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

In the matter of	)	
	)	
Telecommunications Relay Services	)	
and Speech-to-Speech Services for	)	CC Docket No. 98-67
Individuals with Hearing and Speech	)	
Disabilities	)	

ORDER

Adopted: June 30, 2004 **Released: June 30, 2004**

By the Chief, Consumer & Governmental Affairs Bureau:

I. INTRODUCTION

1. On May 3, 2004, the National Exchange Carrier Association, Inc. (NECA), the Interstate Telecommunications Relay Services (TRS) Fund Administrator, filed its annual Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate for the period of July 1, 2004, to June 30, 2005.[1] NECA proposes TRS[2] provider compensation rates of $1.349 per-minute for interstate traditional TRS and interstate and intrastate Internet Protocol (IP) Relay,[3] $1.440 per-minute for interstate Speech-to-Speech Service (STS),[4] and $7.293 per-minute for interstate and intrastate Video Relay Service (VRS).[5] Based on these figures, NECA also proposes a total fund size requirement of

[1] NECA, *Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate*, CC Docket No. 98-67, filed May 3, 2004 (*2004 NECA Filing*). Under the Commission's rules, this report is due May 1, which this year was a Saturday.

[2] 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 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).

[3] Traditional TRS is accomplished via text-to-voice or voice-to-text, with the text provided via a text telephone (TTY). *See* 47 C.F.R. § 64.601(14). IP Relay functions similarly with the text provided to, and received from, the communications assistant (CA) via the TRS consumer's computer or other web-enabled device.

[4] Speech-to-Speech Service (STS) is a telecommunications relay service "that allows people with speech disabilities to communicate with voice telephone users through the use of specially trained CAs who understand the speech patterns of persons with disabilities and can repeat the words spoken by that person." 47 C.F.R. § 64.601(12).

[5] Video Relay Service (VRS) is a telecommunications relay service "that allows people with hearing or speech disabilities who use sign language to communicate with voice telephone users through video equipment. The video link allows the CA to view and interpret the party's signed conversation and relay the conversation back and forth with a voice caller." 47 C.F.R. § 64.601(17).

$289,352,701, and a carrier contribution factor of 0.00356, for the July 1, 2004, through June 30, 2005, fund year.

2. As set forth below, this *Order* approves – subject to adjustment as discussed below – NECA's proposed TRS provider compensation rates for traditional TRS and IP Relay, STS, and VRS for the July 1, 2004, to June 30, 2005, fund year. As discussed below, the compensation rates adopted in this *Order* are subject to revision pending our review of: (1) any supplemental cost data relating to capital investment, and (2) any adjustments to cost disallowances challenged by a provider in response to this *Order*.[6] This Order also approves the proposed fund size and the proposed carrier contribution factor.

II. BACKGROUND

A. Telecommunications Relay Services and Cost Recovery

3. As the Commission has frequently noted, Title IV of the Americans with Disabilities Act of 1990 (ADA) amended the Communications Act of 1934 to add section 225.[7] Section 225 requires the Commission to ensure that TRS is available to the extent possible and in the most efficient manner to persons with hearing or speech disabilities in the United States.[8] To that end, section 225 requires common carriers providing telephone voice transmission services to *also* provide TRS throughout the area in which they offer service so that persons with disabilities will have access to telephone service.[9]

4. The Commission issued its first order pursuant to Title IV of the ADA implementing TRS on July 26, 1991.[10] TRS became available on a uniform, nationwide basis pursuant to Commission regulations in July 1993.[11] In March 2000, the Commission issued the *Improved TRS Order & FNPRM,* which, in part, added STS as a required form of TRS.[12] That order further concluded that VRS was a form of TRS, but also concluded that the provision of VRS should not be mandatory given its

---

[6] On June 30, 2004, the Commission released the *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, CC Docket Nos. 90-571 & 98-67, CG Docket No. 03-123, FCC 04-137, __ FCC Rcd __ (June 30, 2004) (*2004 TRS Report & Order*), which includes an order on reconsideration that affirmed the June 30, 2003, TRS rate order. *See id. at* ¶¶ 163-200, 274; *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* Order, CC Docket No. 98-67, DA 03-2111, 18 FCC Rcd 12823 (June 30, 2003) (*2003 Bureau TRS Order*). The *2004 TRS Report & Order* addresses, *inter alia*, the allowance of a rate of return on capital investment. *See 2004 TRS Report & Order* at ¶¶ 177-182. In view of the recent release of the *2004 TRS Report & Order*, any adjustments to the rates adopted in this order based on the inclusion of a rate of return on capital investment, or changes to cost disallowances, will be effective as of July 1, 2004. We further note that as a result of the *2004 TRS Report & Order,* we anticipate the process of determining the TRS compensation rates for the 2005-2006 fund year will not require these same kinds of post-adoption adjustments to the compensation rates.

[7] 47 U.S.C. § 225.

[8] 47 U.S.C. § 225(b)(1).

[9] 47 U.S.C. § 225(c). For a more detailed description of TRS, *see, 2003 Bureau TRS Order* at ¶ 3; *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-67, FCC 00-56, 15 FCC Rcd 5140 at ¶ 2 (March 6, 2000) (*Improved TRS Order & FNPRM)* (describing a TRS call).

[10] *Telecommunications 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, FCC 91-213, 6 FCC Rcd 4657 (July 26, 1991) (*First TRS Report & Order*).

[11] The statute mandated an implementation date of no later than July 26, 1993. 47 U.S.C. § 225(c).

[12] *Improved TRS Order & FNPRM* at ¶¶ 14-20.

"technological infancy."[13] On April 22, 2002, the Commission released the *IP Relay Declaratory Ruling & FNPRM*, which further expanded the scope of TRS by concluding that IP Relay falls within the statutory definition of TRS.[14] IP Relay, like VRS, was not made a mandatory form of TRS.

5. Section 225 creates a cost recovery scheme whereby providers of TRS are compensated for their costs of providing TRS.[15] This scheme is based on a "jurisdictional separation of costs."[16] Section 225 provides that the costs caused by the provision of *inter*state TRS "shall be recovered from all subscribers for every interstate service," and the costs caused by the provision of *intra*state TRS "shall be recovered from the intrastate jurisdiction."[17] With regard to the provision of *intra*state TRS, as a general matter the costs of providing *intra*state TRS are recovered by each state. [18] No specific funding method is required for *intra*state TRS or state TRS programs.[19] States with certified TRS programs generally recover the costs of intrastate TRS either through rate adjustments or surcharges assessed on all intrastate end users, and reimburse TRS providers directly for their intrastate TRS costs.

6. With respect to *inter*state TRS cost recovery, there are two aspects to the cost recovery framework set forth in the regulations: (1) collecting "contributions" from "[e]very carrier providing interstate telecommunications services" based on "interstate end-user telecommunications revenues" to create a fund from which eligible TRS providers may be compensated; and (2) the payment of money from the fund to eligible TRS providers to compensate them for the costs of providing eligible TRS services.[20] With regard to creating the Interstate TRS Fund, the Commission has enacted a shared-funding mechanism based on contributions from all carriers who provide interstate telecommunications services. All contributions are placed in the Interstate TRS Fund, which is administered by the TRS fund administrator, currently NECA.[21] The fund administrator uses these funds to compensate "eligible" TRS providers[22] for the costs of providing the various forms of TRS; presently, interstate traditional TRS,

---

[13] *Id.* at ¶ 22.

[14] *Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* Declaratory Ruling and Second Further Notice of Proposed Rulemaking, CC Docket No. 98-67, FCC 02-121, 17 FCC Rcd 7779 at ¶¶ 10-11 (April 22, 2002) (*IP Relay Declaratory Ruling & FNPRM)*.

[15] 47 U.S.C. § 225(d)(3).

[16] *Id.*

[17] 47 U.S.C. § 225(d)(3)(B); *see also* 47 C.F.R. § 64.604(c)(5)(ii).

[18] On an interim basis, the costs of providing certain types of *intra*state TRS, including VRS and IP Relay, are currently not recovered from the states, but are recovered pursuant to the rules governing the recovery of the costs of *inter*state TRS. *See Improved TRS Order& FNPRM* at ¶ 15 (addressing VRS); *IP Relay Declaratory Ruling & FNPRM* at ¶ 20 (addressing IP Relay). The Commission recently raised cost recovery and separation of costs issues relating to the provision of IP Relay and VRS in the Further Notice of Proposed Rulemaking in the *2004 TRS Report & Order* at ¶¶ 221-230, 234-242.

