

**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)

**Telecommunications for the Deaf and Hard of Hearing, Inc.
Reply to Oppositions to Motion for Protective Order**

Introduction

Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), through its undersigned counsel, hereby replies to the Opposition of Sorenson Communications, Inc. (“Sorenson Opposition”) and Opposition to Motion for Protective Order filed jointly by AT&T, Inc., Hamilton Relay, Inc., and Sprint Nextel Corporation (“Joint TRS Providers Opposition”) to TDI’s Motion for Protective Order (“Motion”) filed with the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned case (the “Proceeding”). As TDI stated in the Motion, TDI is well aware of the sensitive nature of the data it has requested access to. However, TDI reminds the Commission, Sorenson, and the Joint TRS Providers that it has proactively taken measures to demonstrate its willingness to ensure that the requested information is not publicly disclosed: the entry of the requested protective order.

TDI and the Consumer Groups¹ (“Consumer Groups”) represent the members of the public that use Video Relay Services (“VRS”). For many years, TDI and the other Consumer Groups have been in the middle of a “tug-of-war” between Telecommunications Relay Service (“TRS”) providers and the FCC over standards, compensation, and hosts of other issues. Over the years, the Consumer Groups have attempted to comment on proposed VRS rates based on the scant information available to them, doing the best they can by providing theoretical arguments without any solid factual foundation. This system is

¹ Association of Late-Deafened Adults, Inc. (“ALDA”), National Association of the Deaf (“NAD”), Deaf and Hard of Hearing Consumer Advocacy Network (“DHHCAN”), California Coalition of Agencies Serving the Deaf and Hard of Hearing (“CCASDHH”), American Association of the Deaf-Blind (“AADB”), and Hearing Loss Association of America (“HLAA”) (collectively, the “Consumer Groups”).

fraught with the potential for arbitrary decisions that do not benefit the public, TRS consumers, or TRS providers. The time has come to put this to an end.

I. The Scope of TDI's Request is Not Overbroad

Sorenson and the Joint TRS Providers go through great lengths to imply that TDI's request would grant VRS cost data access to a virtual universe of persons. In reality, the request made by TDI was proscribed: TDI asks for access by representatives of certain, particular public interest groups: TDI, the Association of Late-Deafened Adults, Inc. ("ALDA"), National Association of the Deaf ("NAD"), Deaf and Hard of Hearing Consumer Advocacy Network ("DHHCAN"), California Coalition of Agencies Serving the Deaf and Hard of Hearing ("CCASDHH"), American Association of the Deaf-Blind ("AADB"), and Hearing Loss Association of America ("HLAA") (again, collectively, the "Consumer Groups"). TDI and the Consumer Groups have acted jointly with one another on a host of various topics and issues before the FCC and other agencies over the past several years. They are well-known, specific, and not in the business of providing VRS services. The interest they have is not to shut funding off for VRS. Rather, it is to ensure that TRS and VRS services are made available to end users, that providers offer services and features demanded by consumers, that providers are fairly, but not overly compensated, and that the services as well as technical advances will be available for years to come.

As TDI proposed, each Consumer Group should have access to the requested data because each group has an interest in promoting the interests of its members. Such access can be granted through outside counsel, consultants, or representatives of the groups themselves, so long as the person seeking access has no conflict of interest that should bar their access to such information (such as, for example, a business relationship with a VRS provider or a family member that works for a VRS provider). TDI does not propose that other VRS providers be granted access, nor does its request open doors for any person to walk in off the street and obtain access to the requested information. To be clear: TDI's request covers

TDI and at most six other listed public interest groups.² The world simply does not abound with crowds of “consumer groups” interested in knowing how VRS rates are calculated.

Under its proposal TDI would not pass the information to the other Consumer Groups--each individual person requesting access would be required to sign the confidentiality agreement, and be made subject to investigation by the Enforcement Bureau and possible sanction by the FCC for violation of a Commission order. TDI’s proposal is sufficient to ensure that no sensitive information is inappropriately disclosed. Should the VRS providers have specific concerns with a particular individual requesting such access on behalf of TDI or one of the Consumer Groups, they can seek remedy from the FCC at that time (perhaps by seeking additional safeguards or requesting that a different representative be granted access). Shutting the door to all requests, however, is not a reasonable response to TDI’s request.

