

**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.
Motion for Protective Order**

I. Introduction

Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), through its undersigned counsel, hereby moves for the entry of a confidentiality protective order in the above-captioned case (the “Proceeding”) pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. §§ 154(i), (j) and 47 C.F.R. § 0.457(d).

TDI makes this request in conjunction with a request for access to the cost data associated with the per-minute compensation rate for Video Relay Service (“VRS”) proposed by the National Exchange Carrier Association (“NECA”), and subject to the Notice of Proposed Rulemaking (“NPRM”) released by the Federal Communications Commission (“FCC” or “Commission”) in this Proceeding on May 14, 2009. TDI and other Consumer Groups¹ desire to comment on the proposed VRS compensation rate pursuant to the NPRM, but require additional information concerning how those rates are calculated in order to provide meaningful information to the Commission. TDI recognizes the sensitive nature of the cost information used by NECA, (and presumably held in custody by NECA for the various relevant VRS providers), to derive the proposed VRS compensation rate, and therefore, requests that the Commission issue a protective order in this proceeding to protect such information from harmful disclosure as a result

¹ TDI often provides feedback to the FCC on matters involving disability access and other consumer issues in conjunction with other advocacy groups, including, but not limited to, 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”).

of this request.² The form of the proposed Protective Order is attached as Exhibit A hereto. TDI respectfully requests that should the Commission grant this Petition, that other Consumer Groups similarly be provided access to the requested VRS cost data, subject to their execution of the proposed Protective Order.

II. Background

In the *2007 TRS Rate Methodology Order*,³ the Commission adopted new cost recovery methodologies for the various forms of Telecommunications Relay Service (“TRS”). For both intrastate and interstate VRS, the Commission adopted a tiered rate methodology based on call volume.⁴ Tier I includes the first 50,000 monthly VRS minutes; Tier II includes monthly minutes between 50,001 and 500,000; and Tier III includes monthly minutes above 500,000.⁵ For budgetary and planning purposes, the Commission further concluded in the *2007 TRS Cost Recovery Methodology Order* that the VRS compensation rates should be set for a three year period, subject to certain adjustments, concluding with the 2009-2010 Fund year.⁶ Pursuant to that decision, the Commission required VRS providers to continue to file with NECA (the Fund Administrator) annual costs and demand data. The Commission found that “this information, which includes actual costs for prior years, will be helpful in reviewing the compensation rates ... [adopted] and whether they reasonably correlate with projected costs and prior actual costs.”⁷

On May 1, 2009, NECA, the Interstate TRS Fund Administrator, submitted its annual payment formula and fund size estimate for the Interstate TRS Fund for the period July 1, 2009, through June 30,

² TDI understands that NECA holds the cost data as a custodian for the relevant VRS providers. As such, and to the extent required, the Consumer Groups hereby include the relevant VRS providers as parties whose confidential business information must be protected.

³ See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Report and Order, and Declaratory Ruling, 22 FCC Rcd 20140 (Nov. 19, 2007) (*2007 TRS Rate Methodology Order*).

⁴ See *2007 TRS Cost Recovery Methodology Order*, 22 FCC Rcd at 20160-65, ¶¶ 47-56; 2009 TRS Rate Filing, at 12-16.

⁵ See *2007 TRS Cost Recovery Methodology Order*, 22 FCC Rcd at 20160-65, ¶¶ 47-56.

⁶ *Id.* at 20164-65, ¶ 56.

⁷ *Id.* at 20165, ¶ 56 n.170.

2010 (“2009 TRS Rate Filing”).⁸ Among other things, NECA proposed per-minute compensation rates for interstate and intrastate VRS based on VRS provider cost data and rate calculation methodologies established in the *2007 TRS Rate Methodology Order*.

On May 14, 2009, the FCC released a Public Notice and NPRM requesting comment on, among other things, NECA’s proposed compensation rates for interstate and intrastate VRS. In the NPRM, the FCC requested comment on whether it should modify the compensation rates for VRS for the 2009-2010 Fund year pursuant to NECA’s *2009 TRS Rate Filing*.