[19] In a state with a certified TRS program, the state "shall permit a common carrier to recover the costs incurred in providing intrastate telecommunications relay services by a method consistent with the requirements of [section 225]." 47 U.S.C. § 225(c)(3)(B).

[20] *See* 47 U.S.C. § 225(d)(3); 47 C.F.R. § 64.604(c)(5). The regulations, addressing these matters separately, characterize the former as "cost recovery," *see* 47 C.F.R. §§ 64.604(c)(5)(ii) & (iii)(A) – (D), and the latter as "payments to TRS providers," 47 C.F.R. §§ 64.604(c)(5)(iii)(E) & (F).

[21] The amount of each carrier's contribution is the product of the carrier's interstate end-user telecommunications revenue and a contribution factor determined annually by the Commission. 47 C.F.R. § 64.604(c)(5)(iii).

[22] 47 C.F.R. § 64.604(c)(5)(iii)(E) & (F) (setting forth, among other things, the eligibility requirements for TRS providers seeking to receive compensation from the Interstate TRS Fund).

interstate STS, interstate Spanish Relay service, IP Relay, and VRS. Fund distributions are made on the basis of a payment formula initially computed by NECA in accordance with the Commission's rules, and then approved or modified by the Commission.[23] The compensation rate calculations are presently based on the cumulative average cost per interstate minute for each service.[24] There are currently three different compensation rates for different forms of TRS: a rate for traditional TRS and IP Relay, a rate for STS, and a rate for VRS.[25]

7. In order for the TRS administrator to make the necessary calculations to determine the various per-minute compensation rates, TRS providers are required to submit to the administrator "true and adequate data necessary to determine TRS fund revenue requirements and payments."[26] Specifically, TRS providers must provide the administrator with "total TRS minutes of use, total interstate TRS minutes of use, total TRS operating expenses and total TRS investment," as well as "other historical or projected information reasonably requested by the administrator for purposes of computing payments and revenue requirements."[27] The regulations further provide that this information shall be provided "in general accordance with Part 32 of the [Commission's rules]." [28] Part 32 of the Commission's rules establishes the revised Uniform System of Accounts (USOA) as the standard for accounting for telecommunications companies under the Commission's authority.[29] Finally, the rules give "[t]he administrator and the Commission … the authority to examine, verify and audit data received from TRS providers as necessary to assure the accuracy and integrity of fund payments."[30]

8. Using the projected cost and projected minutes of use information it receives from the TRS providers, the TRS administrator determines the per-minute compensation rate for the various forms

---

[23] 47 C.F.R. § 64.604(c)(5)(iii). The regulations provide that "TRS Fund payments shall be distributed to TRS providers based on formulas approved or modified by the Commission. … Such formulas shall be designed to compensate TRS providers for *reasonable* costs of providing interstate TRS, and shall be subject to Commission approval." 47 C.F.R. § 64.604(c)(5)(iii)(E).

[24] *See generally Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, Order, CC Docket No. 90-571, DA 02-1166, 17 FCC Rcd 8840 at ¶ 2 (May 16, 2002) (order modifying compensation rates of various TRS services). We note that in the Further Notice of Proposed Rulemaking of the *2004 TRS Report & Order* the Commission has sought comment on whether the per-minute cost recovery methodology should continue to be used for VRS. *See 2004 TRS Report & Order* at ¶¶ 234-240.

[25] The Commission has presently determined that the compensation rate for IP Relay would be at the same rate as for traditional TRS because there is little difference in the costs of providing these services. *See IP Relay Declaratory Ruling & FNPRM* at ¶ 22. The Commission, however, recently sought comment on whether this arrangement should continue in the *2004 TRS Report & Order* at ¶¶ 241-242. Likewise, eligible non-English language relay service and captioned telephone Voice Carry Over (VCO) service minutes fall within the traditional TRS rate. *See Improved TRS Order & FNPRM* at ¶¶ 28-31; s*ee also Telecommunications Relay Services, and Speech to Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling, CC Docket No. 98-67, FCC 03-190, 18 FCC Rcd 16121 at ¶ 22 (Aug. 1, 2003) (*Captioned Telephone Declaratory Ruling*); *Telecommunications Services for Individuals with Hearing and Speech Disabilities, Recommended TRS Cost Recovery Guidelines,* Memorandum Opinion and, Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-67, FCC 01-371, 16 FCC Rcd 22948 at ¶ 13 (Dec. 21, 2001) (*TRS Cost Recovery MO&O*). The compensation rates for STS and VRS are distinct, however, because of the unique costs of providing those services. *See TRS Cost Recovery MO&O* at ¶¶ 17, 22.

[26] 47 C.F.R. § 64.604(c)(5)(iii)(C).

[27] *Id.*

[28] *Id.*

[29] *See* 47 C.F.R. Part 32.

[30] 47 C.F.R. § 64.604(c)(5)(iii)(C).

of TRS.[31] In these calculations, the projected minutes of use are the providers' own estimates of the number of minutes of demand there will be for each of the various forms of TRS for a two-year period that encompasses the July through June period for which the new compensation rates will be in effect (*e.g.*, in this case, for all of 2004 and 2005).[32] The providers' own demand estimates are used (instead of projected demand extrapolated from, or otherwise based on, prior actual use data, as is used in determining the fund size and carrier contribution factor) because the providers' projected costs are based on their projected demand.[33]

9. Using this data, the regulations provide that "TRS Fund payments shall be distributed to TRS providers based on formulas approved or modified by the Commission. … Such formulas shall be designed to compensate TRS providers for *reasonable* costs of providing interstate TRS, and shall be subject to Commission approval."[34] The regulations further provide that the "administrator shall establish procedures to verify payment claims, and may suspend or delay payments to a TRS provider if the TRS provider fails to provide adequate verification of payment upon reasonable request, or if directed by the Commission to do so. … The Commission shall have authority to audit providers and have access to all data, including specific carrier data, collected by the fund administrator."[35]

10. In sum, the TRS fund administrator collects and reviews the cost and demand data submitted by the providers. As the TRS fund administrator, NECA has the responsibility, in the first instance, to ensure the accuracy and reasonableness of the cost data submitted, so that proposed rates NECA submits will be based on permissible cost data.[36] The Commission then has the responsibility to review NECA's filing and its calculation of the proposed compensation rates, and to approve or modify the proposed rates.[37] This process of establishing the reasonable compensation rates for the various forms of TRS reflects the Commission's twin obligations of ensuring that providers are compensated for the "reasonable" and "fair" costs of providing eligible TRS services, and ensuring the integrity of the Interstate TRS Fund.

B. NECA's May 3, 2004, Filing

1. Data Collection and Analysis

11. The rules require that the fund administrator file "with the Commission on May 1 of each

[31] *See 2004 NECA Filing* at Exs. 1A-1E, 2, 4.

[32] *See e.g., id.* at 5, Exs. 1A, 1B, 1D, 1E.

[33] As NECA has explained, it uses the providers' projected costs and minutes of use to calculate the compensation rates. *2004 NECA Filing* at 10. However, in determining the fund size estimate and carrier contribution rate, NECA generally uses its own projection of minutes of use based on recent actual minutes of use modified by a growth factor, which is based on historical data and trends analysis. For IP Relay and VRS, because of the more limited historical data on which to base a growth rate, as well as the recent volatile growth in the use of these services, NECA used historical data to develop an amount by which the number of minutes of use each month will be deemed to increase to arrive at an estimate of the total minutes of use for the upcoming fund year. These various approaches to determining the fund size estimate generally produce a larger number of projected minutes than the providers' projections, and help to guarantee that the Interstate TRS Fund has sufficient monies to cover the compensation of all providers for all of their services in the covered year. Any excess monies are carried over into the next fund year. *See* 47 C.F.R. § 64.604(c)(5)(iii)(B).

[34] 47 C.F.R. § 64.604(c)(5)(iii)(E) (emphasis added). As we have noted above, the costs of providing intrastate VRS and IP Relay are also recoverable from the Interstate TRS Fund.

[35] *Id.*

[36] *See 2003 Bureau TRS Order* at ¶ 24; 47 CFR § 64.604(c)(5)(iii)(C).

