

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

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

To: Secretary, FCC  
For: The Commission

**OPPOSITION TO  
MOTION FOR PROTECTIVE ORDER**

AT&T Inc., Hamilton Relay, Inc. and Sprint Nextel Corporation (collectively, the “TRS Providers”), by their respective counsel and pursuant to Section 1.45(b) of the Commission’s rules, 47 C.F.R. § 1.45(b), hereby oppose the May 20, 2009 “Motion for Protective Order” (“Motion”) submitted by Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”) in the above-captioned proceeding.

The TRS Providers, while reluctant to oppose consumer group involvement in Commission proceedings, must respectfully object to the Motion because of the potential damage that could be caused by the essentially limitless number of proposed parties seeking to review the TRS Providers’ confidential data submissions, and by the very real potential for such information to be inadvertently released on a widespread basis given the number of parties that may be subject to the proposed release of data. For this reason, and the reasons set forth below, the TRS Providers submit that the Motion is procedurally and substantively flawed and should be dismissed.

I. The Motion Is Procedurally Defective and Inconsistent with Precedent

In seeking a release of confidential information submitted by the TRS Providers, TDI relies on Sections 4(i) and 4(j) of the Communications Act, as amended, and Section 0.457(d) of

the Commission's rules.<sup>1</sup> However, neither Section 0.457(d) nor the cited provisions of the Communications Act authorize the release of confidential information submitted by the TRS Providers. Sections 4(i) simply provides general ancillary jurisdiction powers to the Commission, and Section 4(j) deals with several Commission administrative issues, none of which appears to be relevant here. Finally, Commission rule Section 0.457(d) deals with the treatment of materials submitted to the Commission on a confidential basis, but it contains no mechanism or criteria for the release of such information other than to require a "persuasive showing."

What TDI is required to file, and has failed to file, is a Freedom of Information Act ("FOIA") request pursuant to Section 0.461 of the Commission's rules.<sup>2</sup> Accordingly, a number of procedural protections bar the grant of TDI's requested relief. Because TDI does not meet the procedural or substantive requirements of a FOIA request in any event, the Motion should be dismissed.<sup>3</sup>

Specifically, Section 552(b)(4) of the Administrative Procedure Act expressly exempts from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."<sup>4</sup> The data submissions that the TRS Providers have submitted for years, and continue to submit to the Administrator annually, are filled with highly sensitive commercial and financial information that has long been treated by the Administrator

---

<sup>1</sup> Motion at 1 (citing 47 U.S.C. §§ 151(i), (j); 47 C.F.R. § 0.457(d)).

<sup>2</sup> 47 C.F.R. § 0.461.

<sup>3</sup> Thus, even if TDI were to file a FOIA request, the TRS Providers submit that TDI would be unable to meet the threshold requirements justifying a release of the TRS Providers' confidential data submissions.

<sup>4</sup> 5 U.S.C. § 552(b)(4).

and the Commission as competitively sensitive and confidential.<sup>5</sup> Under Commission rules, TDI must make a “persuasive showing” to override these statutory protections, which it has not done.<sup>6</sup>

The TRS Providers note that additional procedural layers of protection are afforded to TRS providers that submit confidential information to the Commission. Specifically, since 1993, Section 64.604(c)(iii)(I) of the Commission’s rules has provided that the Administrator “shall keep all data obtained from . . . TRS providers confidential and shall not disclose such data in company-specific form unless directed to do so by the Commission.”<sup>7</sup> Thus for some 16 years, the TRS Providers have relied upon Section 64.604(c)(5)(iii)(I) to provide the Administrator and the Commission with a candid picture of the TRS Providers’ commercially sensitive cost data and other information, under the reasonable assumption that such information is confidential and not subject to disclosure. In those 16 years, the TRS Providers are not aware of any situation in which the Commission has directed the Administrator to disclose TRS provider data to any non-governmental entity in a company-specific form. Indeed, to disclose that information in such a manner to third parties would seriously damage the Commission’s carefully balanced decision to

---

<sup>5</sup> See *Telecommunications Relay Services, and the Americans with Disabilities Act of 1990*, Third Report and Order, 8 FCC Rcd 5300, ¶ 22 (1993). That a company’s underlying cost data is competitively sensitive is beyond dispute. See *General Communications, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd. 5373, ¶ 10 (1996) (withholding data regarding service and equipment costs and service demand); see also *SBC Communications Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 13704, ¶ 3 (2008) (noting that Enforcement Bureau had treated “costs and pricing data” as confidential in underlying investigation).

