

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

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

To: The Commission

Telecommunications for the Deaf and Hard of Hearing, Inc.;
Association of Late-Deafened Adults, Inc.;
National Association of the Deaf;
Deaf and Hard of Hearing Consumer Advocacy Network;
California Coalition of Agencies Serving the Deaf and Hard of Hearing;
American Association of the Deaf-Blind; and
Hearing Loss Association of America

APPLICATION FOR REVIEW

Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), through its undersigned counsel, Association of Late-Deafened Adults, Inc. (“ALDA”), National Association of the Deaf (“NAD”), Deaf and Hard of Hearing Consumer Advocacy Network (“DHHCAN”), California Coalition of Agencies Serving the Deaf and Hard of Hearing (“CCASDHH”), American Association of the Deaf-Blind (“AADB”), and Hearing Loss Association of America (“HLAA”) (collectively, the “Consumer Groups”), pursuant to section 1.115 of the Commission’s Rules, 47 C.F.R. § 1.115, hereby submit their Application for Review of the September 18, 2009 Order issued by the Consumer and Governmental Affairs Bureau (the “Bureau”) in the captioned proceeding.¹

¹ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket 03-123, Order, DA 09-2084 (released Sept 18, 2009) (“Order”).

In the Order, the Bureau dismissed in part a Petition for Rulemaking to Clarify Relay Rules (“Petition”) filed by Purple Communications, Inc. (“Purple”) on August 12, 2009. Pursuant to Section 1.401(e) of the rules, the Bureau dismissed the part of the Purple Petition asking that the Commission to modify the rules to allow that multi-party conference calls that may not include people without disabilities are reimbursable from the Interstate Telecommunications Relay Service (“TRS”) Fund. Section 1.401(e) provides that petitions for rulemaking “which are moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission may be denied or dismissed without prejudice to the petitioner.” 47 C.F.R. § 1.401(e).

I. RELIEF REQUESTED

The Consumer Groups hereby request that the Commission reverse the Bureau’s Order, return to pending status the part of the Purple Petition dismissed by the Bureau, and issue a public notice requesting comment on the entire Purple Petition.

II. STANDING

Many members of the Consumer Groups, including some of the representatives of the Consumer Groups signing this Application for Review, have hearing or speech disabilities and utilize Video Relay Service (“VRS”) and other forms of TRS on a regular basis. On September 11, 2009, the Consumer Groups filed a letter with the Commission requesting that the Purple Petition be placed on public notice for comment as early as possible. The Bureau’s Order dismissing in part the Purple Petition also denies in part the request of the Consumer Groups. Thus, the Consumer Groups are aggrieved by the Order and have standing to file this Application for Review.

III. QUESTIONS PRESENTED

The Consumer Groups present the following questions for Commission consideration:

1. Whether the Bureau's action was inconsistent with prior Commission interpretations of Section 225 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 225.

2. Whether the Bureau acted improperly by dismissing in part the Purple Petition without first seeking comment by issuing a public notice.

IV. DISCUSSION

A. The Bureau's Action was Inconsistent with Prior Commission Interpretations of Section 225 of the Act.

In dismissing in part the Purple Petition, the Bureau for the first time used a restrictive reading of Section 225 of the Act, finding that "VRS calls not involving a hearing individual are not compensable under current law." Order at ¶ 4. As explained below, this statement is based on a very narrow reading of a portion of Section 225(a)(3) of the Act, and fails to take into consideration the entire definition as well as other provisions of Section 225, which call for a broader reading of Section 225(a)(3). The statement is also directly inconsistent with Commission precedent and cannot stand for that reason alone. As explained below, the Commission has found that certain types of relay calls that do not involve hearing people are compensable from the TRS Fund.

In the Order, the Bureau relies upon Section 225(a)(3) of the Act, which defines TRS as:

. . . [T]elephone 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 an hearing impairment or a speech impairment to communicate using voice communication service by wire or radio.*

47 U.S.C. § 225(a)(3) (emphasis added to the portion not quoted in the Order). Although not quoted by the Bureau in the Order, a key component of this definition are the words “functionally equivalent.” It is not simply enough for a relay service to be provided that fits within the Bureau’s narrow partial definition of TRS. The service must be “functionally equivalent” as well. Recognizing that a relay service cannot be technically identical to voice communications services, Congress used the words “functionally equivalent” to convey the concept that TRS must provide the same function as voice telephone service.

Moreover, the mere providing of the same function as voice telephone service is not enough for TRS to be “functionally equivalent.” TRS must also be equivalent. The American Heritage College Dictionary defines “equivalent” as:

- 1.a. Equal, as in value, force or meaning. b. Having similar or identical effects.
2. Being essentially equal, all things considered.

