

**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)	

ORDER DENYING STAY MOTION

Adopted: July 9, 2010

Released: July 9, 2010

By the Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. We have before us a motion filed by Sorenson Communications, Inc. seeking a stay of the effect of interim rates for Video Relay Service (VRS) adopted by the Commission in a recent order.¹ Although Sorenson nominally seeks a “stay,” it asks not just that we stay the interim rates, but also that we take affirmative steps to re-institute the former VRS rate that expired on June 30, 2010. For the reasons set forth below, we deny the request.

II. BACKGROUND

2. In the 2007 *TRS Rate Order*, the Commission established rates for VRS service for the succeeding three years on the basis of providers’ projected costs.² The Commission noted in the order that at the end of the three-year period it would “reassess what the ... rates shall be for the ensuing three-year period,”³ but it nonetheless was concerned about ensuring that VRS rates reflect the actual cost of providing service. The Commission thus required VRS providers to file annually with the National Exchange Carrier Association (“NECA”), the TRS Fund administrator, data reflecting providers’ actual cost of service.⁴ That data, the Commission

¹ *Telecommunications Relay Service*, FCC No. 10-115 (June 28, 2010) (“*Interim Rate Order*”).

² *Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities, Report and Order and Declaratory Ruling*, 22 FCC Rcd 20140 (2007) (“*TRS Rate Order*”).

³ *Id.* ¶72.

⁴ *Id.* at n.170.

determined, “will be helpful in reviewing the reasonableness of rates adopted ... and whether they reasonabl[y] correlate with projected costs and prior actual costs.”⁵

3. The data submitted to NECA by VRS carriers during the first two years of the three-year rate cycle demonstrated that the rates established in the *TRS Rate Order* significantly exceeded the actual costs of providing service.⁶ In 2008, a congressional committee found that “consumers are being significantly overcharged to finance the TRS Fund and TRS providers are being significantly overcompensated.”⁷ In 2009, the Commission issued a notice of proposed rulemaking seeking comment on whether to adjust rates for the 2009-2010 Fund year (which runs from July 1 to June 30) “rather than continue to base rates on” the *TRS Rate Order*.⁸ Ultimately, the Commission did not change the rate for the final year of the three-year rate cycle, and on July 1, 2009, the planned rates for 2009-2010 went into effect as scheduled.

4. On April 30, 2010, two months before the rates established in 2007 expired, NECA submitted to the Commission payment formulas and funding requirement estimates for VRS providers for the upcoming Fund year. The per-minute rates proposed by NECA were substantially lower than the rates established in the *TRS Rate Order*, particularly for providers with the highest volume of minutes.⁹ That same day, the Bureau issued a Public Notice seeking comment on the information and recommendations presented by NECA.¹⁰

5. On June 28, 2010, the Commission issued a Notice of Inquiry seeking public comment on reform of the VRS compensation regime.¹¹ In the proceeding begun by the NOI, the Commission pledged to take a “fresh look” at VRS compensation and rules. A new look is necessary, the Commission explained, because “[o]ver the past few years, the per-minute compensation rates have significantly exceeded the estimated average per-minute costs of providing VRS.”¹² The Commission also expressed concern about “fraudulent and abusive activities.”¹³

⁵ *Ibid.*

⁶ Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities, *Public Notice and Notice of Proposed Rulemaking*, 24 FCC Rcd 6029, 6033 ¶11 (2009).

⁷ Structure and Practices of the Video Relay Service Program, *Notice of Inquiry*, FCC No. 10-111 (June 28, 2010) (*NOI*), citing House Committee on Energy and Commerce Majority Staff Report (Dec. 9, 2008) at 7.

⁸ 24 FCC Rcd at 6033 ¶11.

⁹ *See* Public Notice, 25 FCC Rcd 4682 (CGB 2010).

¹⁰ *See id.* at 4683.

¹¹ *See* n.7.

¹² *Id.* ¶30.

