

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-571

In the Matter of

Telecommunications Relay Services,
and the Americans with Disabilities
Act of 1990

**SECOND ORDER ON RECONSIDERATION AND
FOURTH REPORT AND ORDER**

Adopted: September 28, 1993; Released: September 29, 1993

By the Commission:

I. INTRODUCTION

1. On August 4, 1993, pursuant to Section 64.604 (c)(4)(iii) of the Commission's Rules, 47, C.F.R. 64.604, the Telecommunications Relay Services (TRS) Interim Fund Administrator, the National Exchange Carrier Association, Inc. (NECA) filed its proposed payment formula, fund size, and payment schedule for purposes of administering the interstate TRS Fund.¹ This Order approves the payment formula, fund size, and payment schedule for the TRS Fund.

2. Further, we have before us petitions for reconsideration, and a request for stay of policies and rules we recently adopted concerning the TRS Fund.² For the reasons set forth below, we take the following actions: (1) We reaffirm that interstate service, for purposes of TRS funding includes, but is not limited to, the interstate portion of: cellular telephone and paging, mobile radio, operator services, personal communications service (PCS),³ access (including subscriber line charges), alternative access and special access, packet-switched, WATS, 800, 900, message telephone (MTS), private line, telex, telegraph, video, satellite, international, intraLATA, and resale services, provided by common carriers. (2) We clarify that TRS Fund

contributions may be treated as exogenous costs under price cap regulation. (3) We reiterate that existing accounting and separations rules should be adequate to deal with the provision of interstate TRS by subject service providers and that a Joint Board proceeding at this time is unnecessary. (4) We clarify that the administrator shall reimburse committee members for the reasonable costs incurred in attending advisory committee meetings. (5) We dismiss the request for stay filed by IDB.

II. BACKGROUND

3. The Americans with Disabilities Act of 1990 (ADA) requires that the Commission ensure that interstate and intrastate telecommunications relay services⁴ are available, to the extent possible and in the most efficient manner to individuals in the United States with hearing and speech disabilities by July 26, 1993. In order to fulfill this mandate, the Commission, on November 8, 1990, initiated a rulemaking proceeding.⁵ After considering extensive public comment, and the specific requirements of Title IV of the ADA,⁶ the Commission adopted a Report and Order (*TRS Order*).⁷ In the *TRS Order*, the Commission fashioned a comprehensive set of rules which set forth terminology and definitions of TRS, prescribed operational, technical, and functional minimum standards required of all TRS providers, and delineated the state certification process. On February 19, 1993, in an Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking (*TRS II*),⁸ the Commission resolved five petitions for reconsideration, adopted a shared-funding mechanism for interstate TRS cost recovery, and proposed a specific plan establishing a TRS interstate cost recovery fund. On July 20, 1993, the Commission adopted a Third Report and Order (*TRS III*) which adopted rules implementing the TRS Fund.⁹

III. DISCUSSION

A. TRS Fund Rates and Schedules

4. *Comments.* Section 64.605(e) of the Commission's rules requires the TRS Fund administrator to file with the Commission schedules of payment formulas that are designed to compensate TRS providers for reasonable costs of providing interstate TRS. Pursuant to Section 64.605(e),

¹ See Public Notice, No. 34406 (August 11, 1993).

² See Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Third Report and Order, 58 Fed. Reg. 39671 (July 26, 1993); 8 FCC Rcd 5300 (1993). (hereinafter *TRS III*). Appendix A lists the parties filing comments and reply comments, petitions for reconsideration or stay, as well as abbreviations used throughout this Order to refer to those parties.

³ We note that on September 23, 1993, the Commission initiated a rulemaking proceeding to address to what extent PCS should be considered a private or common carrier service. See Implementation of Title VI of the Omnibus Budget Reconciliation Act of 1993, Notice of Proposed Rulemaking (regulatory treatment of mobile services, including personal communications services, under revised Section 332 of the Communications Act).

