Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Telecommunications Relay Services	)	
and Speech-to-Speech Services for	)	CG _________
Individuals with Hearing and Speech	)	
Disabilities;	)	
	)	
Petition of Telco Group for Declaratory	)	
Ruling or Waiver	)	
	)	

PETITION FOR DECLARATORY RULING,
OR IN THE ALTERNATIVE, PETITION FOR WAIVER

Pursuant to Sections 1.2 and 1.3 of the Federal Communications Commission's ("FCC" or "Commission") rules, 47 C.F.R. §§ 1.2, 1.3, Telco Group, Inc. ("Telco Group")[1/] respectfully requests that the Commission issue a declaratory ruling excluding international revenues from the revenue base used to calculate payments due the Telecommunications Relay Services ("TRS") Fund, at least for those carriers whose international revenues comprise a significant proportion of their total interstate and international revenues, or, in the alternative, that the Commission find good cause to extend a waiver to Telco Group allowing it to exempt such revenues when calculating its TRS Fund payment obligations.[2/]

[1/] Telco Group is a New York-based carrier providing long distance services, including one-plus services, dial-around calling and prepaid calling cards.

[2/] Telco Group is filing concurrently with this Petition a separate Petition for Stay requesting that the Commission allow it to exclude its international revenues from TRS Fund payment calculations for monthly payments due while this Petition is pending.

BACKGROUND AND SUMMARY

As part of the Americans with Disabilities Act of 1990,[3/] Congress required common carriers to provide "telecommunications relay services." These services allow individuals that are speech- or hearing-impaired to engage in voice communications in a manner "functionally equivalent" to that of those persons without such impairments.[4/] Congress also directed the Commission to prescribe regulations implementing these requirements,[5/] including regulations providing that costs incurred from the provision of interstate TRS "shall be recovered from all subscribers for every interstate service."[6/]

Pursuant to Congress's direction, in 1993, the Commission adopted a shared funding mechanism -- the Telecommunications Relay Services ("TRS") Fund -- to compensate TRS providers for the costs of providing eligible TRS services.[7/] The Commission's TRS rules require all interstate service providers to contribute to the TRS Fund. Each carrier's annual contribution to the TRS fund is determined by the product of the carrier's subject revenues for the prior calendar year, as reported on the FCC Form 499-A, and a contribution factor approved annually by the Commission, determined by the ratio of expected TRS fund expenses and interstate end user telecommunications

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3/ Pub. L. No. 101-336, § 401, 104 Stat. 327, *codified at* 47 U.S.C. § 225.

4/ 47 U.S.C. § 225(a)(3).

5/ *Id*., § 225(d).

6/ *Id.*, §225(d)(3)(B); see 47 C.F.R. § 646.604(c)(5)(ii).

7/ *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 1802 (1993) ("*Second Report and Order*") (adopting a shared-funding mechanism for interstate TRS cost recovery and proposing a specific plan establishing a TRS interstate cost recovery fund (TRS Fund); *see also Telecommunications Relay Services and the Americans with Disabilities Act of 1990*, 8 FCC Rcd 5600 (1993) ("*Third Report and Order*") (imposing annual and other reporting requirements on TRS providers and TRS Fund contributors to implement shared-funding).

revenues.[8/] The National Exchange Carrier Association ("NECA") administers the Fund.

On June 30, 2004, the Commission approved NECA's annual recommendation for a total TRS fund size requirement of $289,352,701 and a carrier contribution factor of 0.00356 for the July 1, 2004 through June 30, 2005 fund year.[9/] The new fund size represented a very substantial increase – approximately 151 percent – over the prior fund year. The recently approved figures represent a very significant increase in funding requirements for carriers such as Telco Group.

The vast majority – approximately 96 percent – of Telco Group's revenues is from international services. Under the Commission's TRS rules, revenues from the provision of international services are included when calculating Telco Group's TRS Fund payment obligations.[10/] Although courts have recognized that where international revenues make up a disproportionately large amount of total revenues, such revenues are properly excluded from revenue base calculations for purposes of payments due the Universal Service Fund ("USF"),[11/] this exemption has never been extended to the TRS Fund. As a result, Telco Group is required to pay an extraordinary proportion of its relatively small interstate revenues into the TRS Fund. For the present year, Telco Group's TRS Fund obligations exceed $________ dollars – a significant percentage of its

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8/ 47 C.F.R. § 64.604(c)(5)(iii)(B); *see 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Report and Order*, 14 FCC Rcd. 16602 (1999) (amending the contribution base from gross interstate and international telecommunications revenues to end user interstate and international revenues).