II. The FCC Regularly Grants Access to Sensitive Information Through Protective Agreements, Even Amongst Competitors

The FCC regularly grants access to sensitive data amongst interested parties to Commission proceedings. In doing so, the FCC gains valuable industry insight on proposed rulemakings and other administrative operations. These data-sharing operations are typical, do not require FOIA requests, and often include the sharing of information even among competitors, with the proviso that those individuals who participate in marketing and other business decisions of the competitors do not have access to the data.

For example, in the recent Time Warner spin-off of Time Warner Cable, Time Warner granted access to appropriate representatives of RCN, a Time Warner Cable competitor, to review very sensitive programming access agreements.³ In fact, the FCC has issued protective orders in numerous cases

² See Motion, n.1. In an effort to compromise with the VRS Providers on its request, TDI is willing to explore options to limit exposure of the cost data to a limited number of representatives of the Consumer Groups, or to otherwise ensure that the information is not made available to anybody within any of the Consumer Groups in a position to use that information to the VRS Providers’ detriment. Given the nature of the business of TDI and the Consumer Groups, TDI is unsure of exactly how to make such alterations to its request, but nonetheless, TDI is willing to work with the FCC and the VRS Providers to reach reasonable accommodations.

³ See, e.g., Protective Order issued in FCC Dockets 08-120 & 08-157 on November 10, 2008.

involving mergers among telecommunications service providers to allow interested parties the ability to analyze sensitive data to ensure that the mergers were in the public interest.⁴

A review of Protective Orders released by the FCC in recent weeks revealed a particularly analogous one allowing certain, specific, public interest groups access to sensitive carrier data. Specifically, the Public Safety and Homeland Security Bureau issued a Protective Order granting the National Emergency Number Association, the Association of Public Safety Communications Officials, and the National Association of State 9-1-1 Administrators access to sensitive 911/E911 redundancy, resiliency and reliability reports filed with the Commission by a number of local exchange carriers, commercial mobile radio service providers and interconnected Voice over Internet Protocol service providers.⁵ As stated in that Protective Order. “These reports are presumed to be confidential.”⁶ However, “NENA, APCO, and NASNA have informed the Bureau that they would like access to the 911 Reports. Because the 911 Reports contain proprietary and confidential information, the Bureau hereby adopts, pursuant to its delegated authority, this Protective Order (Order) to ensure that the 911 Reports are afforded adequate protection.”⁷ The FCC had no problems allowing certain public interest groups access to carrier data in that case--and concerns that the requestors of such data are not themselves “carriers” are specious. In sum, arguments that VRS Provider cost data is “too sensitive” to share with seven specifically listed, non-VRS-competitor, consumer groups, even under an FCC protective order, are spurious.

⁴ See, e.g., Protective Orders issued in the XM/Sirius merger proceeding (MB Docket No. 07-57, July 11, 2007). See also Letter issued by the Media Bureau in that proceeding on July 11, 2007, which states as follows: “The Protective Order is carefully designed to provide robust protection to proprietary and confidential information filed with the Commission, including responses to Information and Document Requests, while at the same time providing *other parties to Commission proceedings with a meaningful opportunity to review and comment on the evidence submitted in the record.*” (emphasis supplied). See also the Protective Orders issued in the AT&T/BellSouth merger (WC Docket No. 06-74, May 12, 2006); Verizon/MCI (WC Docket No. 05-75, Mar. 10, 2005).

⁵ See *Implementation of Section 12.3 of the Commission’s Rules*, Protective Order, DA 09-1077 (rel. May 15, 2009), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-1077A1.pdf.

⁶ *Id.*, ¶ 2.

⁷ *Id.*, ¶ 3.

Further, simply because the confidential data can not be placed into the public record does not mean that TDI's analysis would not be useful. If the data demonstrates, for example, that the VRS compensation rate is fair, TDI does not need to disclose all of the steps and analyses it undertook to reach that conclusion, and to place it all into the public record. Claims that the data itself is not useful also misses the point. As a matter of policy, TDI should have the opportunity to determine whether the data is useful or not. If not, TDI may then question why NECA and the FCC rely on "non-useful" data to make major policy decisions affecting TRS consumers in the first place.

