

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

In the Matter of)	
)	
Telecommunications Relay Services)	CG Docket No. 03-123
And Speech-to-Speech Services for)	
Individuals with Hearing and Speech)	
Disabilities)	

To: Secretary, FCC
For: The Commission

COMMENTS OF HAMILTON RELAY, INC.

HAMILTON RELAY, INC.

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SUMMARY

Hamilton Relay, Inc. (“Hamilton”) welcomes this opportunity to reiterate its support for the Multi-state Average Rate Structure, or MARS Plan. The MARS Plan is a superior rate methodology because it is: 1) easier to implement; 2) offers more regulatory certainty; and 3) more closely approximates providers’ reasonable costs than the current rate methodology or any other methodology suggested in the *Further Notice*. The Commission should adopt the MARS Plan as the rate methodology for traditional TRS, Internet Relay, Speech to Speech services and Captel services. Hamilton believes that the rate methodology should continue to be calculated annually.

To the extent that the Commission does not adopt the MARS Plan but continues to rely on the current rate methodology, Hamilton supports the continued compensation of providers’ reasonable costs associated with marketing, outreach, and other legitimate costs. Hamilton notes that such detailed cost calculations would be unnecessary if the Commission implements the MARS Plan.

Finally, Hamilton believes that the growth of the TRS Fund is an affirmation that the Commission is implementing the Americans with Disabilities Act (“ADA”) requirements effectively, and that the ADA’s powerful mandates are indicative of the fact that Congress fully intended the Fund to expand over time. More funding to match the anticipated continued expansion of the Fund would be available if the Commission expands the pool of Fund contributors by including Internet service providers and others that historically have not been required to pay into the Fund. Hamilton believes that, in general, the Fund is being managed appropriately but supports a greater role for the Interstate TRS Fund Advisory Council.

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Hamilton Relay, Inc. (“Hamilton”), by its counsel, hereby submits these comments in response to the Commission’s July 20, 2006 *Further Notice of Proposed Rulemaking* (“*Further Notice*”), which seeks comment on the appropriate cost recovery methodologies for traditional interstate telecommunications relay services (“TRS”), Speech-to-Speech services (“STS”), Internet Protocol relay services (“Internet Relay”) and Video Relay Services (“VRS”).¹ With respect to traditional TRS and STS, the Commission specifically seeks comments on whether to adopt the proposed Multi-state Average Rate Structure (“MARS”) Plan, which would base the compensation rate paid by the Interstate TRS Fund (the “Fund”) on the average of the intrastate TRS rates paid by individual states and the District of Columbia.²

The MARS Plan, if adopted, would replace what is widely viewed as a flawed cost recovery methodology, which relies on a complicated process of detailed cost data submissions, and an annual assessment by the Fund Administrator and the Commission as to which cost

¹ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Further Notice of Proposed Rulemaking, CG Docket No. 03-123, FCC 06-106 (rel. July 20, 2006) (“*Further Notice*”).

² Hamilton Petition for Reconsideration, CC Docket No. 98-67 (filed Oct. 1, 2004).

submissions may or may not be included in the rate calculation, from which eventually a per minute rate is developed for each relay service, based on a quasi-rate-of-return analysis under Part 32 of the Commission's rules. The MARS Plan, in contrast, offers: 1) simplicity; 2) regulatory certainty; and 3) a competitively-based relay rate. Hamilton appreciates the Commission's decision to seek public comment on the MARS Plan, and takes this opportunity to reiterate the benefits of the MARS Plan and to comment on other proposals raised in the *Further Notice*.

I. The Commission Should Adopt the MARS Plan

The *Further Notice* discusses the many benefits of the MARS Plan over the current cost recovery methodology, so they will not be repeated here, other than to reiterate Hamilton's belief that the MARS Plan will provide a fairer approximation of providers' reasonable costs of providing service, because the rates would be based on established competitively bid rates. However, a number of questions related to the MARS Plan are raised in the *Further Notice*, to which Hamilton responds as follows:

A. Hybrid Approaches and True-Ups Are Unnecessary

The Commission raises the issue of whether to adopt the MARS Plan in whole or in part, "such as in a hybrid approach in which the MARS Plan is used to set a rate cap"³ As Hamilton understands it, such a hybrid approach would mean that providers would be required to submit detailed forward-looking cost data as they do now, and the TRS Fund Administrator and the Commission would assess the data and derive a per-minute rate as they do now. Then the Commission would compare that per-minute rate to the weighted intrastate average rate derived under the MARS Plan, and adopt the lower of the two for the year.

³ *Further Notice*, para. 13.

