Holland+Knight

Tel 202 955 3000
Fax 202 955 5564

Holland & Knight LLP
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, D.C. 20006
www.hklaw.com

October 1, 2004

DOCKET FILE COPY ORIGINAL

DAVID A. O'CONNOR
202-828-1889

Internet Address:
david.oconnor@hklaw.com

VIA HAND DELIVERY

Marlene H. Dortch, Esq.
Office of the Secretary
Federal Communications Commission
236 Massachusetts Ave., NE
Suite 110
Washington, DC 20002

RECEIVED

OCT - 1 2004

Federal Communications Commission
Office of Secretary

RE: Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities
CC Docket No. 98-67
Petition for Reconsideration

Dear Ms. Dortch:

Transmitted herewith, on behalf of Hamilton Relay, Inc., are an original and four (4) copies of its Petition for Reconsideration of the Commission's June 30, 2004 decision released in this proceeding.

Should you have any questions concerning this matter, please contact the undersigned.

Respectfully submitted,

HOLLAND & KNIGHT LLP

David A. O'Connor
Counsel for Hamilton Relay, Inc.

Enclosure

No. of Copies rec'd 0+4
List ABCDE

RECEIVED

OCT - 1 2004

Federal Communications Commission
Office of Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

To: The Commission

PETITION FOR RECONSIDERATION

HAMILTON RELAY, INC.

David A. O'Connor
Holland & Knight LLP
2099 Pennsylvania Ave., N.W.
Suite 100
Washington, DC 20006
(202) 955-3000
Its Counsel

October 1, 2004

TABLE OF CONTENTS

Table of Contents ii

Summary iii

I. Background 4

II. Hamilton's MARS Plan 7
- A. Rate of Return Regulation Is Inferior to Competitively Priced Models, As Recognized by the Commission in Numerous Proceedings 7
- B. The Interstate TRS Rate Should Be Based on an Average of Intrastate TRS Rates, Adjusted for Minutes of Use 9
- C. A Multi-state Average Rate Structure Would Be Less Burdensome for the TRS Fund Administrator to Oversee 12
- D. The MARS Plan Would Benefit Consumers by Lowering Prices 13
- E. Hamilton's Proposal Addresses the Concerns Raised in the *Report and Order* About the "Cost-Plus" Methodology 14

III. Conclusion 15

SUMMARY

Hamilton Relay, Inc. ("Hamilton") is seeking reconsideration of one critical aspect of the Commission's June 30, 2004 decision affecting traditional telecommunications relay services ("TRS"). In this proceeding, the Commission upheld the Consumer and Governmental Affairs Bureau's decision to adopt rate of return regulation for providers of Video Relay Services ("VRS"). Irrespective of the merits of that decision, Hamilton submits that the Commission committed prejudicial error by going beyond the scope of the proceeding by extending rate of return regulation to traditional TRS providers. In doing so, the Commission failed to determine whether rate of return regulation is appropriate for traditional TRS, and also failed to consider possible alternatives to rate of regulation. For these reasons, Hamilton requests that the Commission set aside its decision to extend rate of return regulation to traditional TRS.

Hamilton also sets forth in this Petition a better alternative to rate of return regulation. Specifically, the Multi-state Average Rate Structure, or MARS Plan: 1) is grounded in competition, and is thus superior to rate of return from a regulatory standpoint; 2) will be easier and less costly for the interstate TRS Fund Administrator to oversee; and 3) will benefit consumers by lowering interstate TRS rates to the competitively based market value. The specifics of Hamilton's MARS Plan are set forth in Section II.B of the Petition.

Hamilton urges the Commission to initiate a proceeding to adopt the MARS Plan.

2290767_v1

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

To: The Commission

PETITION FOR RECONSIDERATION

Hamilton Relay, Inc. ("Hamilton"), by its counsel and pursuant to Section 1.106(b) of the Commission's rules, 47 C.F.R. § 1.106(b), hereby petitions the Commission for reconsideration of one critical aspect of the Commission's June 30, 2004 telecommunications relay services ("TRS") decision ("*Report and Order*").[1] Specifically, Hamilton submits that the Commission committed prejudicial error in going beyond the scope of the record before it and deciding to expand rate of return regulation to traditional TRS providers. The Commission did so without inquiring whether the circumstances which led the Commission to apply rate of return

[1] *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Report and Order on Reconsideration, and Further Notice of Proposed Rulemaking*, CC Docket Nos. 96-571 and 98-67, CG Docket No. 03-123, FCC 04-137 (rel. June 30, 2004) ("*Report and Order*"). The *Report and Order* was published in the *Federal Register* on September 1, 2004. Accordingly, pursuant to the Commission's rules, this Petition is timely filed. *See* 47 C.F.R. §§ 1.4(b), 1.106(f).

regulation to Video Relay Service ("VRS") providers also exist in the traditional TRS marketplace.[2]