¹³ *Ibid.*

6. In the meantime, however, the three-year rates established in 2007 expired on June 30, 2010, and new rates had to be established. On June 28, 2010 the Commission accordingly issued an order setting forth interim rates for the next Fund year, July 1, 2010 through June 30, 2011.¹⁴ In its *Interim Rate Order*, the Commission concluded that over the past several years VRS providers' projections of their costs have "consistently overstate[d]" those costs, and found for that reason that it could "no longer justify basing VRS compensation rates only on projected costs" supplied by the providers.¹⁵ At the same time, however, the Commission was concerned about a "significant and sudden cut to providers' compensation."¹⁶ The Commission thus declined simply to adopt NECA's rate recommendations based on its data estimating the actual costs of providing service. The Commission instead averaged the NECA-proposed rate and the existing rate for each service tier to establish a "reasonable balance" for one-year rates that are significantly above NECA's recommended cost-based levels.¹⁷

7. Sorenson now asks for a stay of the new rates and an order re-imposing for the period July 1, 2010 through June 30, 2011, the expired rates established in the *2007 TRS Rate Order*.

III. DISCUSSION

8. In reviewing stay motions, the Commission applies a four-part test asking whether the movant has shown: (1) a likelihood of success on the merits; (2) an irreparable injury that will result in the absence of relief; (3) that a stay will not harm other parties; and (4) that the public interest favors a stay.¹⁸ We will examine each area in turn.

A. Likelihood of Success on the Merits.

9. Sorenson fails to show a likelihood of success on the merits. It first argues that, as a procedural matter, the Commission has improperly changed course without the required notice from a three-year "price cap" rate methodology and to a different, one-year methodology. That claim is wrong on several fronts. First, the *TRS Rate Order* did not establish a price cap approach. Indeed, in the *TRS Rate Order*, the Commission stated that it was *not* adopting a price cap methodology.¹⁹ As Sorenson notes, the Tenth Circuit referred in passing to the 2007 rates as

¹⁴ *Interim Rate Order* ¶10.

¹⁵ *Ibid.*

¹⁶ *Id.* ¶12.

¹⁷ *Id.* ¶¶2, 12.

¹⁸ See *In Re Applications of Liberty Productions, A Limited Partnership*, 16 FCC Rcd 18966 (2001); citing *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (D.C. Cir. 1958); *Washington Metropolitan Area Transit System v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977).

¹⁹ *TRS Rate Order*, 22 FCC Rcd at 20162 ¶52 ("We decline to adopt the price cap methodology as proposed. Instead, ... we will adopt tiered rates for VRS based on the providers' projected cost and minutes of use, and other data submitted to the Fund administrator by the providers.")

a “price cap” formula,²⁰ but the ratemaking portion of the *TRS Rate Order* was not before the Court in that case,²¹ and the Court’s description does not amount to a holding of the Court.

10. In any event, contrary to Sorenson’s claim, nothing in the *TRS Rate Order* can be interpreted as a promise that the Commission would continue to establish three-year rates under a “price cap” formula. Sorenson relies on a statement in the 2007 order that the Commission would “reassess what the tiers and rates shall be for the ensuing three-year period,”²² but that statement must be read in the full context of the order, which also anticipated adjusting compensation as needed, pursuant to data that “will be helpful in reviewing the reasonableness of rates adopted ... and whether they reasonabl[y] correlate with projected costs and *prior actual costs*.”²³ Moreover, the Commission plainly indicated in 2007 that it adopted a three-year rate cycle not as an aspect of a price cap approach, but to facilitate planning by VRS providers.²⁴

11. Subsequent to the *TRS Rate Order*, the Commission made it clear to all VRS providers that the 2007 rates and rate methodologies were likely to change no later than July 2010 and provided multiple opportunities for comment on the matter. For example, in 2009, well before the expiration of the three-year cycle, the Commission issued a notice of proposed rulemaking in which it stated that “[n]otwithstanding the adoption of VRS rates for a three-year period in the [*VRS Rate Order*], in this *NPRM* we seek comment on whether we should recalculate the VRS rates for each tier for the 2009-2010 Fund year” based on NECA cost data.²⁵ Furthermore, on April 30, 2010, the FCC’s Consumer and Governmental Affairs Bureau issued a Public Notice calling for comment on cost-based rates proposed by NECA,²⁶ in response to which Sorenson filed substantial comments. Sorenson and other interested parties have had a robust, and legally sufficient, procedure on this matter.

²⁰ See *Sorenson Communications, Inc. v. FCC*, 567 F.3d 1215, 1221 (10th Cir. 2009).

²¹ See 567 F.3d at 1219 (2007 rates “are not at issue in this appeal”)

²² *TRS Rate Order* ¶¶68, 72.

²³ *Id.* at n.170 (emphasis added).


²⁴ *TRS Rate Order* ¶56.

²⁵ 24 FCC Rcd 6029, 6033 ¶11 (2009).