[37] *See* 47 C.F.R. § 64.604(c)(5)(iii)(E).

year, to be effective for a one-year period beginning the following July 1," its "TRS payment formulas and revenue requirements."[38] Pursuant to this rule, on May 3, 2004, NECA filed the Interstate TRS Fund payment formulae and fund size estimate for the period July 1, 2004, through June 30, 2005.[39]

12. NECA's filing describes in some detail its development of the 2004-2005 payment formulae and fund size estimates.[40] On September 30, 2003, NECA sent a request for data to all interstate TRS providers, seeking cost and demand data on traditional TRS, IP Relay, STS, and VRS. The cost and demand data reported by the relay providers consisted of actual amounts for 2002, annualized actual amounts for 2003, and estimated amounts for 2004 and 2005. As NECA explains, the "2002 and 2003 data were used for trending purposes and will be used ... as part of the fund administrator's audit process. The 2004 and 2005 projections are used for rate development for the next funding period."[41] Therefore, from the submitted data, NECA developed the relevant projections for the costs, demand, and fund requirements for these forms of TRS for the July, 2004, through June, 2005, period.

13. As NECA further explains, in analyzing the submitted cost and demand data, NECA followed the directives set forth in the *2003 Bureau TRS Order*.[42] In so doing, NECA notes that "[c]onsistent with the criteria established in the [*2003 Bureau TRS Order*], it performed a detailed examination of the data for all four relay services in developing the proposed compensation levels for the 2004-2005 fund year."[43] NECA states that its "analysis uncovered anomalies in the 2004-2005 data reported by most providers. These included, in some cases: inconsistencies in the relationship between projected salaries and demand; the calculation of occupancy and utilization percentages for Communications Assistants (CA) and interpreters; the amount of research and development included in engineering expenses; the costs included in corporate overheads, disparities between comparable expenses for traditional TRS and IP; the type of taxes claimed or paid; the calculation of profit margin; etc."[44] NECA notes that, as a result, "[i]n each case, [it] contacted the providers concerned and obtained corrections or clarifications before using the data in its calculations. In some cases, after repeated requests for explanations did not achieve a satisfactory result, or a provider's average cost per minute fell far out of the range of all other providers, NECA excluded that provider's data from the rate development calculations."[45]

14. More specifically, NECA made adjustments to the providers' cost data in several areas, principally profit margins and income tax allowances, management salaries, and marketing expenses.[46] NECA further explains that "[except for those providers whose data was totally excluded from the rate

[38] 47 C.F.R. § 64.604(c)(5)(iii)(H).

[39] As noted above, because May 1 was a Saturday, NECA filed its report on May 3.

[40] *2004 NECA Filing* at 4-18.

[41] *Id.* at 5.

[42] The *2003 Bureau TRS Order* was affirmed by the Commission in the *2004 TRS Report & Order. See 2004 TRS Report & Order* at ¶ 274.

[43] *2004 NECA Filing* at 6.

[44] *Id*.

[45] *Id.* NECA further explained that it "excluded all of the data of three single-center providers; a new provider who could not substantiate its projections; a provider who was exiting the business; and a third provider, of TRS only, whose occupancy and utilization was unreasonably low and whose average total costs were out of range of most providers." *Id.* at 7 n.15.

[46] *See id.* at 6 (addressing profit margins), 15 (addressing management salaries and marketing expenses). As discussed below, small disallowances were also made for research and development expenses and corporate overhead.

development, NECA did not reduce salaries and benefits associated with Communications Assistants (CA) or interpreters." [47] Further, "[u]njustifiable indirect or allocated costs that were out of the range of most providers, primarily in the area of compensation, were adjusted."[48]

15. With respect to profit margins and tax allowances, after noting that the *2003 Bureau TRS Order* determined that the inclusion of profit margins and tax allowances on the providers' costs was inconsistent with the TRS statutory scheme,[49] NECA "did not include providers' income taxes or profit margins."[50] Although NECA recognized that, instead of profit, the providers were entitled to the 11.25% rate of return on investment, plus corresponding tax allowances, that was applied in the *2003 Bureau TRS Order,* [51] NECA did not include such sums in its calculations because, in part, it did not have sufficient underlying data on the providers' capital investment.

16. NECA did, however, include an allowance for working capital for all providers in determining the per-minute compensation rate for each form of TRS. This allowance compensates providers for the fact that, commencing July 2004, providers will be compensated for their submitted minutes of service one month after the service was provided, and therefore they will be "out of pocket" the money they are due for the services rendered for one month.[52] In determining the allowance for working capital for this one month lag in payment, NECA also applied the 11.25% rate of return. To apply the 11.25% to the providers' out of pocket costs, NECA applied a factor of 1.4% to the per-minute compensation rate that it calculated for each service based on the providers' submitted projected cost data (less disallowances) and projected minutes of use. This factor of 1.4% represents one-twelfth (or one month) of the 11.25% rate of return, plus a tax allowance.[53]

2. Traditional TRS and IP Relay

17. The compensation rate for providers of eligible traditional TRS and IP Relay services is determined by dividing the providers' total projected costs of providing these services, as adjusted, by the

---

[47] *Id.* at 6-7.

[48] *Id.* at 7.

[49] *Id.* at 5.

[50] *Id.*

[51] *Id.* As noted below, in the *2004 TRS Report & Order* the Commission adopted this approach to the treatment of profit and a rate of return on capital investment.

[52] Prior to the 2004-2005 fund year, NECA's payments to the providers lagged two months after the service was provided.

[53] More specifically, the 1.4 % factor is calculated as follows: (1) the 11.25% rate of return, on a monthly basis, is .9375% (11.25 divided by 12); (2) because the .9375% rate of return is an after-tax rate of return, it must be adjusted to a pre-tax figure, so that the compensation paid for the allowance for working capital equals the 11.25% annualized rate of return *after* taxes are paid on the compensation received; (3) the tax adjustment is based on a 35% federal tax rate and a 5% state tax rate, which totals 40%; (4) however, some providers are not-for-profit, and therefore are not entitled to a tax allowance – based on an analysis of the providers, it is estimated that not-for-profit providers account for 20% of all minutes of service provided, and therefore, the 40% tax allowance rate is reduced by 20%, which results in a rate of 32%; and (5) using the 32% rate, and applying the formula to convert from an after-tax allowance to a pre-tax allowance, the result is that the .9375% monthly rate of return must be adjusted by multiplying it by 1.47, which equals a monthly working capital allowance of 1.4% (that is applied to the per-minute compensation rate that is based on the providers' projected costs and minutes, adjusted as necessary). *See 2004 NECA Filing* at 7, Exs. 1C, 1D, & 1E. The formula for converting from an after-tax basis to a pre-tax basis is: 1 + X/(1-X), where X = net tax allowance (32%). Therefore, the pre-tax allowance for working capital is calculated as follows: 0.9375 x [1 + (.32)/(1 - .32)] = (0.9375) x 1.4706] = 1.3786%, which NECA rounded to 1.4%.

providers' total projected minutes of use.[54] Based on the data provided, NECA's calculations have resulted in a proposed per-minute compensation rate of $1.349; that figure was arrived at by dividing the 2004-2005 annualized average projected costs of $98,251,224 by the 2004-2005 annualized average projected minutes of 73,825,700, and applying the 1.4% rate of return for an allowance for working capital to the resulting average cost per minute.[55] We note that this rate does not reflect a significant change from last fund year's rate of $1.368.[56]

[54] *See 2004 NECA Filing* at 9-11 & Exs. 1A-1C. As we have noted, the total projected costs and minutes of use are determined by adding the providers' total projected costs and minutes for 2004 to the providers' total projected costs and minutes for 2005, and dividing each sum by two. *See id.* For traditional TRS, only the costs of providing interstate service are considered. *Id.* at 9.

[55] *Id.* at Ex. 1C. In other words, the per-minute compensation rate determined by dividing total costs by total minutes equaled 1.331; that figure, multiplied by the working capital allowance figure of 1.4%, totals 1.349. *Id.*

[56] Since its inception, the per-minute compensation rate for traditional TRS has ranged from $1.168 to $1.705 per-minute. The history of TRS payment rates follows:

$1.705 per-minute, July 26, 1993, through December, 1994. *See Telecommunications Relay Services, and the Americans with Disabilities Act of 1990*, Second Order on Reconsideration and Fourth Report and Order, CC Docket No. 90-571, FCC 93-463, 9 FCC Rcd 1637 at ¶ 8 (1993).

$1.304 per-minute, 1995. *See Telecommunications Relay Services, and the Americans with Disabilities Act of 1990*, Order, CC Docket No. 90-571, DA 94-1610, 10 FCC Rcd 1191 at ¶ 7 (1994).

$1.379 per-minute, 1996. *See Telecommunications Relay Services, and the Americans with Disabilities Act of 1990*, Order, CC Docket No. 90-571, DA 95-2475, 11 FCC Rcd 5191 at ¶ 11 (1995).

