

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)
)

MEMORANDUM OPINION AND ORDER

Adopted: June 20, 2006

Released: July 12, 2006

By the Commission: Commissioners Copps, and Adelstein concurring and issuing separate statements.

I. INTRODUCTION

1. On June 30, 2004, the Consumer & Governmental Affairs Bureau (Bureau) adopted the per-minute compensation rate for Video Relay Service (VRS), a form of telecommunications relay service (TRS), for the 2004-2005 fund year.¹ Three parties filed applications for review challenging this rate.² For the reasons set forth below, we deny the applications for review and affirm the 2004-2005 VRS compensation rate adopted by the Bureau.

II. BACKGROUND

A. TRS Cost Recovery Framework

2. TRS. Title IV of the Americans with Disabilities Act of 1990 (ADA) requires common carriers offering "telephone voice transmission services" to also provide TRS throughout the area in which they offer service so that persons with hearing and speech disabilities will have access to the telephone system.³ The statute also mandates that eligible TRS providers will be compensated for their

¹ See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Order, 19 FCC Rcd 12224 (June 30, 2004) (*2004 Bureau TRS Order*). This order was later modified. See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Order, 19 FCC Rcd 24981 (Dec. 30, 2004) (*Modified 2004 Bureau TRS Order*).

² Applications for review challenging the VRS rate were filed by Communication Services for the Deaf, Inc. (CSD) (July 26, 2004) (CSD Application), the National Video Relay Service Coalition (NVRSC) (July 20, 2004) (NVRSC Application), and Hands On Video Relay Services, Inc. (Hands On) (July 20, 2004) (Hands On Application). Hamilton Relay, Inc. (Hamilton) also filed an application for review on July 30, 2004, raising an issue with respect to the cost recovery methodology for traditional TRS (Hamilton Application).

³ 47 U.S.C. § 225(c); see generally *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, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Rcd 12475 at 12479-12480, para. 3 (June 30, 2004) (*2004 TRS Report & Order*). TRS is defined as "telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in

costs of doing so.⁴ As the Commission has explained, however, the cost recovery framework – and the annual determination of the TRS compensation rates – “is not akin to a ratemaking process that determines the charges a regulated entity may charge its customers,” but rather is intended to “cover the reasonable costs incurred in providing the TRS services mandated by Congress and our regulations.”⁵ The intent of Title IV is to further the Communications Act’s goal of universal service by ensuring that individuals with hearing or speech disabilities have access to telephone services that are “functionally equivalent” to those available to individuals without such disabilities.⁶ TRS became available on a nationwide basis in 1993.⁷

3. VRS. In 2000, the Commission recognized VRS as form of TRS eligible for compensation from the Interstate TRS Fund.⁸ As most frequently used, VRS allows a deaf person whose native language is American Sign Language (ASL) to communicate in ASL with the communications assistant (CA), a qualified interpreter, through a video link; the CA, in turn, places an outbound telephone call to a hearing person. During the call, the CA communicates in ASL with the deaf person and by voice with the hearing person. As a result, the conversation between the two end users, deaf and hearing, flows in near real time and in a faster and more articulate manner than a TTY or text-based TRS call. VRS calls, therefore, reflect a degree of “functional equivalency” unimaginable in a solely text-based TRS world.⁹

communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice services by wire or radio.” 47 U.S.C. § 225(a)(3).

⁴ 47 U.S.C. § 225(d)(3). As a general matter, states compensate providers for the costs of providing intrastate TRS, and the Interstate TRS Fund compensates providers for the costs of providing interstate TRS. See generally 2004 TRS Report & Order, 19 FCC Rcd at 12482-12483, paras. 7-8.

⁵ 2004 TRS Report & Order, 19 FCC Rcd at 12543, para. 179; see generally 47 C.F.R. § 64.604(c)(5)(iii)(E) (providers shall be compensated for the “reasonable costs” of providing TRS).

⁶ See 47 U.S.C. § 225(a)(3).

⁷ See generally *Telecommunication Services for Individuals with Hearing and Speech Disabilities, and the Americans With Disabilities Act of 1990*, Report and Order and Request for Comments, CC Docket No. 90-571, 6 FCC Rcd 4657 (July 26, 1991) (TRS I).

⁸ See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, 5152-5154, paras. 21-27 (March 6, 2000) (*Improved TRS Order & FNPRM*) (recognizing VRS as a form of TRS); 47 C.F.R. § 64.601(17). Presently, all VRS calls are compensated from the Interstate TRS Fund. See *Improved TRS Order & FNPRM*, 15 FCC Rcd at 5154, paras. 26-27.

