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REDACTED, FOR PUBLIC INSPECTION

ORIGINAL

June 6, 2017

Accepted / Filed

JUN - 6 2017

Federal Communications Commission
Office of the Secretary

VIA HAND-DELIVERY AND ELECTRONIC FILING

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

DOCKET FILE COPY ORIGINAL

Re: *Structures and Practices of the Video Relay Service Program*, CG Docket No. 10-51; *Telecommunications Relay Services, and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123

Dear Ms. Dortch,

In accordance with the *Second Protective Order* in the above-captioned proceedings, ZVRS Holding Company ("ZVRS Holding"), the parent of CSDVRS, LLC d/b/a ZVRS ("ZVRS") and Purple Communications, Inc. ("Purple"), herein submits Highly Confidential and redacted versions of the attached *ex parte* letter in the above-captioned proceedings.

ZVRS Holding has designated for Highly Confidential treatment the marked portions of the attached documents pursuant to the *Second Protective Order* in CG Docket Nos. 03-123 and 10-51.[1] ZVRS Holding's *ex parte* letter includes granular data with respect to ZVRS and Purple's costs for various categories of both allowed and additional costs, in absolute total and on a per-minute basis, and the amount of traffic that each company receives. These materials fall under the following enumerated items in Appendix A of the *Second Protective Order*:

3. Information that provides granular information about a Submitting Party's past, current or future costs, revenues, marginal revenues, or market share, and future dividends.

5. Information that discusses in detail the number or anticipated changes in the number of customers or amount of traffic, including levels or patterns of usage, churn rate data, detailed information about why customers discontinue service, numbering assignments, and customer complaints.

Pursuant to the *Second Protective Order* and additional instructions from Commission staff, ZVRS Holding is filing a redacted version of the document electronically via ECFS, one copy of the Highly Confidential version with the Secretary, two copies of the redacted version

[1] *Structures and Practices of the Video Relay Service Program; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Second Protective Order, DA 12-858, 27 FCC Rcd. 5914 (Cons. & Gov't Affs. Bur. 2012).

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with the Secretary, and sending copies of the Highly Confidential version to Eliot Greenwald, Robert Aldrich, and Michael Scott of the Consumer and Governmental Affairs Bureau and the TRS Reports mailbox.

Please contact me if you have any questions or require any additional information.

Sincerely,

*/s/*_____

Gregory Hlibok
Chief Legal Officer
ZVRS Holding Company
Parent company of CSDVRS, LLC d/b/a
ZVRS and Purple Communications, Inc.
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Attachment

cc: Eliot Greenwald
Robert Aldrich
Michael Scott
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Federal Communications Commission
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Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Re: Notice of *Ex Parte* Presentation: CG Docket Nos. 10-51 and 03-123

Dear Ms. Dortch,

On June 2, 2017, Sherri Turpin, Chief Executive Officer of ZVRS Holding Company ("ZVRS Holding"), parent company of CSDVRS, LLC d/b/a ZVRS ("ZVRS") and Purple Communications, Inc. ("Purple") (collectively, the "Companies"), together with former FCC Commissioner Harold Furchtgott-Roth and outside counsel Jennifer Richter, spoke on the phone with Nicholas Degani, Senior Counsel to Chairman Ajit Pai, to discuss the various proposals for Video Relay Service ("VRS") compensation rates in the above-referenced proceedings.[1]

Turpin expressed her appreciation for the Commission's support throughout the acquisition of Purple earlier this year, including timely completion of the Consent Decree.[2] She discussed the substantial work that is underway to integrate the Companies. Cost savings from the integration work will not be realized in the immediate future, but should position the Companies for success over the longer term. As acknowledged and agreed in the Consent Decree, the Companies continue to operate separately, with their own staffs, real estate, assets and costs, and will do so until integration is complete. The acquisition of Purple has been and continues to be challenging and expensive for ZVRS Holding, but Turpin believes that with hard work and commitment the ultimate combination of ZVRS and Purple will provide the best chance the Commission and the Deaf and Hard of Hearing community ("Community") have for a viable #2 provider of VRS.

It is clear how hard Commission staff are working on the VRS rate item,[3] and that the Commission is endeavoring to set rates at levels necessary to support the VRS program, its users

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[1] *See* Letter from Gregory Hlibok, Chief Legal Officer, ZVRS Holding Company, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 10-51 & 03-123 (filed May 22, 2017) (attaching analysis of VRS rate proposals against projected 2017 cost and demand data for each provider) ("*May 22 Ex Parte*").

[2] *See Purple Communications, et al.*, Order and Consent Decree, FCC 17-10, 32 FCC Rcd. 1608 (Feb. 15, 2017) ("Consent Decree").

[3] *Structure and Practices of the VRS Program, Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Notice of Inquiry, Further Notice of Proposed Rulemaking, and Order, 32 FCC Rcd. 2436 (Mar. 23, 2017) (individually, the "*FNPRM*").

and providers, ensuring sustainability and competition over the long term. The Companies also understand the Commission's need to protect the Fund and ratepayers by ensuring that VRS funding is used efficiently and properly.

