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

In the Matter of	)	
	)	
Telecommunications Relay Services	)	
And Speech-to-Speech Services for	)	CG Docket No. 03-123
Individuals with Hearing and Speech	)	
Disabilities	)	
	)	
NECA Interstate Telecommunications	)	
Relay Services Fund Payment Formula	)	
and Fund Size Estimate for the July 2006	)	
Through June 2007 Fund Year	)	

To: Secretary, FCC
For: The Commission

COMMENTS OF HAMILTON RELAY, INC.

Hamilton Relay, Inc. ("Hamilton"),[1] by its counsel and pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, hereby opposes the proposed payment formula and fund size estimate for the 2006-2007 Interstate Telecommunications Relay Services ("TRS") Fund, which was submitted by the TRS Fund Administrator on May 1, 2006.[2] For the reasons set forth below, Hamilton believes that the TRS Fund Administrator's arbitrary

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[1] Hamilton is a provider of traditional relay services, captioned telephone services, and speech-to-speech services ("STS") in eleven states, the District of Columbia, the U.S. Virgin Islands and Saipan. In addition, Hamilton is a nationwide provider of Internet Relay and Video Relay Services ("VRS").

[2] *See Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate (filed May 1, 2006), as amended May 10, 2006 ("2006 NECA Proposal"); *see also National Exchange Carrier Association (NECA) Submits the Payment Formula and Fund Size Estimate for Interstate Telecommunications Relay Services (TRS) Fund for the July 2006 Through June 2007 Fund Year*, Public Notice, CG Docket No. 03-123, DA 06-970 (rel. May 2, 2006); *National Exchange Carrier Association (NECA) Submits the Payment Formula and Fund Size Estimate for Interstate Telecommunications Relay Services (TRS) Fund for the July 2006 Through June 2007 Fund Year*, Public Notice, CG Docket No. 03-123, DA 06-1031 (rel. May 12, 2006).

recommendation to exclude all marketing and advertising costs from all relay services was procedurally and substantively in error, and that such costs should be included in the cost formula. Hamilton also believes that, as a policy matter, marketing and advertising are necessary to achieve providers' outreach goals for relay. Finally, Hamilton believes that greater transparency in the ratemaking method can be achieved if providers' cost data are categorically summarized on a no-name basis, as further described below.

I. Marketing and Advertising Costs Were Arbitrarily and Capriciously Excluded from the Cost Formula Without Notice to Providers

As a preliminary matter, Hamilton opposes the proposed payment formula because the procedures for deriving the formula were fundamentally flawed. Specifically, the TRS Fund Administrator decided independently to exclude *all* marketing and advertising costs without notice or an opportunity for providers to demonstrate that such costs are reasonable.

For the past several years, Commissioners and providers alike have shared their exasperation that the requirements of the Administrative Procedure Act ("APA")[3] were not being followed by the TRS Fund Administrator or the Consumer & Governmental Affairs Bureau ("Bureau"). In 2004, Commissioner Copps noted that "[a]s a general principle, people intuitively endorse lower rates, but here the providers . . . were left wondering what costs were allowed and what costs were disallowed by a methodology that was employed with too little in the way of rules, standards or prior guidance by the Commission."[4] The Commissioner also

[3] *See* 5 U.S.C. § 706(2).

[4] *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket Nos. 90-571, 98-67, CG Docket No. 03-123, FCC 04-137 (rel. June 30, 2004) ("*2004 TRS Order*") (Commr. Copps approving in part, dissenting in part).

decried the "know-it-when-I-see it" relay cost standard used in 2003.[5] His concerns were echoed by Commissioner Adelstein, who noted that the Commission has an obligation "to ensure that providers have *adequate notice* of how [the Commission] will apply [the 'reasonable costs'] standard."[6]

Fast forward to 2006, and the exact same problem exists. Providers were asked to submit their cost data for marketing and advertising, only to be informed in the 2006 NECA Proposal that such costs had been excluded. Providers were not afforded an opportunity to explain or justify their cost submissions for marketing and advertising — the costs were simply and arbitrarily recommended for exclusion without further analysis.[7] The only comment offered to justify the exclusion is the following: "It is [the TRS Fund Administrator's] understanding that costs of providers marketing their own TRS services are not includable in the formulas, however."[8] This comment is unsupported by any reference to any Commission or court decision, and does not constitute reasoned decisionmaking or fairness under the requirements of the APA. The recommendations made by the TRS Fund Administrator should be held to no less a standard under the APA than the Commission charged with overseeing relay services.