⁴ Telecommunications relay service (TRS) permits persons with and without hearing and speech disabilities to commu-

nicate using the telephone. TRS facilities are equipped with specialized equipment and staffed by communications assistants (CAs) who relay conversation between people who use text telephones and people who use traditional telephones.

⁵ See Notice of Proposed Rulemaking, CC Docket No. 90-571, 55 Fed. Reg. 50037 (Dec. 4, 1990); 5 FCC Rcd 7187 (1990).

⁶ See S.933, Pub. L. 101-336, 104 Stat. 327, 366-69 (July 26, 1990).

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

⁸ Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking, 8 FCC Rcd 1802 (February 25, 1993), (hereinafter *TRS II*).

⁹ *TRS III, supra, n.2.*

NECA filed a proposed payment formula, fund size and payment schedule for purposes of administering the interstate TRS Fund.

5. In its filing, NECA proposes that the Commission approve the rate of \$1.705 as the average payment per interstate minute of use. NECA projects, based on applying the nationwide average rate to total estimated interstate annual demand, that nationwide interstate annual costs for 1993 will be between \$24 million and \$29 million. Further, NECA states that administrative expenses are estimated to be approximately \$312,000 annually, plus start-up costs of approximately \$567,000, that uncollectibles are estimated at 3% annually, and that all NECA expenses associated with TRS will be accounted for on a "keep-cost" basis and charged only to the TRS Fund.¹⁰ NECA projects the TRS Fund size, including growth in TRS expenses and demand, NECA TRS administrative expenses and an additive for uncollectibles, to be between \$25 million and \$31 million. NECA further proposes that the payment formula set forth in its filing is to remain in effect through December 31, 1994, and that in succeeding years, NECA will file its TRS payment formulas, and associated data with the Commission on October 1, to be effective for a one-year period beginning each January 1, as prescribed in Section 64.604(c)(4)(iii)(h) of the rules. Finally, NECA proposes that eligible TRS providers shall begin receiving disbursements from the TRS Fund on or about November 1, 1993, and initial payments will cover the service period from July 26, 1993, through August 31, 1993. In its filing, NECA proposes that TRS providers be required to report to NECA actual interstate minutes of use for this period no later than September 14, 1993, and thereafter, providers report usage for each monthly service period by the tenth work day of the succeeding month.¹¹ The payment formula, rate, and fund size proposals of NECA are virtually unchanged from estimates considered in *TRS III*, and are unopposed.

6. In its comments, AT&T, the sole commenter on the NECA filing, proposes three technical modifications to NECA's reporting schedule proposal and general administration of the TRS Fund. Specifically, AT&T's proposes (1) that NECA's proposal be modified to provide for adjustments of the payment amount at six month intervals during the initial period of TRS Fund operation through December, 1994; (2) that NECA should be required to invest contributions in interest bearing securities and that fund contributors be credited with the interest earned on their fund payments as an offset to any future payment obligations; and (3) that NECA's proposed reporting schedule be modified to permit TRS providers to compile information from their normal records systems.¹² AT&T asserts that this reporting schedule modification should not affect the schedule proposed by NECA for disbursements to TRS providers.

7. In its reply comments, NECA concurs that the TRS Fund's performance requires close scrutiny and may require revision. However, NECA asserts that a scheduled revision of the payment formula would require a completely new "cost and demand data" collection from TRS providers, and that, absent clear evidence that TRS provid-

ers were not being compensated adequately at the payment level approved by the Commission for that calendar year, NECA would not recommend mandating a burdensome data collection to recalculate the formula. With regard to investment and earnings of TRS fund contributions, NECA agrees that undistributed contributions must be wisely invested and intends to invest undistributed contributions in secure interest-bearing securities. NECA states that interest on investments of any excess contributions will be used to reduce future TRS Fund requirements. With regard to the reporting schedule, NECA proposes to revise its proposed schedule to require that TRS demand be reported no later than the fifteenth work day of the month succeeding the associated service period, and will distribute a revised schedule to TRS providers to reflect this modification, if approved by the Commission.