III. Motion for Protective Order and Access to VRS Provider Cost Data

Currently, interstate and intrastate VRS compensation rates are set as follows;

Tier 1 <50,000	\$ 6.7362
Tier 2 50,001 to 500,000	\$ 6.4675
Tier 3 >500,000	\$ 6.2685

In the *2009 TRS Rate Filing*, for interstate and intrastate VRS NECA proposes the following tiered rates:

Tier 1 <50,000	\$ 6.7025
Tier 2 50,001 to 500,000	\$ 6.4352
Tier 3 >500,000	\$ 6.2372 ⁹

As the Commission is aware, these rates are more than double, and in some cases more than triple, the compensation rates for other forms of TRS. Obviously, VRS provider cost structures drive this distinction, which demonstrates why access to actual cost data information is necessary for TDI and other Consumer Groups to provide the Commission with a reasoned analysis of VRS compensation.

In the *2009 TRS Rate Filing*, NECA provides aggregate cost data as justification for the modification in VRS rates. However, 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

⁸ *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate*, CG Docket No. 03-123 (filed May 1, 2009) (“*2009 TRS Rate Filing*”).

⁹ *See 2009 TRS Rate Filing*, at 13 and Exb. 1-4.

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.¹⁰ 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.

TDI recognizes that the cost data being requested is confidential business information and would be valuable to a VRS competitor or other related third parties. However, this information is also not only used, but heavily relied upon by NECA for purposes of proposing compensation rates for VRS services, and as such, it is necessary that this information be provided to non-competitor interested parties (with necessary protections in place) so that it can be analyzed and used for informed comment to the Commission on this topic. TDI emphasizes that it and the other Consumer Groups have a long history of providing meaningful insight to the FCC on a host of telecommunications issues that affect persons with disabilities. TDI nor any of the other Consumer Groups are marketplace competitors to VRS or any other form of TRS, nor can TDI or the other Consumer Groups otherwise use this information in a manner detrimental to the VRS providers.

In sum, individual provider VRS cost data is the heart of the VRS compensation rate modification. Without this information, the FCC can not reasonably obtain informed analysis on the proposed VRS compensation modifications. The entry of a confidentiality protective order in this Proceeding would balance the need for confidential treatment of the VRS cost data with the public interest in evaluating the appropriateness of the proposed VRS compensation modifications.

¹⁰ In fact, some of the aggregate VRS cost information provided by NECA in the 2009 TRS Rate Filing is incomplete or has otherwise been omitted entirely. *See, e.g., 2009 TRS Rate Filing*, at 15 - Figure 1 VRS Cost Composition (the composite cost information in this chart is not properly labeled or explained).

IV. Conclusion

TDI believes that the attached proposed protective order provides an efficient mechanism for allowing the review of the confidential information submitted to NECA by VRS providers, while protecting that information from unwarranted and potentially harmful disclosure. Access to VRS cost data is necessary in order to make a reasoned assessment of the compensation structure for VRS, and a protective order will ensure that this sensitive information not be used in an inappropriate manner or disclosed to competitors or other third parties. For these reasons, TDI respectfully requests that the Commission adopt their proposed Protective Order, attached hereto.

Respectfully submitted,

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

/s/Tamar E. Finn
Tamar E. Finn
Eliot J. Greenwald
Jeffrey R. Strenkowski
BINGHAM MCCUTCHEN LLP
2020 K Street, NW
Washington, DC 20006
(202) 373-6000

*Counsel to Telecommunications for the Deaf and
Hard of Hearing, Inc.*

May 20, 2009

CERTIFICATE OF SERVICE

I, Jeffrey R. Strenkowski, hereby certify that a copy of the foregoing filing was served this 20th day of May 2009, by electronic filing and email to the persons listed below.

The following parties were served:

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 by U.S. Mail)

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

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

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

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

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

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

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

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



Jeffrey R. Strenkowski

Exhibit A

Proposed Protective Order

Federal Communications Commission

Before the
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Washington, D.C. 20554

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

PROTECTIVE ORDER

1. This Protective Order is intended to facilitate and expedite the review by Reviewing Parties in this above-captioned proceeding of documents that contain material designated by NECA as trade secrets and privileged or confidential commercial or financial information.