In addition, the 2006 NECA Proposal appears to have ignored the TRS Fund Administrator's own definitions for marketing/advertising and outreach. The Relay Services Data Request Instructions, sent to providers in October 2005,[9] provided the following definitions:

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[5] *Id.*
[6] *Id.* (Commr. Adelstein approving in part, dissenting in part) (emphasis added).
[7] 2006 NECA Proposal, at 8.
[8] *Id.*
[9] A copy of the instructions is attached as an exhibit to the 2006 NECA Proposal (bold in original).

1. **Marketing/Advertising:** Expenses associated with promoting TRS services within the community. All costs over $10,000 should be itemized. **The cost of equipment given to, sold to, and or used by relay callers, and call incentives are NOT to be reported as expenses. ADDITIONAL DATA REQUIRED – see Appendix 1**

2. **Outreach**: Expenses of programs to educate the public on TRS. **ADDITIONAL DATA REQUIRED – see Appendix 1**

Several conclusions can be drawn from these definitions. First, the definitions are virtually indistinguishable. The "community" and the "public" are synonymous terms, and promotion and education are not on their face distinct terms. Providers simply were not (and, to Hamilton's knowledge, never have been) provided guidance as to the difference, if any, between marketing/advertising and outreach. In fact, Hamilton has believed all along that marketing/advertising and outreach are so indistinguishable that it split its costs 50/50 between the categories. In short, Hamilton has found it difficult to accurately submit marketing/advertising and outreach costs because no one has provided a clear definition of those terms.

Second, the fact that the form specifically *included* certain marketing/advertising expenses (i.e., the itemization of all costs over $10,000), and specifically *excluded* other costs (equipment, etc.) would lead the average person to believe that some, but not all, marketing and advertising costs are appropriately included in the rate base. This conclusion is consistent with the Commission's decision to include providers' reasonable outreach costs,[10] but is at odds with the irrational and unsupported recommendation to remove *all* advertising and marketing costs.

Finally, the TRS Fund Administrator altered its definitions of marketing/advertising and outreach arbitrarily and without warning. In the 2006 NECA Proposal, the TRS Fund

[10] *2004 TRS Order*, ¶ 97.

Administrator appears to have independently redefined marketing/advertising costs as costs incurred to promote a particular provider's services, and outreach costs as costs incurred to promote relay services in general.[11] Under the APA, such fundamental definition changes cannot be made without a rulemaking proceeding.[12] Accordingly, Hamilton urges the Commission to direct the TRS Fund Administrator to reinstate all marketing/advertising and outreach costs submitted by providers until the Commission completes a rulemaking proceeding as to the meaning of those terms. The Commission needs to allow the public to comment on these important matters. For example, is attending a trade show an outreach effort? A marketing effort? Is there a difference? If a provider has a booth at a trade show and offers tutorials on VRS use, is that outreach? These and numerous other questions must be answered in the public record; unilateral decisions by the TRS Fund Administrator or the Bureau on these issues are simply inconsistent with the APA.

As a final matter, Hamilton submits that marketing and advertising costs are legitimate costs under Part 32 accounting procedures that should be included in the cost formula for relay services.[13] The Commission implicitly endorsed the use of Part 32 by TRS providers when it adopted a rate of return policy for all forms of relay services.[14] In fact, the Commission's rules require that TRS providers "shall provide the administrator with the following: total TRS minutes of use, total interstate TRS minutes of use, total TRS operating expenses and total TRS

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[11] *See* 2006 NECA Proposal, at 8.
[12] *See* C.F. Communications Corp. v. FCC, 128 F.3d 735, 739 (D.C. Cir. 1997) (holding that, although the Commission may be able to "amend its rules to render 'premises' a term of art encompassing telephone equipment or land . . . on which telephone equipment is located[,] . . . to do so, it must use the notice and comment procedure of the Administrative Procedure Act.").
[13] *See* 47 C.F.R. § 32.6610-6613.
[14] *2004 TRS Order*, ¶¶ 181-182.

investment in general accordance with Part 32 of the Communications Act . . . ."[15] Relay services remain subject to rate of return regulation, and current Commission rules specifically require the submission of cost data in general accordance with Part 32 rules.[16] Hamilton submits that the Commission may not arbitrarily (and without notice) select which components of Part 32 costs may be allowed and which may be disallowed. Therefore, the Commission should reject the TRS Fund Administrator's implicit recommendation to do so.

