has made recruiting interpreters particularly difficult as well.

However, it was only *after* June 30, 2003, when the Bureau cut the VRS payment rate, that VRS wait times substantially increased. Prior to that date wait times were comparable to the 10 second standard for TRS set forth in FCC Rule 64.604(b)(2). *See* Communications Services for the Deaf (Ex Parte Amendment to Comments on Petition for VRS Waivers (November 25, 2003) (CSD, prior to July 1, 2003, was the largest provider of VRS service). Wait times were comparable despite that from April 2002 to June 2003, in just 15 months, VRS minutes increased by a factor of almost 8 times, from 27,550 to 211,259.

Hands On's experience is similar. For example, during the first half of 2003, Hands On's wait times averaged under 20 seconds for VRS, even though it saw a three-fold increase in VRS minutes from January to June of 2003. In the second half of 2003, Hands On's wait times averaged more than a minute despite an increase in VRS minutes of less than 50 percent. Plainly it was not the increase in minutes of use that drove the increase in wait time. It was the lack of funds to pay interpreters. In this connection, it bears noting that Hands On shared its call data and wait times with the Bureau, so not only is the Bureau's speculation unsupported by any substantial record evidence, the Bureau had ample evidence which belied its unsupported speculation why wait times have increased.

Third, the Bureau's suggestion that VRS service quality problems arise from the growth of VRS demand fail facially to explain why following the July 1, 2003, rate cut 24 hour VRS service was discontinued. One would logically presume that increased VRS demand would support 24 hour service, not cause its cancellation. The Bureau's Rate Order, however, does not even acknowledge the lack of 24 hour service or attempt to explain why lack of sufficient funding would have no relation to it. That is apparently because it could not explain this fact.

The only thing the Bureau can point to is that VRS minutes have increased. According to the Bureau, that fact “belies the suggestion that the compensation rate is the determining factor to service issues, including quality issues.” Rate Order at para. 46. The Bureau logic is flawed. If lead infested water is the only water available for drinking, it stands to reason people would still drink it instead of seawater, or no water at all, even though there are serious water quality issues. That still would be no justification for not sufficiently funding the water company so it could provide lead-free drinking water.

That analogy closely mirrors what is happening here with VRS. Deaf/hard of hearing and speech disabled people have the choice of text-based relay, degraded VRS, or nothing at all. Anyone who has ever suffered through a text-based relay call fully understands why deaf/hard of hearing and speech disabled persons would prefer degraded VRS to text-relay. VRS allows real time conversations. VRS allows deaf/hard of hearing and speech disabled persons to communicate in their natural visual language. VRS allows inflection and non verbal communication to be expressed. In addition, VRS allows young children and other persons who are not fluent in written English to communicate. Text relay allows none of these things. VRS calls are increasing because more deaf/hard of hearing and speech disabled persons have available to them the necessary equipment to use the service: a video device (either a D-Link video phone or a personal computer equipped with a video camera) and a high speed Internet line. For a bureau of this Commission of all agencies not to understand this basic fact is particularly distressing.

Since the FCC first authorized VRS in December of 2000, broadband penetration has increased from approximately 12 percent of US households to more than 45 percent of US households. See <http://www.websiteoptimization.com/bw/0403/> (WebSite Optimization.com, *US*

Broadband Penetration Jumps to 45.2 % - US Internet Penetration Nearly 75 % - March 2004 Bandwidth Report, Figure 2, citing Nielson//NetRatings data). VRS demand is increasing because more people have the tools necessary to access VRS and because VRS has greater utility and functionality than text-based relay. By strangling the funding for VRS with tortured rationales and unsupported speculation, the Bureau is impeding deaf/hard of hearing and speech disabled persons from using the most functionally equivalent communications service available to them. That is contrary to the letter and intent of Section 225 of the Communications Act of 1934, as amended, and it is contrary to the overall public interest.

It certainly makes sense that at some point if VRS minutes continue to grow that there could be a nationwide interpreter shortage.¹¹ This is especially the case if VRS providers open call centers in locations where their competitors already have a call center opened.¹² However, today there is not an interpreter shortage. There is a money shortage. And that money shortage is the limiting factor in VRS providers being able to hire a sufficient number of interpreters to lower the average speed of answer.

Accordingly, the Bureau's cutting of the VRS compensation rate to \$7.293 will make a bad situation worse. It should require no leap of logic to understand that if VRS service is inadequate at a reimbursement rate of \$7.751 per minute (which the Commission adjusted upward to \$8.854 on

¹¹ Plainly, however, market forces over the long term will remedy any interpreter shortage. Salaries will be bid up sufficiently to bring more interpreters into the market so that there will be both a sufficient number of video relay interpreters and community interpreters. VRS providers have to be able to pay the going rate for qualified interpreters, however.

¹² One VRS provider seems intent on following this business strategy, apparently to raid the stock of trained VRS interpreters, rather than devote its resources to train additional VRS interpreters. Perhaps this is a further byproduct of the inadequate VRS funding resulting from the Bureau's inappropriate rate cuts of June 30, 2003 and now June 30, 2004.

June 30, 2004, retroactive to September 1, 2003), VRS service will not improve by *lowering* the rate to \$7.293. There is thus a clear disconnect in the VRS reimbursement rate adopted by the Bureau and reality. That should have signaled the Bureau on review of NECA’s proposed VRS rate that NECA’s design methodology, or its input data, if not both, were deficient.