⁹ As the following figures for approximate monthly minutes of use of VRS demonstrate, usage continues to rise: May 2003 – 189,422; July 2004 – 900,000; August 2005 – 2.7 million; and April 2006 – 3.2 million. In the past year, the Commission has adopted several items expanding the availability of VRS. See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Order, FCC 06-81 (June 16, 2006) (order clarifying application of 10-minute in-call replacement rule to VRS CAs); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Declaratory Ruling and Further Notice of Proposed Rulemaking, FCC 06-57 (May 9, 2006) (requiring VRS equipment and service to be interoperable); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Report and Order, and Order on Reconsideration, FCC 05-203 (Dec. 12, 2005) (certification of VRS providers); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and*

4. *Cost Recovery.* Section 225 provides that the costs of providing interstate TRS “shall be recovered from all subscribers for every interstate service.”¹⁰ This mandate requires both collecting contributions to establish a fund (the Interstate TRS Fund) from which TRS providers can be compensated, and paying money from the fund to eligible providers for their provision of eligible TRS services.¹¹ These duties are performed by the Interstate TRS Fund administrator, selected by, and under the direction of, the Commission.¹² The current Interstate TRS Fund administrator is the National Exchange Carrier Association (NECA).

5. The TRS fund administrator makes payments to eligible providers based on per-minute compensation rates for traditional TRS, IP Relay, Speech-to-Speech (STS), and VRS.¹³ The compensation rates are set on an annual basis through a two-stage process. First, the TRS fund administrator requests and collects projected cost and demand (*i.e.*, minutes of use) data from the providers.¹⁴ The fund administrator then uses this data to propose compensation rates to the Commission for the particular fund year. The proposed rates are intended to compensate the providers for their “reasonable” costs of providing TRS. Second, the Commission reviews the proposed rates and, in adopting compensation rates for the ensuing fund year, may approve or modify the proposed rates.¹⁵

6. The fund administrator may “examine, verify, and audit data received from TRS providers as necessary to assure the accuracy and integrity of fund payments.”¹⁶ The fund administrator therefore has the responsibility, in the first instance, to ensure the accuracy and reasonableness of the cost and demand data submitted by the providers so that its proposed rates will be based on permissible costs

Speech Disabilities, CC Docket No. 98-67, CG Docket No. 03-123, Order on Reconsideration, 20 FCC Rcd 13140 (July 19, 2005) (recognizing ASL-to-Spanish VRS); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, CG Docket No. 03-123, Report and Order, 20 FCC Rcd 13165 (July 19, 2005) (*VRS Speed of Answer Order*) (adopting speed of answer rules for VRS, recognizing VRS Mail as a compensable service, and requiring VRS to be provided 24 hours a day, seven days a week); *see also Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Further Notice of Proposed Rulemaking, FCC 06-58 (May 8, 2006) (seeking comment on ways to curtail misuse of VRS); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Notice of Proposed Rulemaking, FCC 05-196 (Nov. 30, 2005) (seeking comment on access to emergency services through VRS).

¹⁰ 47 U.S.C. § 225(d)(3)(B).

¹¹ *See generally* 47 C.F.R. § 64.604(c)(5)(iii)(A) & (E).

¹² *See* 47 C.F.R. § 64.604(c)(5)(iii).

¹³ In the 2005 TRS Rate Order, the Commission concluded that it would adopt separate rates for traditional TRS and IP Relay beginning with the 2005-2006 fund year. *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, CG Docket No. 03-123, Order, 20 FCC Rcd 12237 (June 28, 2005) (2005 TRS Rate Order).

¹⁴ *See* 47 C.F.R. § 64.604(c)(5)(iii)(C).

¹⁵ *See generally Telecommunications Relay Services and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Third Report and Order, 8 FCC Rcd 5300, 5305, para. 30 (July 20, 1993) (“The [TRS] rate calculated by the administrator shall be subject to Commission approval.”).

¹⁶ 47 C.F.R. § 64.604(c)(5)(iii)(C).

consistent with the TRS regulations and prior Commission orders.¹⁷

7. Once the fund administrator reviews the submitted projected costs and minutes of use, it calculates per-minute compensation rates based on data submitted (or modified, as necessary).¹⁸ The fund administrator then files these proposed rates with the Commission, and they are placed on public notice.¹⁹ The Commission reviews the fund administrator's proposed rates, the basis for those rates, and any comments received, and by June 30 issues an order adopting the TRS compensation rates for the following July 1 to June 30 fund year.