II. Marketing and Outreach Are Essential to the Future Growth of Relay Services

As a policy matter, the marketing and advertising of relay services and relay providers' outreach efforts are intrinsically inseparable and should be compensated in a similar manner. The goal is the same — marketing and outreach each are designed to improve public awareness about relay. Effective marketing and effective outreach accomplish that goal equally.[17]

The Commission has previously noted that lack of awareness about relay "adversely affects the quality of TRS."[18] Thus, it is critical to the Commission's goal of improving relay that efforts be made to improve awareness in both the hearing and deaf communities about all forms of relay, so that the use of relay spreads. Hamilton's marketing and outreach efforts are

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[15] 47 C.F.R. § 64.604(c)(5)(iii)(C). Hamilton believes that the rule inadvertently refers to Part 32 of the Communications Act instead of the more appropriate reference to Part 32 of the Commission's rules. *See* 47 C.F.R. §§ 32.1-32.9000 (Uniform System of Accounts for Telecommunications Companies).

[16] *See* Hamilton Petition for Reconsideration, CC Docket No. 98-67 (filed Oct. 1, 2004). Hamilton in general opposes the use of rate of return regulation for relay, and has urged the Commission to solicit comment on Hamilton's alternative methodology known as the "MARS Plan." Indeed, much of the controversy each May about relay rates would disappear if the Commission were to adopt the MARS Plan, because rates for all but VRS would be easily determined by simply calculating the multistate average rate.

[17] This assumes, for purposes of argument, that there is a difference between marketing and outreach. It is not clear from the record that there is a difference.

[18] *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, FCC 00-56, ¶ 104 (rel. Mar. 6, 2000).

designed to accomplish this goal. There is still much work to do, particularly in improving awareness in rural and economically disadvantaged areas, and in providing relay services during emergencies. Hamilton experienced this emergency scenario first-hand in August 2005 when, as the approved state relay provider in Louisiana, it helped numerous deaf and hard of hearing citizens communicate in the aftermath of Hurricane Katrina. Outreach and marketing were critical to these efforts, particularly on the interstate level given the Diaspora effect of the hurricane.

However, if providers are not compensated for their reasonable marketing and outreach costs, there will be no incentive for them to continue their outreach efforts beyond the minimum requirements, which even the Commission acknowledges are inadequate.[19] In addition, Hamilton submits that if providers' marketing/advertising costs are no longer compensated from the fund, then the increases in demand projected by the TRS Fund Administrator will be erroneous and must be recalculated before the per minute compensation rate can be established.

The fact that there has been a marked increase in the number of annual interstate relay minutes merely demonstrates that providers' outreach efforts are working.[20] Hamilton believes that the increases are due to improved relay services and the fact that more hearing people are recognizing and accepting relay calls. Advanced relay services have opened up new opportunities and possibilities to users, much in the same way that other portions of the Americans with Disabilities Act have done, such as mandatory curb cuts, wheelchair ramps, Braille characters on elevators, and closed captioning services on television. However,

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[19] 47 C.F.R. § 64.604(c)(3). The Commission has acknowledged that the minimum rule "may not be fully effective." *2004 TRS Order*, ¶ 90.

[20] *See* http://www.neca.org/media/0206TRSIPVRSCOMPARISON.pdf. The NECA chart indicates an approximate threefold increase in the number of all interstate relay minutes in as many years.

knowledge and use of relay must continue to expand. The Commission should continue to encourage providers' outreach efforts beyond the minimum requirements, by compensating them for their reasonable costs associated with marketing and outreach.

III. Greater Transparency in the Process Is Necessary and Achievable

As noted above, Hamilton opposes the fact that the TRS Fund Administrator did not share provider cost data with the TRS Advisory Council. There is no question that the Commission's rules contemplate an active role for the TRS Advisory Council in this cost recovery process.[21] Denying access to substantive provider cost data submissions effectively prevents the TRS Advisory Council from carrying out its Commission mandate of monitoring the TRS Fund Administrator.