$1.217 per-minute, 1997. *See Telecommunications Relay Services and the Americans with Disabilities Act of 1990,* Order, CC Docket No. 90-571, DA 96-2158, 12 FCC Rcd 14120 at ¶ 11 (1996).

$1.168 per-minute, 1998. *See Telecommunications Relay Services and the Americans with Disabilities Act of 1990*, Order, DA 97-2676, 12 FCC Rcd 22046 at ¶ 9 (1997).

$1.179 per-minute, January, 1999, through June, 2000. *See Telecommunications Relay Services, and the Americans with Disabilities Act of 1990*, Order, CC Docket No. 90-571, DA 98-2481, 13 FCC Rcd 23520 at ¶ 14 (1998); *1998 Biennial Regulatory Review*, Memorandum Opinion and Order, CC Docket No. 98-171, DA 99-2027, 1999 WL 777545 at ¶ 9 (Sept. 30, 1999).

$1.282 per-minute, July, 2000, through December, 2000. *See Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, Order, CC Docket No. 90-571, DA 00-1433, 15 FCC Rcd 11384 at ¶ 7 (2000) (*2000 TRS Payment Rate Order*).

$1.328 per-minute, January, 2001, through June, 2001. *See Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, Order, CC Docket No. 90-571, DA 01-490, 16 FCC Rcd 4651 at ¶ 7 (2001) (*February 2001 TRS Payment Rate Order*).

$1.309 per-minute, July, 2001. *See Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, Order, CC Docket No. 90-571, DA 01-1502, 16 FCC Rcd 12895 at ¶¶ 5-6 (2001) (*June 2001 TRS Payment Rate Order*).

$1.395 per-minute, August, 2001, through June, 2002. *See Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, Order, CC Docket No. 90-571, DA 02-1166, 17 FCC Rcd 8840 at ¶ 8 (2002) (*2002 TRS Payment Rate Order*).

(continued....)

18. With respect to traditional TRS, NECA adjusted the providers' submitted costs to eliminate any claimed "profit" margin and corresponding tax allowances, and also disallowed some costs relating to marketing, research and development, and corporate overhead. In sum, of the total submitted projected costs for 2004 and 2005 for traditional TRS of approximately $366.4 million, NECA disallowed approximately $59.1 million in costs, or approximately 16.1% of the costs submitted. Approximately 73% of the disallowed costs were for profit and tax allowances. For marketing and research and development, the disallowed costs totaled less than 0.5% of the total disallowed costs.[57]

19. With respect to IP Relay, NECA also adjusted the providers' submitted costs to eliminate any claimed "profit" margin and corresponding tax allowances, and also disallowed some costs relating to marketing, research and development, and corporate overhead. In sum, of the total submitted projected costs for 2004 and 2005 for IP Relay of approximately $160.6 million, NECA disallowed approximately $13 million in costs, or approximately 8.0% of the costs submitted. Approximately 68% of the disallowed costs were for profit and tax allowances. For marketing and research and development, the disallowed costs totaled approximately 1.0% of the total disallowed costs.

20. For purposes of determining the fund size requirement and carrier contribution rate, for traditional TRS NECA projected demand based on prior actual usage, as modified by a historic growth rate.[58] Based on 10 years of historical data for traditional TRS, NECA applied a -0.007% decline per month to arrive at a forecast of 22.2 million minutes of use for the period of July, 2004, through June, 2005, for traditional TRS.[59] For IP Relay, because there is more limited data on which to base an historic growth rate, and because of the recent substantial growth in the minutes of use, NECA applied an average monthly minutes of growth figure of 209,497 to arrive at a forecast of 86.7 million minutes of use for the period of July, 2004, through June, 2005, for IP Relay.[60] Taken together, NECA therefore forecasts that there will be 108.9 million minutes of use for traditional TRS and IP Relay during the 2004-2005 fund year, an increase of approximately 90% from the previous year. By multiplying the new, proposed per-minute rate ($1.349) by NECA's projected minutes of use, NECA projects that the Interstate TRS Fund will need $146.8 million to compensate TRS providers for providing these services.[61]

3. Speech-to-Speech (STS)

21. The compensation rate for providers of interstate STS is determined the same way, using

(...continued from previous page)

$1.528 per-minute, July, 2002 through June, 2003. *See Proposed Payment Formula and Fund Size Estimate for the Interstate Telecommunications Relay Services (TRS) Fund for July 2002 Through June 2003*, Public Notice, CC Docket No. 90-571, DA 02-1422, 17 FCC Rcd 11242 at ¶ 3 (2002) (*2002 Payment Formula PN*).

$1.368 per-minute, July, 2003 through June, 2004. *See 2003 Bureau TRS Order* at ¶ 26.

[57] Because the providers' cost data submissions are confidential, we do not discuss in detail the adjustments made to individual submissions or particular categories of costs with respect to any of the forms of TRS addressed herein. Providers may, however, if they so desire, contact the Consumer & Governmental Affairs Bureau's Disability Rights Office to discuss any cost adjustments made to their individual submissions.

[58] *2004 NECA Filing* at 10.

[59] *Id.* at 10.

[60] *Id.* at 12 & Ex. 2 (page 2B of 6).

[61] *Id.* at 12-13, Ex. 4. The $108.8 million, added to the funding requirements for the projected use of STS and VRS, as noted below, plus certain administrative costs, determines the total projected Interstate TRS Fund size estimate. *See id*.

the providers' total projected interstate costs of providing this service and the providers' total projected minutes of use. Based on the data submitted, NECA calculations have resulted in a proposed per-minute compensation rate for STS of $1.440; that figure was arrived at by dividing the 2004-2005 annualized average projected costs of $131,483 by the providers' 2004-2005 annualized average projected minutes of 92,593, and applying the 1.4% rate of return for an allowance for working capital to the resulting average cost per minute.[62] That rate represents a 41% decrease from the current rate of $2.445.[63]

22. With respect to STS, NECA also adjusted the providers' submitted costs to eliminate any claimed "profit" margin and corresponding tax allowances, and also disallowed some costs relating to marketing and corporate overhead. In sum, of the total submitted projected costs for 2004 and 2005 for STS of approximately $1.9 million, NECA disallowed approximately $368,000 in costs, or approximately 19.1% of the costs submitted. Approximately 52% of the disallowed costs were for profit and tax allowances. For marketing, the disallowed costs totaled approximately 8% of the total disallowed costs. In addition, because several STS centers "exhibited characteristics that were significantly out of the norm," NECA "excluded their data entirely from the rate development."[64]

23. For purposes of determining the fund size requirement and carrier contribution rate, NECA projected demand based on prior actual usage, as modified by a historic growth rate, for the period of July, 2004, through June, 2005, to be 155,047 minutes,[65] an increase in projected demand of approximately 12% from the previous year. By multiplying the new, proposed per-minute rate ($1.440) by NECA's projected minutes of use, NECA projects that the Interstate TRS Fund will need $223,268 to compensate TRS providers for providing STS.[66]

4. Video Relay Service (VRS)

24. The compensation rate for providers of VRS is also determined the same way, using the total projected costs of providing this service and the total projected minutes of use. Based on the data submitted, NECA's calculations have resulted in a proposed per-minute compensation rate of $7.293; that figure was arrived at by dividing the 2004-2005 annualized average projected costs of $57,411,359 by the providers' 2004-2005 annualized average projected minutes of 7,982,733, and applying the 1.4% rate of

---

[62] *See id.* at 14 & Ex.1D. NECA notes that "the STS cost data submitted this year more closely resembled traditional TRS costs than ever before," and therefore suggests that beginning with the 2005-2006 fund year STS costs and demand will be included in the traditional TRS rate development and compensated at the same rate as traditional TRS. *Id.* at 14. We believe that such a conclusion is premature, and instruct NECA to continue to calculate a compensation rate for STS as it has in the past, until otherwise instructed.

[63] Since its inception, the per-minute compensation rate for STS has ranged from $2.62 to $4.263 per-minute. The history of STS payment rates follows:

> $4.623 per-minute, July, 2000, through June, 2001. *See 2000 TRS Payment Rate Order* at ¶ 7 & Table 1.
>
> $2.620 per-minute, July, 2001. *See June 2001 TRS Payment Rate Order* at ¶ 9.
>
> $2.469 per-minute, August, 2001, through June, 2002. *See 2002 TRS Payment Rate Order* at ¶ 8.
>
> $4.045 per-minute, July, 2002, through June, 2003. *See 2002 Payment Formula PN* .
>
> $2.445 per-minute, July, 2003, through June, 2004. *See 2003 Bureau TRS Order at* ¶ 28.