Hamilton submits that such a hybrid approach would be even more administratively burdensome than the present methodology, and would remove all of the efficiencies to be obtained by adopting the MARS Plan. Moreover, the MARS Plan is based on actual competitively bid rates which in turn are based on actual costs. In contrast, a hybrid plan would still rely on forward-looking costs that may or may not be accurate. Finally, the MARS Plan provides every incentive for providers to be cost-conscious, so there is no need to punish providers with a potentially lower rate than the competitive MARS rate. If the underlying rate is competitively-based, which it would be under the MARS Plan, then a rate cap would only punish those relay providers that are more cost-conscious than other providers.

In the same vein, allowing for a true-up would provide no incentive for providers to be cost-conscious, because under a true-up regime, whatever the provider spends is recouped. True-ups may make sense when the cost recovery methodology is based on forward-looking costs, where the costs are necessarily estimates. It makes no sense to have a true-up in connection with competitively established rates, because it would defeat the purpose of having a competitively based rate if every provider could recoup all costs associated with providing the service.

B. Conversation Minutes vs. Session Minutes

The Fund presently compensates providers for conversation minutes, which are limited to actual conversation time between the calling and called party, as opposed to session minutes, which include call set-up time and any other time that the Communications Assistant is on the call.⁴ Because some states compensate for conversation minutes and some states compensate for session minutes, Hamilton proposed that a conversion factor be used in connection with the MARS rate. To do so, the Commission must collect both session minutes and conversation

⁴ *Id.* para. 14.

minutes for each calendar year for each state. Then a conversion factor can be determined based on whether the Commission decides to compensate based on a session minute or conversation minute basis.⁵

C. Rounding and Circularity

The Commission also raised the issue of rounding. MCI, in its comments supporting the MARS Plan, noted:

[S]tate rates are universally based on full minute rates — i.e., each call is rounded up to the closest minute. In contrast, NECA only allows rounding of reported conversation time. Had NECA’s methodology been utilized by states, total minutes, both conversation and session, would have been approximately 14 percent less according to MCI estimates. Thus, Hamilton’s methodology understates its estimate of the average interstate rate by approximately 14 percent. If the Commission utilizes Hamilton’s methodology, it should make state rates consistent with federal rates, by correcting for both differential session/conversation measuring at the state level, but also differential rounding methods between the federal and state jurisdictions.”⁶

Hamilton does not object to harmonizing the federal and state methods of rounding. For the record, Hamilton rounds to the nearest 100th of a minute.

Finally, Hamilton does not believe that circularity will be a problem because, as far as Hamilton is aware, California is the only state that uses the interstate TRS rate. To avoid any circularity problems, Hamilton believes that California’s intrastate rate should not be used as long as it is tied to the interstate rate.

D. The MARS Plan Should Be Used for Traditional TRS, Internet Relay and STS

Most states compensate traditional TRS and STS services at the same rate. Internet Relay tentatively has been determined to be an interstate service and thus has no intrastate

⁵ Any information the Commission obtains from the states may be kept confidential to the extent necessary. Further details on the conversion are provided in Hamilton’s Petition for Reconsideration filed on October 1, 2004.

⁶ MCI Comments on Petition for Reconsideration, at 3 (filed Nov. 15, 2005).

analogue. However, as Hamilton has noted in previous filings,⁷ the costs associated with providing Internet Relay and traditional TRS are essentially the same. In fact, this year's compensation rates for traditional TRS and Internet Relay are virtually the same (\$1.291 and \$1.293, respectively), and Hamilton believes that last year's gap was an aberration. Hamilton therefore disagrees with the Commission's decision to separate the traditional TRS and Internet Relay interstate rates,⁸ and opposes any separation of the traditional TRS and STS rates, because it would unnecessarily complicate the ratemaking process with little if any resulting benefit. Instead, the Commission should use the MARS Plan as the compensation methodology for all three services so that the compensation rate is the same for all three.⁹

E. The MARS Plan May be Expanded to Captel

Hamilton also believes that the interstate Captel compensation rate may be calculated according to the MARS Plan. Each state that has established intrastate Captel service has established a Captel compensation rate, based on competitive bidding. Those competitively bid rates could be combined and averaged to calculate the interstate Captel compensation rate.

F. The MARS Rate Should Continue to Be Calculated Annually

Current Commission rules require the relay rates to be calculated annually. Hamilton believes this practice should continue if the MARS Rate plan is adopted. Although some commenters have proposed a longer period between rate adjustments,¹⁰ Hamilton believes that a two-year or longer period between adjustments would not capture rate changes that occur in

⁷ Hamilton Comments, CC Docket No. 98-67, at 4 (filed May 13, 2005).

⁸ *Telecommunications Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, FCC 05-135 (rel. June 28, 2005).

⁹ Spanish Relay services also could be compensated at the same rate, because the costs associated with that service are essentially the same as traditional TRS.