As the Commission has long recognized, rate of return regulation is clearly inferior to pricing determined by competition.[3] Hamilton believes that it is possible to regulate traditional TRS providers' costs in a manner that is based on competitive rates rather than a return on capital investment. Hamilton has set forth in this Petition a TRS pricing system based on a multi-state average TRS rate, adjusted for minutes of use.[4] Since neither the Bureau nor the Commission afforded parties an opportunity to advance alternative cost formulas for TRS,[5] Hamilton urges the Commission to reconsider its rate of return decision and

---

[2] A Consumer and Governmental Affairs Bureau ("Bureau") decision also dated June 30, 2004 implements the Commission's decision to adopt rate of return for traditional TRS providers. *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, *Order*, CC Docket No. 98-67, DA 04-1999, ¶ 31 (CGB rel. June 30, 2004) ("*2004 Bureau Order*") (citing Commission's endorsement of applying rate of return regulation to TRS providers, *Report and Order*, ¶¶ 177-182). On July 30, 2004, Hamilton separately filed an Application for Review of the *2004 Bureau Order*, which Hamilton respectfully requests that the Commission address collectively with this Petition. Importantly, Hamilton is *not* asking the Commission to reinstate the "cost-plus" methodology rejected in the *Report and Order*.

[3] *See* discussion *infra* Part II.A.

[4] *See* discussion *infra* Part II.B.

[5] Hamilton recognizes that the Commission has initiated a proceeding to examine the cost methodology for Video Relay Services ("VRS") but, as set forth below, VRS and traditional TRS are fundamentally different services and their rate structures may and should be regulated differently. Unless otherwise indicated, references herein to "TRS providers" and "TRS" specifically exclude VRS providers and VRS, but specifically include Spanish Relay, IP Relay and Speech-to-Speech ("STS") services. Even though IP Relay is not competitively bid, the rate for that service traditionally has been tied to the traditional TRS rate. Hamilton believes that the Commission and the TRS Fund Administrator could use the rate established by the MARS Plan to compensate providers of IP Relay.

consider the alternative cost formula proposed in this Petition. As explained in detail below, Hamilton's proposed "Multi-state Average Rate Structure" or "MARS" Plan: 1) is grounded in competition, and is thus superior to rate of return from a regulatory standpoint; 2) will be easier and less costly for the TRS Fund Administrator to administer; and 3) will benefit consumers by lowering interstate TRS rates to the competitively based market value.[6]

Importantly, Hamilton's MARS Plan has nothing to do with the compensation rates for Video Relay Services ("VRS"). As the Commission has previously noted, VRS is very different from TRS.[7] The Commission has established a pleading cycle to determine future VRS rates, and Hamilton intends to file comments in that proceeding.[8] Because VRS rates cannot be established based on competitively bid state rates (as TRS can), the VRS rate formula ultimately may differ considerably from the rate formula used for competitive TRS services. Whatever the Commission decides to do with the VRS rate, the fact

---

[6] Under Hamilton's MARS example, the 2004 interstate per-minute TRS rate would have been $1.32913, compared to the $1.349 rate announced by the Bureau on June 30, 2004. *See Bureau Order* ¶ 1. Even though a separate MARS Plan rate would be necessary for STS services, the MARS proposal could be used to set rates for every TRS service, with the exception of VRS.

[7] *Telecommunications Services for Individuals with Hearing and Speech Disabilities, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 01-371, FCC 01-371, ¶ 22 (rel. Dec. 21, 2001); *Telecommunications Relay Services, and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Declaratory Ruling*, CC Docket 98-67, FCC 03-190, ¶ 86 (rel. Aug. 1, 2003); *see also Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Order*, CC Docket No. 98-67, DA 03-2111 (CGB rel. June 30, 2003) ("*2003 Bureau Order*").

[8] *See Report and Order*, ¶¶ 234-240.

remains that TRS is different from VRS, and TRS rates should be based on competitive rate information to the extent possible, and not on a surrogate rate of return on capital investment.

I. Background.

Administration of TRS rates is divided along jurisdictional grounds between interstate TRS services and intrastate services. The former is administered by the Commission while the latter is administered by the individual states whose TRS programs are certified by the Commission. The vast majority of states contract with individual TRS providers following a competitive bidding process. Hamilton is currently a provider of intrastate TRS services awarded by contract in eight states (Idaho, Kentucky, Louisiana, Maine, Nebraska, Rhode Island, Wisconsin, and Wyoming) and the District of Columbia.

On the interstate side, all carriers in the United States are subject to the Commission's TRS rules. The Commission determined in 1993 that all TRS providers "shall be permitted to recover interstate TRS costs based on a national average TRS interstate minutes of use rate."[9] In implementing this decision, the Commission adopted a rule stating that "TRS Fund payments shall be distributed to TRS providers based on formulas approved or modified by the Commission. . . .