8. If either the fund administrator or the Commission disallows any of a provider's submitted costs, the provider has the opportunity to contest the disallowances before they are finalized.²⁰ The precise process by which the providers' challenges to cost disallowances have been handled has varied, depending in part on whether the fund administrator or the Bureau has made the disallowance. The providers may further challenge the adopted rates, including any cost disallowances, by seeking review of the rate order, as was done in this proceeding.²¹ Since 1993, the Commission has released orders at least annually setting forth the per-minute compensation rates for the various forms of TRS.²²

B. Applications for Review

9. On June 30, 2004, the Bureau released the *2004 Bureau TRS Order*, which adopted NECA's proposed TRS per-minute compensation rates for traditional TRS and IP Relay, STS, and VRS, for the 2004-2005 fund year.²³ These rates, however, were subject to revision based on review of: "(1)

¹⁷ See generally *id.*

¹⁸ As NECA has explained, NECA calculates a national average cost per minute of use. It does so by totaling projected costs and minutes of use for all providers for a two year period, and then dividing each sum (costs and minutes) by two. Then the average costs are divided by the average minutes to determine the average cost per minute. See NECA, *Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate*, filed April 25, 2005, at 9 & Appendix 1E.

¹⁹ See, e.g., *National Exchange Carrier Association (NECA) Submits the Payment Formula and Fund Size Estimate for Interstate Telecommunications Relay Services (TRS) Fund for July 2005 Through June 2006*, CC Docket No. 98-67, Public Notice, DA 05-1175 (April 28, 2005) (*2005 TRS Rate Notice*).

²⁰ Because of confidentiality issues, this is generally done either in a telephone conversation or in an individual meeting with each provider.

²¹ A rate order may also be challenged by filing a petition for reconsideration, as was done with respect to the *2003 Bureau TRS Order*. *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Order, 18 FCC Rcd (June 30, 2003) (*2003 Bureau TRS Order*). Those petitions were resolved in the *2004 TRS Report & Order*, 19 FCC Rcd at 12537-12552, paras. 163-200.

²² The Commission released the first rate order on September 29, 1993. See *Telecommunications Relay Services, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Second Order on Reconsideration and Fourth Report and Order, 9 FCC Rcd 1637 (Sept. 29, 1993). Subsequent rate orders have been released at the bureau level, with the exception of the *2005 TRS Rate Order*. See *2004 Bureau TRS Order*, 19 FCC Rcd at 12231, para. 17 n.56 (listing rate orders); *2005 TRS Rate Order*; 47 C.F.R. § 0.141(f).

²³ *2004 Bureau TRS Order*, 19 FCC Rcd 12224.

any supplemental cost data relating to capital investment, and (2) any adjustments to cost disallowances challenged by a provider in response to this *Order*.²⁴ The Bureau also approved NECA's proposed Interstate TRS fund size and carrier contribution factor.²⁵

10. In response to the *2004 Bureau TRS Order*, some, but not all, of the providers elected to submit capital investment data and/or to challenge the cost disallowances specific to their filings.²⁶ The Bureau reviewed the data submitted, and made appropriate adjustments to the TRS rates. The Bureau also reviewed every cost disallowance that was challenged by a provider, and added back some costs for some providers for the various TRS services.²⁷ As a result of these two adjustments, the Bureau recalculated the compensation rate for each of the TRS services. The Bureau announced that the VRS compensation rate would be \$7.596 per minute (an increase of \$0.303 over NECA's proposed rate).²⁸

11. Three parties challenge the *2004 Bureau TRS Order* and the determination of the VRS compensation rate.²⁹ Hands On makes three arguments related to the process by which NECA determined the proposed TRS rates, arguing that: (1) the *2003 Bureau TRS Order* "was not a sufficient guide" for NECA's evaluation of a provider's submitted cost data;³⁰ (2) NECA lacked authority to review

²⁴ *Id.*, 19 FCC Rcd at 12225, para. 2. The rates were \$1.349 per-minute for interstate traditional TRS and interstate and intrastate IP Relay, \$1.440 per-minute for interstate STS, and \$7.293 per-minute for interstate and intrastate VRS. In calculating these rates, NECA disallowed certain costs submitted by some of the providers for each of the TRS services. See *id.*, 19 FCC Rcd at 12232-12234, paras. 18-19 (traditional TRS and IP Relay), 22 (STS), and 25 (VRS). As discussed below, these rates were modified on December 30, 2004, by the *Modified 2004 Bureau TRS Rate Order*.

²⁵ *Id.*, 19 FCC Rcd at 12224-12225, paras. 1-2. NECA proposed a total fund size requirement of \$289,352,701, and a carrier contribution factor of 0.00330.

²⁶ These providers include Hands On, Sprint, and Hamilton.

²⁷ The Bureau offered to meet with any provider that desired to review and challenge its cost disallowances, and held several such meetings. Because of provider confidentiality issues, we can only summarize the cost disallowances and the restoration of certain costs. Five providers had costs disallowed. Two of these providers elected not to challenge NECA's proposed disallowances; in those cases, the disallowed costs were almost entirely profit and tax allowances, which do not constitute reasonable costs. See *2004 TRS Report & Order*, 19 FCC Rcd at 12542-12545, paras. 177-182 ("reasonable costs" do not include a profit or mark-up on expenses). With respect to the remaining three providers, one provider had approximately 18% of its submitted costs initially disallowed by NECA, and approximately 30% of those costs restored; another provider had approximately 9% of its submitted costs initially disallowed, and approximately 92% of those costs restored; and one provider had approximately 3% of its submitted costs initially disallowed, and approximately 78% of those costs restored.