In other words, the Bureau should have performed a reality check. Since it apparently did not, it is now incumbent on this Commission to fulfill its responsibility under Section 225(b)(1) of the Act to ensure the availability of functionally equivalent relay service. This requires this Commission to examine the proposed VRS rate with as much attention -- if not more -- than was given to the 2003-04 proposed rate. While that is done, however, the Commission should continue in effect the only fully vetted VRS rate of \$8.854 per minute.

This Commission has more than adequate evidence – indeed clear and convincing evidence - - from VRS consumers themselves, that the VRS rate NECA proposed and the Bureau adopted is inadequate to provide functionally equivalent service.

For example, NECA admitted it lacked sufficient data to apply the Bureau’s prescription of an 11.25 percent rate of return on investment for TRS providers. Rather than asking for the data it knew it lacked,¹³ however, NECA attempted to fashion a proxy that applied the 11.25 percent figure only to working capital. Here the Bureau rightly acknowledged, as it had to, that NECA’s methodology was defective. However, rather than rejecting a clearly inadequate rate, the Bureau

¹³ NECA’s failure to obtain this data is puzzling since it is specifically required to obtain from providers data on “total TRS investment.” FCC Rule §64.604(c)(5)(C). That requirement, of course, does not necessarily mean that the rate of return should be calculated on investment only as the Bureau’s June 30, 2003, interim rate order assumed.

nevertheless rubber stamped NECA's proposed erroneous rate and now proposes to make up that deficiency by obtaining capital investment data from providers post hoc.

The Bureau's approach is contrary to the public interest. Proceeding with an admittedly inadequate rate weakens the VRS industry and will further tax the resources of providers as they strive to bring functionally equivalent service to the deaf/hard of hearing and speech disabled community. Lacking substantial evidence that the current rate compensates the reasonable costs of providing VRS service, the appropriate course is to continue in effect the \$8.854 rate this Commission set in its June 30, 2004 reconsideration order.

C. The June 30, 2003 order was not a sufficient guide for NECA's evaluation of provider cost estimates for 2004-05.

NECA purported rely on the Bureau's June 30, 2003 interim rate order as its basis for examining provider cost data. And the Bureau accepted that representation. Rate Order at para. 30. That representation cannot be true, however, because the June 30, 2003 order provided no actual guidelines for evaluating provider costs. Other than purporting to apply an 11.25 percent rate of return on investment – for which the Bureau admitted itself that it lacked sufficient information to determine¹⁴ – the June 30, 2003, order provided absolutely no guidelines for NECA's review of provider cost data.

The June 30, 2003, order was purposefully vague on the adjustments the Bureau made to providers' 2003-04 costs. The sole discussion in that order, other than on the issue of rate of return, is set forth at paragraph 36. It is reprinted in its entirety below:

¹⁴ See 2003-04 Rate Reconsideration Order at 192.

36. In addition, some providers appear to overstate their interpreter salaries due to estimates that incorporate labor inefficiencies and excess capacity, or that are based upon inconsistent reimbursable minutes and labor cost behavior. Further, the data filed by three providers either contains various errors or is predicated on incorrect assumptions and therefore is not reliable; for this reason, we have eliminated them from our consideration in their entirety.

Given that NECA failed to adjust any provider's interpreter costs, it is clear that paragraph 36 could offer no guidance for the cost adjustments NECA claims were mandated by the June 30, 2003 order.¹⁵ In light of the obvious disconnect between what NECA claims it based its review on and what it admitted it excluded,¹⁶ the Bureau should have had no confidence in NECA's cost adjustments outside of the issue of rate of return, which in any event, the Bureau determined NECA flubbed.

¹⁵ NECA representatives have stated that the FCC has given them no other written guidelines for evaluating provider costs, and in response to undersigned counsel's request, have not disclosed any oral guidance provided by Commission staff. Of course, any such non-record instructions would violate the Commission's *ex parte* rules, the Administrative Procedures Act and provider's due process rights.

¹⁶ NECA's discussion in its proposed rate filing of the adjustments it made and the reasons therefore is plainly inadequate as NECA itself recognized, but nevertheless failed to remedy. *See* NECA Submission at n. 34. Given that NECA itself believed its discussion was inadequate, the Commission can hardly have any confidence in it.

D. To the extent the June 30, 2003 order gave NECA adequate guidance, the record is bereft of any indication that NECA followed that guidance.

Whatever guidance NECA actually received from the June 30, 2003, order, there is no evidence from its rate submission that it followed that guidance. And there is no indication that the Bureau conducted any analysis to verify whether what NECA did in rejecting certain provider cost data was or was not justified. At no point in NECA's admittedly bare bones discussion of its costs adjustments and the reasons therefore,¹⁷ did NECA relate those adjustments to the June 30, 2003, order. For example, NECA claims to have made an adjustment for certain research and development expenses relating to VRS. NECA Recommendation at 6 & 15. Nowhere in the June 30, 2003, order, however, did the Bureau indicate that R&D expenses were not appropriately included in the rate. In fact no written guidance existed in the FCC's reported decisions indicating that R&D expenses are an inappropriate rate factor as of the date of NECA's recommendation.

¹⁷ See note 16, *supra*.