[9] *Telecommunications Relay Services, and the Americans with Disabilities Act of 1990*, MM Docket No. 90-571, 8 FCC Rcd 5300, 5305 ¶ 29 (rel. July 20, 1993).

Such formulas shall be designed to compensate TRS providers for reasonable costs of providing interstate TRS . . . ."[10]

For many years, the TRS Fund administrator filed an annual proposed TRS payment formula with the Commission, based on the providers' combined projected costs. Each year, the TRS Fund Administrator's proposal for reasonable TRS provider cost recovery was approved by the Commission with little or no modification. This system continued largely without incident until 2002, when the Commission decided to allow IP Relay and VRS providers to be compensated from the interstate TRS fund for their services. Because of the similarities between IP Relay and traditional TRS, the Commission tied the IP Relay rate to the per-minute rate used for traditional TRS. In contrast, with VRS the Commission created a separate per minute rate that was significantly higher because of the high costs associated with the provision of VRS.

In 2003, the Bureau became concerned with the costs submitted by VRS providers, and the subsequently high VRS rate proposed by the TRS Fund Administrator. The Bureau determined, without an opportunity for notice and comment, that the VRS rate should be limited to an 11.25% rate of return on investment.[11] In contrast, the TRS Fund Administrator's proposed rate for

[10] *Id.* (implementing 47 C.F.R. § 64.604(c)(4)(iii)(E), now codified at 47 C.F.R. § 64.604(c)(5)(iii)(E)).
[11] *2003 Bureau Order*, ¶ 35.

traditional TRS and IP Relay was adopted without the imposition of a rate of return.[12]

Several parties filed Petitions for Reconsideration of the Bureau's decision concerning VRS.[13] Those petitions were not addressed by the Bureau, but instead were addressed in the Commission's *Report and Order*. In that decision, the Commission upheld the Bureau's 11.25% rate of return methodology as applied to VRS.[14]

The Commission appears to have authorized rate of return for *all* forms of TRS, or at least that is how the Bureau has interpreted the *Report and Order*. In its June 30, 2004 decision, the Bureau for the first time applied an 11.25% rate of return to TRS, citing for support the Commission's decision that a TRS provider's costs may include "a reasonable return on capital investment."[15] Thus, for the first time, providers in the highly competitive TRS market are now subject to a rate of return on capital investment.

Hamilton submits that the Commission erred in extending rate of return to TRS without examining other options. While such a methodology may (or may not) be the only available approach for reining in the high costs of VRS, there is no justifiable reason for extending rate of return regulation to TRS. Rather, there are other methods of regulating these services which are grounded in competition. As

---

[12] *Id.* ¶ 26 (adopting traditional TRS and IP Relay rates on interim basis); *see also Report and Order*, ¶ 166 (adopting those rates as the final rates for the July 1, 2003 to June 30, 2004 period).
[13] *See Report and Order*, ¶ 165 & n.474.
[14] *Id.* ¶¶ 179-182.
[15] *Id.* ¶ 181.

explained below, Hamilton urges the Commission to base its interstate rate for TRS on an average of the competitive rates set at the state level.

II. Hamilton's MARS Plan.

A. Rate of Return Regulation Is Inferior to Competitively Priced Models, as Recognized by the Commission in Numerous Proceedings.

When the Commission in this proceeding concerning VRS compensation imposed a rate of return structure on TRS service, it erred by going beyond the scope of the record before it, by giving no consideration to the drawbacks of a rate of return regime, and by failing to consider alternate possibilities that might serve the public interest better.

The Commission has repeatedly found that rate of return regulation fails to replicate the competitive market, and instead discourages efficiency and encourages the "padding" of investment. Here is what the Commission said as it began its historic move from rate of return to price cap regulation for major dominant carriers:

> Our experiences in traveling the second path of regulatory change, in which we developed the existing rate of return structure, illuminate the difficulties of administering rate of return regulation under any circumstances. In theory, rate of return is intended to replicate competitive market results. However, there are many differences in the manner in which rate of return regulation and competitive forces operate. Competition holds each firm to "normal" profit levels as a result of a dynamic process that operates over time — a firm strives to maximize profits and secure advantage over other firms by responding to consumer demand effectively. Under rate of return, however, "normal" profit levels are established in advance by regulatory fiat. The dynamic process that produces socially beneficial results in a competitive environment is strongly suppressed. In fact, rather than encourage socially beneficial behavior by the regulated firm, rate of return actually discourages it.