²⁸ See *Modified 2004 Bureau TRS Order* (effective for the July 1, 2004, to June 30, 2005, fund year). The other final TRS compensation rates were: for eligible traditional TRS and IP Relay, \$1.398 per minute (an increase of \$0.049); for eligible STS, \$1.596 per minute (an increase of \$0.156).

²⁹ See note 1, *supra*. CSD's and NVRSC's filings were accompanied by petitions for emergency stay of the *2004 Bureau TRS Order*. Those petitions sought to have the VRS per-minute compensation rate of \$8.854, which was adopted as the final VRS rate for the September 1, 2003 to June 30, 2004 funding period, apply to the 2004-2005 fund year, and not the rate of \$7.293 adopted in the *2004 Bureau TRS Order*, until such time as the Commission resolves the applications for review and the "quality issues" raised in the *2004 TRS Report & Order's* FNPRM. We address the petitions for stay below, and deny them as moot.

³⁰ Hands On Application at 17-18. As a result of the December 30, 2004, *Modified 2004 Bureau TRS Order*, Hands On amended its application for review, withdrawing its challenges to some cost disallowances. Hands On, Supplement to Application for Review, CG Docket No. 03-123 (filed Feb. 15, 2005). Hamilton also filed a

and disallow submitted cost data;³¹ and (3) providers did not have the opportunity to contest disallowances.³² CSD asserts that the Bureau improperly excluded certain costs in setting the 2004-2005 VRS.³³ Finally, CSD and the NVRSC argue that the determination of the rate is at odds with the mandate that the Commission encourage new technology.³⁴

III. DISCUSSION

A. The Process of Setting the 2004-2005 VRS Compensation Rate was Proper

12. We find that the procedural arguments raised by Hands On are without merit. NECA properly looked to the prior *2003 Bureau TRS Order* for guidance in analyzing the submitted costs because that order was the most recent pronouncement on the relevant issues.³⁵ Hands On contends that the *2003 Bureau TRS Order* did not sufficiently detail permissible costs, and as a result, NECA's cost adjustments were an unreliable basis for the Bureau's evaluation of its proposed rates.³⁶ Hands On asserts, for example, that NECA did not sufficiently explain in its May 3, 2004, filing why it made the cost adjustments that it did, and did not tie those adjustments to the *2003 Bureau TRS Order*.³⁷ As we have noted, however, NECA's proposed rates are reviewed by the Bureau, which makes an independent

supplement to its application for review. Hamilton, Supplement to Application for Review, CC Docket No. 98-67, CG Docket No. 03-123 (filed Feb. 23, 2005).

³¹ Hands On Application at 22-23.

³² *Id.* at 23-26. Hands On makes the related argument that even if the *2003 Bureau TRS Order* provided sufficient guidance for the determination of the TRS compensation rates, NECA did not follow that guidance.

³³ CSD Application at 2-13.

³⁴ *Id.* at 13-15; NVRSC Application at 7-11; see 47 U.S.C. § 225(d)(2). Hamilton's application for review challenges the *2004 Bureau TRS Order* to the extent it "abandoned the 'cost-plus' reimbursement rate methodology for traditional [TRS]." Hamilton Application at 1. Hamilton notes, however, that this issue is "inextricably interwoven" with issues presented in the *2004 TRS Report & Order* (on which the *2004 Bureau TRS Order* relied), and that it filed the application for review "to ensure that the [2004 Bureau TRS Order] does not become a final order" before the Commission addresses Hamilton's petition for reconsideration of the *2004 TRS Report & Order*. *Id.* at 1-2. Therefore, Hamilton's real challenge is to the Commission's *2004 TRS Report & Order*, not to the *2004 Bureau TRS Order*. In these circumstances, we deny Hamilton's application for review because it does not assert that the Bureau erred in adopting the *2004 Bureau TRS Order*. We will address the pending petitions for reconsideration of the *2004 TRS Report & Order* in a separate order.

³⁵ At the time NECA filed its proposed 2004-2005 TRS compensation rates with the Commission, the *2003 Bureau TRS Order* was the only Commission or Bureau level order that specifically addressed cost disallowances. The *2003 Bureau TRS Order* reflected the general principle that the providers' submitted costs must relate to the "reasonable" costs of providing TRS, and that the Commission has the duty to ensure that costs underlying the compensation rates are appropriate under this standard. *2003 Bureau TRS Order*, 18 FCC Rcd at 12834-12836, paras. 32-37. The *2003 Bureau TRS Order* noted categories of submitted costs where the Bureau found that certain costs were not reasonable. *Id.*, 18 FCC Rcd at 12835, para. 34 (profit calculations, taxes, and labor costs are unreasonable). That order made clear that because of confidentiality concerns, the cost disallowances would be addressed individually with the providers. *Id.*, 18 FCC Rcd at 12835, para. 33 & n.91.