Not until the June 30, 2004 Rate Reconsideration Order, did the Commission provide any guidance on what R&D costs are an appropriate cost item. There the Commission explained that “such costs directed at providing VRS features that fall outside the functional equivalency mandate of section 225 are not compensable from the Interstate TRS Fund as a ‘reasonable cost.’”¹⁸ Although this is not perhaps the clearest standard this Commission has ever articulated, it is at least a standard. Yet, NECA failed to peg any of its R&D cuts to this or any other standard, nor did the Bureau in

¹⁸ We do not read this standard as justifying the wholesale exclusion of R&D costs. R&D costs are an appropriate element of a rate when it is for the benefit of consuming ratepayers. *Communications Satellite Corporation*, 90 F.C.C.2d 1159 (1982). See *Public Service Company of New Mexico v. FERC*, 832 F.2 1201, 1214-15 (10th Cir. 1987). See also Satrom, *Office of Consumers’ Counsel v. FERC*, 2 Energy Law Journal 119 (1981); Comments of Ed Bosson (May 21, 2004) (Mr. Bosson, Texas Relay Administrator, has aptly been described as the father of VRS). Where R&D stands to benefit deaf/hard of hearing and speech disabled consumers of VRS, those expenses are manifestly appropriate cost elements to the VRS rate. Indeed, exclusion of R&D is particularly inappropriate given Congress’s direction to the FCC that its regulations “not discourage or impair the development of improved [relay] technology. 47 U.S.C. §225(d)(2). Moreover, the Commission’s recent orders waiving certain VRS and IP Relay requirements condition those waivers on providers reporting on their R&D efforts to meet the waived requirements. See *Telecommunications Relay Service*, 18 FCC Rcd 12379 (2003). Given that the Commission expects R&D to meet waived requirements, it was irrational of NECA to eliminate R&D expenses.

affirming NECA's recommendation. Thus, the Commission is left to wonder: did NECA cut all R&D expenses, or just some, and if some did NECA employ the same standard the Commission set out two months later in its 2003-04 Reconsideration Order. Likewise did the Bureau apply the same standard a few hours later when it rubber-stamped NECA's rate recommendation? The record here is devoid of any evidence of what NECA did, what standard it applied, and what standard the Bureau applied in approving NECA's recommendation. Plainly Commission review of this item is necessary.

Moreover, as the Bureau determined, NECA's fashioning of a proxy for the 11.25 percent rate of return on investment prescribed in the June 30, 2003 order, failed to follow that order's guidance because NECA only considered a return on working capital. As the Bureau correctly determined, FCC Rule Part 65 specifies working capital is an add on to the rate base, not a substitute for it. *See* FCC Rule Section 65.820(d). *See also Public Service of New Mexico v. FERC*, 832 F.2d at 1219-22. We welcome the Bureau's intent to fix NECA's erroneous rate of return formula. However, the Bureau in affirming the working capital component of NECA's formula got it wrong as well.

NECA's method of determining working capital, apparently now approved by the Bureau, is at odds with Commission and judicial precedent. NECA applied the rate of return figure by taking one-twelfth of 11.25, plus a 40 percent tax allowance times one month's VRS billings. NECA rationalizes the one-twelfth figure on the basis that it will pay providers at the end of the month following the end of the month when service is provided. This assumes, however, that providers' working capital needs are for a one month period, i.e., from the end of the month in which service is provided until the end of the next month. That is plainly wrong. The problem with NECA's

approach, is that providers incur costs starting at the *beginning* of the month in which service is provided, and continuing throughout that month, then providers have the carrying costs of that working capital expended during the preceding month until payment from the Interstate TRS Fund.

The D.C. Circuit has explained this process precisely:

A utility's actual need for working capital can be most accurately determined by performing a lead-lag study of the average number of days that passes between payment of expenses and receipt of revenues for a given service. One part of this calculation is the "revenue lag" – the number of days between the time expenses are incurred for services and the date of billing for those services – and the "payment lag" – the number of days between billing and payment. A utility also experiences "lead time" when it receives payment for services before it pays the expenses associated with those services. The number of lag days minus the number of lead days yield a net lag which represents the utility's actual needs for working capital.

Boroughs of Ellwood City, Grove City, New Wilmington, Wampum, and Zelienople v. FERC, 731 F.2d 959, 963 (1984) (footnotes and citations omitted).

The exact way providers incur working capital costs obviously varies, and NECA of course failed to seek this information though a "lag-lead" study as required by FCC Rule §65.820(e). However, what is clear is that NECA and the Bureau in accepting NECA's recommendations omitted entirely to consider the "revenue lag" portion of working capital. If we make the very reasonable assumption that the bulk of providers' costs are labor costs and that most providers pay their employees semi-monthly, then two very important conclusions are apparent. First, TRS providers have little, if any, "lead time;" that is they do not receive payments prior to paying expenses. And Second, TRS providers' "revenue lag" is significant. It is plainly obvious then that NECA and the Bureau in affirming NECA's working capital formula, undercounted the working capital needs of providers.