[64] *2004 NECA Filing* at 14. NECA informed the providers in question of its intent to exclude data from these centers. *Id.*

[65] *Id.* at Ex. 4.

[66] *Id.* at 14 & Ex. 4.

return for an allowance for working capital to the resulting average cost per minute.[67] That rate represents a 6% decrease from the 2003-2004 interim rate of $7.751, and a 17% decrease from the $8.854 final VRS rate applicable for the period September 1, 2003, to June 30, 2004, pursuant to the *2004 TRS Report & Order*.[68]

25. With respect to VRS, NECA also adjusted the providers' submitted costs to eliminate any claimed "profit" margin and corresponding tax allowances, and also disallowed some costs relating to marketing, research and development, management, corporate overhead, and other miscellaneous costs. In sum, of the total submitted projected costs for 2004 and 2005 for VRS of approximately $153 million, NECA disallowed approximately $38.1 million in costs, or approximately 25% of the costs submitted. Approximately 76% of the disallowed costs were for profit and tax allowances. For marketing, research and development, and miscellaneous costs, the disallowed costs totaled approximately 5.5% of the total disallowed costs.

26. For purposes of determining the fund size requirement and carrier contribution rate, because, like IP Relay, there is more limited data on which to base an historic growth rate for VRS, and because of the recent substantial growth in the minutes of use, NECA used a combination of providers' forecasts and the available historical data to develop and apply an average monthly minutes of growth figure of 57,726 to arrive at a forecast of 15.1 million minutes of use for the period of July, 2004, through June, 2005.[69] That figure represents an increase of 621% from the previous year. By multiplying the new, proposed per-minute rate ($7.293) by NECA's projected minutes of use, NECA projects that the

[67] *Id.* at 16 & Exs.1E, 4.

[68] Since its inception (March 2000) the per-minute compensation rate for VRS has ranged from $5.143 to $17.044 per-minute. The history of VRS payment rates follows:

$5.143 per-minute, July, 2000, through September, 2000. *See 2000 TRS Payment Rate Order* at ¶ 7 & Table 1.

$5.539 per-minute, October, 2000, through June, 2001. *See February 2001 TRS Payment Rate Order* at ¶ 14.

$7.449 per-minute, July, 2001. *See June 2001 TRS Payment Rate Order* at ¶ 10.

$9.614 per-minute, August, 2001, through June, 2002. *See 2002 TRS Payment Rate Order* at ¶ 8.

$17.044 per-minute, July, 2002, through June, 2003. *See 2002 Payment Formula PN.*

$7.751 per-minute, July, 2003, through August, 2003. *See 2003 Bureau TRS Order* at ¶ 37

$8.854 per-minute, September, 2003, through June, 2004. *See 2004 TRS Report & Order* at ¶ 272.

We also note that the first VRS minutes of use submitted to NECA for reimbursement were for December 2000, and those minutes (256) were from a trial program. Minutes of use for VRS were subsequently submitted to NECA for service rendered beginning January 2002. Since that time, the monthly minutes of use for VRS, as reported to NECA, are as follows: January 2002: 7,215; February 2002: 12,884; March 2002: 2,397; April 2002: 27,550; May 2002: 33,314; June 2002: 35,433; July 2002: 59,028; August 2002: 61,922; September 2002: 80,201; October 2002: 91,397; November 2002: 94,811; December 2002: 102,775; January 2003: 128,114; February 2003: 133,985; March 2003: 160,735; April 2003: 171,124; May 2003: 189,422; June 2003: 211,259; July 2003: 240,470; August 2003: 247,913; September 2003: 290,724; October 2003: 360,565; November 2003: 295,839; December 2003: 381,783; January 2004: 477,538; February 2004: 534,536; March 2004: 709,718; April 2004: 722,863. *See* NECA, *Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate*, CC Docket No. 98-67, filed May 1, 2003 at Ex. 2 (page 2B of 3); *2004 NECA Filing* at Ex. 2 (page 2D of 6).

[69] *2004 NECA Filing* at 16-17 & Ex. 2 (page 2D of 6).

Interstate TRS Fund will need $110,105,761 to compensate TRS providers for providing VRS.[70]

5. Interstate TRS Fund Size and Carrier Contribution Rate

27. Once NECA has calculated its proposed compensation rates for traditional TRS and IP Relay, STS, and VRS, NECA calculates the proposed fund size and carrier contribution rate.[71] As we have noted, the total annual Interstate TRS Fund requirement is determined by adding together the projected payments to TRS providers for the various forms of TRS, plus certain administrative expenses. The contribution factor is then based on the "ratio between expected TRS Fund expenses to interstate end-user telecommunications revenues."[72]

28. Making these calculations, NECA determined that the total fund size requirement – *i.e.*, the amount that would be necessary to compensate providers for providing all eligible TRS services for the period of July, 2004, through June, 2005 – would be $289,352,701 (which includes certain costs and other relevant expenses).[73] NECA then divided that number by the total 2003 common carrier end user revenues ($81.2 billion) to arrive at a contribution factor of 0.00356.[74] NECA submits all of its data to the Commission, which has the authority to approve or modify NECA's proposed carrier contribution factor, fund size, and per-minute compensation rates.[75]

C. Commenters

29. On May 4, 2004, the Commission released a Public Notice requesting comment from interested parties on NECA's filing.[76] Approximately 445 comments, 26 reply comments, and 126 late-filed comments were filed.[77] In general, commenters make the following arguments: (1) NECA exceeded its authority and failed to adequately explain its actions; (2) the rates proposed by NECA are based on a ruling by the Consumer & Governmental Affairs Bureau (CGB) (*i.e.,* the *2003 Bureau TRS* Order) that was impermissibly made without notice and comment from the public; (3) NECA's rate

---

[70] *Id.* at Ex.4.

[71] *Id.* at 17-18 & Ex.4. Under the Commission's rules, "[e]very carrier providing interstate telecommunications services shall contribute to the TRS Fund on the basis of interstate end-user telecommunications revenues." 47 C.F.R. 64.604(c)(5)(iii)(A).

[72] *Id.*

[73] *Id.* Costs include the actual costs of providing TRS, NECA's administrative costs, and allowances for uncollectible contributions. This amount is reduced by interest income on retained funds. *See id.*at Ex. 4.

[74] *Id.* The carrier contribution "shall be the product of their subject revenues for the prior calendar year and a contribution factor determined annually by the Commission. The contribution factor shall be based on the ratio between expected TRS Fund expenses to interstate end-user telecommunications revenues." 47 C.F.R. § 64.604(c)(5)(iii)(B).

[75] *See* 47 C.F.R. § 64.604(c)(5)(iii)(E), (H).

[76] *National Exchange Carrier Association (NECA) Submits the Payment Formula and Fund Size Estimate for Interstate Telecommunications Relay Services (TRS) Fund for July 2004 through June 2005*, Public Notice, CC Docket No. 98-67, DA 04-1258, released May 4, 2004.

[77] The numbers are as of June 23, 2004. The bulk of these comments are single sentence statements from individuals opposing the proposed compensation rates. Other commenters include six TRS providers (Sprint Corporation (Sprint), MCI, Hamilton Relay, Inc. (Hamilton), Hands On Video Relay Services, Inc. (Hands On), AT&T, and Communication Service for the Deaf, Inc. (CSD)), and four consumer organizations (Telecommunications for the Deaf, Inc. (TDI), Greater Cincinnati Deaf Club, SignOn, and NorCal Center on Deafness (NorCal)). On June 2, 2004, NECA filed reply comments. Hands On filed an untimely response to NECA's reply comments; nevertheless, we also address that filing below.

development methodology is flawed; and (4) the quality of TRS, especially VRS, has decreased since the rate for VRS was reduced a year ago and this lack of quality will continue without an increase in the reimbursement rate.[78] We address the comments below.