8. *Decision.* We have reviewed the TRS Fund size, rate and payment schedule proposed by NECA and the comments of AT&T regarding administrative matters and reporting schedules. Pursuant to Section 64.604(c)(4)(iii) of the Commission's rules, we approve the proposed rate of \$1.705 as the rate of payment to TRS providers per interstate minute of use. This rate will remain in effect through December 31, 1994. For succeeding years, the fund administrator is required to file its TRS payment formulas, and associated data with the Commission on October 1, to be effective for a one-year period beginning the following January 1, as prescribed in Section 64.604(c)(4)(iii)(h) of the rules. Eligible TRS providers shall begin receiving disbursements from the TRS Fund on or about November 1, 1993, and initial payments will cover the service period July 26, 1993, through August 31, 1993.

9. With regard to the reporting and payment schedule, we find merit in AT&T's proposed revision, and recognize that NECA has found administrative reasons to revise its reporting schedule to reflect TRS providers report actual interstate minutes of use for each monthly service period by the fifteenth work day of the succeeding month.¹³ We recognize that September 15, 1993 has passed and, therefore, require that for the service period from July 26, 1993, through August 31, 1993, TRS providers report usage to NECA no later than October 1, 1993, if they wish to be reimbursed by November 1, 1993. We note, however, that TRS providers can report usage for this period until October 28, 1993, in order to be reimbursed by December 1, 1993.

B. Petitions for Reconsideration

10. *Petitions.* In their petitions for reconsideration of *TRS III*, Ameritech, NYNEX, and SWB request that the Commission reconsider the definition of gross revenues and exclude revenues received by local exchange carriers (LECs) for the provision of interstate access service, which is the basis for TRS contributions. Specifically, Ameritech contends that requiring LECs to contribute on the basis of access service revenues, including subscriber line charges (SLCs), creates inefficiency and unnecessary administrative costs because it results in double billing for those costs. In the alternative, Ameritech requests that the Commission state that TRS costs will receive exogenous cost treatment

¹⁰ NECA Filing at 9.

¹¹ See NECA filing at Exhibit 3.8

¹² See AT&T Comments, Exhibit A.

¹³ The modifications proposed by AT&T regarding interim

changes in the payment formula and general administration of the TRS Fund were fully considered and resolved in *TRS III* at paragraphs 21 and 22.

under price cap regulation because TRS costs were imposed by the legislative requirement of the ADA and therefore, are beyond the control of carriers. Ameritech notes that these TRS costs are imposed on common carriers providing interstate services and therefore uniquely affect LECs.¹⁴ In its petition, NYNEX asserts that double billing results in unnecessary transaction costs including the costs of LECs gathering data, and preparing the TRS Fund Worksheet, submission and processing by NECA, applying for exogenous cost treatment, and recovery from IXCs.

11. In its petition, CompTel proposes that the Commission exclude payments made by carriers to other common carriers for interstate transmission service and for interstate access, because to do otherwise, it contends, would lead to double payment by many carriers, particularly resale carriers. In its petition, Telocator contends that paging carriers should not be required to contribute to the TRS Fund because paging service does not constitute telephone voice transmission service and paging carriers do not have to provide interstate TRS.¹⁵

12. In its petition, NARUC requests that the Commission reconsider its decision not to refer the separations issues raised in the TRS Fund proceeding to a Joint Board. NARUC asserts that a Joint Board proceeding is necessary to assure fair cost allocation between the interstate and intrastate jurisdictions. Further, NARUC requests that the Commission clarify that the costs of participation incurred by members of the TRS advisory committee be covered by the TRS Fund administrator, and that the Commission clarify that "state representatives" are representatives of state public utility commissions.