> The distorted incentives created by rate of return regulation are easily illustrated. In a competitive environment, where prices are dictated by the market, a company's unit costs and profits generally are related inversely. If one goes up, the other goes down. Rate of return regulation stands this relationship on its head. Although carriers subject to such regulation are limited to earning a particular percentage return on investment during a fixed period, a carrier seeking to increase its dollar earnings often can do so merely by increasing its aggregate investment. In other words, under a rate of return regime, profits (i.e., dollar earnings) can go up when investment goes up. This creates a powerful incentive for carriers to "pad" their costs, regardless of whether additional investment is necessary or efficient. And, because a carrier's operating expenses generally are recovered from ratepayers on a dollar-for-dollar basis, and do not affect shareholder profits, management has little incentive to conserve on such expenses. This creates an additional incentive to operate inefficiently. Moreover, institutions in which carriers providing more than one service face competition for one or more of such services, rate of return regulation enables carriers to distort the competitive process by manipulating their reported cost allocations.
>
> A system that establishes such incentives is unlikely to encourage efficiency.[16]

In this proceeding, the Commission may have considered that rate of return regulation for VRS providers was the only alternative to the existing system which permitted "mark-ups" disfavored by the Bureau and the Commission. But that is definitely not the case with TRS services. As the Commission is aware, in the *intrastate* market, TRS services are procured mainly by state-by-state competitive

[16] *Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking*, CC Docket No. 87-313, 4 FCC Rcd 2873, 2889-90 (1989); *see also Promotion of Competitive Networks in Local Telecommunications Markets, Notice of Proposed Rulemaking and Notice of Inquiry*, WT Docket No. 99-217, 14 FCC Rcd 12673, 12684 & n.50 (1999).

bidding.[17] Consequently, an excellent surrogate for actual *interstate* competition is to base interstate TRS rates on the average cost for the same services in the competitive intrastate market. As we show below, that method would not only avoid the disadvantages of the rate of return methodology, but would in fact produce lower interstate TRS rates than rate of return methodology.

By failing to give consideration to the drawbacks of rate of return methodology and the possibility of other methods, and by prescribing rate of return methodology without setting out that issue in a rulemaking proceeding, the Commission has committed prejudicial error, and should set aside its ruling in this proceeding.

B. The Interstate TRS Rate Should Be Based on an Average of Intrastate TRS Rates, Adjusted for Minutes of Use.

Hamilton's proposed "multi-state average rate structure," or MARS Plan, is based on the intrastate rates in the twenty-three states for which information is readily available. *See* Exhibit 1. However, the Commission could easily obtain the information for the remaining jurisdictions, and the TRS Fund Administrator could easily keep and maintain a database of such information.[18]

---

[17] In contrast, there is no such thing as an intrastate VRS market, since VRS is funded solely out of the interstate TRS Fund. Moreover, VRS is voluntary, while TRS is mandatory (with the exception of IP Relay).

[18] Some data relied upon by Hamilton may be outdated but are the most recently available data for that state. In some instances, more recent rate information was filed under seal and is not available to third parties. In other cases, there is no public record. The TRS Fund Administrator and the FCC, in contrast, would have no difficulty in obtaining such information for every jurisdiction whose TRS program has been certified by the Commission.

Column A of the attachment indicates each state whose TRS program has been certified by the Commission. Column B indicates the population in each jurisdiction as of 2003.[19] Column C indicates the total estimated conversation minutes per month per jurisdiction.[20] Column D indicates the per minute intrastate TRS rate based on a competitively bid contract with each state.

Column E indicates whether the state bases its per minute TRS rate on a "session minute" ("SM") or on a "conversation minute" ("CM").[21] For consistency purposes, all SM rates were converted to a CM rate based on historical data which are readily available to the Commission and the TRS Fund Administrator. The conversion ratio derived from this historical data is 1.46 (i.e., 1 CM = 1.46 SM), which is reflected in Column F. For example, in Alabama (a SM state), the per minute contractual rate of $.8900 (Column D) has been converted to a CM rate by multiplying .8900 by 1.46. The converted rate of $1.2994 is reflected in Column F. In contrast, for a CM state such as Arizona, the figures in Column D and Column F are identical because no conversion is necessary. Column G represents Column C (each state's total estimated CMs) multiplied by Column F (each state's per minute rate, converted if necessary).

---

[19] This information was obtained from the Census Bureau's website, www.census.gov.

[20] Although individual minutes of use by state is available to the Fund Administrator, such information is not readily available to Hamilton. In the absence of such information, Hamilton has developed its own model to estimate the minutes of use in each jurisdiction, based on the total population of that jurisdiction.

[21] A CM does not include time for call set-up, call wrap-up and general assistance in its rate, in contrast to a SM which does.

If the sum of all twenty-three available rates (Column F) is divided by 23 (the number of states for which Hamilton has information),[22] the resulting unweighted per minute rate is $1.408. This figure is comparable to the $1.349 per minute rate established by the Bureau on June 30, 2004.