³⁶ Hands On Application at 18-21.

³⁷ *Id.* at 19.

determination of the appropriate TRS compensation rates.³⁸ Hands On acknowledges that the regulations specifically permit the fund administrator to examine, verify, and audit data it receives from the providers, but asserts that the regulations do not permit the fund administrator "to exclude categories of costs or to substitute its judgment for the good faith judgment of the providers."³⁹ We disagree. It is the fund administrator's role to request and collect the providers' cost and demand data, to review that data for compliance with the Commission's rules, and to propose compensation rates to the Commission based on that data.⁴⁰ In so doing, the fund administrator need not defer to the judgment of the providers concerning what are allowable costs; indeed, such an arrangement would be an abdication of the administrator's role in overseeing the integrity of the fund.

13. Hands On further states that even if NECA has the authority to review and disallow submitted cost data, it must give the providers an opportunity to contest the disallowances. We agree. Indeed, NECA *did* discuss possible cost adjustments with the providers, including Hands On, *before* it submitted its proposed rates to the Commission.⁴¹ In addition, the Bureau gave each provider, including Hands On, an opportunity to review and contest disallowances specific to it.⁴² Hands On further complains that NECA's report proposing the compensation rates to the Commission does not detail individual cost disallowances.⁴³ The Bureau reviewed Hands On's cost disallowances with Hands On in great detail in meetings and over the telephone, and as a result, the Bureau restored some of the costs initially disallowed.⁴⁴ Hands On's challenges to those disallowed costs not restored are addressed below.⁴⁵ Because of confidentiality issues, all cost disallowances are not shared with all providers.⁴⁶ In sum, neither Hands On, nor any other provider, has been denied a meaningful opportunity to challenge any cost disallowances specific to it under the procedures outlined above and followed by the fund administrator and the Bureau in adopting the 2004-2005 TRS compensation rates.⁴⁷

³⁸ See paras. 5-8, *supra*.

³⁹ Hands On Application at 23.

⁴⁰ See 2004 Bureau TRS Order, 19 FCC Rcd at 12239, para. 40 (rejecting notion that NECA cannot make adjustments to cost data in proposing rates to the Commission).

⁴¹ See 2004 Bureau TRS Order, 19 FCC Rcd at 12229, para. 13 & n.43 (also citing NECA filing). NECA also provided the Commission with the details of its cost disallowances for each provider.

⁴² See Hands On Supplement to Application for Review at 1-2 (noting meetings between the Bureau and Hands On addressing its cost disallowances); see also *Ex parte* letter from George L. Lyon, Jr., Counsel for Hands On, CC Docket No. 98-67 (filed Oct. 25, 2004).

⁴³ *Id.* at 23-26; see also Hands On Supplement to Application for Review at 2 (asserting that all elements of rate determination, including all of the providers' cost disallowances, must be on the public record).

⁴⁴ See note 27, *supra*.

⁴⁵ See para. 17, *infra*.

⁴⁶ See generally 2004 Bureau TRS Order, 19 FCC Rcd at 12239, para. 39 (noting that NECA cannot detail all cost disallowances because of confidentiality issues); see 47 C.F.R. § 64.604(c)(5)(iii)(I) (requiring the fund administrator to keep the providers' data confidential).

⁴⁷ NVRSC makes the related argument that the Bureau erred by adopting NECA's proposed VRS compensation rate when the Bureau also noted it might subsequently modify the rate based on submissions of capital investment data and challenges to specific cost disallowances. NVRSC Application at 9. The *Modified 2004 Bureau TRS*

B. The 2004-2005 VRS Rate Properly Excluded Quality of Service Factors

14. We reject claims that the Bureau did not properly consider the effect of the VRS rate on the quality of service, and should have allowed costs related to waived requirements.⁴⁸ TRS compensation rates are designed to compensate providers for the reasonable costs of providing service in compliance with non-waived mandatory minimum standards.