13. In its petition for reconsideration,¹⁶ IDB requests that the Commission reconsider the inclusion of video and audio program distribution services in the definition of gross revenues for purposes of TRS contributions.¹⁷ Specifically, IDB argues that inclusion of revenues from video and audio program distribution services is arbitrary and capricious because it is not supported by Section 225(d)(b)(B), and that the Commission failed to provide adequate notice of its intent to include these services in the TRS contribution base.¹⁸

14. In its opposition, USTA asserts that the Commission was neither arbitrary nor capricious in its decision to include all interstate services, including audio and video, in the interstate contribution requirement of the TRS Fund. In support of its assertion, USTA argues that the explicit language of the statute requires that costs caused by interstate TRS be recovered from all subscribers for every interstate service.¹⁹ USTA contends that the term "interstate service" is intended to be broad and comprehensive and is not ambiguous. Further, USTA asserts that all interested parties had ample notice and opportunity for comment in the Commission's February 25, 1993, further notice (*TRS II*) seeking comment on a proposed shared-funding mechanism for interstate TRS cost recovery. USTA argues that to

the extent IDB chose not to participate in *TRS II*, it should not be allowed to litigate the same issue in a petition for stay.

15. *Decision.* As stated in *TRS III*, in order to provide universal telephone service to TRS users as mandated by the ADA, Congress ordered the Commission to prescribe regulations providing generally that costs caused by interstate telecommunications relay services should be recovered from all subscribers to every interstate service.²⁰ We believe that recovering interstate relay costs from all common carriers who provide interstate service on the basis of their interstate revenues will accomplish this goal. In *TRS III*, we defined, for the purposes of funding interstate TRS, that interstate service includes, but is not limited to, the interstate portion of: cellular telephone and paging, mobile radio, operator services, personal communications service (PCS), access (including subscriber line charges), alternative access and special access, packet-switched, WATS, 800, 900, message telephone (MTS), private line, telex, telegraph, video, satellite, international, intraLATA, and resale services, provided by common carriers. Some petitioners assert that it is inappropriate to require contributions from providers of resale services and access services. Petitioners argue that double payment would occur if both resold and underlying services are subject to contribution. These petitioners assert that double payment results because the charge for the resold service would presumably cover the contribution for the resold service as well for the underlying services. Petitioners' assertions regarding access, resale, and paging were considered at length in *TRS III*.²¹ Petitioners now contend that requiring contributions based on these interstate services creates inefficiencies and administrative costs.

16. The petitioners have not presented any arguments that would undermine our previous conclusion that Congress intended that subscribers to "every" interstate service, including access and other resold services, be required to contribute to the support of telecommunications relay services. The clear language of the statute is broad and all-inclusive: "costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service. . . ." 47 U.S.C. Section 225(d)(3). Congress gave no indication that any individual interstate service should be exempt from this requirement. Indeed, it would be nearly impossible to adopt the petitioners' approach to implementing the statute's cost recovery provisions. Under their interpretation, the Commission would continually be called upon to make decisions about whether a particular interstate service was composed of any underlying service that may have already made some contribution to the TRS Fund. We would also be required to decide whether it should be the underlying service or the resold service that should be required to contribute, and we would have to determine what portion of each service was not resold. As we move to a network of networks, such line-drawing would be next to impossible. More impor-

¹⁴ See Ameritech petition at 3.

¹⁵ Petition of Telocator at 2.

¹⁶ IDB filed a petition for stay pending reconsideration. In light of our consideration of IDB's reconsideration petition here, we dismiss the stay request because it is moot.

¹⁷ IDB does not request a stay of the requirement to contribute based on its revenue from interstate telephone services.

¹⁸ Petition for Stay at 2.

¹⁹ Opposition of USTA at 2.

²⁰ See *TRS III* at paragraph 12.

²¹ *Id.* at paragraphs 9-16.

tantly, it would be inconsistent with the broad purpose of the statute, which is to require contributions from *all* subscribers to *every* interstate service.