American Heritage College Dictionary, Third Edition 1993. These definitions compel the concept that TRS must be as equal to voice telephone service as reasonably possible. This concept is buttressed by Section 225(d)(2) of the Act, which requires the Commission to “. . . ensure that regulations prescribed to implement this section encourage . . . the use of existing technology and do not discourage or impair the development of improved technology.” 47 U.S.C. § 225(d)(2).

When Congress enacted Section 225 of the Act, the only form of TRS that was available at the time was traditional TTY service. In enacting Section 225(d)(2), Congress fully understood the changing nature of technology, and that the technology available in 1990 would be surpassed by new technologies that would bring TRS ever closer to functional equivalency. In other words, functional equivalency is a dynamic concept that is not frozen by the technology

available in 1990. As the Commission explained: “[S]ection 225 encourages TRS providers *and the Commission* to be innovative in improving TRS consistently with the functional equivalency mandate.”² In short, Congress contemplated that the services available within the definition of TRS will continually change to embrace new technologies that improve what is functionally equivalent, and that the Commission must actively support such change.

The dynamic nature of functional equivalency is consistent with other provisions of the Act as well. Section 7(a) of the Act unequivocally states: “It shall be the policy of the United States to encourage the provision of new technologies and services to the public.” 47 U.S.C. § 157(a). There is no question that the Commission must embrace new technologies and services to further this very clear Congressional directive when making Commission policy decisions. Moreover, Section 255(c) of the Act states: “A provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.” 47 U.S.C. § 255(c). This section of the Act demonstrates the clear objective of Congress that all types of telecommunications services shall be made available to people with disabilities.

Taken together, these various provisions of the Act, all of which were ignored by the Bureau, show a very clear directive on the part of Congress to make available to people with disabilities, using the very best technologies that are available, all of the same types of services that are already available to people without disabilities, in a manner that is as functionally equivalent as possible.

² *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Americans with Disabilities Act of 1990*, CC Docket No. 98-67, CG Docket No. 03-123, Second Report and Order, Order on Reconsideration, and Notice of Proposed Rulemaking, 18 FCC Rcd. 12379 at ¶ 21 (2003) (“*2003 TRS Second Report and Order*”) (emphasis added).

In furtherance of these Congressional mandates, the Commission has expanded the number of services that are available for reimbursement from the TRS Fund. In addition to TTY, TRS now includes voice carry over (“VCO”), hearing carry over (“HCO”), captioned telephone voice carry over (“captioned telephone VCO”), Internet protocol relay (“IP Relay”), IP captioned telephone, speech-to-speech (“STS”), IP STS, and VRS. Consistent with the availability of new forms of TRS, the Commission has permitted some types of communications between persons with disabilities using two different forms of TRS to be reimbursable from the TRS Fund.

Indeed the Commission has stated: “TRS facilities must be capable of handling any type of call normally provided by telecommunications carriers unless the Commission determines that it is not technologically feasible to do so.”³ Thus, the Commission has specifically permitted that HCO-to-TTY, HCO-to-HCO, VCO-to-TTY and VCO-to-VCO calls be reimbursable from the TRS Fund, finding that such calls were being provided by TRS providers, were desired by and provided distinct benefits to TRS users, and were technologically feasible.⁴

The types of calls discussed in the prior paragraph are between people with disabilities using two different types of TRS to complete the call. A hearing person is not a party to the call. Yet, the Bureau erroneously ignored the Commission’s *2003 TRS Second Report and Order* when it provided its very narrow interpretation of an incomplete portion of Section 225(a)(3) of the Act to describe what qualifies as a TRS call compensable from the TRS Fund. For this reason alone, the Bureau’s decision must be reversed.

³ *2003 TRS Second Report and Order* at ¶ 26.

⁴ *Id.* at ¶¶ 32, 34.

Moreover, the Bureau’s reference to the Commission’s policy that point-to-point video calls between VRS users are not relay calls⁵ is a red herring. No one is disputing that these types of point-to-point video calls do not qualify as TRS. However, multi-party conference calls are not point-to-point calls. The Bureau also makes reference to the definition of VRS found in Section 64.601(a)(26) of the Rules.⁶ 47 C.F.R. § 64.601(a)(26). However any potential inconsistency between a proposed rule and a rule that is currently effective is not a foundation for dismissal of a petition for rulemaking. In fact, the very purpose of a petition for rulemaking is to modify the rules.