15. Arguments regarding quality of service generally concern the effect of the rate on the ability of providers to offer VRS 24 hours a day, seven days a week (24/7), and to promptly answer calls. The Commission raised these quality of service issues in the *2004 TRS Report & Order's* FNPRM, and did not adopt speed of answer and 24/7 service requirements for VRS until July 14, 2005.⁴⁹ The Bureau does not have the discretion to include costs in its calculations that relate to matters that the Commission has raised only in a pending FNPRM, or that the Commission has indicated are not appropriate for reimbursement.⁵⁰ We agree with the Bureau that "providers are not entitled to unlimited financing from the Interstate TRS Fund to enable them to further develop a service that is not even required."⁵¹ We find, therefore, that because the Commission had only proposed speed of answer and 24/7 service requirements for VRS at the time the Bureau adopted the 2004-2005 rate, the Bureau correctly excluded costs of meeting such requirements from the 2004-2005 rate calculations. Such costs may be included in subsequent cost submissions, and the resulting rate will reflect reasonable costs incurred to comply with these new requirements.⁵²

16. Section 225 provides that the Commission shall ensure that its TRS regulations encourage the use of existing technology and not discourage or impair the development of new technology.⁵³ Petitioners argue that, pursuant to Section 225, providers should be compensated from the Interstate TRS Fund for research and development directed at complying with technical and operational

Order, however, applied the modified VRS rate to the entire 2004-2005 fund year, thus ensuring that the compensation rates properly reflected all reasonable costs of providing the services. Further, the adoption of the modified rate makes NVRSC's argument moot.

⁴⁸ See generally CSD Application at 3-8; NVRSC Application at 13-15; Hands On Application at 4-16.

⁴⁹ *VRS Speed of Answer Order* at para. 1 (the requirements became effective January 1, 2006).

⁵⁰ Such costs include, for example, engineering, research and development, or other costs relating to enhancements that go beyond the required standards applicable to the particular service. *2004 TRS Report & Order*, 19 FCC Rcd at 12547-12548, 12551, paras. 189-190, 197.

⁵¹ *2004 Bureau TRS Order*, 19 FCC Rcd at 12236, para. 31 n.84. This statement was taken from the Commission's *2004 TRS Report & Order*. Therefore, CSD's argument is directed not at the *2004 Bureau TRS Order*, but rather the *2004 TRS Report & Order*.

⁵² CSD makes the related assertion that the VRS rate was based on the incorrect assumption that the "lower" VRS rate adopted for the previous fund year (2003-2004) did not affect the quality of VRS service. CSD Application at 8-10; see also NVRSC Application at 15. The order itself makes clear, however, that the VRS rate was adopted based solely on the projected cost (and demand) data submitted by the providers, as modified based on certain disallowances. *2004 Bureau TRS Order*, 19 FCC Rcd at 12242, para. 50.

⁵³ CSD Application at 13-14. NVRSC asserts the VRS rate is too low to allow providers to enhance the quality of the service through the development of new and improved technology. NVRSC Application at 8-10; see generally 47 U.S.C. § 225(d)(2).

standards that have been waived.⁵⁴ We reject this argument. As a general matter, we believe that the principle recognized in the *2004 TRS Report & Order* – that compensable costs must be directed to providing the service in compliance with applicable non-waived mandatory minimum standards⁵⁵ – is consistent with the mandate that the Commission not impair the development of new technology. Providers are free to develop new TRS features and services to enhance the provision of TRS, and may gain a competitive advantage in doing so. But absent more specific direction from the Commission resulting from the annual waiver reports⁵⁶ or information otherwise brought to the Commission's attention, providers may not be compensated from the Interstate TRS Fund for research and development to meet waived mandatory minimum standards. Moreover, the very existence of VRS – and the Commission's adoption of other new forms of TRS such as Captioned Telephone service⁵⁷ – reflect the Commission's faithful adherence to encouraging new technologies to meet this statutory mandate.

C. The Cost Disallowances Related to Installation Were Proper

17. We reject Hands On's assertion that that the Interstate TRS Fund should pay for its installation of video cameras and VRS software at its customers' premises (which includes on-site training) to ensure "connectivity."⁵⁸ Installation expenses are not "reasonable costs" of *providing* TRS, and are not permitted for any provider. The Commission has consistently stated that compensable expenses must be *the providers'* expenses in making the service available and not the customer's costs of receiving the service.⁵⁹ Compensable expenses, therefore, do not include expenses for customer premises equipment – whether for the equipment itself, equipment distribution, or installation of the equipment or any necessary software.

D. Allowance for Working Capital

18. We reject Hands On's contention that the Bureau should have adopted a higher allowance

⁵⁴ CSD Application at 13-15; NVRSC Application at 19-20.

⁵⁵ *2004 TRS Report & Order*, 19 FCC Rcd at 12547-12548, paras. 189-190.

⁵⁶ See generally *id.* at 12520-12521, para. 111 (waivers of mandatory minimum standards for IP Relay and VRS contingent on providers filing annual reports with Commission addressing continuing need for each waiver).

⁵⁷ See, e.g., *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, CG Docket No. 03-123, Order, 20 FCC Rcd 13195 (July 19, 2005) (finding that two-line Captioned Telephone service is a type of TRS eligible for compensation from the Interstate TRS Fund).