9/ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Order*, CC Docket No. 98-67, DA 04-1999 (rel. Jun. 30, 2004).

10/ 47 C.F.R. § 64.604(c)(5)(iii)(A).

11/ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("*TOPUC*"); *see* 47 C.F.R. § 54.706(c).

interstate end user revenues in the United States, which last year were only $_______. This heavy fee burden is disproportionately large compared to the obligations of other carriers in the market, places Telco Group at a competitive disadvantage in the marketplace, and could present a substantial impediment to the future delivery of services by Telco Group in the United States.

The Commission should clarify that carriers whose international revenues comprise a substantial majority of total revenues, either calculated by using the USF standard of 88 percent of revenues or another similar standard, may exclude those revenues from TRS fund payment calculations, or, in the alternative, that there exists good cause to waive the requirement that Telco Group include such international revenues in calculating its TRS fund payment obligations.

REQUIRING TELCO GROUP TO BASE TRS FUND PAYMENT OBLIGATIONS ON REVENUES FROM INTERNATIONAL SERVICES IS INEQUITABLE AND DISCRIMINATORY

As the Commission has recognized, its rules establishing a methodology for the cost recovery of telecommunications relay services are designed to be equitable and nondiscriminatory.[12/] The existing rules governing TRS contributions do not meet this standard, at least as applied to carriers such as Telco Group that have disproportionately large international revenues.

12/ *See, e.g.*, *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay services, North American Numbering Plan, Local Number Portability, and Universal Support Mechanisms*, 14 FCC Rcd 16602, ¶¶ 11-12 (1999) (noting that information requested with respect to TRS and other funds "is essential to ensuring that individual carriers and segments of the industry contribute to the mechanisms in a fair and equitable manner, and, thereby, to ensuring [sic] the integrity of the mechanisms."); *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 1995 Price Cap Treatment of Regulatory Fees Imposed by Section 9 of the Act*, 10 FCC Rcd 13512, 13562 (1995) ("The Commission found that the TRS methodology provides an efficient and equitable mechanism for assessing fees.").

A. It is Inequitable and Discriminatory to Require Telco Group to Shoulder a Disproportionate Share of the TRS Fund.

The current application of the Commission's rules requires Telco Group to contribute to the fund in an amount that is both excessive and out of proportion to that required of other carriers.

The amount that Telco Group is required to contribute is vastly disproportionate to its stature in the marketplace. Because payments due the Fund are calculated based on interstate and international revenues, and because Telco earns substantial revenues internationally, it ends up paying a significant portion of its U.S. interstate revenues -- 9% -- into the TRS Fund. Under the Commission's calculations, Telco Group faces a payment of over $_______ for the present fund year -- a remarkable amount given that the *entire fund* is less than $290 million in size. Telco Group's share represents nearly ___% of the total fund this year, even though it is a very small carrier in the United States and there are over five thousand carriers that should (and presumably do) contribute to the Fund.[13/] By way of comparison, Telco Group is required to pay roughly that same amount into the USF Fund -- a fund that is approximately $5.6 *billion* in total size, nearly 20 times larger than the TRS Fund.[14/] It is noteworthy, in addition to contributing to the TRS Fund and USF Fund, Telco Group is also required to pay regulatory fees based on its international revenues.[15/] For 2004, for example, Telco Group is required to pay over

[13/] *See "Statistics of the Long Distance Telecommunications Industry, Industry Analysis and Technology Division, Wireline Competition Bureau*" at 11 (May 2003), available at http://www.fcc.gov/wcb/iatd/lec.html (noting that there are 5,362 interstate telecommunications providers).

[14/] *See 2003 Annual Report, Universal Service Administrative Company*, available at http://www.universalservice.org/Reports.

[15/] *Assessment and Collection of Regulatory Fees for Fiscal Year 2004*, *Report and Order*, MD Docket No. 04-73, FCC 04-146 (rel. Jun. 24, 2004).