Assuming providers pay their employees bi-weekly, semi-monthly or weekly, it leads to the conclusion that a 45 day working capital assumption is most appropriate. That should have been no surprise to NECA since NECA itself has urged this Commission to adopt up to a 45 day working capital assumption for small telephone companies. *See* NECA Comments in Docket 02-313 and 02-390 on FCC Rule §65.820. This 45 day rule appears to be well established in utility regulation. *See Public Service of New Mexico v. FERC*, 832 F.2d at 1220. Since NECA’s working capital methodology failed to recognize the significant costs incurred by providers prior to billing the TRS Fund, NECA’s working capital assumptions appear facially invalid. The Bureau was thus in error to adopt them. Indeed, what is even more disturbing is that Hands On made this argument in its comments on the NECA rate and the Bureau simply choose not to address them. *See* Comments at 13-15.

E. NECA has no delegated authority to judge the appropriate level of provider cost estimates.

It is an elementary principle of administrative law that an agency may not sub-delegate its power without clear authority from its enabling statute. *Vierra v. Rubin*, 915 F.2d 1372 (9th Cir. 1992); *Assiniboine and Sioux Tribes of Fort Peck Indian Reservation v. Board of Oil and Gas Conservation of State of Montana*, 792 F.2d 782 (9th Cir. 1986). *See Save Our Wetlands v. Sands*, 711 F.2d 634, 641-43 (5th Cir. 1983). There is nothing in Section 225 which allows the FCC to delegate to a private entity such as NECA the authority to determine the reasonable costs of TRS. *See* 47 U.S.C. §225(b)(3). Nor is there any other provision in the Act which can be construed to authorize sub-delegation of this function to a private entity. In fact, Congress was explicit when it desired to authorize the Commission to sub-delegate the authority Congress delegated to this agency. *See* 47 U.S.C. §§154(f)(4) (amateur radio examinations, and amateur and citizens band violation monitoring), 251(e)(numbering administration), 252 (interconnection agreement arbitration), 254 (universal service); 410(a) (joint boards), 410(b) (state commissions), 410(c) (Federal-State Joint Board). The only authority Congress gave the Commission to sub-delegate with respect to TRS, is the ability to refer matters to a joint board pursuant to Section 410 of the Act. *See* Section 225(d)(3)(A). In the absence of similar authority to sub-delegate, this Commission may not sub-delegate to NECA, or any other private entity, the authority to judge provider cost data. That is authority this Commission must itself exercise.

Hands On made this point in its comments on the NECA rate. *See* Comments at 15-16. The Bureau, however, ignored this point in its Rate Order. Instead the Bureau simply asserted that NECA's review of provider's costs is necessary in light of the TRS rules which require the administrator to determine the reasonable cost of providing TRS service. That's all well and good,

but it fails to answer the point Hands On made that nothing in the agency’s governing statute gives it the authority to delegate such authority to NECA in the first place.

Moreover, although Hands On acknowledged that FCC Rule §64.604(c)(5)(iii)(C) gives the Commission and the TRS Fund administrator authority to examine, verify and audit data received from providers to insure the accuracy and integrity of fund payments, it gives no authority to the administrator to exclude categories of costs or to substitute its judgement for the good faith judgement of providers. Aside from the delegation of authority issue, a legal principle which binds this Commission, an additional fundamental problem is that NECA is reviewing cost data without any written guidelines, and without any formal due process rights of providers to contest, correct, or confront NECA on its cost adjustments. NECA’s actions are therefore *ultra vires*.

Thus, even were the delegation of authority to NECA legal, there would still have to be a fair procedure for its exercise to ensure meaningful Commission review and oversight, not mere rubber stamping. *See Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974), *cert. denied* 421 U.S. 944 (1975); *Save Our Wetlands v. Sands*, 711 F.2 at 641-43. As we discuss below, the Bureau’s Rate Order fails in this regard as well.

F. To the extent the Commission has lawfully delegated to NECA authority to pass on provider cost data, it must establish due process safeguards, including notice and a fair opportunity to be heard.

Assuming it were legal -- and it is not currently-- if the Commission intends NECA to have the authority to reject provider cost items, it must establish a fair procedure that affords providers and the public notice and an opportunity to offer evidence in support of those costs. The procedure followed thus far by NECA and adopted by the Bureau’s Rate Order denies the public and providers

due process because they do not have adequate notice of why cost items were excluded, nor a meaningful opportunity to be heard in opposition to NECA's exclusions.

With respect to notice, NECA's rate submission fails to itemize the cost adjustments made.¹⁹ At best NECA provided a vague discussion of exclusions made and admitted to an inadequate discussion of the reasons it made those adjustments. NECA Recommendation at n.34. That was plainly an inadequate basis to expect that meaningful public comment on the rate submission would comport with constitutional and statutory due process of law since interested parties are denied the opportunity to know what NECA actually did and why.

Similarly, there is no meaningful opportunity to be heard in this proceeding because the individual cost adjustments NECA made are not even before this Commission. Those cost exclusions were not detailed in NECA's rate submission and NECA has stated to Hands On that no other materials have been provided the FCC other than the rate submission itself. Accordingly, while it is a nice gesture for the Bureau to offer to meet with providers to discuss NECA's cost

¹⁹ We are talking here about line item adjustments NECA made to provider cost data. We are not talking here about NECA's formulation of profit or rate of return, even though as we have explained above and the Bureau agreed that NECA's formulation of a return component is erroneous. NECA adequately explained what it did with respect to the rate of return issue and providers and the public have a sufficient basis to explain why the rate of return component NECA formulated was inappropriate.

exclusions, how is the Bureau in any position to evaluate those exclusions post hoc from NECA's exclusion?