<sup>6</sup> 47 C.F.R. § 0.457(d)(2); *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd. 24816, ¶¶ 19-20 (1998) (“*Confidentiality Order*”).

<sup>7</sup> 47 C.F.R. § 64.604(c)(iii)(I). Because the presumption of confidentiality is codified in the Commission’s rules, the TRS Providers have no burden of first proving that such treatment is appropriate. *Confidentiality Order* at ¶ 19. Rather, TDI bears the entire burden of making a persuasive showing as to the reasons for inspection of that confidential information. *Id.* TDI’s Motion does not meet that burden.

permit TRS providers' cost data to be submitted on a confidential basis and to be published in a non-company specific aggregate form.

Furthermore, the Commission has a longstanding policy of treating information obtained from carriers during audits as confidential.<sup>8</sup> TRS providers' cost data are submissions of information mandated and protected by rule and thus are the equivalent of audits.<sup>9</sup> Indeed, the Commission's Office of Managing Director ("OMD") has directed the Administrator to review and verify, on a monthly basis, all call data submitted each month by each TRS provider, to ensure that reimbursements from the Interstate TRS Fund are legitimate and correct.<sup>10</sup> This directive is plainly a request for monthly audits of TRS providers, and the cost data submissions resulting from OMD's directive, and other cost data submissions by the TRS Providers, should be afforded the same confidential protections as the Commission has traditionally extended to carriers during audits, in light of the carriers' "legitimate interest in protecting confidential information."<sup>11</sup>

II. Any Potential Benefits Derived from Releasing the Data Would Be Outweighed By the Potentially Serious Competitive Harm to the TRS Providers

In addition to the procedural infirmities noted above, the TRS Providers submit that the significant concerns regarding possible public release of the TRS Providers' confidential filings outweigh any potential benefits of granting TDI's Motion. As noted, TDI has suggested that

---

<sup>8</sup> *Confidentiality Order* at ¶ 54. The Commission has "only rarely departed from the general policy of withholding audit information from public disclosure." *Id.* at ¶ 55. *See also* 47 U.S.C. § 220(f).

<sup>9</sup> *See Confidentiality Order* at ¶¶ 44-45; 47 C.F.R. § 64.604(c)(5)(iii)(I).

<sup>10</sup> *See* Letter from Anthony J. Dale, Managing Director, FCC Office of Managing Director, to Bill Hegmann, President and Chief Executive Officer, NECA (Oct. 30, 2008), *available at* [http://www.fcc.gov/omd/trs-letters/2008/2008.Oct.30-Internal\\_Controls-TRS\\_Fund\\_Administration.pdf](http://www.fcc.gov/omd/trs-letters/2008/2008.Oct.30-Internal_Controls-TRS_Fund_Administration.pdf).

<sup>11</sup> *Confidentiality Order* at ¶ 54. The Commission has indicated its agreement that such "disclosure could result in competitive injury to those who provide [confidential] information to the Commission." *Id.*

“other advocacy groups” could seek to obtain the same confidential information being requested by TDI. TDI is in essence suggesting that access to that information be given to a limitless number of interested parties, citing a non-exhaustive list of potential parties to the requested protective order.<sup>12</sup> The TRS Providers submit that this open-ended request is fraught with the potential for inadvertent disclosure of highly sensitive financial information which cannot be recaptured once publicized. TDI’s request should be rejected for this reason as well.

Moreover, any information gleaned from TDI’s review of the TRS Providers’ confidential data submissions would be of little value to the public, in light of the fact that TDI’s analysis of that information could not be cited or used in its comments in this proceeding. Combined with the very real risk of inadvertent publication, the limited value of the disclosure simply does not merit a grant of TDI’s request.

Finally, the TRS Providers submit that the disclosure requested by TDI goes beyond the scope and intention of the Commission’s recent Notice of Proposed Rulemaking (“*NPRM*”) in this proceeding.<sup>13</sup> In the *NPRM*, the Commission has asked the very narrow question of whether the current VRS rates should be kept or whether the Commission should “adopt new VRS rates for each tier that correlate to providers’ cost data, *as reflected in NECA’s May 1st filing . . .*”<sup>14</sup> The providers’ cost data is already in the public record, in non-company specific form as contemplated by Section 64.604(c)(iii)(I) of the rules, as reflected in NECA’s May 1 filing. It is

---

<sup>12</sup> TDI Motion at 1 & n.1.