⁵⁸ Hands On Application at 35. Hands On's application for review challenges other cost disallowances. See *id.* at 26-37. Subsequent to the filing of Hands On's application for review, however, the Bureau reviewed with Hands On its cost disallowances, and ultimately restored approximately 30% of the initially disallowed costs. As a result, subsequent to the release of the *Modified 2004 Bureau TRS Order*, Hands On withdrew its objections concerning cost disallowances in the areas of accounting staff, corporate overhead, operations, software licensing, and general and administrative personnel. Hands On Supplement to Application for Review at 2-3. Hands On's supplemental filing, however, does not address its initial challenges to cost disallowances for engineering personnel. See Hands On Application at 30-31. After meetings between the Bureau and Hands On, Hands On agreed that some of the excluded engineering personnel could be removed, and the Bureau ultimately restored costs for some other engineering personnel previously excluded. Therefore, issues regarding disallowances for engineering personnel have been resolved.

⁵⁹ See, e.g., *2004 TRS Report & Order*, 19 FCC Rcd at 12543-12544, paras. 179, 181.

for working capital. This factor, which was set at 1.4 percent, compensates the providers for the time they are out of pocket their expenses before they are compensated by NECA.⁶⁰ Hands On asserts that the 1.4 percent figure does not adequately cover the time period for which providers are out of pocket their expenses because it is based on a 30 day period rather than a 45 day period.⁶¹ Hands On maintains that, although the providers are reimbursed on a monthly basis one month after service is provided, they incur costs at the beginning of each month, but do not receive compensation for that month until the end of the following month.⁶²

19. Hands On's argument confuses when a provider incurs an expense, with when the provider pays the expense. The purpose of the working capital allowance is to reimburse the providers for the time they are actually out of pocket money they have paid for services rendered. Even granting Hands On's assumption that most of the providers' costs are labor costs, and that "most providers pay their employees semi-monthly,"⁶³ we believe that the 30 day period reasonably compensates the providers for the time they are actually out of pocket.⁶⁴ Accordingly, we decline to increase the working capital allowance.

E. The 2003-2004 VRS Compensation Rate Does Not Apply to the 2004-2005 Fund Year

20. We reject CSD's and NVRSC's argument that, instead of adopting a VRS rate for the 2004-2005 fund year based on the cost and demand data submitted by the providers for that fund year, the Bureau should have continued to apply the modified VRS rate adopted in the 2004 TRS Report & Order (\$8.854 per minute) applicable to the previous fund year (2003-2004), pending resolution of VRS issues raised in the 2004 TRS Report & Order's FNPRM.⁶⁵ According to CSD and NVRSC, VRS providers should be compensated at the rate of \$8.854 per minute in 2004-2005, not at the rate of \$7.596 ultimately adopted by the Bureau for the 2004-2005 fund year.⁶⁶

21. This argument is inconsistent with the cost recovery mechanism that has been in place for over ten years. As explained above, for each fund year the compensation rates are based on the

⁶⁰ Hands On Application at 20-21; see 2004 Bureau TRS Order, 19 FCC Rcd at 12230, para. 16 & n.53 (setting forth in detail the derivation of the 1.4 percent figure for an allowance for working capital).

⁶¹ Hands On Application at 20-21.

⁶² *Id.* at 20.

⁶³ *Id.* at 21.

⁶⁴ Assuming, for example, that employees are paid on the 15th and 30th of the month, the average payment date would be the 22nd. We also assume that labor is paid at least a week in arrears, i.e., that payment is not concurrent with period of performance. For example, the payment on the 15th of the month would be for labor from the 22nd of the prior month to the 8th of the month, and the payment on the 30th of the month would be for labor from the 8th to the 22nd of the month. Under these circumstances, the average out-of-pocket date for labor incurred in a particular month, which would be paid by NECA at the end of the following month, would be the 30th of the month. Further, we assume that other types of expenses are generally paid approximately 30 days after the provider is billed.

⁶⁵ CSD Application at 16-17; NVRSC Application at 9-10, 18-20. NVRSC asserts that the Bureau should not have followed the 2004 TRS Report and Order in adopting the 2004-2005 VRS rate, but rather should have continued the VRS rate from the 2003-2004 fund year. NVRSC Application at 9-10.

⁶⁶ CSD Application at 15-16; NVRSC Application at 20.

providers' own projected cost and demand data for the upcoming two-year period. If there is concern that the rates were not calculated correctly, the answer is not to apply rates from a previous fund year based on an entirely different set of cost and demand projections, but to review the calculation of the challenged rates and the data upon which they rely and make any resulting adjustments retroactive to the beginning of the fund year. In this instance, therefore, there is no basis to apply the VRS rate from the 2003-2004 fund year to the 2004-2005 fund year.