²⁶ 25 FCC Rcd 4682.

²⁷ 47 U.S.C. §§ 225(a)(3), (b)(1).

²⁸ Declaration of Scott K. Sorenson ¶¶4, 12.



13. Sorenson also claims that the tiered pricing structure used for the VRS program unfairly discriminates against it because many of its calls will be reimbursed at a lower rate than other VRS providers' calls. That claim fails for several reasons. First, the tiered structure treats all VRS providers equally. The Commission expressly established what it termed "cascading" tiers, under which all providers are "compensated at the same rate for the minutes falling within a specific tier."³⁰ Thus, Sorenson – like every other provider – will receive the Tier I rate for all of its minutes falling within Tier I (the first 50,000 minutes each month), the Tier II rate for the next batch of minutes (from 50,000 to 500,000), and the Tier III rate for additional minutes. Sorenson may receive a lower average rate than other providers, but that is only because Sorenson provides many more minutes of VRS service than any other VRS provider, and it accordingly has more traffic in the tier with the lowest federal rate. That difference in average rates is inherent in the tier structure, which was established (and not challenged) in 2007 to reflect economies of scale.³¹

14. Second, the tier structure makes sense because the Commission found in 2007 that larger providers have lower average costs than smaller ones and thus should be compensated at lower rates.³² While Sorenson has raised theoretical questions about whether costs fall with volume in the VRS industry, the NECA data show that Tier III providers in fact operate at a lower cost than smaller providers. NECA determined that it costs Tier I providers \$5.78 per minute to provide VRS, but costs Tier III providers only \$3.90 per minute.³³ As a Tier III provider, Sorenson thus is not situated similarly to smaller providers and should not be compensated the same. Indeed, insofar as Sorenson, with its higher volume and lower average costs, is compensated at the Tier I and II rates for calls falling within those tiers, it is being overcompensated relative to smaller providers for those minutes. Moreover, the interim rates adopted for Tiers I and II exceed the NECA-proposed rates by less than 10 percent, whereas the interim rate for Tier III is 30 percent higher than NECA's proposal for that tier. This effectively means that the interim rates give Sorenson more of a margin over its costs than any other provider, since NECA's proposed rates are based on actual cost data.

15. Sorenson is incorrect that the Commission was required to eliminate the tier structure in the *Interim Rate Order*. That issue, along with many others, is being considered in

²⁹ 47 C.F.R. § 64.604(b)(2)(iii)

³⁰ *TRS Rate Order* ¶54.

³¹ *TRS Rate Order* ¶¶52-54.

³² *Ibid.*

³³ Sorenson thus is wrong that "the only reliable evidence in the record" on economies of scale was provided by its economics "expert," who opined that there were no such economies. Motion at 10.

the overarching VRS proceeding initiated by the *NOI*.³⁴ In addition, the tiered structure has not been challenged by any provider other than Sorenson.

16. Finally, Sorenson claims that the *Interim Rate Order* unreasonably “fails to take many of the costs of VRS into account,” such as “the costs of developing and providing videophones, providing technical assistance, and taxes and interest payments.” Most of the costs Sorenson complains of have never been directly recoverable under any of our rate orders, including the *TRS Rate Order*,³⁵ and there is particularly no basis to claim that they must be accounted for in an interim rate that will be in effect for one year. Moreover, Sorenson does not show that telecommunications ratepayers, who fund VRS service, should bear the costs of Sorenson’s interest payments, which as explained below result from its voluntarily chosen and heavily debt-laden financial structure.

B. Irreparable Injury.

17. Sorenson has also failed to demonstrate that it will suffer irreparable injury in the absence of a stay and re-imposition of the expired rate. [REDACTED]

[REDACTED] We reject that claim for several reasons.

18. First, Sorenson’s claim of harm is speculative. [REDACTED]

[REDACTED] Moreover, a user’s choice of provider may depend on many factors, including quality of the video images provided by the service and whether a user’s calling equipment is compatible with other providers’ service. Users may be especially reluctant to switch providers because Sorenson’s customers – [REDACTED] – have received their videophone from Sorenson itself, and the Commission has noted significant questions whether Sorenson’s equipment can be used to obtain service from other providers.³⁷

19. Second, Sorenson has [REDACTED] percent market share in the VRS service market.³⁸ Given that market position, even if the interim rate causes some customers to switch providers (a

³⁴ See *National Ass’n of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984) (agencies need not address all regulatory issues “in one fell swoop”).