2. Definitions.

a. Authorized Representative. "Authorized Representative" shall have the meaning set forth in Paragraph 8.

b. Commission. "Commission" means the Federal Communications Commission or any Bureau or Office within the Commission acting pursuant to delegated authority.

c. Confidential Information. "Confidential Information" means (i) information submitted to the Commission by NECA that has been so designated by NECA and which NECA has determined in good faith constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) and (ii) information submitted to the Commission by NECA that has been so designated by NECA and which NECA has determined in good faith falls within the terms of Commission orders designating the items for treatment as Confidential Information.

d. Declaration. "Declaration" means the declaration attached to this Protective Order.

e. Reviewing Party. "Reviewing Party" means a Petitioner, person or entity participating in a filing with a Petitioner, and other persons approved by a Petitioners and by NECA, or approved by the Commission on motion filed showing good cause for reviewing the Confidential Information.

3. Claim of Confidentiality. NECA may designate information as "Confidential Information" consistent with the definition of that term in Paragraph 2.c of this Protective Order. The

1 NECA acts as a custodian of the relevant Video Relay Service cost data "Confidential Information" provided to NECA by certain Video Relay Service providers (the "VRS Providers"). To the extent necessary, this Protective Order incorporates the relevant VRS Providers as parties hereto whose confidential business information is to be protected.

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Commission may, *sua sponte* or upon petition, pursuant to 47 C.F.R. §§ 0.459 and 0.461, determine that all or part of the information claimed as “Confidential Information” is not entitled to such treatment.

4. Procedures for Claiming Information is Confidential. Confidential Information submitted to the Commission shall be filed under seal and shall bear on the front page in bold print, “CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION - DO NOT RELEASE.” Confidential Information shall be segregated by NECA from all non-confidential information submitted to the Commission. To the extent a document contains both Confidential Information and non-confidential information, NECA shall designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information.

5. Storage of Confidential Information at the Commission. The Secretary of the Commission or other Commission staff to whom Confidential Information is submitted shall place the Confidential Information in a non-public file. Confidential Information shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

6. Access to Confidential Information. Confidential Information shall only be made available to Commission staff, Commission consultants, and to counsel or other Authorized Representatives (as defined in Paragraph 8) for the Reviewing Parties. Before a Reviewing Party may obtain access to Confidential Information, counsel or such other designated person must execute the attached Declaration. Consultants under contract to the Commission may obtain access to Confidential Information only if they have signed, as part of their employment contract, a non-disclosure agreement the scope of which includes the Confidential Information, or if they execute the attached Declaration.

7. Disclosure. Counsel to a Reviewing Party may disclose Confidential Information to other Authorized Representatives to whom disclosure is permitted under the terms of Paragraph 8 of this Protective Order only after advising such Authorized Representatives of the terms and obligations of the Order. In addition, before Authorized Representatives may obtain access to Confidential Information, each Authorized Representative must execute the attached Declaration.

8. Authorized Representatives shall be limited to:

a. Subject to Paragraph 8.d, counsel for the Reviewing Parties to this proceeding, including in-house counsel, actively engaged in the conduct of this proceeding and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding;

b. Subject to Paragraph 8.d, specified persons, including employees of the Reviewing Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding; and

c. Subject to Paragraph 8.d., any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper; except that,

d. Disclosure shall be prohibited to any persons in a position to use the Confidential Information for competitive commercial or business purposes, including persons involved in competitive

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decision-making, which includes, but is not limited to, persons whose activities, association or relationship with the Reviewing Parties or other Authorized Representatives involve rendering advice or participating in any or all of the Reviewing Parties', Authorized Representatives' or any other person's business decisions that are or will be made in light of similar or corresponding information about a competitor.

9. Inspection of Confidential Information. Confidential Information shall be maintained by NECA for inspection at their Washington, D.C. office. Inspection shall be carried out by Authorized Representatives upon reasonable notice not to exceed one business day during normal business hours.

10. Copies of Confidential Information. NECA shall provide a copy of the Confidential Material to Authorized Representatives upon request and may charge a reasonable copying fee not to exceed twenty five cents per page. Authorized Representatives may make additional copies of Confidential Information but only to the extent required and solely for the preparation and use in this proceeding. Authorized Representatives must maintain a written record of any additional copies made and provide this record to NECA upon reasonable request. The original copy and all other copies of the Confidential Information shall remain in the care and control of Authorized Representatives at all times. Authorized Representatives having custody of any Confidential Information shall keep the documents properly and fully secured from access by unauthorized persons at all times.