17. We also disagree with Telocator's argument that interstate paging services should be exempt from the contribution requirement because paging services are not voice services subject to the "provision of services" requirement set forth in Section 225(c) of the Act.²² The Act clearly distinguishes between the obligation to provide TRS service, which applies only to "telephone voice transmission services," and the obligation to contribute to the cost recovery for those services, which applies to "all subscribers for every interstate service" without limitation. 47 U.S.C. Sections 225(c), 225(d)(3). Nothing in the ADA's legislative history would suggest that Congress meant to apply its cost recovery provisions to subscribers of interstate voice services only.

18. We are persuaded by petitioners to clarify that for TRS fund contributors regulated under price cap regulation, contributions may be treated as exogenous costs for the purposes of calculating the price cap index. We make this finding pursuant to Section 61.45(d) of the Commission's rules, which grants exogenous treatment to any cost the Commission shall permit or require, plus a list of specifically enumerated exogenous costs.²³ As the Commission recently stated, exogenous costs are selected based upon whether the cost is beyond the carrier's control and not otherwise reflected in the price cap formula, *i.e.*, in the measure of inflation less productivity growth.²⁴ In the case of TRS fund contributions, carriers make a persuasive showing that these amounts are beyond their control. First, contributions are a requirement of the ADA as implemented by this Commission. Second, carriers are unable to control the actual level of these costs because fund contributions are made as a straight percentage of gross interstate revenues, a percentage amount imposed pursuant to this docket. While gross revenues is a statistic that reflects a number of business decisions over which the carrier has control, the percentage figure that determines their contribution is a regulatory decision, similar to the levy of a tax. Fund contributions are also not likely to otherwise be reflected in the price cap formula because, while all businesses must comply with other titles of the ADA, fund contributions are unique to common carriers and are in addition to the other obligations imposed on all businesses by the ADA.²⁵ Moreover, rate recognition of TRS fund contributions ensures that interstate ratepayers participate in the fund, as Congress intended. Finally, grant of exogenous cost treatment is consistent with the overall price cap incentive structure in that only the fund contribution

amounts outside of carrier control are exogenous, not costs associated with the carrier's own decisions about how to configure service arrangements for TRS.

19. With regard to the petition of NARUC, we reiterate our findings in *TRS III* that existing accounting and separations rules should be adequate to deal with the provision of interstate TRS by subject service providers and, therefore, a Joint Board proceeding at this time is unnecessary.²⁶ Section 410(c) of the Communications Act of 1934, as amended, requires the Commission to refer to a Joint Board any proceeding regarding the jurisdictional separation of common carrier property and expenses between intrastate and interstate operations, which the Commission institutes pursuant to a notice of proposed rulemaking. We are not proposing any changes to the existing separations rules for subject carriers, and are requiring NECA's cost recovery form to be consistent with Parts 32 and 36 of our rules. With regard to NARUC's request for clarification of the composition of the advisory committee, we stated clearly that the committee was to include state regulatory officials. *See TRS III* at n. 30. Lastly, we do not oppose the proposal of NARUC that we clarify that the administrator of the TRS Fund may reimburse advisory committee members for the reasonable costs incurred in attending advisory committee meetings because doing so may permit some groups to participate who may not otherwise be able to do so. We expect the administrator to limit reimbursement to two persons per representative group,²⁷ be based upon requests by participants for reimbursement, and result in *de minimis* reimbursement costs. The administrator is required to report these costs pursuant to section 64.604(c)(4)(iii)(h) of the rules.

20. We also reject IDB's assertion that video and audio program distribution services by satellite or otherwise, should be excluded from the TRS revenue base. In *TRS III*, we concluded, after a thorough review of the legislative history, that private networks provided by common carriers are included in the cost recovery process, and as stated above, the statute requires that costs be recovered from subscribers of every interstate service and does not, for purposes of cost recovery, limit recovery to subscribers of telephone or other voice services. In response to IDB's Administrative Procedures Act²⁸ notice argument, we have solicited comments throughout this TRS proceeding on, *inter alia*, provision of service requirements, cost recovery, mandatory minimum TRS standards, and state certification procedures. With respect to defining subject carriers, we did not in any way limit our discussion to voice services. On the contrary, in the NPRM portion of *TRS II*, at Appendix D, the proposed rules stated that the contribu-

²² We note that although paging itself is not a voice service, some persons will use TRS centers to initiate pages.