D. The Commission's June, 30, 2004, Order on Reconsideration Addressing the TRS Compensation Rates

30. As noted above, NECA states that it followed the *2003 Bureau TRS Order* in analyzing the submitted cost data. The Commission affirmed that order on reconsideration in the *2004 TRS Report & Order*. Although we recognize that the *2004 TRS Report & Order* was not released until after NECA filed its May 3, 2004, proposed rates, and after the commenters filed their comments to NECA's filing, we are necessarily bound by the *2004 TRS Report & Order* and its underlying analysis in reviewing NECA's proposed rates for the 2004-2005 fund year.[79]

31. To briefly summarize, the Commission in the *2004 TRS Report & Order* affirmed the *2003 Bureau TRS Order.*[80] In so doing, as relevant here, the Commission: (1) found that "TRS providers are entitled to be compensated only for their costs of providing the service," and that such costs "do not include an additional sum that represents a markup on those costs," or a "profit," but may include a return on capital investment[81]; (2) that the rate of return on investment of 11.25% that the Commission has applied in a wide range of other telecommunications contexts was appropriate in the TRS context as a means of ensuring that providers are not left to finance reasonable investment in TRS assets out-of-pocket[82]; (3) that salaries of corporate officers and executives can be included in submitted costs only based on the percentage of such persons' salaries that is attributable to the provision of TRS[83]; (4) that engineering and research and development expenses (including software development) that go to service enhancements that go beyond the applicable (non-waived) mandatory minimum standards are not allowable[84]; (5) that, as a general matter, engineering costs cannot be reported as immediate expenses in the year they are incurred, but should be capitalized[85]; and (6) that an allowance for working capital, *i.e.,*

[78] In addition, NorCal urges the Commission to make VRS a mandatory service, available on a 24 hour basis (NorCal Comments at 4). We note that the California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH) filed a Petition for Rulemaking requesting that the Commission initiate a rulemaking to make VRS a mandated form of TRS. As part of the FNPRM in the *2004 TRS Report & Order,* the Commission seeks comment on this very question. *See 2004 TRS Report & Order* at ¶ 243 n.667. This Order does not address CCASDHH's request or similar requests filed as comments in this proceeding.

[79] *See 2004 TRS Report & Order* at ¶¶ 163-200.

[80] *2004 TRS Report & Order* at ¶ 274.

[81] *Id.* at ¶¶ 181-182; *see generally id.* at ¶¶ 177-182.

[82] *Id.* at ¶ 182.

[83] *Id.* at ¶ 182 n.520.

[84] *Id.* at ¶¶ 189-190. The Commission more broadly stated that "for purposes of determining the 'reasonable' costs that may be recovered for providing ... [TRS], the costs must relate to the provision of the service in compliance with the applicable non-waived mandatory minimum standards." *Id.* at ¶ 199. And with respect to arguments directed at the VRS rate, the Commission stated that "[t]o the extent petitioners are arguing that without a higher compensation rate they cannot pursue further enhancements to the non-mandatory VRS service, we note 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, under a statute that requires providers to offer TRS as an accommodation for persons with certain disabilities." *Id.* at ¶ 197. We also note that the Commission raised in the Further Notice of Proposed Rulemaking in the *2004 TRS Report & Order* whether VRS should be a mandatory service. *Id.* at ¶¶ 243-245.

[85] *Id.* at ¶ 190 n.543.

an allowance for a return earned on funds required to be retained to finance expenditures until reimbursed (because there is a lag between the time the providers provide the service, and the time they are compensated for providing the service) might be appropriate.[86]

III. DISCUSSION

32. In accordance with the Commission's rules, NECA has submitted proposed TRS per-minute compensation rates, Interstate TRS Fund size requirements, and a proposed carrier contribution factor for the July, 2004, through June, 2005, fund year. These proposed compensation rates are based on NECA's review and analysis of the providers' submitted projected costs and various demand projections, which in some instances resulted in modifications to particular data. As noted above, the TRS fund administrator is required to determine TRS fund revenue requirements and payments, and to this end must ensure that the data on which the compensation rates are based is appropriate to ensure "the accuracy and integrity of fund payments."[87]

33. Under the Commission's rules, the Commission has the authority and responsibility to review NECA's filing, and to approve or modify the proposed rates and figures.[88] It is ultimately the Commission's duty to ensure the integrity of the Interstate TRS Fund and the payments made from the Fund. To this end, the rules make clear that these rates and figures are intended to compensate TRS providers for the "reasonable" and "fair" costs of providing eligible TRS.[89]

34. As set forth below, we have reviewed the *2004 NECA Filing*, as well as the underlying cost data and the comments that were filed. Based on this review, and the guidance provided by the Commission's *2004 TRS Report & Order,* we approve NECA's proposed compensation rates of $1.349 per-minute for traditional TRS and IP Relay, $1.440 per-minute for STS, and $7.293 per-minute for VRS. As discussed below, however, these compensation rates adopted in this *Order* are subject to revision pending our review of: (1) any supplemental cost data relating to capital investment, and (2) any adjustments to cost disallowances challenged by a provider in response to this *Order*. We also approve the proposed carrier contribution factor and the proposed fund size, which shall be 0.00356 and $289,352,701, respectively.

A. The Comments

35. First, commenters make assorted arguments asserting that NECA exceeded its authority in fashioning its proposed rates or failed to adequately explain its actions.[90] Some of these commenters challenge NECA's use of rate of return on capital investment instead of profit with respect to traditional TRS, STS and IP Relay, as well as VRS, noting that the *2003 Bureau TRS Order* applied a rate of return only to VRS.[91] Sprint argues, for example, that if the *2003 Bureau TRS Order* is to serve as the basis for

---

[86] *Id.* at ¶ 192 n.550.

[87] *See* 47 C.F.R. § 64.604(c)(5)(iii)(C).

[88] *See* 47 C.F.R. § 64.604(c)(5)(iii)(E).

[89] *Id.; see also 2001 MO&O* at ¶ 34.

[90] *See, e.g.*, Hamilton Comments at 3; MCI Comments at 4.

[91] MCI Comments at 3-4. MCI asserts that NECA extended the errors made in the *2003 Bureau TRS Order*, which were limited to VRS, to STS, IP Relay, and traditional TRS, resulting in the STS rate being reduced by approximately 40%. MCI also asserts that there was no notice to relay providers that the methodology for non-VRS forms of TRS would be changed. MCI also finds troubling NECA's rejection of data by certain providers merely because NECA found them to be outliers. *See also* Sprint Comments at 2 (NECA erred in using the rate of return methodology to determine the reimbursement rates for all forms of TRS, given that the *2003 Bureau TRS Order* only used rate of return for VRS).

establishing the 2004-2005 compensation rates, then rates for traditional TRS, IP Relay, and STS must be based on the "cost-plus" (profit) methodology that NECA had applied for years prior to the *2003 Bureau TRS Order*.[92]

36. Hands On more broadly argues that NECA failed to follow the guidance in the *2003 Bureau TRS Order*.[93] Hands On also challenges NECA's asserted use of a "surrogate" for including a rate of return on capital investment.[94] Hands On further asserts that although Commission rules authorize the TRS Fund Administrator to examine, verify, and audit data received from providers to ensure the accuracy and integrity of fund payments, it does not authorize the administrator to exclude categories of costs or to substitute its judgment for the good faith judgment of providers.[95] Finally, Hands On claims that NECA's filing fails to itemize the cost adjustments made, therefore precluding challenges by providers because the individual cost adjustments NECA made are not before the Commission.[96] MCI similarly asserts that NECA made adjustments to certain expenses without providing sufficient explanation regarding the basis for the exclusion, and without contacting the providers to explain to them the exclusions.[97]

37. The *2004 TRS Report & Order* makes clear that "profit," or a mark-up on expenses, is not an appropriate "cost " that can be recovered by providers for providing any of the forms of TRS, but that instead the providers are entitled to an 11.25% rate of return on capital investment.[98] Therefore, the arguments that NECA could reject profit and apply an 11.25% rate of return on capital investment, if at all, only with respect to VRS, is wrong. Consistent with the *2004 TRS Report & Order,* NECA correctly rejected profit and corresponding tax allowances for all forms of TRS and, as noted above, these disallowances constituted the great majority of the costs disallowed.

38. We acknowledge, however, that although NECA correctly disallowed profit and corresponding tax allowances in calculating its proposed compensation rates, it did not include the 11.25% rate of return on capital investment. Rather, NECA apparently determined that because it did not collect data on which it could determine for each provider (and for each form of TRS) the appropriate rate

[92] Sprint Comments at 2; *see 2004 NECA Filing* at 7.

[93] Hands On Comments at 12-13 (asserting that NECA claims to have made an adjustment for certain research and development expenses relating to VRS, but nowhere in the *2003 Bureaus TRS Order* did CGB indicate that R&D expenses were not appropriately included in the rate).

[94] Hands On Comments at 9-13.

[95] Hands On Comments at 15-16.

[96] Hands On Comments at 17.

[97] MCI Comments at 3-4.