11. Filing of Declaration. Reviewing Parties shall provide to NECA and the Commission a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed by such Authorized Representative, or by any other deadline that may be prescribed by the Commission.

12. Use of Confidential Information. Confidential Information shall not be used by any person granted access under this Protective Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review), shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or that is obtained independently in proceedings before a court or agency of competent jurisdiction; or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents. The foregoing shall not be construed to preclude any person, counsel or consultant from commencing, prosecuting or defending any action in a court of competent jurisdiction, provided that Confidential Information is not directly used or disclosed by such person, counsel or consultant in any such action except to the extent permitted by this paragraph. The term "directly use" means the explicit introduction of the Confidential Information in the course of a proceeding (unless the information is obtained independently in that proceeding).

13. Pleadings Using Confidential Information. Both NECA and the Reviewing Parties may, in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings and filed under seal;

b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order;

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c. Each page of any Party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: "Confidential Information included pursuant to Protective Order, CG Docket No. 03-123;" and

d. The confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission, NECA, and those Reviewing Parties that have signed the attached Declaration. Such confidential portions shall be served under seal, and shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to NECA and an opportunity to comment on such proposed disclosure). NECA and the Reviewing Parties filing a pleading containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. NECA and the Reviewing Parties may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notations required by this Paragraph 13 are not removed.

14. Violations of Protective Order. Should a Reviewing Party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, it shall immediately convey that fact to the Commission and to NECA. Further, should such violation consist of improper disclosure or use of Confidential Information, the violating party shall take all necessary steps to cease and remedy the improper disclosure or use. The Violating Party shall also immediately notify the Commission and NECA, in writing, of the identity of each party known or reasonably suspected to have obtained the Confidential Information through any such disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to NECA at law or equity against any party using Confidential Information in a manner not authorized by this Protective Order.

15. Termination of Proceeding. Within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives of Reviewing Parties shall, at the direction of NECA, destroy or return to NECA all Confidential Information as well as all copies and derivative materials made, and shall certify in a writing served on the Commission and NECA that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel to a Reviewing Party may retain two copies of any pleadings containing Confidential Information submitted on behalf of the Reviewing Party. Any Confidential Information contained in any copies of pleadings retained by counsel to a Reviewing Party or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with Paragraphs 10 and 12 of this Protective Order unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

16. No Waiver of Confidentiality. Disclosure of Confidential Information as provided herein shall not be deemed a waiver by NECA of any privilege or entitlement to confidential treatment of such Confidential Information, nor shall Reviewing Parties' acceptance of this Order or execution of the Declaration be deemed a waiver of any claim that material designated by NECA as Confidential Information is not entitled to such treatment under applicable law. Reviewing Parties, by viewing these materials: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of Confidential Information shall not be deemed a waiver of the privilege.

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17. Additional Rights Preserved. The entry of this Protective Order is without prejudice to the rights of NECA to apply for additional or different protection where it is deemed necessary or to the rights of Reviewing Parties to request further or renewed disclosure of Confidential Information.

18. Effect of Protective Order. This Protective Order constitutes an Order of the Commission and an agreement between the Reviewing Parties, executing the attached Declaration, NECA, and the relevant VRS Providers.

19. Authority. This Protective Order is issued pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. §§ 154(i), (j) and 47 C.F.R. § 0.457(d).

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Individuals with Hearing and Speech Disabilities)

DECLARATION

I, _____, hereby declare under penalty of perjury that I have read the Protective Order that has been entered by the Commission in this proceeding and that I agree to be bound by its terms pertaining to the treatment of Confidential Information submitted by the National Exchange Carrier Association (“NECA”), as custodian of the relevant Confidential Information, in this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of this proceeding. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement with NECA. I am not in a position to use the Confidential Information for competitive commercial or business purposes, including competitive decision-making, and my activities, association or relationship with the Reviewing Parties, Authorized Representatives, or other persons does not involve rendering advice or participating in any or all of the Reviewing Parties’, Authorized Representatives’ or other persons’ business decisions that are or will be made in light of similar or corresponding information about a competitor.

(signed) _____
(printed name) _____
(representing) _____
(title) _____
(employer) _____
(address) _____
(phone) _____
(date) _____