B. The Bureau Acted Improperly When it Dismissed in Part the Purple Petition Without First Asking for Public Comment.

In attempting to justify the dismissal in part of the Purple Petition pursuant to Section 1.401(e) of the rules, the Bureau stated:

We find that Purple’s filing of a petition that contradicts Purple’s own arguments in another pending proceeding renders consideration of the inconsistent Petition for a Rulemaking unwarranted on the issue of VRS calls not involving a hearing individual.⁷

This finding is erroneous, because the Purple Petition does not contradict the arguments made by Purple and other VRS providers in a joint Petition for Declaratory Ruling filed by various VRS providers on January 28, 2009 in this Docket (“Joint Petition”).

The Joint Petition seeks “. . . a Declaratory Ruling clarifying that all relay calls between and among individuals who are deaf, hard of hearing, speech-disabled and deaf-blind using different technologies that are needed to achieve functionally equivalent telephone service, are legitimate TRS calls that are eligible for reimbursement from the TRS Fund . . . even when such

⁵ Order at ¶ 4.
⁶ Order at ¶ 4.
⁷ Order at ¶ 3.

calls involve more than one CA interpreter.”⁸ The Purple Petition on the other hand asks the Commission to modify the rules to allow that multi-party conference calls that may not include people without disabilities are reimbursable from the TRS Fund.⁹ The Joint Petition does not ask for any ruling on multi-party calls. In fact, multi-party calls are specifically excluded from consideration by the Joint Petition.¹⁰

Since there is no conflict between the Joint Petition and the Purple Petition, the Bureau’s basis for dismissing in part the Purple Petition pursuant to Section 1.401(e) of the rules fails. The portion of the Purple Petition that was erroneously dismissed by the Bureau raises important policy questions regarding multi-party conference calls that warrant serious consideration by the Commission. People who are deaf, hard of hearing, speech disabled or deaf-blind should be able to participate in all of the normal day-to-day business and other activities that people without hearing or speech disabilities consider routine. Businesses routinely utilize multi-party conference calls. Denying people with hearing or speech disabilities the ability to participate in multi-party conference calls on a routine basis is a denial of functional equivalency in violation of Section 225 of the Act. Such denial can result in reduced opportunities for employment and exacerbate an already significant unfair unemployment disparity.

For people with hearing and speech disabilities, the availability of career jobs are hard to find outside of the traditional government type jobs. Career jobs with VRS companies have been rewarding because VRS employers promote upward mobility. There are now people with hearing and speech disabilities in senior management positions with VRS companies who need

⁸ Joint Petition at 14.

⁹ Purple Petition at 14-19.

¹⁰ Joint Petition at 4 n.10.

to make VRS and other TRS calls in the ordinary course of business to be effective on the job. To impose restrictions on such individuals does violence to the very principles of the Americans with Disabilities Act.

Additionally, there are people with hearing and speech disabilities who work in government agencies or in VRS and other TRS companies who supervise other people with hearing and speech disabilities. When it comes to conference calls, there are no effective means to make such calls without the use of VRS. For example, at NorCal Services for Deaf & Hard of Hearing (“NorCal”), over half of the 55 staff members are Deaf. If NorCal were to host a conference call with its outreach offices throughout northern California, there would not always be hearing people be on the call. Yet, the use of VRS is essential to having the multi-party conference call. In another possible scenario, the call might start out with hearing people, and the hearing people might drop off the call for various reasons during the course of the call, leaving only people who are deaf on the call. Furthermore, holding a multi-party conference call could be critical in an emergency situation where life or property are threatened.

The Commission should seek comment on the entire Purple Petition, including the section on multi-party conference calls so that the public can have an opportunity to explain why people who are deaf, hard of hearing, speech-disabled, or deaf-blind do not have functionally equivalent communications opportunities when it comes to multi-party conference calls and why multi-party conference calls are important to people with disabilities. The Bureau squandered an opportunity to obtain public comment on multi-party conference calls when it improperly dismissed in part the Purple Petition pursuant to Section 1.401(e) of the rules, and this egregious error must be corrected by the Commission.

V. CONCLUSION

By using a restrictive reading of a portion of Section 225(a)(3) of the Act that does not take into consideration other parts of Section 225 as well as other sections of the Act, and that is inconsistent with prior Commission rulings, the Consumer and Government Affairs Bureau has done a distinct disservice to the rights of people who are deaf, hard of hearing, deaf-blind and speech-disabled. The Bureau's Order cannot stand for this reason alone, and the Commission must correct this egregious error by reversing the Bureau's Order and placing the entire Purple Petition on public notice for comment. Moreover, the Bureau's reliance on Section 1.401(e) of the rules to dismiss the Purple Petition is fundamentally flawed, because there is no inconsistency between the Purple Petition and an earlier Petition for Declaratory Ruling filed by a coalition of VRS providers.

Respectfully submitted,

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