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Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: *Telecommunication Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities* – CG Docket No. 03-123
Written Ex Parte

Dear Ms. Dortch:

In January 2006, providers of Video Relay Service ("VRS") submitted projected cost and demand data supporting a VRS rate of $7.01 per minute for the 2006-07 rate year. On May 1, 2006, the National Exchange Carrier Association ("NECA"), as Administrator of the Interstate Telecommunications Relay Service ("TRS") Fund, proposed that the Federal Communications Commission ("FCC" or "Commission") slash the VRS rate to $6.138 per minute for the 2006-07 rate year.[1] That proposed rate represents more than a 12 percent reduction from what providers submitted and a reduction of almost 8 percent from the VRS rate of $6.644 for the 2005-06 rate year.

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1 Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, attached to letter from John Ricker, NECA, to Marlene H. Dortch, FCC, (May 1, 2006), as amended by *Errata* (May 10, 2006) ("2006 NECA Filing"). (Except as otherwise indicated, all filings cited herein were filed in CG Docket No. 03-123.)

NECA's proposal has been met with universal criticism and opposition.[2] Consumer groups, providers, and individuals have expressed grave concerns about the adequacy of the proposed VRS rate; described various flaws in the NECA ratemaking process, including lack of transparency, consistency, and predictability; and identified methodological errors, which, if ratified by the Commission, would violate the Americans with Disabilities Act ("ADA") and the Communications Act of 1934, as amended ("Act"), by preventing providers from receiving reimbursement for the reasonable costs of providing Video Relay Service and conducting outreach and marketing.

On May 24, NECA filed brief reply comments in which it purported to address some of the criticisms raised in the record, even as it also conceded that it needs "specific guidance" from the FCC on key issues.[3] NECA's reply comments fail to justify its proposed VRS rate of $6.138. In fact, those reply comments largely consist of unsupported generalizations or irrelevancies that are not responsive to the specific criticisms raised by commenters. The record, therefore, continues one-sidedly to demonstrate that NECA's proposed rate, if adopted, would unreasonably and unlawfully fail to compensate providers for their reasonable costs of providing Video Relay Service, including outreach and marketing costs.

NECA arrived at its proposed rate of $6.138 per minute by taking providers' projected costs and making two types of adjustments: excluding all marketing costs projected by providers, as well as all of Sorenson's Outreach Education costs; and increasing projected demand without increasing projected costs commensurately. As

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[2] *See, e.g.*, Comments of Communication Service for the Deaf on Payment Formula and Fund Size Estimate for Interstate TRS Fund for July 2006 Through June 2007 (May 17, 2006) ("CSD Comments"); Comments of Hamilton Relay, Inc. (May 17, 2006) ("Hamilton Comments"); Verizon's Comments on Payment Formula and Fund Size Estimate for Interstate TRS Fund for July 2005 Through July 2006 (May 17, 2006) ("Verizon Comments"); Letter from Bob Segalman, Ph.D to Marlene H. Dortch, FCC (May 17, 2006) ("Segalman Comments"); Letter from Telecommunications for the Deaf and Hard of Hearing, Inc. ("TDI"), National Association of the Deaf ("NAD"), Deaf and Hard of Hearing Consumer Advocacy Network ("DHHCAN"), and California Coalition of Agencies Serving the Deaf and Hard of Hearing, Inc. ("CCASDHH") (April 28, 2006), attached to Letter from Paul O. Gagnier and Eliot J. Greenwald, counsel to TDI, to Monica Desai, FCC (May 17, 2006) ("Consumer Groups Comments"); Reply Comments of TDI, NAD, DHHCAN and CCASDHH (May 24, 2006) ("Consumer Groups Reply Comments").

[3] Reply Comments of the National Exchange Carrier Association at 8 (May 24, 2006) ("NECA Reply Comments"); *see also id.* at 3 (FCC should "clarify" whether and to what extent marketing and advertising expenses of providers are reimbursable); *id.* at 8 (if FCC finds that reimbursement formulas should be calculated in a manner different from what NECA proposed, NECA will promptly submit revised results).

Sorenson and others demonstrated, both adjustments are inappropriate.[4] As the declaration of Commissioner Cheryl Parrino (submitted in support of Sorenson's comments) demonstrates in detail, the effect of these adjustments was a proposed VRS rate for the 2006-07 rate year that is approximately $0.935 lower than it should be.[5] Commissioner Parrino's analysis is corroborated by the fact that the data submitted by providers to NECA support a VRS rate that is $7.01.[6]

As explained below, NECA has not presented any evidence that rebuts this testimony. The record therefore continues to support a VRS rate of approximately $7.073 for the 2006-07 rate year.