$______ in regulatory fees. This means that Telco Group will pay nearly $_______ dollars for these three fees alone, even though it earned only slightly over $_______ last year in interstate revenues.

The impact of Telco Group's TRS payment obligations has become particularly severe recently because the funding requirements of the TRS Fund have grown at such a rapid rate. While the Fund in July 2003 totaled $115,455,570, the size of the fund was increased in February of this year to $170,500,000 -- a 48% increase, requiring a significant increase in carrier contributions.[16/] Telco Group's own monthly payments increased by an even larger factor -- from approximately $______ to over $______. In the most recent fund year commencing July 1, 2004, the total fund size again increased to $289,352,701-- another 70% increase that will result in a monthly payment obligation for Telco Group of nearly $______. Thus, while Telco Group's payment obligations have been unreasonably and disproportionately large since the Fund's inception, they have *tripled* in the last year, and are now of such a magnitude that they cannot be ignored and indeed, will disrupt business operations.

A requirement that Telco Group fund such a significant proportion of the total Fund, encompassing such a significant portion of its revenues, cannot be considered fair, equitable or nondiscriminatory.[17/]

16/ The fund size requirement and carrier contribution factor for the July 1, 2003 through June 30, 2004 fund year were originally $115,455,570 and 0.00149, respectively. *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Order,* 18 FCC Rcd. 2993 (2003). Those amounts were increased in an order released by the Commission on February 24, 2004 to $170,500,000 and 0.00220, respectively. *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Order*, 19 FCC Rcd. 2993 (2004) ("*2004 Bureau TRS Order*").

17/ *See*, *e.g.*, *AT&T Corp. v. Pub. Util. Comm'n. of Texas*, -- F.3d ---, 2004 WL 1334688 (5th Cir. Jun. 30, 2004) (Texas Public Utility Commission's practice of taxing revenues from both

B. Analogous Case Law Supports the Exclusion of International Revenues From the Commission's Definition of Interstate Revenues for TRS Fund Contributions.

The inequity of Telco Group's TRS payment obligations stems primarily from the fact that obligations are calculated using revenues from international services, even where, as here, those revenues make up the vast proportion of a carrier's total revenues. In the universal service context, such revenues are excluded from USF assessments if interstate revenues are less than twelve percent of the carrier's total interstate and international revenues.[18/] The Commission should apply the same or a similar rule to the TRS Fund.

The Commission initially determined that it would include international revenues in its calculation of the TRS Fund payment obligations without any analysis or discussion. Instead, it only observed that one carrier had asked for such revenues to be included, based on the concept that carriers are compensated from the Fund for international TRS calls.[19/] The Commission did not consider whether its decision would impact or disadvantage carriers with predominantly international revenues. Because the language of Section 225 gives the Commission wide latitude in defining the revenue base

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interstate and intrastate calls for the state universal service fund was inequitable and discriminatory because it placed multijurisdictional carriers at a competitive disadvantage within the state; fact that carrier could not show that the amount of the fee outweighed the revenues held not to defeat its claim of discrimination).

[18/] 47 C.F.R. § 54.706(c).

[19/] *Telecommunications Relay Service, and the Americans with Disabilities Act of 1990, Third Report and Order*, 8 FCC Rcd 5300 n.14 (1993) ("*Third Report and Order*") (noting that Sprint argued "that international services should be included because TRS providers will be compensated by the administrator for international TRS minutes of use"). Sprint's argument has since been substantially undermined, because providers are not compensated for the costs of IP Relay services, one of the fastest growing segments of the Fund. *See In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 18 FCC Rcd 12823 n.73 (2003) ("[t]he Interstate TRS Fund does not currently reimburse providers for the costs of providing international calls via IP Relay.").

for the TRS Fund -- requiring only that costs caused by interstate telecommunications relay services be recovered "from all subscribers for every *interstate* service…."[20/] -- the Commission has full authority to exclude international services from its definition of interstate services subject to Fund payment obligations.