³⁵ See *TRS Rate Order* at ¶82 & nn.208-209 (“costs attributable to relay hardware and software used by the consumer, including installation, maintenance costs, and testing are not compensable from the Fund”)

³⁶ Declaration of Scott K. Sorenson ¶¶4, 12.

³⁷ *NOI* ¶21.

³⁸ Declaration of Scott K. Sorenson ¶4.

proposition that is far from certain for the reasons set forth above), Sorenson will remain by far the leading provider of VRS service. Any customer losses could be made up later in the same manner by which Sorenson has garnered the lion's share of all users to begin with.³⁹

20. Third, Sorenson has failed to show that the Tier III rate is under-compensatory. The Commission chose an interim rate of \$5.07 per minute – 30 percent higher than the rate recommended by NECA – which was based in part on Sorenson's reported cost data. It would be especially unwarranted to return to the Tier III rate of \$6.24 per minute that applied under the *2007 Rate Order*, which the Commission has recognized “significantly exceeded the estimate average per-minute costs of providing VRS.”⁴⁰ Indeed, Sorenson itself proposed a rate of \$5.95 per minute (for all traffic, without tiering) that would yield Sorenson substantially less revenue than the prior rate.

21. Finally, we have a serious concern that Sorenson's alleged financial difficulties may be of its own making. Sorenson claims that it will suffer [REDACTED] below what is needed to meet its financial obligations. However, publicly available financial information reveals that earlier this year it paid a voluntary \$179 million dividend to a private equity fund with an ownership interest in Sorenson.⁴² It paid out that money – and acquired substantial new debt – in the face of both the Commission's 2009 NPRM seeking comment on whether VRS rates should be lowered and the knowledge that the 2007 rates would be expiring and likely would be reduced within a few months. Moreover, Sorenson pays interest on the large amount of debt it has taken on – more than \$1 billion and perhaps as much as \$1.5 billion.⁴³ Some of that debt apparently was taken on in order to fund the recent dividend.⁴⁴ Sorenson has not shown that its claimed costs, which include interest and dividend payments, are the result of sound business decisions, or that it would be unable to renegotiate its financial commitments or reduce its costs in ways that do not affect its service. We discern no legal or policy basis for setting rates at a level that is designed to ensure that Sorenson can profitably maintain its particular financial structure.

C. Harm to Others and the Public Interest.

³⁹ *Central & Southern Freight Tariff Ass'n v. United States*, 757 F.2d 301, 309 (D.C. Cir.), *cert. denied*, 474 U.S. 1019 (1985) (“revenues and customers lost to competition which can be regained through competition are not irreparable”).

⁴⁰ *NOI* ¶30.

⁴¹ Declaration of Scott K. Sorenson ¶9.

⁴² Debtwire, June 15, 2010.

⁴³ *Ibid.* Debtwire refers to two bond issues, one of \$735 million and another of \$810 million.

⁴⁴ *Ibid.*

22. The TRS Fund is financed by all users of telecommunications services.⁴⁵ Any overcompensation of VRS providers thus comes directly out of the pockets of ratepayers – virtually all adults in the country. All of those persons will be directly harmed by the re-imposition of a rate that Sorenson itself recognizes far exceeds its costs. It is no answer to say, as Sorenson asserts, that there will be no harm because the amount of money is smaller than the Universal Service Fund, another, unrelated, subsidy mechanism.

23. At the same time, Sorenson has not shown that the public interest favors a stay. It claims that hearing- and speech-impaired Americans will suffer [REDACTED], but the harm is de minimis – if it even comes to pass. Moreover, Sorenson itself has alleged that other providers will be able to provide service should its own fall short of customer expectations. There is no reason to believe that any member of the public will be harmed in the absence of relief.

24. At the same time, the public interest favors the efficient administration of a publicly supported fund that has approached \$1 billion. To the extent that the prior VRS rates were overcompensatory – and the overwhelming evidence discussed above shows that they were – it would not serve the public interest to perpetuate those rates.

IV. ORDERING CLAUSE

25. For the foregoing reasons, Sorenson's motion for a stay of the *Interim Rate Order* is DENIED, and Sorenson's request for establishment of different rates for 2010-2011, in order to fill the gap created by the requested stay, is DISMISSED AS MOOT.

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Affairs Bureau

⁴⁵ 47 U.S.C. § 225(d)(3)(B).