<sup>13</sup> *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Public Notice and Notice of Proposed Rulemaking, FCC 09-39 (rel. May 14, 2009).

<sup>14</sup> *Id.* ¶ 11.

this aggregated data upon which the Commission seeks comment.<sup>15</sup> For this reason as well, TDI has not made a persuasive showing as to why disclosure is warranted here, even with a protective order.<sup>16</sup>

Respectfully submitted,

Robert Vitanza  
General Attorney  
AT&T Services, Inc.  
1120 20th Street, NW, Suite 1000  
Washington, DC 20036  
Tel: (202) 457-3076  
E-mail: robert.vitanza@att.com

David A. O'Connor  
Counsel for Hamilton Relay, Inc.  
Wilkinson Barker Knauer, LLP  
2300 N Street, NW, Suite 700  
Washington, DC 20037  
Tel: (202) 783-4141  
E-mail: doconnor@wbklaw.com

Michael B. Fingerhut  
Senior Attorney, Government Affairs  
Sprint Nextel Corporation  
2001 Edmund Halley Drive  
Reston, VA 20191  
Tel: (703) 592-5112  
E-mail: Michael.B.Fingerhut@sprint.com

June 1, 2009

*Submitted via ECFS*

---

<sup>15</sup> Thus, the Commission's stated basis for making information available for public inspection, which relates to the adequate notice requirements of the APA, is not of concern here. *See Confidentiality Order* at ¶ 44.

<sup>16</sup> To the extent that TDI has specific concerns for the manner in which NECA has presented its information to the Commission, *see* Motion at 4 n.10, the TRS Providers submit that the Commission could instruct NECA to clarify such information without disclosing company-specific data consistent with the confidentiality provisions of Section 64.604(c)(iii)(I).

**CERTIFICATE OF SERVICE**

I, Paula Lewis, hereby certify that a copy of the foregoing filing was served this 1<sup>st</sup> day of June, 2009, by electronic mail unless otherwise noted, to the individuals listed below:

Tamar E. Finn, Esq.  
Eliot J. Greenwald, Esq.  
Jeffrey R. Strenkowski, Esq.  
Bingham McCutchen LLP  
2020 K Street, NW  
Washington, DC 20006  
*Counsel for Telecommunications for the Deaf and Hard of Hearing, Inc.*  
(via First Class mail)

Claude L. Stout  
Executive Director  
Telecommunications for the Deaf and Hard of Hearing, Inc.  
8630 Fenton Street, Suite 604  
Silver Spring, MD 20910  
(via First Class mail)

John A. Ricker  
Director- Universal Service Support  
National Exchange Carrier Association, Inc.  
80 South Jefferson Road  
Whippany, NJ 07981  
jricker@neca.org  
(also provided a copy via First Class mail)

Cathy Seidel  
Consumer and Governmental Affairs Bureau  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554  
Cathy.Seidel@fcc.gov

Thomas Chandler  
Consumer and Governmental Affairs Bureau  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554  
Thomas.Chandler@fcc.gov

Suzanne Tetreault  
Consumer and Governmental Affairs Bureau  
Federal Communications Commission

445 12th Street, SW  
Washington, DC 20554  
Suzanne.Tetreault@fcc.gov

Diane Mason  
Consumer and Governmental Affairs Bureau  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554  
Diane.Mason@fcc.gov

Andy Mulitz  
Consumer and Governmental Affairs Bureau  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554  
Andrew.Mulitz@fcc.gov

Lisa Boehley  
Consumer and Governmental Affairs Bureau  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554  
Lisa.Boehley@fcc.gov

James Lande  
Wireline Competition Bureau  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554  
Jim.Lande@fcc.gov

Mark Stephens  
Office of the Managing Director  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554  
Mark.Stephens@fcc.gov

Kent R. Nilsson  
Office of Inspector General  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554  
Kent.Nilsson@fcc.gov

Best Copy and Printing, Inc.  
Room CY-B402  
445 12th Street, SW  
Washington, DC 20554  
fcc@bcpi.web

  
Paula Lewis