If the TRS Advisory Council is to achieve its mission of monitoring the ratemaking process, it must be provided with substantive data by the TRS Fund Administrator and given an adequate amount of time to digest that data. Hamilton recognizes that transparency is made more difficult because providers submit their costs information on a confidential basis. However, nothing prohibits the TRS Fund Administrator from summarizing cost data submissions on a per minute basis by category, and providing that summary to the TRS Advisory Council. For example, the TRS Fund Administrator could summarize cost data as follows:

[21] 47 C.F.R. § 64.604(c)(5)(iii)(H) ("The administrator shall establish a non-paid voluntary advisory committee of persons from the hearing and speech disability community, TRS users (voice and text telephone), interstate service providers, state representatives, and TRS providers, which will meet at reasonable intervals (at least semi-annually) in order to *monitor* TRS cost recovery matters") (emphasis added).

PROJECTED COSTS – TRADITIONAL RELAY SERVICES*

	Company A**	Company B	Company C	Company D	Company E	Company F	Company G	Total
Facilities	$1.000***	$1.000	$1.000	$1.000	$1.000	$1.000	$1.000	$7.000
Communications Assistants	$1.000	$1.000	$1.000	$1.000	$1.000	$1.000	$1.000	$7.000
Relay Center Operation	$1.000	$1.000	$1.000	$1.000	$1.000	$1.000	$1.000	$7.000
Indirect Expense	$1.000	$1.000	$1.000	$1.000	$1.000	$1.000	$1.000	$7.000
Depreciation Expense	$1.000	$1.000	$1.000	$1.000	$1.000	$1.000	$1.000	$7.000
Marketing/Advertising Expense	$1.000	$1.000	$1.000	$1.000	$1.000	$1.000	$1.000	$7.000
Outreach Expense	$1.000	$1.000	$1.000	$1.000	$1.000	$1.000	$1.000	$7.000
Other Expenses	$1.000	$1.000	$1.000	$1.000	$1.000	$1.000	$1.000	$7.000
Capital Investment	$1.000	$1.000	$1.000	$1.000	$1.000	$1.000	$1.000	$7.000
Total	$9.000	$9.000	$9.000	$9.000	$9.000	$9.000	$9.000	**$63.000**

* Sample numbers. A similar chart could be prepared for each form of relay service (STS, Internet Relay, VRS).

** Providers would not be named.

*** All numbers reflect per minute costs, not total costs.

Hamilton would not interpose any objection to categorical summaries of its confidential cost data on a per minute basis, provided that data for all providers is disclosed equally, and the identity of individual providers is adequately protected. As long as the identity of providers is adequately shielded, Hamilton submits that the purpose of submitting cost data on a confidential basis would not be frustrated by publishing summaries of that data. The availability of such summaries would vastly improve transparency and allow the opportunity for meaningful input by the TRS Advisory Council. It would also be an improved means of determining the total per minute cost for each service and for determining outliers.

IV. Calculation of the Carrier Contribution Factor

In addition to proposing across-the-board decreases in the per-minute compensation levels for relay services, the TRS Fund Administrator also has proposed a decrease in the carrier contribution factor. In doing so, the TRS Fund Administrator did not account for (or even discuss) one of the major factors that historically has been part of the record in this regard: the continued decline in the interstate revenue base used to fund the TRS program.[22] Hamilton believes that the TRS Fund Administrator is obligated to account for this factor when recommending the carrier contribution factor, or explain why it is no longer applicable.

V. Conclusion

Hamilton urges the Commission to direct the TRS Fund Administrator to include all provider costs for marketing/advertising and outreach, until the Commission affords the public an opportunity to comment on the differences, if any, between those two funding categories. In addition, Hamilton believes that the Commission must step in and set the ground rules for the annual relay ratemaking process, in order to improve what is now the "ad hoc and last minute

[22] *See* 2005 NECA Proposal; 2004 NECA Proposal; 2003 NECA Proposal.

quality" of relay rate setting.[23] Hamilton also encourages the Commission to require the TRS Fund Administrator to provide categorical summaries of cost data submissions to the TRS Advisory Council on a no-name basis, in an effort to improve the ratemaking system.

Respectfully submitted,

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[23] *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, CC Docket No. 98-67, CG Docket No, 03-123, FCC 05-135 (rel. June 28, 2005) (Statement of Commr. Copps).