Hands On requested from NECA an explanation of the items NECA claimed to have excluded from Hands On's cost submission. In response NECA provided Hands On a list of costs it claimed it included in the rate. Based on that statement, Hands On derived the items NECA apparently excluded from Hands On's cost estimates, and confirmed those exclusions with NECA. However, this all occurred *after* NECA made its rate recommendation public, and despite lengthy discussions, NECA was unwilling to reconsider even one single item of its exclusions of Hands On's cost data.²⁰

²⁰ For example, it was brought to NECA's attention that it excluded from the VRS rate Hands On's CPA audit expense, a plainly irrational and erroneous exclusion. Indeed, NECA specifically included in the fund calculation, the cost for an annual audit of the TRS Fund by an independent auditor. NECA Recommendation at 17. NECA refused to modify its rate submission even to fix this plain error. This raises the serious question of NECA's judgement, fairness and

motivation in evaluating provider cost data. This is a very good reason why the Commission should set this rate determination for evidentiary hearing where providers, and NECA personnel would be required to provide sworn testimony and be subject to cross-examination on disputed cost items.

In any event, neither NECA's statement provided Hands On, nor the lengthy discussions that followed are of record in this proceeding and available for public comment as contemplated by the APA, and FCC Rule §1.401 et. seq. If NECA is to be authorized to exclude provider cost data based on its judgement, then all the providers and the public, especially the deaf/hard of hearing and speech disabled public that TRS/VRS are designed to serve, have a right to comment on all those exclusions, not just each provider who may have had a cost item excluded. That right trumps any one provider's right to confidential treatment of those costs.²¹ Once NECA or the Commission has a question whether a cost item is appropriate or justified, that item legitimately must be subject to public comment. To the extent confidentiality can be maintained, it should be. But confidentiality may not be a shield to protect a potentially erroneous cost exclusion or inclusion from being subjected to public scrutiny. That amounts to a denial of fundamental fairness to all affected persons, providers and more importantly, the deaf/hard of hearing and speech disabled community. In the end, it is deaf/hard of hearing and speech disabled persons who suffer most from inadequate VRS service if the rate the Commission sets is inadequate.

G. The bulk of the adjustments NECA made to Hands On's costs are without basis.

In its comments on NECA's proposed TRS rates, Hands On chose to discuss publicly the expense items NECA admitted it excluded and which Hands On contested. It did so because it believed the confidential nature of this data is outweighed by the public interest in illustrating the arbitrary nature of the cost exclusions NECA made to its data. Hands On urged other providers to

²¹ Hands On makes this statement despite admitting that in certain instances, it agreed with some of the adjustments NECA made to its costs. Hands On is not embarrassed to admit a mistake when it so realizes. NECA, the Bureau and this Commission should not be embarrassed either. These issues are too important for the deaf/hard of hearing and speech disabled community for interested parties to take any other position.

make the same determination. *See* Comments at 19-27. Amazingly, the Bureau’s Rate Order contains not one word concerning Hands On’s discussion. It’s as if the Bureau simply could not be bothered in its haste to rubber stamp NECA’s proposed rate reduction to let facts which were inconvenient to its determination get in the way. Hands On is therefore at a loss to understand how the Commission can consider the Bureau’s Rate Order a fair review of NECA’s proposed rate when facts were before the Bureau raising questions concerning the rate, and the Bureau simply ignored them. We explain, the exclusions NECA admitted making to Hands On’s data below to illustrate the degree this process has devolved into a standard less, arbitrary exercise.

Hands On explained that NECA excluded costs amounting to approximately 50 percent of Hands On’s proposed corporate overhead expenses. They were in the areas of Accounting, Human Resources, Operations, Engineering, Corporate Management and Other Expenses. Each area was cut approximately 50 percent. That implied to Hands On that those cuts were made in an arbitrary, across the board fashion. NECA personnel denied this. However, examination of what was done, reinforced Hands On’s view that this is exactly what NECA did, consciously or unconsciously. NECA excluded salary expense for all senior corporate management except the president and the chief technical officer. In other words, NECA thinks Hands On should function without an executive vice president, chief operating office and chief financial officer. NECA also eliminated software licensing costs for Hands On’s VideoSign(SM) software,²² for its VRS platform software, and maintenance costs for its accounting software. Contrary to the procedures it claims it followed of “repeatedly asking for explanations, *and excluding costs after repeated requests for explanation*

²² As explained above, the free NetMeeting video software is inadequate to provide the quality VRS Hands On is dedicated to deliver the deaf/hard of hearing and speech disabled community.

did not achieve a satisfactory result,” NECA Recommendation at 6, NECA at no point indicated to Hands On that it found Hands On’s explanation for any item inadequate.²³

In an effort to understand why Hands On’s administrative costs were excluded, Hands On asked NECA for an explanation. In response, NECA told Hands On that NECA focused on the cost of Hands On’s then proposed -- now in operation -- Pacific Northwest call center and that its projected costs for this call center in 2004 were out of range with other call centers, so NECA then looked closely at the company’s expenses to determine why. Thus, NECA seemed to be saying that because the start-up call center’s expenses were out of the range of other call centers, NECA closely examined the company’s expenses. Yet, when confronted with the fact that Hands On allocated only 14 percent of its administrative expenses to the Pacific Northwest call center, and that NECA said it did not cut any interpreter related expenses, NECA retreated from this explanation and reverted to reciting the mantra that it looked at all providers’ expenses.