However, this approach results in aberrations. For example, Alaska has a very high per minute intrastate rate ($1.48) and a very small number of CMs per month, which tends to skew the multi-state per minute rate higher than it should be. On the other hand, if the sum of Column G is divided by the sum of Column C, the resulting per minute average rate, adjusted for minutes of use, is only $1.329. This is *two cents per minute* lower than the rate adopted by the Bureau. Indeed, Hamilton expects that the per minute rate would be even lower if it were based on *all* jurisdictions with TRS programs certified by the Commission.[23] The Commission and the TRS Fund Administrator could easily obtain this information for all such jurisdictions.

---

[22] Certain states for Hamilton is the TRS provider consider their rate information proprietary, and therefore Hamilton has included those states in its calculation. However, for the record, if the rate information for those states were included in the calculation, the rate would be lower. As stated earlier, the Commission could easily obtain TRS rate information for all states.

[23] However, it is worth noting that the intrastate rate paid in California is determined by the interstate TRS rate, so the inclusion of California's rate in the MARS Plan may be circuitous. Excluding California's rate from the MARS calculation would lower the interstate TRS rate even further, by an additional $.008 (.8 cents).

C. A Multi-state Average Rate Structure Would Be Less Burdensome for the TRS Fund Administrator to Oversee.

In contrast to Hamilton's straightforward MARS Plan, the Commission has essentially required the TRS Fund Administrator to examine the minutiae of each TRS providers' costs and capital investments, and to determine a rate based on arcane rate of return methodologies. Such an approach means that the TRS Fund Administrator will be forced to review all costs submitted by each provider and to determine whether to allow or disallow each individual cost. With the introduction of an allowance for a return on capital investment, the TRS Fund Administrator must now deal with rate base inclusions of appropriate tax allowances, overhead costs, corporate officers' salaries (and the percentages of which are attributable directly to the provision of TRS), net working capital, engineering support costs, operations support costs, and numerous other costs.[24] Decisions on whether to allow these costs into the rate base will need to be approved by the Bureau before a final rate, or perhaps an interim rate only, can be established. Clearly, this is a complicated rate-making process that will only get more complicated as providers seek to include ever more of their costs in the rate base.

Hamilton's MARS Plan, on the other hand, would eliminate the need for examining *any* carrier data. Each year, the TRS Fund Administrator's staff would simply collect the per-minute rate and minutes of use from each FCC-certified TRS jurisdiction. Those rates are presumptively competitive rates, because they have

[24] *Report and Order* ¶¶ 182, 192 & n.550.

been subject to a state contract competitive bidding process.[25] The TRS Fund Administrator's staff could then examine the rates and determine the appropriate "average" rate for that year, adjusted for minutes of use, which would represent the proposed interstate TRS rate for that year. This proposal would then be forwarded to the Bureau for approval in the normal course by May 1 of each year. Importantly, no rule change is required to adopt Hamilton's proposal, because the rules already authorize the Commission to approve or modify TRS payment formulas, if conducted in accordance with the Administrative Procedure Act.[26]

D. The MARS Plan Would Benefit Consumers by Lowering Rates.

Even with rate information for approximately half of the states, the average per minute rate is already two cents lower than the existing "rate of return" rate. Given that the MARS Plan is expected to decrease rates even further if information for all states is added to the multi-state average rate, TRS users stand to benefit significantly through reduced rates for TRS services. In turn, less funding would be required to administer the interstate TRS fund (at least with respect to TRS), and therefore consumers of telephone services in general throughout the United States would be required to contribute less to the Fund. Indeed, Hamilton estimates that TRS contributions in 2003 could have been reduced by **$3,195,815.10** under the MARS Plan. The attached Exhibit 2 provides further information in support of this

---

[25] To the extent that the Commission believes that a particular state's rate is not based on competitive bidding, the Commission may eliminate that rate from the multi-state averaging process, or take other steps as necessary to ensure that the state's rate is based on a competitively bid system, since each state TRS program must be certified by the Commission. *See* 47 U.S.C. § 225(f).

[26] *See* 47 C.F.R. § 64.604(c)(5)(iii)(E), (H); *cf. Report and Order* ¶ 169.

conclusion. The savings could be larger if all state rate information was included in the calculation.

In short, all consumers stand to benefit from lower telephone rates if the MARS Plan is adopted. Rate reduction for consumers is a hallowed Commission goal, and Hamilton's proposal would forward that goal.

E. Hamilton's Proposal Addresses the Concerns Raised in the *Report and Order* About the "Cost-Plus" Methodology.

Hamilton's "average rate" proposal is fully consistent with the *Report and Order* and its rejection of the "cost-plus" methodology. That methodology, which had been used by the TRS Fund Administrator until this year, permitted TRS providers to include profits and tax allowances in the rates submitted to the TRS Fund Administrator. In the *Report and Order*, the Commission determined that such a "markup on expenses, *i.e.*, a return based upon a percentage of total TRS costs that is not itself a cost of providing TRS service," is invalid.[27]

Consistent with this finding, Hamilton's proposed rate methodology does not provide for any "markup on expenses" or other profit margin. Rather, TRS providers would be entitled only to the average state contract rate (each of which presumptively has been reached by competitive bidding), adjusted for minutes of use.

