

October 19, 2018

Via ECFS

Ms. Marlene H. Dortch
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* in CG Docket Nos. 10-51 and 03-123

Dear Ms. Dortch:

In an *ex parte* filed this week,¹ ZVRS and Purple (collectively “ZVRS”), have asked the Commission to extend their authorizations to engage in at-home interpreting *through December 31, 2020*, while prohibiting every other provider from using at-home interpreters during this time. The Commission should reject this discriminatory request to award ZVRS rights that are not available to other providers because it would give ZVRS an extraordinarily unfair competitive advantage.

ZVRS’s request would dramatically change the conditions for participation in the trial of at-home interpreting—but for only one party, ZVRS. The Commission offered providers the opportunity to participate in a limited trial of at-home interpreting and allowed each provider to assess for itself whether the benefits of participating in such a time-limited trial outweighed the costs. The rules adopted by the Commission specifically limited the trial to one year, and the Commission stated that it would subsequently consider whether to adopt rules allowing at-home interpreting on a permanent basis. Because the trial was limited to one year and required investment in changes to interpreters’ homes, and because of the difficulty of addressing any subsequent shut down of at-home interpreting, Sorenson elected not to participate. ZVRS and Purple, who also knew that the trial would last only one year, determined that the benefits of participation in a one-year trial outweighed these costs and opted into the trial.

Now, at the end of the one-year trial, ZVRS has asked the Commission to extend the pilot program for two more years (double the initial trial period) while denying other providers the ability to participate. That would be unfair and does not further the purposes of the trial. As ZVRS acknowledges, the purpose of the pilot program was to allow the Commission to collect data about at-home interpreting. But over the last twelve months, ZVRS has attempted to use the trial to gain a competitive advantage. Rather than simply assigning existing interpreters to work from home, ZVRS has attempted to use the pilot program as a recruiting tool for new interpreters. It has aggressively used at-home interpreting come-ons to poach interpreters from other providers. ZVRS has created “at home interpreter” positions, which it advertises to

¹ Letter from Gregory Hlibok, Chief Legal Officer, ZVRS and Purple, to Marlene Dortch, Secretary, Federal Communications Commission, CG Docket Nos. 10-51 & 03-123 (filed Oct. 17, 2018) (“ZVRS *Ex Parte*”).

interpreters outside the companies. Because these positions require at least three years of experience in VRS, the advertisements target interpreters who already work for other providers. ZVRS thus uses its ability to offer at-home interpreting to attempt to hire experienced interpreters who have already been trained by other companies. Other companies must be permitted to respond.

Sorenson has not previously complained about this conduct because providers understood at the outset that participating providers would be able to offer at-home interpreting for a year, while non-participating providers would not be able to do so for that year. But it was *not* part of the cost-benefit analysis that ZVRS would be able to use at-home interpreting to poach interpreters for years following the trial, while all other providers would be legally prohibited from responding.

ZVRS concedes that it has now collected sufficient data to allow the Commission to evaluate whether to extend the at-home interpreting program indefinitely. Accordingly, the pilot program has fulfilled its purpose. Nevertheless, ZVRS argues that “extension of the Pilot Program is *only* needed to prevent disruption of the at-home call handling processes, procedures, and workforce already in place at the Companies.”² Ironically, however, ZVRS does not limit its request to allowing interpreters who already work at home to continue doing so; ZVRS requests a continuation of the pilot program for two years, which would enable ZVRS to continue to *expand* its at-home interpreting program. In any case, this explanation does not meet the requirements for a waiver. As the D.C. Circuit has explained, “[a]n applicant for waiver faces a high hurdle even at the starting gate.”³ To qualify for a waiver, ZVRS must show that “(1) ‘special circumstances warrant a deviation from the general rule,’ and [that] (2) the waiver will ‘serve the public interest.’”⁴ ZVRS’s request simply does not meet that standard.

First, there are no special circumstances that justify allowing ZVRS to continue—and even expand—its at-home interpreting program for years at a time while excluding other providers from doing the same. To prove that special circumstances justify a waiver, ZVRS bears “a heavy burden” to prove that its “arguments are substantially different from those which have been carefully considered at the rulemaking proceeding.”⁵ This it cannot do. The fact that at-home interpreting would end after one year and that the Commission would then “evaluate the value and effectiveness of this program” was known *at the time the Commission adopted rules authorizing the pilot program*. Thus, it does not qualify as a “special circumstance” warranting deviation from the general rule.

² *Id.* at 1 (emphasis added).

³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

⁴ *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁵ *Indus. Broad. Co. v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970).