[98] *2004 TRS Report & Order* at ¶¶ 179-180. The Commission explained that: "[B]ecause Title IV places the obligation on carriers providing voice telephone services to *also* offer TRS to, in effect, remedy the discriminatory effects of a telephone system inaccessible to persons with disabilities, the costs of providing TRS are really just another cost of doing business generally, *i.e.,* of providing voice telephone service. For this reason, the annual determination of the TRS compensation rates is not akin to a rate-making process that determines the charges a regulated entity may charge its customers. Rather, it is a determination of a per-minute compensation rate that will cover the reasonable costs incurred in providing the TRS services mandated by Congress and our regulations. ... The rules... provid[e] that TRS payment formulas shall be designed to compensate TRS providers for reasonable costs of providing service. We follow that guidance in concluding that, in the context of Title IV of the ADA, 'reasonable costs" do not include a mark-up on the reasonable costs claimed." *Id.* (internal quotation marks omitted). The Commission further explained that it was not prescribing a separate rate of return specifically for TRS, but that this is the current rate of return on investment that the Commission has applied in a wide range of telecommunications contexts, and could appropriately also be applied in the TRS context. *Id.* at ¶ 182.

of return on capital investment, it would compensate providers for an allowance for working capital, and did so by adjusting the compensation rates by 1.4%, as we have explained above.[99] The allowance for working capital, however, is a separate and distinct category of "costs" for which providers may be compensated. Therefore, because NECA did not include the permissible 11.25% rate of return on capital investment, each provider may submit supplemental cost data reflecting their capital investment for each form of TRS. As a result, the rates adopted in this order may be revised based on an analysis of how inclusion of a rate of return on capital investment for those providers who choose to submit supplemental cost data may affect the compensation rates.

39. With respect to the arguments that NECA's filing fails to adequately explain the cost disallowances for the various providers and the various forms of TRS, we note that because of confidentiality issues the details of the disallowances could not be set forth in NECA's filing. For the same reason, we also do not detail them here.[100] At the same time, however, as we have noted, we again invite the providers to contact CGB if they want to review what costs specific to their filing were disallowed. If, as a result of that review of the providers' data, we conclude that certain disallowances should not have been made, the rates adopted herein will be adjusted accordingly.

40. We reject, however, the broader notion that NECA exceeded its authority in reviewing the submitted cost data and making adjustments to it pursuant to the *2003 Bureau TRS Order*. The TRS fund administrator's role is not simply to rubber-stamp the cost data submitted, but to ensure that the data reflects the "reasonable costs" of providing the various services in accordance with our rules.[101] The Commission's affirmance of the *2003 Bureau TRS Order* reflects that adjustments to the providers' submitted cost data may be appropriate and necessary to ensure that the compensation rates are based on "reasonable" costs and NECA, as the fund administrator, is surely empowered to make these adjustments in the first instance. Indeed, the TRS regulations provide that the fund administrator "shall have the authority to examine, verify and audit data received from TRS providers as necessary to assure the accuracy and integrity of fund payments."[102] That provision makes clear, implicitly if not explicitly, that the fund administrator is not required to base its proposed compensation rates solely on the raw data submitted by the providers.

41. Second, commenters make a variety of arguments to the effect NECA's proposed TRS compensation rates are improperly based on a Bureau order (the *2003 Bureau TRS Order*) which, in turn, was impermissibly adopted without notice and comment from the public.[103] Sprint, for example, asserts that the basic flaw in NECA's rate development methodology is that it assumed that the pronouncements in the *2003 Bureau TRS Order* were those of the Commission itself, and that the Bureau acted outside its delegated authority in the *2003 Bureau TRS Order*.[104] Hamilton asserts that the Bureau's adoption of NECA's proposed rates would only compound the problems created by the *2003 Bureau TRS Order* and would violate the Administrative Procedures Act (APA).[105] Hamilton states that until a notice and comment proceeding is initiated, the Bureau is obligated to direct NECA to rely upon the methodology

[99] *2004 NECA Filing* at 7.

[100] *Cf. 2003 Bureau TRS Order* at ¶ 33 (noting confidentiality of providers' data).

[101] *See generally 2004 TRS Report & Order* at ¶ 195.

[102] 47 C.F.R. § 64.604(c)(5)(iii)(E).

[103] CSD Comments at 7; MCI Comments at 2-3; Sprint Comments at 2 (Sprint also attached its Petition for Reconsideration of the *2003 Bureau TRS Order*, which it filed on July 30, 2003, and incorporated those arguments into its Comments); Hands On Comments at 6-7, 10; Hamilton Comments at 8.

[104] Sprint Comments at 2.

[105] Hamilton Comments at 8.

employed in previous years.[106]

42. These arguments are now beside the point. Although NECA was correct to rely on the *2003 Bureau TRS Order* in analyzing the submitted data because that order reflected the then most current pronouncement on the determination of the TRS compensation rates, as we have noted the Commission in the *2004 TRS Report & Order* affirmed the *2003 Bureau TRS Order*.[107] Therefore, the *2003 Bureau TRS Order* is not under consideration here, and arguments that the Bureau acted outside its authority in the *2003 Bureau TRS Order* cannot be entertained. The relevant issue now is whether NECA's proposed rates and its underlying analysis comport with the *2004 TRS Report & Order*, and except with regard to failing to include a rate of return on capital investment as noted above, we find that they do.

43. Third, apart from various arguments (with respect to the various forms of TRS) that NECA incorrectly rejected profit and instead stated that providers were entitled to an 11.25% rate of return on capital investment, which we have addressed above,[108] some providers object to NECA's rejection of certain cost data submitted by the providers merely because the data was found to fall outside the range of similar data submitted.[109] Hands On contends, for example, that NECA has no authority to determine which parts of a providers' cost data are reasonable and will be considered, and which parts are not reasonable and therefore will not be considered.[110] Hands On further argues that to the extent that NECA has the authority to consider and reject specific cost data, the providers should be given an opportunity to be heard on those adjustments.[111]

44. As we have stated above, it is not correct that the TRS fund administrator, in analyzing the providers' submitted cost data to calculate the TRS compensation rates based on "reasonable costs," cannot disallow certain data. Further, to the extent NECA's filing did not give providers a sufficient basis on which to challenge NECA's disallowances, as we have noted the providers may now request a meeting with the Bureau to review the adjustments, if any, to their cost data, and any adjustments resulting from these meetings may result in a modification to the compensation rates adopted in this *Order*.

45. Fourth, and finally, several commenters raise issues that tie the quality and availability of VRS to the proposed VRS compensation rate.[112] For example, several commenters assert that the current reimbursement rate for VRS is causing unreasonably long wait times until the user reaches the VRS CA ("speed of answer"), and that the proposed rate will continue and even exacerbate this problem.[113] Commenters also assert that the proposed rate may affect the future availability of VRS because allowing a rate of return on capital investment, but not profit, will discourage new market entrants and may cause existing VRS providers to exit the market.[114] Commenters contend that, as a result, the proposed VRS

---

[106] Hamilton Comments at 8.

[107] *2004 TRS Report & Order* at ¶ 274.

[108] As we have noted, NECA did not include in its calculations the 11.25% rate of return on capital investment, and we therefore have invited providers to submit this supplemental data, which may result in an adjustment to the rates adopted in this *Order*.

[109] MCI at Comments 3; Hands On Reply Comments at 3; *see generally 2004 NECA Filing* at 6, 14.

[110] Hands On Comments at 16.

[111] Hands On Comments at 16-17.

[112] AT&T Comments at 3-4; CSD Comments at 9; Hamilton Comments at 6-7; NorCal Comments at 1-2; TDI Coalition Comments at 7-9; AT&T Reply Comments at 3-4.

[113] CSD Comments at 9. Hamilton Comments at 7. TDI Coalition Comments at 8.