²³ Hands On pointed out in its Comments that it was “troubled by NECA’s use of the phrase ‘achieve a satisfactory result.’” Hands On did not understand that either NECA or the Commission intended this exercise to be result oriented. Rather Hands On understood it to be driven by the legitimate costs providers incur in delivering functionally equivalent service. Comments at n.14.

Whichever explanation might be true, the obvious reason the startup call center's expenses were higher than other call centers was *because it was a startup*, and because Hands On projected for it to commence 24 hour operation during 2004 so the deaf/hard of hearing and speech disabled community could once again have 24 hour service. Thus, the cost of that call center was a result of the trunking inefficiencies of being a startup and of projecting 24 hour service so that deaf/hard of hearing and speech disabled persons would not be cut off from society in the late night hours, not because of the relatively limited company administrative costs allocated to it.²⁴ This is plainly evident had NECA looked at the projected 2005 costs for this call center which Hands On provided to it. That data showed that (this time) with a 40 percent allocation of corporate overhead, the projected cost per minute of this call center was considerably less than Hands On's Rocklin call

²⁴ Hands On chose the new call center for 24 hour operation because the fixed costs of operating that call center 24 hours a day are less than those that would have been incurred operating the Rocklin, CA call center 24 hours a day. In addition, the new call center was chosen for 24 hour operation because of interpreter availability. Had NECA actually inquired why – and it did not – it would have been told this. The unanswered question is why didn't NECA ask why. And why did the Bureau not even discuss the matter?

center. This fact apparently did not factor into NECA's relative cost analysis. The obvious question is, why not? Yet, the Bureau again rubber-stamped NECA's rate recommendation without any discussion of this matter.

With respect to specific cost items NECA excluded, these are discussed below.

Accounting. NECA cut three of six positions in 2004 and four of seven positions in 2005, including expense for a Chief Financial Officer ("CFO"), limiting costs to a comptroller and two staffers. NECA also cut funds for Hands On's CPA and the yearly audit, as well as maintenance and support for Hands On's accounting software. Hands On does not dispute NECA's cutting of two staff positions for the accounting department. Hands On actually had advised NECA prior to the rate being publicly announced that it had budgeted for one staffer too many. Beyond that, reasonable people might differ whether expense for a second staffer should have been excluded. Where reasonable people cannot differ is the need for a CFO to have overall supervision of the financial operations of the company. Given the need for detailed financial projections made for a period of two years out as NECA and the Commission require, the expertise of a CFO is plainly necessary for a TRS provider. Reasonable people ought not to be able to differ about the need for an accounts payable person, a purchasing agent and a mail room/file clerk for a company with two separate calls centers, administering three separate VRS platforms and projected to do more than 20 percent of VRS minutes in 2004 and 2005. These expense items were valid and should have been included in the rate calculation. Yet, the Bureau would not even address these issues.

Beyond that, elimination of accounting software maintenance and support and CPA/audit expense is simply arbitrary and irrational. NECA does not think the TRS fund can do without an audit. *See* NECA Recommendation at 20. Does the Commission really expect TRS providers to do

so as well? And the need to maintain accounting software should require no further discussion. Finally, at no point did NECA indicate to Hands On prior to its rate submission that it considered these costs unnecessary, nor did NECA disclose at any point that it made similar cuts in other providers' expense items. The conclusion that these cuts were arbitrary is plainly evident. Yet, the Bureau did not even bother to discuss these matters raised in Hands On's comments to NECA's proposed rate. *See* Comments at 21-22.

Engineering. NECA cut one senior engineer and two engineering staff in 2004 and two senior engineers and three staff in 2005. NECA said it increased engineering consulting in 2004 as a result of discussions with Hands On which indicated that Hands On had underestimated engineering consulting prior to hiring its chief technical officer coming on board. In discussing these cuts with NECA, NECA rejected the view that Hands On has three VRS platforms, AT&T, MCI and Hands On's own branded VRS service. NECA instead suggested that the company merely has three web sites. NECA's view omits to consider that separate billing and other records must be maintained for each web site, that each site has its own incoming high speed Internet lines, that each site has its own dedicated call center equipment and each site is run independently of the others.

Hands On asked NECA to confirm specifically whether Hands On's engineering costs were higher than that of other VRS providers. After all, NECA claimed that is the chief reason it made cost adjustments to provider data. NECA Recommendation at 6. NECA refused. NECA's basis for refusing was a statement that the answer "would not help resolve the rate level issue." That refusal is stunning. That refusal casts grave doubt whether NECA actually did what it claims to have done in making cost adjustments. That refusal casts grave doubt on NECA's proper role in this process. That refusal casts grave doubt on the integrity of this entire process. If NECA is refusing to provide

essential data to allow evaluation of the validity of its costing review, the how can the Commission have confidence that NECA's review was fair, reliable or justified? And how can Hands On argue NECA is incorrect in excluding its engineering expenses, if NECA is unwilling to admit whether Hands On's engineering expenses were out of the range of engineering expenses of other VRS providers whose engineering expenses were not cut. The conclusion that something was terribly amiss with NECA's evaluation of provider cost data was thus manifest. Yet, the Bureau saw fit not even to discuss the matter. Under these circumstances, how can this Commission have any confidence in the Bureau's review of NECA's exclusions?

