

Before the
Federal Communications Commission
Washington D.C. 20554

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

PETITION FOR EMERGENCY STAY BY
COMMUNICATION SERVICE FOR THE DEAF

Communication Services for the Deaf, Inc.
102 North Krohn Place
Sioux Falls, SD 57103
605-367-5760

By: Karen Peltz Strauss
KPS Consulting
2120 L Street, N.W.
Washington, D.C. 20037
(202) 478-6148

July 26, 2004

Before the
Federal Communications Commission
Washington D.C. 20554

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

PETITION FOR EMERGENCY STAY BY
COMMUNICATION SERVICE FOR THE DEAF

I. Introduction

Communication Service for the Deaf (CSD) hereby petitions the Federal Communication Commission (FCC) for an emergency stay of the Consumer and Governmental Affairs' (CGB's) Telecommunications Relay Services (TRS) June 2004 Rate Order (2004 Rate Order), DA 04-1999, released on June 30, 2004.¹ This Order reduces, on an interim basis, the compensation rate for video relay services (VRS) to \$7.293 per minute, as proposed by the National Exchange Carriers Association (NECA) on May 3, 2004. At the same time that CSD is submitting this petition, CSD is also filing an Application for Review of the proposed rate reduction. In requesting a stay of this Order, CSD seeks to have the FCC restore the \$8.854 VRS compensation rate retroactively set for 2003-04 in its June 10, 2004 Report and Order.² Specifically, CSD urges the Commission to keep the retroactive rate in effect pending the Commission's

¹ *In the Matter of Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities, Order*, Dkt. 98-67, DA 04-1999 (rel. June 30, 2004) (CGB 2004 Rate Order). This Petition is brought pursuant to 47 C.F.R. §§ 1.41, 1.43, 1.44, 1.45, and 1.298.

² *In the Matter of Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking*, CC Dockets No. 90-571, 98-67, 03-123, FCC 04-137 (rel. June 30, 2004 ("2004 TRS Report & Order").

decision on CSD's and other Applications for Review of the compensation rate, as well as the Commission's review of the VRS cost methodology and quality issues raised in the Commission's further notice of proposed rulemaking (FNPRM) accompanying the June 10th Order.³

In determining whether to grant a stay, the Commission must consider four factors: (1) the likelihood that petitioners will succeed on the merits, (2) whether denial of a stay would cause irreparable harm to the party seeking the stay, (3) whether a stay would harm third parties, and (4) whether a stay would serve the public interest.⁴ The Commission has acknowledged that where a petitioner makes a strong showing of the latter three factors, it has the discretion to grant a stay, even where the likelihood of success on the merits remains uncertain.⁵ Moreover, the Commission has concluded in the past that a stay should be granted if needed to simply preserve the status quo if denying that stay would cause serious harm to some and not cause harm to others.⁶

In the instant case, granting a stay to maintain the existing VRS compensation rate will not only *not* harm any parties, but it will *prevent* irreparable harm from occurring to deaf and hard of hearing Americans and significantly serve the public interest. In addition, because CGB's June 30th Order violates the intent and statutory language of the Americans with Disabilities Act, petitioners are very likely to succeed on the merits.

³ These quality issues address, among other things, whether VRS should become a 24 hour, 7 day a week mandated service with a minimum answer speed.

⁴ Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d. 841,843 (D.C. Cir. 1977)

⁵ *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, Wireless Communication Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services*, Memorandum Opinion and Order, WT 99-217, DA 01-940 (April 21, 2001). There the court cited to the decision in Holiday Tours, noting that a court need not "find that ultimate success by the movant is a mathematical probability" so long as the movant has "made a substantial case on the merits." 559 F.2d at 843.

⁶ *Florida Public Service Commission*, 11 FCC Rcd 14324, 14325-6 (1996).

II. CSD is Likely to Succeed on the Merits of this Case

In CSD's accompanying Application for Review, attached hereto and incorporated by reference herein, CSD sets out a series of arguments demonstrating the flawed legal assumptions and conclusions used by CGB to justify a reduction of the VRS compensation rate, a rate that was rejected by NECA's own Advisory Council. The arguments contained in this Application demonstrate the failure of the Bureau to comply with statutorily directed mandates to consider the needs of people who are deaf and hard of hearing in the development of its Rate Order, and as such offer a substantial and convincing showing that CSD is likely to prevail on the merits in this case. Specifically, CGB's Order reducing the VRS rate is premised on several assumptions, all of which ignore historical fact and violate the spirit and language of the telecommunications relay service (TRS) mandates contained in the Americans with Disabilities Act (ADA).⁷

To begin with, CGB suggests that its reduction of the VRS rate is not linked to VRS quality. This statement ignores the receipt of well over 1,000 consumer comments to the contrary that have been submitted to the FCC over the past year. The FCC's first reduction in the VRS rate, implemented for TRS fiscal year 2003-04, directly resulted in the significant deterioration of video relay services, including very limited hours and a significant increase in VRS blockage rates and waiting times. Notwithstanding repeated attempts, both through meetings and voluminous public comment, to alert CGB to the existence of these problems, the Bureau has consistently neglected to consider the adverse effects that its funding directives have had and will continue to have on deaf and hard of hearing consumers.