[114] AT&T Comments at 3; Hamilton Comments at 6. Hamilton also argues that it would affect other forms of TRS as well. We disagree. Because of state TRS programs' competitive bidding processes in selecting a TRS vendor,

(continued....)

rate is at odds with the Commission's obligation to ensure that VRS, like all forms of TRS, is a service that is functionally equivalent to telephone voice transmission service.[115]

46. The purpose of this *Order* is to approve or modify the TRS compensation rates proposed by NECA – rates designed to compensate the providers for the reasonable costs of providing the various forms of TRS in compliance with all non-waived mandatory minimum standards. Therefore, commenters' concerns directed at quality of service issues are not relevant here. In addition, the Further Notice of Proposed Rulemaking to the *2004 TRS Report & Order* raises issues with regard to VRS concerning speed of answer and whether the service should be mandatory and required to be offered 24/7.[116] That proceeding is the appropriate one in which concerns over issues such as speed of answer, or other "quality" issues, should be directed.[117] We also note, as the *2004 TRS Report & Order* reflects, that VRS has flourished in the past year, notwithstanding the 2003-2004 interim compensation rates of $7.751 per minute.[118] That fact belies the suggestion that the compensation rate is the determining factor to service issues, including quality issues.[119]

B. The Compensation Rates, Interstate TRS Fund Size, and Carrier Contribution Rate

47. We have summarized above NECA's proposed compensation rates, and its adjustments to the submitted cost data, as well as the comments filed in response to NECA's filing. For the reasons set forth above, with the exception of the failure to include costs representing a rate of return on capital investment (on an individual provider, and individual service, basis), we do not find that any of the arguments made by the commenters provide a basis to disturb NECA's proposals. Therefore, as set forth below, based on our own review of NECA's proposals, we adopt NECA's proposed compensation rates, subject to revision pending our review of: (1) any supplemental cost data relating to capital investment, and (2) any adjustments to cost disallowances challenged by a provider in response to this *Order*. We also adopt NECA's proposed fund size and carrier contribution factor.

(...continued from previous page)
the rate for providing *intrastate* traditional TRS calls is generally less than the rate for providing *interstate* traditional TRS calls. Further, the number of TRS providers offering relay service has been relatively steady for the past decade.

[115] Hands On Comments at 27; AT&T Comments at 3-4.

[116] *2004 TRS Report & Order* at ¶¶ 243-246.

[117] We also note that the longer wait times in reaching a VRS CA that some consumers have experienced is, more than anything, likely the result of supply and demand. As noted above, from April 2002 to April 2004 the minutes of use of VRS grew 25-fold, and even in the past year the minutes of VRS usage have increased more than four-fold (from, *e.g.,* 171,124 minutes per month in April 2003 to 722,863 minutes per month in April 2004). VRS providers, therefore, have had to quickly attempt to hire a large number of qualified interpreters to handle the demand. This increase in VRS minutes has resulted, in part, from aggressive marketing efforts by some of the providers. In this regard, we further note that the Commission has raised in the Further Notice of Proposed Rulemaking in the *2004 TRS Report & Order* whether, if VRS became a mandatory service or a particular speed of answer rule was adopted, there are a sufficient number of interpreters available to ensure that providers could meet the new requirements. *See 2004 TRS Report & Order* at ¶¶ 245-246.

[118] *2004 TRS Report & Order* at ¶ 199.

[119] We note that Hands On also alleges that NECA violated section 64.604(c)(5)(iii)(I) of the Commission's rules by disclosing, in NECA's reply comments, terms of Hands On contracts with other TRS providers. Hands On Response at 1. This is not the proper forum for addressing this claim.

1. Compensation Rate for Traditional TRS and IP Relay

48. NECA proposes a compensation rate of $1.349 per-minute for eligible traditional TRS and IP Relay. As we have noted above, this rate was determined by dividing the providers' total projected costs of $196,502,448 (as adjusted) by the providers' total projected minutes of 147,651,399. [120] We have reviewed NECA's proposed rate and its analysis of the relevant underlying data. We find that, except as discussed above with respect to including a rate of return on capital investment, NECA's calculations with respect to these services are reasonable. Therefore, we approve the recommended cost compensation rate for traditional TRS and IP Relay as the compensation rate for the 2004-2005 fund year, pending review of any submitted supplemental cost data relating to investment and possible review of specific disallowances. The Interstate TRS Fund will pay $1.349 per-minute for eligible traditional TRS and IP Relay calls[121] for the period of July, 2004, through June, 2005.

2. Compensation Rate for Speech-to-Speech (STS)

49. NECA proposes a compensation rate of $1.440 per-minute for interstate STS relay calls. As we have noted above, this rate was determined by dividing the providers' total projected interstate costs of $131,483 (as adjusted) by the providers' total projected minutes of 92,593.[122] We have reviewed NECA's proposed rate and its analysis of the relevant underlying data. We find that, except as discussed above with respect to including a rate of return on capital investment, NECA's calculations with respect to this service are reasonable. Therefore, we approve the recommended cost compensation rate for interstate STS as the compensation rate for the 2004-2005 fund year, pending review of any submitted supplemental cost data relating to investment and possible review of specific disallowances. The Interstate TRS Fund will pay $1.440 per-minute for eligible interstate STS for the period of July, 2004, through June, 2005.

3. Compensation Rate for Video Relay Service (VRS)

50. NECA proposes a compensation rate of $7.293 per-minute for VRS calls. As we have noted above, this rate was determined by dividing the providers' total projected interstate costs of $57,411,359 (as adjusted) by the providers' total projected minutes of 7,982,733.[123] We have reviewed NECA's proposed rate and its analysis of the relevant underlying data. We find that, except as discussed above with respect to including a rate of return on capital investment, NECA's calculations with respect to this service are reasonable. Therefore, we approve the recommended cost compensation rate for VRS as the compensation rate for the 2004-2005 fund year, pending review of any submitted supplemental cost data relating to investment and possible review of specific disallowances. The Interstate TRS Fund will pay $7.293 per-minute for VRS for the period of July, 2004, through June, 2005.[124]

---

[120] *2004 NECA Filing* at Ex. 1C.

[121] The Interstate TRS Fund does not currently reimburse providers for the costs of providing international calls via IP Relay.

[122] *2004 NECA Filing* at Ex. 1D.

[123] *Id.* at Ex. 1E.

[124] We note that in the Further Notice of Proposed Rulemaking in the *2004 TRS Report & Order,* the Commission raises issues relating to the compensation of TRS providers under the cost recovery scheme adopted by Congress in Title IV of the ADA. *See 2004 TRS Report & Order* at ¶¶ 221-249. These issues include the appropriate cost recovery methodology for VRS, the possible determination of which IP Relay and VRS calls are interstate and which are intrastate, whether separate compensation rates should be adopted for traditional TRS and IP Relay, and whether the compensation rate for VRS should be set for a two year period rather than a one year period. We emphasize that nothing we have stated or concluded in this Order prejudges the outcome of that proceeding. At the same time, we will include all of the filings made in this proceeding in the cost recovery proceeding so that the

(continued....)

4. Interstate TRS Fund Size and Carrier Contribution Rate

51. NECA proposes an Interstate TRS Fund size of $289,352,701 for the fund year July, 2004, through June, 2005, and uses that number to determine the carrier contribution factor. We approve that amount. Calculating the carrier contribution factor based on this approved fund size of $289,352,701, and dividing this amount by the 2003 total carrier end-user interstate revenues of $81.2 billion, NECA arrived at a carrier contribution factor of 0.00356.[125] We approve this figure as the carrier contribution factor for the fund year July, 2004, through June, 2005.

IV. ORDERING CLAUSES

52. Accordingly, IT IS ORDERED, pursuant to the authority contained in 225 of the Communications Act of 1934, as amended, 47 U.S.C. § 225, and sections 0.141, 0.361 and 64.604(c)(5)(iii) of the Commission's rules, that this ORDER is hereby ADOPTED.

53. IT IS FURTHER ORDERED that as compensation rates effective for the 2004-2005 fund year, subject to revision pending our review of any supplemental cost data relating to investment and any cost disallowances challenged by a provider in response to this *Order,* NECA shall compensate traditional telecommunications relay service (TRS) providers and IP Relay providers at the rate of $1.349 per completed interstate conversation minute (and, for IP Relay, per completed intrastate conversation minute) for the period July 1, 2004, through June 30, 2005; Speech-to-Speech relay service (STS) providers at the rate of $1.440 per completed interstate conversation minute for the period July 1, 2004, through June 30, 2005; and Video Relay Service (VRS) providers at the rate of $7.293 per completed interstate or intrastate conversation minute for the period July 1, 2004, through June 30, 2005.

54. IT IS FURTHER ORDERED that the fund size shall be $289,352,701, and the carrier contribution factor shall be 0.00356, for the July 1, 2004, through June 30, 2005, fund year.

55. 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) 418-0531 (voice) or (202) 418-7365 (TTY). This *Order* can also be downloaded in Word and Portable Document Formats (PDF) at http://www.fcc.gov/cgb.dro.

FEDERAL COMMUNICATIONS COMMISSION

K. Dane Snowden, Chief
Consumer & Governmental Affairs Bureau

(...continued from previous page)
Commission will have a complete record of relevant data in the cost recovery proceeding.

[125] *Id.* at Ex. 4.