Marketing

NECA conceded it needs FCC guidance on "whether and to what extent" marketing and advertising expenses must be reimbursed from the Interstate TRS Fund.[7] In the absence of such guidance, NECA recommended that the FCC exclude all marketing and advertising expenses from the VRS rate formula. The FCC's rules require reimbursement of all "reasonable" costs incurred to fulfill the requirements of the ADA however.[8] And, the ADA requires the Commission to "ensure" that VRS is available to all deaf, hard-of-hearing, and speech-disabled ASL users.[9] As the record demonstrates abundantly, marketing efforts are necessary to educate the public about VRS and increase the penetration of VRS within the ASL community.[10] NECA has said nothing to the contrary, and has not even attempted to rebut evidence that its decision to use new definitions of "marketing/advertising" and "outreach" – announced only after providers submitted their cost data for the 2006-07 rate year – as a basis for excluding the former

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4 Comments of Sorenson Communications, Inc. at 6-7, 16-28 (May 17, 2006) ("Sorenson Comments"); Declaration of Cheryl L. Parrino, attached to Sorenson Comments, ¶¶ 5, 33-43 ("Parrino Decl."); *see also, e.g.*, CSD Comments at 5-7; Consumer Groups Reply Comments at 2; Reply Comments of CSD on Payment Formula and Fund Size Estimate for Interstate TRS Fund for July 2006 Through June 2007 at 2 (May 24, 2006) ("CSD Reply Comments"); Hamilton Comments at 5-7; Comments on Proposed Fund Size and TRS Rates of Hands On Video Relay Services, Inc. at 4-5, 11-18 (May 17, 2006) ("Hands On Comments"); Segalman Comments.

5 Parrino Decl. ¶¶ 5, 44.

6 *See* Sorenson Reply Comments at 4 n.9.

7 NECA Reply Comments at 3.

8 47 C.F.R. § 64.604(c)(5)(iii)(E).

9 47 U.S.C. § 225(b)(1).

10 *See, e.g.*, Sorenson Comments at 12-13; CSD Comments at 7-9; Hamilton Comments at 6-8; Verizon Comments at 8-9; Consumer Groups Reply Comments at 2.

category of costs was unlawful.[11] The Commission therefore must reject NECA's recommendation to exclude all marketing/advertising expenses from the VRS rate formula for the 2006-07 rate year.

Outreach

In its January 2006 cost submission to NECA, Sorenson sought reimbursement for its Outreach Education efforts, which comprised more than half of Sorenson's entire outreach budget for 2006-07. Sorenson informed NECA that Outreach Education was a new campaign designed to expand Sorenson's outreach beyond its traditional focus on large cities, which tend to have large deaf populations and relatively robust support networks. By targeting rural communities and small cities, Outreach Education would enable Sorenson for the first time to educate thousands of relatively isolated ASL users about VRS and the unprecedented functional equivalence it promises.[12]

As Sorenson has explained, funding such educational efforts is critical to achieving the ADA's mandate that all deaf ASL users have access to high-quality VRS. Sadly, that mandate is far from being realized. Today, less than 10 percent of all deaf ASL users have access to VRS, and the penetration rate is even lower in the rural and small urban communities that Sorenson seeks to target with its Outreach Education campaign.[13]

In its May 1 filing, NECA – ignoring the universal-access requirement of the ADA – proposed a VRS rate formula for 2006-07 that excluded all of the costs for Outreach Education that Sorenson had projected. In its reply comments, NECA proffered two explanations for this proposal: (1) Sorenson had "projected outreach expenditures for the two-year period that were more than eight times the total of all of the other providers' projected outreach expenditures combined"; and (2) Outreach Education was a new category that "had not previously been funded" by NECA or "previously reported" by Sorenson.[14] Neither explanation has any merit.

As a matter of law, NECA must reimburse all outreach costs that are (i) "reasonable" (*i.e.*, not wasteful, fraudulent, or abusive),[15] and (ii) designed to extend the penetration of high-quality VRS among ASL users who are deaf, hard-of-hearing, or speech-disabled.[16] The record demonstrates that Sorenson's Outreach Education expenses

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[11] *See, e.g.*, Sorenson Comments at 12-14; Hamilton Comments at 3-4; Verizon Comments at 1-8.

[12] *See* Sorenson Comments at 20-22; *see also* Hands On Comments at 17-18.

[13] *See* Sorenson Comments at 5 n.7, 17-18 (comparing VRS penetration to the penetration for voice services).

[14] NECA Reply Comments at 4.

[15] 47 C.F.R. § 64.604(c)(5)(iii)(E).