⁷ The ADA's mandates have been codified in the Communications Act at 47 U.S.C. §225 *et. seq.*

That insufficient funding has worsened VRS quality should not come as a surprise to the Commission. The history of relay service experience in this country has consistently shown a direct correlation between relay funding and the quality of these services. The inability of privately run and state-operated programs to meet the telecommunications needs of relay users back in the 1970s and 1980s illustrates the inextricable link between these two factors. Just as limited funding created hardships for individuals seeking effective telephone access then, it is continuing to do so now.

CGB's assumption that its earlier rate reduction failed to negatively impact relay quality because relay volume rose dramatically over the past year is similarly flawed. This growth evidences not an acceptable compensation rate, but rather the growing reliance on VRS because of the extraordinary benefits that this service can offer to deaf and hard of hearing consumers. Finally, CGB's Order is flawed because it assumes that the Commission can apply a different standard of functional equivalency for VRS than it does for traditional TRS, simply because it has not yet mandated VRS. On this point, CGB ignores entirely Congressional directives to ensure the provision of functionally equivalent telephone service and to take steps to encourage new relay technologies that can achieve this objective. For example, by discouraging VRS as a technologically improved relay service and denying all research and development associated with this technology, the Bureau's Order is in direct conflict with the FCC's mandate to "ensure that regulations prescribed to implement [section 225 of the Act] encourage, consistent with Section 7(a) of this Act, the use of existing technology, and do not discourage or impair the development of improved technology."⁸

⁸ 47 U.S.C. §225(d)(2).

In the FNPRM accompanying the FCC's June 10th Report and Order, the FCC seeks comment on a number of critical questions that can result in significantly improving telecommunications access by people who are deaf and hard of hearing. Among other things, the Commission seeks input on the most appropriate cost methodology for compensating VRS providers, as well as the extent to which VRS should become a mandated service with around-the-clock service and mandated answer times. NECA did not have the benefit of the record about to be created by the FCC when it calculated the present VRS rate. It is appropriate that the existing rate of \$8.854 remain in effect until this record is complete and the FCC is able to provide NECA, consumers and relay providers with clear directives on VRS compensation and mandates for functionally equivalent VRS.

It should be noted that in addition to the above errors in the underlying justifications for CGB's Order, CGB itself acknowledges that the rate proposed by NECA is flawed because it failed to comply with the Commission's directives to incorporate an 11.25% rate of return on investment. Although CGB has noted that this rate is subject to adjustment upon the receipt of supplemental cost data on investment and the review of specific NECA disallowances,⁹ it decided to go ahead anyway and apply the lower, incorrect rate pending the receipt of this additional information. The problem with this approach is that again, the Bureau took this action without any regard for the impact that the lower, incorrect rate would have on populations who rely on these services for their telephone communications while these adjustments were being made. Such action was in violation of the ADA's mandate for functional equivalency and requires the immediate restoration of the 2003-04 retroactive compensation rate.

⁹ CGB Rate Order at ¶50. CGB still has not provided guidance to providers defining the nature of this supplemental data.

III. CSD's clients will suffer irreparable harm if the stay is not granted.

CSD is a private, non-profit organization that offers programs and services intended to increase communication, independence, productivity, and self-sufficiency for all individuals who are deaf and hard of hearing. Originally established in 1975 as part of the South Dakota Association of the Deaf,¹⁰ CSD is an organization that is largely operated by deaf individuals, who, owing to the civil rights established in the ADA, now have equal opportunities to make significant contributions to American society. In addition to providing TRS, CSD offers education, counseling, training, and other communication assistance programs to improve the lives of its clients and beneficiaries. In other words, CSD is far more than a relay service provider; it is an organization of, by and for deaf individuals whose mission is dedicated to bettering the lives of people who are deaf and hard of hearing so that they can become active and productive members of our society.