¹⁰ *See, e.g.*, MCI Comments on Petitions for Reconsideration, at 4 (filed Nov. 15, 2005).

some states on an annual basis. Hamilton is aware of about seven states that change their per-minute rate annually. Using the most recent information from these states will ensure that the interstate TRS rate reflects the current state of competition at the state level. Moreover, the MARS Plan is so administratively easy that an annual rate can be calculated without undue administrative burden.

II. Alternative Cost Methodologies Are Inferior to the MARS Plan

The Commission also is seeking comment on alternative methods for calculating the interstate TRS rates. For example, the Commission suggests that the interstate rate could be the same as the intrastate rate paid for a similar call coming into the relay center and handled by the same provider.¹¹ For example, an interstate TRS call originating in Maryland would be compensated at the intrastate rate for calls in Maryland.

Hamilton believes that this approach would be an extremely overcomplicated way of calculating the rate. To implement this alternative plan, the TRS Fund Administrator would need to solicit voluminous call detail records from each provider, track all fifty intrastate rates, and match the millions of individual interstate calls to the relevant intrastate rate. The administrative burden of doing so would be enormous, both for the Fund Administrator and the providers, and far more burdensome than the present system.

In contrast, the MARS Plan is far *less* burdensome than the present system and would represent a better approximation of providers' reasonable expenses because the rate would be based on an average of intrastate rates. The alternative plan suggested by the Commission also does not account for the fact that some states use session minutes and some states use conversation minutes, leading to an additional complication that the MARS Plan already

¹¹ *Further Notice*, para. 20.

resolves. In addition, there is a danger that the alternative plan could lead to cream-skimming, whereby providers are drawn to states with the highest intrastate rates because they know that the interstate rate from calls originating from those states also will be higher. This could lead to diminished relay service in states with lower intrastate rates.

Finally, it would be even more burdensome and complicated to *compare* the rate derived using the Commission's alternative plan with the MARS Plan, because the fund administrator would need to go through the exhausting effort of calculating the alternative plan's rate and comparing it to the MARS rate. From a paperwork reduction viewpoint, the alternative plan or a comparison of the alternative plan to the MARS Plan are essentially non-starters. The better approach is to simply adopt the MARS Plan.

III. Detailed Cost Calculations Would Be Unnecessary Under the MARS Plan

The Commission has requested comments on whether certain costs, such as marketing, outreach, legal costs, lobbying costs, executive compensation and overhead costs should continue to be compensated from the Fund. That the Commission must seek comments at such a granular level is indicative of the problem with the current rate methodology. None of these costs would need to be examined if the Commission simply adopted the MARS Plan, because the MARS Plan is based on competitive rates and, under a long line of Commission precedent, competitively based rates are presumptively "reasonable." The Commission need inquire no further.

Nonetheless, Hamilton is providing comments on these various costs in the event that the MARS Plan or another non-cost-based plan is not adopted by the Commission.

A. Marketing and Outreach Are Necessary and Should Be Compensated

Commission rules require relay providers to “engage in outreach activities to ensure that ‘callers in their service area are aware of the availability and use of all forms of TRS.’”¹² Hamilton takes this obligation seriously, and believes that there is intrinsically no difference between “outreach” and “marketing,” and that any costs related to raising awareness about relay should be compensable. Therefore, Hamilton disagrees with the Commission’s tentative conclusion that provider-specific “branded” marketing may not be compensated from the Fund.¹³

Prohibiting compensation for branded marketing ignores the fact that there are many relay providers, all of whom are competing to provide the best relay service possible, with different products and service offerings. Providers need to differentiate themselves from competitors through advertising in order to raise awareness of new technology and new services available. If the Commission discourages marketing by failing to compensate providers for any branded marketing, the Commission will also be discouraging the development of improved relay technologies, in contravention of the Communications Act.¹⁴

Compensating providers for branded marketing is permitted by the Commission in other instances, and thus should be permitted for relay providers as well. For example, eligible carriers under the High Cost Universal Support program may recover costs associated with marketing pursuant to Part 32 accounting rules.¹⁵ Given that the TRS rules also reference Part 32

¹² *Further Notice*, para. 34 (quoting 47 C.F.R. § 64.604(c)(3)).

¹³ *Further Notice*, para. 36.

¹⁴ 47 U.S.C. § 225(d)(2) (“The Commission shall ensure that regulations . . . do not discourage or impair the development of improved technology.”).

¹⁵ *See* 47 C.F.R. § 54.301(b) (referencing “Marketing Expense[s]” allowable under Account 6610); *id.* § 32.6110.

accounting rules,¹⁶ Hamilton believes that relay providers should be eligible to recover costs associated with marketing.