Since the enactment of the TRS Fund, international revenues have been excluded from total revenues for purposes of calculating USF contributions when much of a carrier's revenues are international because it has been recognized that their inclusion can lead to highly inequitable results. In *TOPUC*, in which COMSAT, whose revenues were predominantly international revenues, challenged the inclusion of international revenues in the USF contribution base, the Fifth Circuit found that requiring COMSAT to pay into the USF based on its international revenues was inequitable and discriminatory and violated the Commission's own principle of competitive neutrality, and that the "heavy inequity the rule places on COMSAT and similarly situated carriers cannot simply be dismissed by the agency as a consequence of its administrative discretion."[21/] Because the rules had damaged some international carriers more than others, the Court also found that the Commission's interpretation was discriminatory.[22/] Since the *TOPUC* decision, the Commission has amended its rules to allow carriers whose international revenues exceed eighty-eight percent of total revenues to exclude those revenues from USF payment calculations.[23/]

As noted above, the Commission's TRS rules harm Telco Group -- 96% of whose

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20/ 47 U.S.C. § 225(d)(3)(B) (emphasis added).

21/ *Id*. at 434-35.

22/ *Id*. at 435.

23/ *See* 47 C.F.R. §§ 54.706, 54.709.

revenues derive from the provision of international services -- substantially more than other carriers, and thus, like those examined in *TOPUC*, are inequitable and discriminatory and violate the Commission's principle of competitive neutrality.[24/]

C. It is in the Public Interest to Grant Telco Group's Request

Granting Telco Group's request would serve the public interest because it would ensure that Telco Group remains a viable competitor in the market for interstate services. The Commission has frequently recognized the public interest value in preserving and promoting a healthy competitive telecommunications marketplace.[25/] If Telco Group's request is not granted, it may not be able to survive as a United States company.

Requiring Telco Group to shoulder a disproportionate TRS burden substantially hinders Telco Group's ability to provide competitive telecommunications services. Telco Group's 2004 TRS obligations of $________, combined with its regulatory fee obligation of over $________, total nearly 15 percent of its end user interstate revenues, and these figures do not include various other significant regulatory payment obligations.

Telco Group simply cannot continue to pay a disproportionate sum of money into the TRS fund and remain competitive with other providers that hold a far greater market share in the United States but are required to contribute far less. Further, these high payment obligations also hinder Telco Group's ability to compete outside the United

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[24/] *Federal-State Joint Board on Universal Service, Notice of Proposed Rulemaking,* CC Docket No. 96-45, FCC 04-127, ¶ 1 (rel. Jun. 8, 2004); *Federal-State Joint Board on Universal Service, Midwest Wireless Iowa, LLC Petition for Waiver of Sections 54.313(d) and 54.314(d) of the Commission's Rules and Regulations*, CC Docket No. 96-45, DC 04-1688, ¶ 8 (rel. Jun. 14, 2004) (noting the Commission's goal of competitive neutrality).

[25/] *See, e.g., Low-Volume, Long Distance Users*, 15 FCC Rcd. 6298, ¶ 11 (1999) ("the Commission's goal is to bring to all Americans the benefit of a robust and competitive communications marketplace" because "competition has created greater choice and value for many consumers."); *Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 87, ¶ 2 (1996) (noting goal of establishing rules that will enhance rather than distort competition consistent with the procompetitive goals of the 1996 Act).

States, and so contradict the Commission's efforts to promote and encourage competition in the international and interstate markets.[26/] Granting Telco Group's request will enable Telco Group to remain a healthy competitor of telecommunications services in both the interstate and international markets and thus will serve the public interest.

CONCLUSION

For the reasons described above, the Commission should act promptly to exclude international revenues from its TRS Fund payment calculations, at least for those carriers whose international revenues comprise a significant proportion of total interstate and international revenues, or, in the alternative, should find good cause to extend a waiver to Telco Group to allow it to exclude such international revenues from its TRS Fund obligation calculations.

Respectfully submitted,

TELCO GROUP, INC.

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Chérie R. Kiser
Tara M. Corvo
Michelle Cadin
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, DC 20004
202/434-7300

Its Attorneys

Marie C. Pierre-Paul
Telco Group, Inc.
30-50 Whitestone Expressway
4th Floor
Flushing, NY 11354
(718) 358-5390
(718) 732-7751 (facsimile)

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[26/] *See, e.g.*, *2000 Biennial Regulatory Review – Policies and Procedures Concerning the International, Interexchange Marketplace, Report and Order*, 16 FCC Rcd 10647, ¶ 6 (2001) ("the Commission has worked diligently to further competition in the international exchange marketplace").