Nor has ZVRS shown that it is in the public interest to extend the trial in a discriminatory way. The D.C. Circuit has warned against granting waivers in a discriminatory fashion.⁶ ZVRS attempts to justify its request for special treatment by claiming that a waiver is necessary to “stranding the Companies’ investment in at-home call handling.”⁷ But ZVRS does not explain what investments it has made or why it could not reuse those investments if the Commission adopts rules to permanently allow at-home interpreting. More importantly, even if there were a risk of stranded investment, ZVRS does not even attempt to argue that the value of those stranded investments (which were entirely foreseeable when ZVRS opted into the trial) outweighs the competitive harm to other providers from allowing ZVRS to continue to poach interpreters for two more years. Nor does it explain why the Commission should relieve it of the risks of stranded investment when it knowingly assumed those risks by electing to participate in a one-year trial.

Finally, it bears emphasis that ZVRS has not presented sufficient data to support its requests. In supporting its petition, ZVRS has relied entirely on redacted secret data that it has sought to withhold from public inspection. By placing all the data supporting its petition under a blanket request for confidentiality (thus making it unavailable even to parties who have signed the protective order in this proceeding), ZVRS has deprived other providers and interested members of the public of their right to comment on its petition.⁸ The Commission must therefore disregard this data in considering ZVRS’s petition.

In supporting its petition for a rulemaking, ZVRS cannot rely on secret data that it has not made available to the public more generally. ZVRS has no right “to be heard in secret, thereby depriving other interested parties of the opportunity to know the basis of an administrative agency’s decision”:

A proprietor of information who thinks that information will significantly affect the decision on a proposed rule is free to submit it, but not under conditions which

⁶ *Northeast Cellular Telephone Co.*, 897 F.2d at 1166 (noting that the purpose of the two-part waiver test is “to prevent discriminatory application and to put future parties on notice” as to the agency’s standard for waivers).

⁷ ZVRS *Ex Parte* at 2.

⁸ *See* 5 U.S.C. § 555(b) (“So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function.”); *Block v. SEC*, 50 F.3d 1078, 1085 (D.C. Cir. 1995) (“Rather, § 555(b) is universally understood to establish the right of an interested person to participate in an on-going agency proceeding.”).

will in effect deprive other interested parties of the opportunity to challenge it before the agency or upon judicial review.⁹

For that reason, the Commission has stated that materials submitted in a rulemaking must be available for public inspection.¹⁰

Those same principles also prevent the Commission from relying on undisclosed confidential information submitted by ZVRS in support of its waiver. As an interested party, Sorenson has the right to participate in the waiver proceeding—a right that includes the opportunity to review and comment on the evidence. As the D.C. Circuit has explained, “The distinct and steady trend of the courts has been to demand in informal adjudications procedures similar to those already required in informal rulemaking. Courts have required some explanation for agency action and, to ensure the adequacy of that explanation, some opportunity for interested parties to be informed of and comment upon the relevant evidence before the agency.”¹¹ ZVRS thus cannot ask the Commission to grant its waiver based on secret data purporting to show that its participation in the at-home-interpreting program has been a success. And without the secret data submitted by ZVRS, there is no basis upon which the Commission could grant ZVRS the unilateral right to continue the at-home-interpreting pilot program.

In short, the Commission must reject ZVRS’s transparent and unlawful attempt to use the at-home interpreting pilot program to continue poaching interpreters from other providers while denying other providers the ability to defend themselves. If the Commission is going to extend the at-home-interpreting program, it must do so for all providers. If, however, currently certified VRS providers who did not initially participate are prohibited from participating in an extended Pilot Program (particularly an extension that exceeds the original timeframe by more than double), then the Pilot Program should end in accordance with the 2017 VRS Improvements Report and Order, and a report should be produced that shows the impact on efficiency, costs, and service.

⁹ *Westinghouse Elec. Corp. v. U.S. Nuclear Regulatory Comm’n*, 555 F.2d 82, 95 (3d Cir. 1977).

¹⁰ *Examination of Current Policy Concerning the Treatment of Confidential Info. Submitted to the Comm’n*, Report and Order, 13 FCC Rcd. 24816, 24844 ¶ 44 (1998) (“Material submitted in rulemakings will continue to be routinely available for public inspection because, as the commenters who addressed rulemakings acknowledge, rulemakings have a broad impact on the public, and wide public participation, with a full opportunity to comment, is contemplated by the APA.”).

¹¹ *Indep. U. S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 922-23 (D.C. Cir. 1982) (internal citations omitted).

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Respectfully submitted,

A handwritten signature in black ink that reads "Mark Davis". The signature is fluid and cursive, with the first name "Mark" and last name "Davis" clearly distinguishable.

John T. Nakahata

Mark D. Davis

Counsel for Sorenson Communications, LLC

cc: Nirali Patel
Karen Peltz Strauss
Robert Aldrich
Eliot Greenwald