Furthermore, if providers are not compensated for their reasonable marketing costs, (regardless of whether the marketing is “branded” or not), there will be no incentive for providers to continue their outreach efforts beyond the minimum requirements, which even the Commission acknowledges are inadequate.¹⁷

Finally, restricting providers to non-branded outreach could lead to consumer confusion, because consumers will be unfamiliar with the various names of the relay providers. Such non-branded outreach efforts could be confused with telemarketing. Indeed, Hamilton recently had a complaint from a hearing person who thought that relay calls were telemarketing calls. The individual complained that he had registered his telephone numbers on the National Do Not Call Registry and should not be receiving these calls. It is exactly this type of situation that outreach and branded marketing are designed to remedy, by improving awareness in both the hearing and deaf communities about all forms of relay, so that such problems do not become widespread and the use of relay continues to expand. In keeping with this goal, providers should be compensated for their efforts.

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.¹⁸ Hamilton believes that the increases are due to improved relay services and the fact that more hearing people are

¹⁶ See 47 C.F.R. § 64.604(c)(5)(iii)(C); *id.* § 64.604(c)(5)(iii)(E).

¹⁷ 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.

¹⁸ See <http://www.neca.org/media/0206TRSIPVRS COMPARISON.pdf>. The NECA chart indicates an approximate threefold increase in the number of all interstate relay minutes in as many years.

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, 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.

B. Other Costs

The Commission's discussion of legal and lobbying costs, overhead costs and executive compensation shows that current rate methodology is getting more and more complicated. Again, the Commission and the Fund Administrator would not have to examine the minutiae of providers' costs if the Commission were to adopt the MARS Plan for traditional TRS, STS and Internet Relay.¹⁹ Nonetheless, Hamilton believes that these costs are reasonable because they are necessary to assure quality relay service and compliance with the minimum operating standards. The Commission cannot have a cost-based rate system and continually remove costs from the rate base. A point will come when so many costs have been removed from the rate base that the cost of providing service is more expensive than the recovered costs. When that point is reached, providers will begin to exit the market, and consumers will suffer by having fewer choices (or possibly no choice) of providers.

¹⁹ As Hamilton noted in its Petition for Reconsideration, the MARS Plan could not be applied to VRS because there is no VRS intrastate equivalent and (unlike Internet Relay) the costs associated with providing VRS are very different.

IV. TRS Fund Size

The growth of the Fund is an affirmation that the Commission has tapped a real need in the community as Congress envisioned, and that TRS is working to help deaf and hard of hearing people communicate more effectively. More people are being served, the technology is improving as envisioned, and better services are being provided. The Commission should congratulate itself that it is moving in the right direction, and is implementing the ADA requirements effectively. The ADA's powerful mandatory language is indicative of the fact that Congress fully intended the Fund to expand over time. Hamilton believes that, in order for the TRS program to remain successful, the Fund will need to continue to grow so that such issues as Internet fraud, E911, uniform numbering, and the cost of compliance with expiring waivers are handled adequately.

Hamilton notes that the Commission is considering whether to expand the pool of contributors to the Fund by including Internet service providers and others that historically have not been required to pay into the Fund. Hamilton supports this expansion of the support base because the Fund is essential to fulfilling the ADA obligations of these providers of alternative voice communications (much like VRS is a substitute for traditional relay). To the extent the support base is expanded, Hamilton believes that the Commission will have more funding to carry out the congressionally mandated TRS program.

V. Management and Administration of the Fund

The Commission also seeks comment on ways to improve administration of the Fund.²⁰ Hamilton believes that, in general, the Fund is being managed appropriately. As Hamilton has noted in previous comments, however, the Interstate TRS Fund Advisory Council ("Council")

²⁰ *Further Notice*, para. 46.

has the potential to be a useful oversight mechanism, and to date the Council has been underutilized.²¹ Hamilton encourages the Commission to interpret the role of the Council broadly and to clarify that the Council has ready access to any data created by or provided to the Fund Administrator. This oversight function of the Council will help prevent fraud, waste and abuse in the TRS program by allowing the Council to bring potential problems to the attention of the Commission.

Hamilton does not believe that providers should be required to submit financial statements, earnings reports or parent/affiliate information to the Fund Administrator, as proposed in the *Further Notice*.²² Providers that are federally certified must submit much of this data at the time of certification, and state-certified providers are required to submit much of this data to the states, so submitting it as well to the Fund Administrator would be redundant in most instances. Nor is it clear what the Fund Administrator would do with this information if providers were required to submit it. Hamilton believes that there are more effective oversight mechanisms. Indeed, the Fund Administrator would not need this information if the MARS Plan is adopted because cost data would no longer be relevant.

VI. Conclusion

Hamilton urges the Commission to adopt the MARS Plan for traditional TRS, STS and Internet Relay, because it represents the most cost effective and administratively convenient

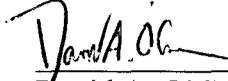
²¹ Hamilton Comments, at 8-10 (filed May 17, 2006).

²² *Further Notice*, para. 48.

method for determining the “reasonable” costs for which relay providers are entitled to be compensated.

Respectfully submitted,

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