Furthermore, the Commission concluded in the *Report and Order* that "the annual determination of the TRS compensation rates is not akin to a rate-making process that determines the charges a regulated entity may charge its customers.

---

[27] *Report and Order* ¶ 179.

Rather, it is a determination of a per-minute compensation rate that will cover the reasonable costs incurred in providing the TRS services mandated by Congress and [the FCC's] regulations."[28] Hamilton concurs with this assessment. Yet the Commission seems to have ignored its own language and endorsed an annual rate-making process by requiring the TRS Fund Administrator to examine each TRS providers' underlying costs and determine which costs may legitimately be put into the rate base. In contrast, Hamilton's proposal would produce "a per-minute compensation rate," *without the need for the TRS Fund Administrator to examine providers' underlying costs*, by simply calculating an average of intrastate per-minute rates. Such an approach is fully consistent with the Commission's goal of ensuring that TRS providers are compensated only for their reasonable costs, since in executing their state TRS programs the states have already concluded that the TRS providers' costs are reasonable. Accordingly, Hamilton urges the Commission to adopt the MARS Plan.

III. Conclusion.

The Commission committed prejudicial error in this proceeding by extending rate of return regulation to an unquestionably competitive service, TRS. In doing so, the Commission went beyond the scope of the record before it, and failed to consider alternate possibilities that might serve the public better than rate of return regulation. As set forth in this Petition, Hamilton's MARS Plan is a superior cost recovery methodology, and will serve the public better by lowering TRS rates

---

[28] *Id.*

and reducing the administrative burden on the TRS Fund Administrator. For these reasons, Hamilton respectfully requests that the Commission set aside its ruling in this proceeding to the extent requested herein, and initiate a proceeding to adopt Hamilton's MARS Plan.

Respectfully submitted,

HAMILTON RELAY, INC.

David A. O'Connor
Holland & Knight LLP
2099 Pennsylvania Ave., NW
Suite 100
Washington, DC 20006
Tel: 202-828-1889
E-mail: david.oconnor@hklaw.com
Its Counsel

October 1, 2004

EXHIBIT 1

HAMILTON RELAY, INC. PROPOSED TRS MULTI-STATE AVERAGE RATE STRUCTURE

Area Name	B 2003 Population	C Total Est CM per Month	D State Rate	E State Basis	F Rate per CM (1.46 factor)	G Total Known Dollars
Alabama	4,500,752	164,897	0.8900	Session	1.2994	$ 214,266.97
Alaska	648,818	24,522	1.4800	Session	2.1608	$ 52,986.28
Arizona	5,580,811	204,257	1.0500	Conv	1.0500	$ 214,470.08
Arkansas	2,725,714	100,210				
California	35,484,453	1,294,030	1.3500	Conv	1.3500	$ 1,746,939.93
Colorado	4,550,688	166,717	0.8300	Session	1.2118	$ 202,027.25
Connecticut	3,483,372	127,821	1.0400	Session	1.5184	$ 194,082.92
Delaware	817,491	30,669				
District of Columbia	563,384	21,408				
Florida	17,019,068	621,099	0.7300	Session	1.0658	$ 661,967.63
Georgia	8,684,715	317,372				
Hawaii	1,257,608	46,708	1.9000	Session	2.7740	$ 129,566.92
Idaho	1,366,332	50,670				
Illinois	12,653,544	462,007				
Indiana	6,195,643	226,663				
Iowa	2,944,062	108,167	0.8900	Session	1.2994	$ 140,551.83
Kansas	2,723,507	100,129				
Kentucky	4,117,827	150,942				
Louisiana	4,496,334	164,736				
Maine	1,305,728	48,461	0.9200	Session	1.3432	$ 65,093.14
Maryland	5,508,909	201,637	0.9200	Session	1.3432	$ 270,838.70
Massachusetts	6,433,422	235,329				
Michigan	10,079,985	368,220				
Minnesota	5,059,375	185,255	1.1200	Session	1.6352	$ 302,928.38
Mississippi	2,881,281	105,879				
Missouri	5,704,484	208,764				
Montana	917,621	34,318	1.3000	Conv	1.3000	$ 44,612.79
Nebraska	1,739,291	64,261				
Nevada	2,241,154	82,551	0.7300	Session	1.0658	$ 87,982.62
New Hampshire	1,287,687	47,804	0.7600	Session	1.1096	$ 53,043.07
New Jersey	8,638,396	315,684	1.2100	Session	1.7666	$ 557,687.66
New Mexico	1,874,614	69,193				
New York	19,190,115	700,218				
North Carolina	8,407,248	307,260	0.9100	Session	1.3286	$ 408,226.29
North Dakota	633,837	23,976	0.8900	Session	1.2994	$ 31,153.96
Ohio	11,435,798	417,629	0.8200	Session	1.1972	$ 499,985.83
Oklahoma	3,511,532	128,847				
Oregon	3,559,596	130,598	1.1025	Conv	1.1025	$ 143,984.84
Pennsylvania	12,365,455	451,509				
Rhode Island	1,076,164	40,095				
South Carolina	4,147,152	152,011				
South Dakota	764,309	28,730				
Tennessee	5,841,748	213,766	1.2400	Conv	1.2400	$ 265,070.45
Texas	22,118,509	806,937				
Utah	2,351,467	86,571				
Vermont	619,107	23,439				
Virginia	7,386,330	270,055				
Washington	6,131,445	224,324				
West Virginia	1,810,354	66,851				
Wisconsin	5,472,299	200,303	1.0750	Session	1.5695	$ 314,375.15
Wyoming	501,242	19,144	0.9300	Session	1.3578	$ 25,993.07
	290,809,777	10,642,641		Total Known TRS Dollars		$ 6,627,835.74
Areas with data	136,280,270	4,986,602		Average Interstate Rate		1.40818
				Multi-state Average ("MARS Rate")		**1.32913**