As an expert in the field of telecommunications relay services, CSD can attest to the fact that perhaps more than any other technology in this or the prior century, VRS has made a dramatic difference in the lives of people who are deaf and hard of hearing. For many individuals, including children, senior citizens, and others who cannot type, VRS offers a way to finally communicate by telephone. For others, these services offer the only means of achieving functional equivalence through real time, natural flowing conversations with and by people who use sign language.

There is no question that CGB's reduction in the compensation rate will cause irreparable harm to the above populations of individuals who have come to rely on VRS as their predominant, and in many occasions, only means of telephone communications.

¹⁰ In 2002, CSD became an independent entity, and is no longer part of SDAD.

The shortened hours, higher blockage rates, and long answer speeds caused by insufficient funding over the past year have already brought significant harm to consumers and businesses that need this service. It is inevitable that the new rate will aggravate the injury that has already been inflicted on this community. Not only is this harm severe; it is immediate and irreparable because a person unable to make a telephone call on demand at a particular point in time can never go back to that point in time to complete the desired call. Moreover, the present inability of providers to research and develop improvements to the performance and functions of VRS hold people who use American Sign Language back as the rest of the nation surges ahead in the enjoyment of new broadband technologies. The more that time passes before these improvements can take place, the further behind this community falls.

CSD is not alone in reporting the irreparable harm likely to occur if the present compensation rate is not stayed. An unusually large coalition of consumers, including all of the nation's leading deaf and hard of hearing consumer organizations, has already come forth to report the severe restrictions on their lives that has resulted and will continue to result if the FCC does not take action to ensure adequate VRS funding¹¹ We join these consumers in urging the FCC to maintain the status quo to prevent additional harm while the FCC undertakes a thorough consideration of how best to achieve high quality and readily available VRS through reasonable compensation rates.

IV. Other Parties will not be Harmed by a Stay

Other parties will not suffer any injury if the Commission grants a stay in this proceeding. The difference between the \$7.293 rate adopted by the Bureau on June 30th and the VRS rate of \$8.854 for 2003-04, while significant with respect to the quality and

¹¹ Application for Review of the National Video Relay Service Coalition; Petition for Emergency Stay of the National Video Relay Service Coalition, filed July 20, 2004.

availability of VRS for consumers, is inconsequential with respect to the size of contributions that must be made to the Interstate fund. Ratepayers who indirectly pay into this fund through their telephone bills will not see any change in those bills once the adjustment requested in this petition is spread across millions of people.

Rather than be injured by the stay, the general public will stand to benefit from its issuance. VRS calls generally takes place between two parties, one who signs and one who can hear. Improving the functional equivalency of a VRS call benefits not only the deaf person, but the hearing person as well. If a deaf person cannot access VRS because the lines are down or blocked, the hearing person cannot receive that call. If a deaf person can get through and enjoy the natural flow and real-time benefits offered by VRS, the hearing person will benefit from that experience as well.

V. A Stay is in the Public Interest

In the ADA, Congress established as national policy the need to ensure the active participation of people who were deaf and hard of hearing in the mainstream of our society. Inclusion of relay service mandates within this legislation was designed to further this goal by establishing telephone access as a civil right for the first time in our nation's history. By requiring relay services to parallel conventional voice telephone services to the greatest extent possible, Congress sought to end the discrimination that had prevented people with hearing loss from exercising this right. A stay of the VRS rate will serve this public interest objective because it will ensure adequate funding to provide functionally equivalent services in a manner that meets the needs of the ADA's intended beneficiaries.

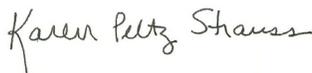
VI. Conclusion

CGB's reduction of the VRS compensation rate is based on flawed assumptions that can not withstand legal or historical scrutiny. Implementation of the new rate will cause severe and irreparable harm to deaf and hard of hearing consumers throughout America who will be denied the ability to make real time, functionally equivalent telephone calls on demand. Because the grant of a stay will not harm any individuals and will serve the public interest by facilitating telecommunications access for significant segments of the American population, the Commission should immediately stay CGB's June 30th Rate Order, and restore the retroactive VRS rate of \$8.854 established in the Commission's June 2004 Report and Order, pending resolution of the Applications for Review and the issues raised in the FNRPM accompanying that order.

Respectfully submitted,

/s/

Ben Soukup, CEO
Communication Service for the Deaf
102 North Krohn Place
Sioux Falls, SD 57103
605-367-5760



By: Karen Peltz Strauss
KPS Consulting
2120 L Street, NW
Suite 400
Washington, D.C. 20037
202-478-6148
kpsconsulting@starpower.net

July 26, 2004