III. Access to the Data is Necessary for Informed Public Input on Major Policy Decisions

Individual VRS providers have different operations, costs, and efficiencies. The information provided by NECA does little to explain these differences, how the modification in VRS rates are calculated, where individual VRS provider resources are utilized, where efficiencies in the provision of VRS may be found, or other useful information to guide the FCC, TDI, or other Consumer Groups, to provide meaningful feedback on the proposed compensation rate modification. Individual VRS cost data is needed so that TDI and other interested, non-competitor parties can provide constructive responses on the proposed changes. TDI believes that the actual VRS provider cost data provided to NECA, on which federal TRS Fund compensation is ultimately based, will provide valuable insight on how the proposed VRS compensation rates are calculated, whether the proposed rates are reasonable, and perhaps where efficiencies in VRS providers' cost structures may be found.

In particular, the Consumer Groups have no way to assess whether the three-tier rate structure is rationally-based, and if not, how to modify the three-tier structure so as to assure a just and reasonable compensation rate to all reasonably efficient VRS providers, whether they be small or large. Any compensation rate must be competitively neutral between VRS providers to ensure that they are equally able to compete with one another on a level playing field. Without access to the data, the Consumer Groups cannot assess the viability of the rate differences between the tiers, or whether a different structure, such as a four-tier structure would better serve the public interest. Prior to the enactment of the three-tier structure in 2007, aggregate industry data was sufficient to establish the VRS compensation

rate. This is the first VRS rate proceeding since the enactment of the three-tier structure, so this is the first time the existence of the three-tier structure justifies the need for the Consumer Groups to examine individual cost data.

TDI and the Consumer Groups have worked proactively with the FCC on policy issues, and are proud of the role both sides have played in developing the many diverse forms of TRS that are now offered in the market to the deaf and hard of hearing populations. Commission policy, however, is not confined to the minimum traditional TRS/Internet-based TRS operating standards TRS providers must follow. The FCC and other interested parties must ensure that the rates are structured to support those standards. The rates must be determined in a way that makes policy work to the benefit of all, and ensures that TRS services, including VRS as well as technical advances in services, are available for years to come.

The VRS providers are responsible for providing services to the maximum benefit for their users at the least possible cost to the Interstate TRS Fund. The FCC is required to establish policies and rate mechanisms to ensure TRS services are being provided at a reasonable cost to the Interstate TRS Fund, yet not discourage innovation and technical improvements. Consumer groups must make the consumers' expectations known and made clear to both the FCC and the TRS industry, as well as to examine and evaluate whether the FCC and the industry are doing their part to "serve the public interest." Without informed public participation, the demands of the public (and in this case TRS consumers) will not be met, and the integrity of the Interstate TRS Fund may be put into jeopardy. Simply put: the input from TRS users must be given paramount importance by the Commission as it establishes TRS policies, regulations, and rate mechanisms. The VRS providers forget how VRS and other forms of TRS came into being: consumer demand. That consumer demand drives VRS services. As representatives of the user communities, TDI and the Consumer Groups have the right to know whether the money paid for VRS is being put to good use, overpays, or even underpays the VRS providers for the services rendered.

The cost data provided by VRS providers to the Consumer Groups is limited and often conflicting. For far too long the Commission and NECA have taken a sideways approach to VRS rate

setting, which has led to uninformed and capricious results. However, *the development of the VRS rate itself is the relevant policy that ensures that services, including technical advancements, are adequately provided today and in the future.* It is meaningless to request comment on the final result without providing the means for commenters to understand how that policy is made, and whether it is reasonable. TDI and the Consumer Groups are particularly well positioned to help the FCC reach the right result, but they need the tools to do the job.

IV. Conclusion

TDI believes that its proposed protective order provides an efficient mechanism for allowing the review of the confidential VRS Provider cost data. It will protect VRS providers from harmful disclosure. Access to VRS cost data, however, is necessary for TDI and the Consumer Groups to make a reasoned assessment of the compensation structure for VRS. For these reasons, TDI respectfully requests that the Commission adopt the proposed Protective Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey R. Strenkowski, hereby certify that a copy of the foregoing filing was served this 3rd day of June 2009, by electronic filing and email to the persons listed below.

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