Assumptions:	The example above illustrates an alternate method for determining interstate TRS rates. NECA could easily develop interstate TRS rates without using a rate of return calculation. Competitive bidding determines intrastate TRS rates, and this process ensures that profit margins are kept to the minimum that the market will tolerate. NECA already collects actual conversation minute (CM) and session minute (SM) data from all TRS providers. Adding the intrastate basis (CM or SM) and rate to this data collection would complete the required information.
Column B	The 2003 population for each area.
Column C	Actual historic TRS data reveal a high correlation between a state's population and TRS minutes. Hamilton developed a model to predict TRS minutes based on population. When these estimated conversation minutes (Col C) are annualized, the result is nearly identical to the total conversation minutes NECA used to estimate 2004 fund requirements.
Column D	The competitively bid per-minute rate paid for intrastate TRS minutes, if available.
Column E	For those states for which an intrastate rate is known, this column indicates whether the state's rate is a Session Minute Rate, or a Conversation Minute Rate.
Column F	Hamilton's population/minute model results in a 1 to 1.46 ratio between conversation and session minutes. This ratio may vary across providers and is readily calculated with data from NECA's annual reports.
Column G	The total estimated conversation minutes multiplied by the conversation minute rate for each state. (Alabama is estimated to use 164,897 conversation minutes of TRS each month. 164,897 conversation minutes at $1.2994 per conversation minute is $214,366.97.)

Average Interstate Rate: The unweighted average intrastate rate for the 23 states for which rate data was available.

Multi-state Average Rate ("MARS Rate"): The average intrastate rate, adjusted for minutes of use, i.e., The total number of dollars (Column G) divided by the total estimated minutes of use (Column C).

EXHIBIT 2

Interstate TRS Fund
Traditional and IP at Actual Rate

Data Month	Trad, Span Minutes	IP Minutes	Total Minutes	Actual Rate	Fund Disbursements
Jul 03	2,233,918	3,630,327	5,864,245	$ 1.368	$ 8,022,287.16
Aug 03	2,172,890	3,636,191	5,809,081	1.368	7,946,822.81
Sep 03	2,117,469	4,004,030	6,121,499	1.368	8,374,210.63
Oct 03	2,121,486	4,385,261	6,506,747	1.368	8,901,229.90
Nov 03	1,974,131	4,423,357	6,397,488	1.368	8,751,763.58
Dec 03	2,112,687	4,954,794	7,067,481	1.368	9,668,314.01
Jan 04	2,188,805	5,325,009	7,513,814	1.368	10,278,897.55
Feb 04	1,987,706	4,666,086	6,653,792	1.368	9,102,387.46
Mar 04	1,973,792	5,235,048	7,208,840	1.368	9,861,693.12
Apr 04*	1,959,976	5,444,545	7,404,521	1.368	10,129,384.73
May 04*	1,946,256	5,654,042	7,600,298	1.368	10,397,207.66
Jun 04*	1,932,632	5,863,539	7,796,171	1.368	10,665,161.93
	24,721,748	57,222,229	81,943,977		$ 112,099,360.54