Hands On represents that currently, and since July of 2003, its engineering staff has been undermanned. 60 to 80 hour work weeks are common. Hands On specifically limited the engineering costs it proposed to below what it considered necessary to provide quality VRS service and gave detailed job descriptions of its proposed engineering personnel because it was mindful of the Bureau's exclusion of a portion of its engineering costs in the 2003-04 interim rate, and wished to avoid an issue over this expense in connection with the 2004-05 rate. For NECA to have cut this expense in some arbitrary fashion, apparently without even making a finding that the expense exceeded other providers' expenses once again raised the clear inference that what NECA did was to make arbitrary cuts in Hands On's expenses because of the startup expenses associated with its Pacific Northwest call center. Such action would plainly be improper and an abuse of the trust the Commission has placed in the fund administrator. Hands On specifically raised this issue with the Bureau, yet, the Bureau would not even address the issue. *See Comments at 22-23.*

Operations. NECA cut Hands On's expense for its COO and for all but one operations staff

person, as well as all consulting expense associated with this department.²⁵ The rationale for cutting the COO, again, was that in NECA’s opinion, “Hands On had too many executives.” Hands On pointed out that the web sites of its two chief VRS competitors, Sorenson Media and CSD show similar, if not a substantially greater number of executives. NECA’s response was that these companies are engaged in other enterprises. Perhaps, however, Sorenson’s -- which appears to have the most similar executive complement to Hands On -- public statements indicate that VRS is now its chief line of business. And CSD, though providing traditional TRS and community interpreting besides VRS,²⁶ shows many more executives on its web site than for which Hands On costed.²⁷ Since from publicly available information, it is clear the Hands On’s executive personnel do not

²⁵ No adjustment was made for operations support personnel, consisting of administrative assistants and in house interpreters who support the several deaf persons Hands On employs.

²⁶ Hands On’s sister company, Hand On Sign Language Services, Inc. also provides community interpreting. Hands On, however, made an allocation of administrative expense between its community interpreting and its VRS businesses.

²⁷ The inference can also be drawn that NECA’s cost adjustments with respect to Hands On reflect a bias against small start-up entities. Though we would be reluctant to argue that inference, it is apparent from the explanation NECA provided for excluding Hands On’s executive costs.

exceed that of other similar providers, it is plainly apparent that NECA's exclusion of those executive personnel was arbitrary. Yet, once again, the Bureau did not even deign to address the matter.

Human Resources. NECA included in its VRS rate calculation costs from Hands On for an HR director and one staff person. Hands On had costed for two staff persons in 2004 and three in 2005. Staff persons projected included an HR manager, a benefits coordinator and a recruiter. In fact and after further review of its projections, for both 2004 and 2005, Hands On determined that it should have costed for three HR staff persons since each call center requires a recruiter. Recruiting qualified interpreters for a VRS call center is a full time job. Each of Hands On's call centers needs a full time recruiter. And while the HR manager position and the benefits coordinator position are legitimately jobs for two persons, Hands On will not push the point here. But what this means is that NECA unjustifiedly cut at least one necessary position in 2004 and in 2005. Hands On raised this matter in its comments, yet, once again, the Bureau chose to be silent on the matter. *See Comments at 24-25.*

Corporate Overhead. NECA cut the expense associated with the company's executive vice president, and his assistant. This was erroneous for the same reason discussed with respect to the COO. NECA also disallowed interest expense and management consulting. The stated rationale with respect to the interest expense was that "interest is not covered in the instructions to the form used to collect cost information." NECA's deficient forms, however, are not a good basis for excluding legitimate expense items from the VRS rate calculation. Suffice it to say that interest costs are includable in the rate base pursuant to FCC Rule §§65.800 and 65.820 and thus were a

legitimate capital cost;²⁸ yet once again, the Bureau was silent on the matter. The exclusion of this item was therefore contrary to the Commission's rules and thus were a legitimate capital cost, yet once again, the Bureau was silent on the matter.

NECA also gave Hands On no reason why it excluded management consulting so Hands On is at a loss to understand why this cost is not an appropriate rate component, especially given that NECA slashed costs for most of Hands On's management team. Again Hands On raised this matter in its comments. And again, the Bureau declined to address it. *See* Comments at 25.

Other VRS expenses. NECA also eliminated software licensing expenses for Hands On's video software program and for its platform management software. It appears these costs were excluded because NECA did not understand them. And while Hands On will assume whatever blame is merited for any lack of adequate explanation of these software costs, at no point did NECA ever advise the company that Hands On had not provided an adequate explanation for these software licensing fees. These expenses are incurred on the basis of a percentage of revenues in one case and profit in another. That is because these two software programs were obtained for no up front cash expenditure. In effect their costs were capitalized as the Commission's Rate

²⁸ Perhaps the Bureau intends to fix this problem in its modification of the TRS rates to reflect a return on investment, since interest expense is a cost item associated with investment. The problem is that in not addressing the matter, the Bureau leaves everyone to wonder.