F. The Emergency Petitions for a Stay of the 2004 Bureau TRS Order.

22. CSD and NVRSC filed a petition for emergency stay, seeking to have the 2003-2004 VRS per-minute compensation rate of \$8.854 apply to the 2004-2005 fund year, instead of the rate of \$7.293 adopted in the *2004 Bureau TRS Order* for the 2004-2005 fund year, until such time as the Commission resolved the pending applications for review.⁶⁷ Because, as set forth above, we have affirmed the *2004 Bureau TRS Order* (as modified by the *Modified 2004 Bureau TRS Order*), and have rejected the argument that the 2003-2004 VRS rate should apply in the 2004-2005 fund year, we dismiss the stay requests as moot.

IV. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1, 2, and 225 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, and 225, this *Memorandum Opinion and Order* IS hereby ADOPTED.

24. IT IS FURTHER ORDERED that the applications for review filed by CSD, Hands On, NVRSC, and Hamilton ARE hereby DENIED, as provided herein.

25. IT IS FURTHER ORDERED that this *Memorandum Opinion and Order* SHALL BE EFFECTIVE upon publication in the Federal Register.

26. To request materials in accessible formats (such as Braille, large print, electronic files, or audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY). This *Order* can also be downloaded in Word and Portable Document Formats (PDF) at <http://www.fcc.gov/cgb/dro>.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶⁷ The petitions for an emergency stay accompanied the applications for review. See note 2, *supra*.

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Memorandum Opinion and Order, CG Docket 03-123

It is axiomatic that those who have access to communications technologies will get ahead in our society while those who don't are in serious jeopardy of being left behind. The Americans with Disabilities Act recognized this fundamental point when it required that persons with disabilities have access to facilities that are "functionally equivalent" to those facilities used by those without disabilities. This simple, if inelegant, term actually constitutes a civil right that has enabled millions of Americans with disabilities to fully utilize their talents and make tremendous contributions to our communities.

Essential to the success of those with hearing disabilities are telecommunications relay services (TRS) that enable them to communicate by phone or video to employers, doctors, family and friends. I concur in this decision because I believe that the TRS compensation system as it exists today is far less than transparent. The lack of consistent, clear and fully transparent rules make it difficult for the Commission to administer the program accurately while at the same time causing tremendous economic uncertainty for providers who want to develop and implement business plans to serve the hearing disabled. All this raises my biggest concern that, at the end of the day, it is the consumers who will suffer perhaps because they do not know that video relay service is available or because a provider chooses not to serve a community altogether.

This Order falls short by not tackling the larger problem of setting out transparent rules that everyone – providers and the FCC – can follow. I hope that the Commission undertakes such a rulemaking shortly so that we can answer the call for reliable, rational, and transparent TRS compensation rules.

**CONCURRING STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Memorandum Opinion and Order, CG Docket No. 03-123

Video Relay Service (VRS) is an increasingly important tool for those portions of the deaf and hard of hearing community who rely on American Sign Language (ASL). VRS allows ASL and hearing individuals to have real-time conversations that more closely mirror the speed and natural flow of voice-to-voice conversations. VRS opens a world of new communications opportunities for many senior citizens, children, and others who may be unable to type on a TTY phone easily. Users of VRS rely on these services not only to communicate with friends and family, but also to run successful businesses, reach operators in the event of an emergency, and complete everyday tasks that many of us take for granted.

Among the issues raised in this Order is the Commission's process for determining the "reasonable costs" that may be recovered from the TRS Fund by VRS providers. During the past three years, the rate-setting process has presented a variety of open questions and controversy among providers and consumers. In this Order, the Commission finds that neither the Bureau nor the TRS Administrator violated the Commission's rules in setting compensation rates for the 2004-05 funding year, a finding that provides a degree of closure for a funding period now two years removed.

Working together, the Commission has taken important steps to improve VRS over the past year. I particularly appreciate the fine work of our Consumer and Governmental Affairs Bureau on VRS issues during this time. Yet, particularly with respect to the rate setting process the Commission can raise the bar and improve VRS for all participants. I limit my support for this Order to a concurrence because it is imperative that the Commission take up comprehensively the broader questions raised about the VRS rate setting process. Providers have urged us to inject more transparency and predictability into this process, and I have called on the Commission to engage in this sort of review. It is absolutely critical that the Commission provide oversight to ensure that our VRS compensation rate is limited to "reasonable costs," the standard articulated in our rules. At the same time, we also have an obligation to ensure that providers have adequate notice of how we will apply this standard, so that they can plan their operations accordingly.

I continue to believe that this sort of comprehensive review and the development of predictable and transparent rules would benefit providers, contributors, and the many consumers with and without hearing disabilities who rely on VRS. I look forward to working with my colleagues, our CGB staff, members of the TRS Advisory Committee, and the many members of the disabilities community on these issues as we move forward.