²³ *See, e.g.*, Provision of Access for 800 Service, CC Docket No. 86-10, 8 FCC Rcd 907 (1993) (granting exogenous treatment of costs associated with the implementation of basic 800 data base service based on "highly unusual circumstances" surrounding the Commission's implementation of 800 data base).

²⁴ Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employer's Accounting for Postretirement Benefits Other than Pensions," 8 FCC Rcd 1024 (1993).

²⁵ TRS Fund contributions are analogous to taxes levied solely on telecommunications providers, which we have held to be exogenous.

²⁶ Pursuant to Sections 36.2(e) and 36.376 of the Commission's

rules, the contributions for interstate TRS, as well as any similar billed amounts that might be incurred solely for intrastate TRS, are to be categorized as "All Other Customer Services Expense," Category 3, and are to be directly assigned to the appropriate jurisdiction.

²⁷ Pursuant to Section 64.604(c)(4)(iii)(h) of the rule, the advisory committee includes representatives from the hearing and speech disabled community, voice TRS users, text telephone TRS users, interstate service providers, state regulatory officials, and TRS providers.

²⁸ 5 U.S.C. Section 553.

tion would be "assessed on all carriers that offer interstate telecommunications services."²⁹ We concur with USTA that IDB has had notice of cost recovery issues and ample opportunity to comment.

IV. CONCLUSION

21. For the reasons set forth above, we conclude that the TRS Fund payment formula, fund size, and payment schedule will create strong incentives for TRS providers to offer high quality, innovative services at reasonable cost. Moreover, providers of TRS will be reasonably compensated by all subscribers of every interstate service. We further conclude that the TRS Fund will further the goal of the ADA to provide functionally equivalent telecommunications services for all Americans.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to Section 225 of the Communications Act, 47 U.S.C. §§ 225, that \$1.705 is the rate of payment to TRS providers per interstate minute of use, that it will remain in effect through December 31, 1994, and that in succeeding years, the fund administrator is required to file its TRS payment formulas, and associated data with the Commission by October 1, to be effective for a one-year period beginning each January 1, as prescribed in Section 64.604(c)(4)(iii)(h) of the rules. Eligible TRS providers shall begin receiving disbursements from the TRS Fund on or about November 1, 1993, and initial payments will cover the service period July 26, 1993, through August 31, 1993.

23. IT IS FURTHER ORDERED, that the petitions filed by Ameritech Operating Companies, NYNEX, National Association of Regulatory Utility Commissioners, Southwestern Bell Corporation, Competitive Telecommunications Association, Telocator, and IDB Communications Group, Inc. ARE GRANTED in part as discussed in this Order and ARE OTHERWISE DENIED.

24. IT IS FURTHER ORDERED, that the petition for stay filed by IDB Communications Group, Inc. IS DISMISSED.

25. IT IS FURTHER ORDERED, that this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Attachment A

LIST OF COMMENTERS

TRS Fund Administration

AT&T

National Exchange Carriers Associations, Inc. (NECA) *

Petitions for Reconsideration of the Third Report and Order

Ameritech

Competitive Telecommunications Association (CompTel)

IDB Communications (IDB)

National Association of Regulatory Utility Commissioners (NARUC)

NYNEX

Southwestern Bell Corporation (SWB)

Telocator

Petition for Stay

IDB Communications (IDB)

United States Telephone Association (USTA) (Opposition to Stay)

* Filed Reply Comments

²⁹ See Proposed Section 64.604(c)(4)(iii)(a).