Reconsideration Order seems to require. *See Rate Reconsideration Order* at para. 190 n.543. Because Hands On did not know what its revenue or profit would be, since these are factors of the final VRS rate, Hands On assumed a rate level and reported that rate level to NECA. Hands On expected NECA to adjust this cost in its rate calculation based on NECA's final recommended rate. NECA's sole question concerning these expenses was the basis for the VRS rate assumption. NECA was informed that it was a best estimate. At no point did NECA advise that this was not an acceptable way to proceed, or ask for further justification of the expense, despite that this is how NECA represented to the Commission that it proceeded with respect to a cost it excluded from its calculations. These software costs are legitimate and necessary expenses.

The VideoSign(SM) software is necessary to maintain the video picture quality that is so important to the deaf/hard of hearing and speech disabled community striving to communicate in their natural visual language in a functionally equivalent manner to hearing persons. The VideoSign(SM) software is not a proprietary software. It is a variant of commercially available Vianet video software which Hands On makes available to its customers at no charge and which Hands On uses on its platforms in order to obtain a clearer picture than is available with the free NetMeeting software. The platform management software is necessary to deliver the myriad of data and reports, including billing reports, which the Commission and NECA require or have the authority to require. These costs, therefore, should have been included in the rate. Hence, the Bureau should therefore have rejected the NECA recommended VRS rate and directed NECA to recalculate the rate to include these items. Instead, the Bureau was again silent on the matter.

Finally, NECA excluded Hands On's outreach program of making on premises installs of video cameras and VRS software. The reason NECA gave is that the TRS Fund does not pay for

customer premises equipment. However, Hands On's installation program is designed to provide deaf/hard of hearing and speech disabled persons with connectivity, including on-site troubleshooting, software installation and training. For traditional TRS, this is generally funded via the state TRS programs. No state to our knowledge funds such a program for IP Relay or VRS, which are compensated through the Interstate TRS Fund. Thus, it is appropriate that the Interstate TRS Fund should ensure connectivity for VRS users. In any event, Hands On is aware of no policy ruling from the FCC supporting NECA's position. NECA has no authority to set policy, and in the absence of such authority or FCC policy statement, its exclusion of this item is inappropriate. Again, however, the Bureau was silent with respect to this matter.

IV. Conclusion.

It is readily apparent that serious deficiencies exist with the 2004-05 VRS rate NECA proposed and the Bureau adopted. From merely a reality check standpoint, the Commission must closely review the Bureau's rubber stamping of NECA's proposed VRS rate since it proposes to decrease the VRS rate for 2004-05 in the face of clear and convincing evidence that the previous 2003-04 higher interim compensation rate of \$7.751 was inadequate to provide deaf/hard of hearing and speech disabled persons with functionally equivalent telecommunications service. NECA's own TRS Advisory Council so concluded in unanimously rejecting the proposed rate in its April 2004 meeting, a fact the Bureau's Rate Order never even mentioned or considered.

As we have shown, the deficiencies leading to NECA's recommended VRS rate are many. NECA did not obtain sufficient information to formulate a rational, compensatory rate for functionally equivalent VRS service. Moreover, the June 30, 2003, interim rate order itself was an inadequate guide for NECA's formulation of the 2004-05 VRS rate, because it lacked standards and

guidelines for evaluating provider cost data. Even if the June 30, 2003, interim rate order were an appropriate guide -- and it was not -- there is no evidence in NECA's rate filing that NECA appropriately followed the interim rate order. In fact it appears that NECA set itself up as an independent judge of appropriate VRS expense items and abrogated to itself the authority summarily to exclude such cost items, and that the Bureau simply rubber stamped that recommendation without conducting any substantial review and analysis. The FCC, however, has never delegated this authority to NECA and the FCC itself has no statutory authority to make this delegation. Therefore, NECA's action in excluding items, is *ultra vires*.

Even were NECA lawfully delegated authority to exclude provider costs -- which would require an act of Congress -- providers' due process rights are violated by the process NECA followed since they had neither notice nor a meaningful opportunity to be heard on those exclusions, nor even access to the information NECA used in making its cost evaluations. And the opportunity to submit comments on NECA's proposed VRS rate level was plainly inadequate since the Bureau would not even discuss Hands On's detailed objections to NECA's exclusions of Hands On's cost data. Thus, the procedure followed below was totally inadequate to afford providers due process since the information NECA relied upon, and the cost adjustments it made have not been disclosed and made available for public comment and are not even of record in this proceeding. Finally, to the extent NECA was willing to explain its methodology to Hands On with respect to adjustments made to Hands On's costs, most of those adjustments were arbitrary and capricious, apparently the result of a lack of understanding of those items, or apparently result from an unintentional, but nevertheless invidious bias which penalizes start-up stand-alone operators such as Hands On in favor of integrated providers or larger diversified companies. For all of these reasons, the Commission

can have no confidence in NECA's VRS rate recommendation, just as the NECA's TRS Advisory Council had no confidence in that rate recommendation. Likewise, the Commission must question the Bureau's rubber stamping of that rate even while the Bureau acknowledged that NECA failed to correctly apply the Commission's rate of return methodology.

For all of these reasons, the Commission must step in on an emergency basis, and hold the TRS rates at the 2003-04 level pending resolution of the many issues pending with respect to TRS compensation in CG Docket 03-123, and raised with respect to the Bureau's adoption of NECA's 2004-05 recommended TRS rates.

Respectfully submitted,

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Certificate of Service

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