Interstate TRS Fund
Traditional and IP at Estimated Rate

Data Month	Trad, Span Minutes	IP Minutes	Total Minutes	Wt Avg Rate	Fund Disbursements
Jul 03	2,233,918	3,630,327	5,864,245	$ 1.329	$ 7,793,581.61
Aug 03	2,172,890	3,636,191	5,809,081	1.329	7,720,268.65
Sep 03	2,117,469	4,004,030	6,121,499	1.329	8,135,472.17
Oct 03	2,121,486	4,385,261	6,506,747	1.329	8,647,466.76
Nov 03	1,974,131	4,423,357	6,397,488	1.329	8,502,261.55
Dec 03	2,112,687	4,954,794	7,067,481	1.329	9,392,682.25
Jan 04	2,188,805	5,325,009	7,513,814	1.329	9,985,858.81
Feb 04	1,987,706	4,666,086	6,653,792	1.329	8,842,889.57
Mar 04	1,973,792	5,235,048	7,208,840	1.329	9,580,548.36
Apr 04*	1,959,976	5,444,545	7,404,521	1.329	9,840,608.41
May 04*	1,946,256	5,654,042	7,600,298	1.329	10,100,796.04
Jun 04*	1,932,632	5,863,539	7,796,171	1.329	10,361,111.26
	24,721,748	57,222,229	81,943,977		$ 108,903,545.44

FUND REDUCTION $ 3,195,815.10

*Estimates
SOURCE: www.neca.org

DECLARATION

I, John Nelson, President of Hamilton Relay, Inc., hereby declare, under penalty of perjury, the following:

1) That Hamilton is a provider of intrastate TRS services in eight states and the District of Columbia, and that in each of those states, Hamilton participated in a competitive bidding process;

2) That, upon information and belief, the majority of other state TRS contracts are awarded on a similarly competitive basis;

3) That I have reviewed the foregoing Petition for Reconsideration, and the attached Exhibit 1, which was prepared by me or under my supervision, and, except for facts of which judicial notice may be taken by the Commission, the information contained therein is true and accurate to the best of my knowledge, information and belief.

John Nelson
President
Hamilton Relay, Inc.

Dated: September 30, 2004

CERTIFICATE OF SERVICE

I, Laura Ledet, an employee of Holland & Knight LLP, hereby certify that copies of the foregoing Petition for Reconsideration were sent on October 1, 2004, via first-class mail, postage prepaid (or as otherwise noted), to the following:

Christopher Libertelli
Legal Adviser to Chairman Powell
Federal Communications Commission
445 Twelfth St., SW
Washington, DC 20554

Scott Bergmann
Legal Adviser to Commissioner Adelstein
Federal Communications Commission
445 Twelfth St., SW
Washington, DC 20554

Matthew Brill
Legal Adviser to Commissioner Abernathy
Federal Communications Commission
445 Twelfth St., SW
Washington, DC 20554

Jessica Rosenworcel
Legal Adviser to Commissioner Copps
Federal Communications Commission
445 Twelfth St., SW
Washington, DC 20554

Daniel Gonzalez
Legal Adviser to Commissioner Martin
Federal Communications Commission
445 Twelfth St., SW
Washington, DC 20554

Martin Perry
Chief Economist
Federal Communications Commission
445 Twelfth St., SW
Washington, DC 20554

Gary Cohen
Lionel B. Wilson
Helen M. Mickiewicz
Jonady Hom Sun
505 Van Ness Ave.
San Francisco, CA 94102

Beth Wilson, Ph.D. Executive Director, SHHH
401 9th Street, N.W., Suite 400
Washington, D.C. 20004

Katherine Keller
Publisher, STSnews.com
P.O. Box 100607
Milwaukee, WI 53210

Claude Stout
Executive Director
Telecommunications for the Deaf, Inc.
8630 Fenton Street, Suite 604
Silver Spring, MD 20910-3803

Michael B. Fingerhut
Richard Juhnke
Sprint Corporation
401 9th Street, N.W., Suite 400
Washington, D.C. 20004

Ronald H. Vickery
404 Benton Dr.
Rome, Georgia 30165

Dana Mulvany, MSW, LCSW
dmulvaney@usa.net

Mark C. Rosenblum
Peter H. Jacoby
AT&T Corp.
295 North Maple Avenue
Basking Ridge, NJ 07920

Brenda Battat
SHHH
Suite 1200
7910 Woodmont Ave
Bethesda, MD 20814

Nancy J. Bloch
Executive Director
National Association of the Deaf
814 Thayer Avenue
Silver Spring, MD 20910-4500

Karen Peltz-Strauss
KPS Consulting
3508 Albermarle St. NW
Washington, DC 20008

Natek, Inc.
236 Massachusetts Avenue NE
Suite 110
Washington, DC 20002

Larry Fenster
MCI
1133 19th St. NW
Washington, DC 20036

George L. Lyon, Jr., Esq.
Lukas, Nace Guttierez & Sachs, Chartered
1111 19th Street, NW Suite 1200
Washington, DC 20036

Mike Maddix
Sorenson Media Inc.
4393 S Riverboat Road
Suite 300
Salt Lake City, UT 84213

Tom Chandler
Consumer & Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Cheryl King
Consumer & Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Warren O'Hearn
Consumer & Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Greg Hilbo k
Consumer & Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Laura Ledet #

2290724_v1