[16] 47 U.S.C. § 225(b)(1) (FCC "shall ensure" that interstate TRS is available, "to the extent possible," to deaf, hard-of-hearing, and speech-disabled persons).

meet both requirements,[17] and NECA has not attempted to rebut that evidence. The relative size of Sorenson's outreach expenditures is irrelevant to this inquiry. As Sorenson explained in its initial comments,[18] the FCC has chosen a competitive model for the provision of VRS. Under that model, each provider has the freedom to devise an optimal business plan that it believes is likely to differentiate its service from those of other providers and meet the goals of the ADA. One provider may focus its efforts on outreach as a way to achieve these ends; others may choose to expend less on outreach but more on other categories of costs. The fact that one provider – in this case, the provider with the majority of VRS minutes – chose to incur more costs than others in a particular category does not create an unreasonable outlier that must be disallowed, as NECA assumes. Rather, it is an indication of how robust competition causes providers to seek to differentiate themselves through various investment strategies – the very result the Commission sought to achieve when it opted for a competitive model for promoting VRS.

Equally spurious is NECA's suggestion that Outreach Education does not merit reimbursement because it is a new category of costs. As Sorenson has explained to NECA (and as summarized above), Sorenson's Outreach Educational efforts seek to achieve the traditional goal of outreach – to extend the accessibility of VRS to new deaf ASL users, in accord with the ADA. The only novel aspect of Outreach Education is that it targets ASL users who live in rural and small urban communities that have not previously benefited from outreach efforts. NECA and the Commission should commend and encourage such efforts rather than refusing to fund it.

The Commission should reject NECA's suggestion that the FCC "establish[] a set formula percentage (*e.g.*, 2%) that can be added to TRS reimbursement formulas as a standard amount" of outreach costs that may be reimbursed from the Interstate TRS Fund.[19] Although VRS minutes have grown dramatically, the service itself is still in its infancy, as indicated by its dismally low penetration. Under these circumstances, VRS outreach must be more robustly funded than traditional TRS in an effort to meet the universal access mandate of the ADA.[20] Moreover, funding may vary significantly from year to year, as providers ramp up their outreach efforts or experiment with new outreach strategies or target populations, in accord with the FCC's competitive model. The

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17 Sorenson Comments at 20-24; Hands On Comments at 17-18.

18 Sorenson Comments at 14-15.

19 NECA Reply Comments at 4-5 n.13.

20 NECA appears to assume that, as VRS minutes increase and the size of the VRS portion of the Interstate TRS Fund grows, the amount spent on outreach should grow proportionately. From a policy perspective, this assumption is backwards. The greatest amounts of outreach are needed when VRS minutes are relatively low, due to a low penetration among the ASL community. When and if VRS achieves a penetration comparable to that of traditional telephony, by contrast, the need for outreach will be relatively diminished.

Commission should not hamstring such efforts by rigidly limiting outreach reimbursement to a "set formula percentage."

Effect of Increased Demand on Costs

As Commissioner Parrino demonstrated, in its May 1 filing, NECA projected increased demand for VRS but then failed to account fully for the effect increased demand would have on costs. First, NECA inappropriately assumed that certain costs would not vary at all with increased demand. Second, even for those costs that NECA recognized as "variable," it underestimated the degree of variability – *i.e.*, how much the costs would increase as demand grows.[21] These two assumptions contributed significantly to NECA's proposing an unreasonably low VRS rate for the 2006-07 rate year.

In its reply comments, NECA did not attempt to rebut Commissioner Parrino's testimony with respect to either adjustment. Instead, NECA simply claimed that the proposed 2006-07 VRS formula "anticipates that approximately 92 percent of costs are in fact variable."[22] First, NECA's statement that it treated 92 percent of costs as variable is disingenuous at best. In fact, if one uses the per-minute rate resulting from the providers' January 2006 filings, NECA's analysis effectively treated less than 80 percent of the providers' costs as variable.[23] Second, even taken at face value, NECA's statement is not sufficient to show that the 8 percent of costs treated as non-variable should have been so treated, or – more importantly – that the costs treated as variable were ascribed a sufficient degree of variability to allow providers to recover all reasonable costs associated with increased demand.

Pursuant to the Commission's rules, this letter is being submitted for inclusion of the public record in the above-referenced proceeding.

Sincerely,

/s/ Ruth Milkman
Ruth Milkman
Counsel for Sorenson Communications, Inc.

cc: Thomas Chandler
Monica Desai
Jay Keithley
Andrew Mulitz

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21 Parrino Decl. ¶¶ 5, 36-38, 43-44.

22 NECA Reply Comments at 7.

23 NECA treated the following cost components as having at least some degree of variability: $4.247 per minute for interpreters; $0.61 per minute for Category B other than interpreters; and $0.68 for Category C. The sum of those amounts, divided by $7.01, is slightly less than 79 percent.