ZVRS Holding is concerned, however, that the rate item may be headed in a direction that will materially financially impair Purple and ZVRS and frustrate any chances for meaningful competition in the VRS industry. We have analyzed different potential outcomes in order to provide maximum information and transparency to the Commission regarding the impact of potential changes to the Joint Rate Proposal. Each of the below, if implemented as part of VRS rate reform, would individually be of serious concern to the Companies' short- and long-term viability. Together, these changes will put ZVRS and Purple in an untenable financial position:

(1) **New rates effective July 1, not January 1**: As the Commission knows, the Joint Rate Proposal was predicated on the new rates being effective retroactive to January 1, 2017. The impact of the glide path on the non-dominant providers over the past four years has been material, and the adoption of sustainable rates retroactive to January 1 is essential to stabilize the non-dominant providers and ensure that they are able to recoup the losses suffered, particularly those that have resulted from the ever-deepening glide path rate cuts over the last 18 months. Over that period, ZVRS and Purple have operated at *** **BEGIN HIGHLY CONFIDENTIAL INFORMATION** *** [redacted] *** **END HIGHLY CONFIDENTIAL INFORMATION** *** For ZVRS and Purple, the financial impact of the new rates becoming effective July 1 and not January 1, assuming adoption of the Joint Rate Proposal, is *** **BEGIN HIGHLY CONFIDENTIAL INFORMATION** *** [redacted] *** **END HIGHLY CONFIDENTIAL INFORMATION** ***

(2) **Implementing a new glide path for the next four years instead of holding rates steady**: As the Commission knows, it is crucial to stabilize rates for the non-dominant providers. The point of the last glide path was, in conjunction with other competitive reforms adopted by the Commission in 2013, to try to bring costs and rates for all VRS providers closer together by the 2016 Fund Year.[4] As the Commission acknowledges, however, "the VRS market structure has seen little change, in part because the structural reforms the Commission envisioned in 2013 have been slow to arrive."[5] At this juncture, there are no competitive reforms that have been adopted, and even those proposed carry no guarantee that they will lower costs for any of the providers. As a result, it is unclear if any cost reductions from

[4] *Id.* at para. 87, *citing Structure and Practices of the Video Relay Services Program, Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Report and Order and Further Notice of Proposed Rulemaking*, 28 FCC Rcd. 8618, 8698-99, 8704, paras. 199-200 (2013), *aff'd in part and vacated in part sub nom. Sorenson Communications, Inc. v. FCC,* 765 F.3d 37 (D.C. Cir. 2014).

[5] *Id.*

structural reforms will materialize to justify further rate reductions and, even if they do, at what pace they might arrive. Moreover, the rates under the current glide path were cut so deeply that the Companies *** **BEGIN HIGHLY CONFIDENTIAL INFORMATION** *** [redacted] *** **END HIGHLY CONFIDENTIAL INFORMATION** *** As former Commissioner Furchtgott-Roth noted in his expert report, "For the past 10 years, the FCC has tried to strike the right regulatory balance with rate tiers and has almost certainly erred in one direction or the other."[6] The Commission should not repeat its past predictive errors and force the non-dominant providers to bear the risk that structural reforms may not arrive on schedule or deliver reduced costs. The glide path, if one is justified and implemented, must be modest, with minimal rate decreases over time. A 1% reduction per year would be consistent with the recommendations of the Congressional Budget Office and ties to the economic total factor productivity.[7] Even a modest glide path of 1% a year over the next four years, would cause *** **BEGIN HIGHLY CONFIDENTIAL INFORMATION** *** [redacted] *** **END HIGHLY CONFIDENTIAL INFORMATION** *** If a glide path similar to the current glide path is implemented, with reductions of 8.5% annually, then *** **BEGIN HIGHLY CONFIDENTIAL INFORMATION** *** [redacted] *** **END HIGHLY CONFIDENTIAL INFORMATION** ***

(3) **<u>Counting the minutes of ZVRS and Purple together when the Companies are separately operated</u>**: A more fulsome discussion of whether the minutes of ZVRS and Purple should be counted together is contained below. The incremental financial impact of this decision, however, would be *** **BEGIN HIGHLY CONFIDENTIAL INFORMATION** *** [redacted] *** **END HIGHLY CONFIDENTIAL INFORMATION** ***

As the Commission knows, under the Joint Rate Proposal as originally conceived, with rates retroactive to January 1st, ZVRS and Purple treated as separate Companies, and rates held steady for the next four years, ZVRS and Purple already would operate at *** **BEGIN HIGHLY CONFIDENTIAL INFORMATION** *** [redacted] *** **END HIGHLY CONFIDENTIAL INFORMATION** *** If the above changes to the Joint Rate Proposal also are implemented, ZVRS and Purple will operate at *** **BEGIN HIGHLY**

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[6] Expert Report of Harold Furchtgott-Roth, CG Docket Nos. 10-51 & 03-123, at 15, para. 33 (filed Apr. 24 2017) ("Furchtgott-Roth Expert Report").

[7] *See generally* Robert Shackleton, Working Paper 2013-01, "Total Factor Productivity Growth in Historical Perspective," Congressional Budget Office, at 5 (Mar. 2013), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/44002_TFP_Growth_03-18-2013.pdf (noting that the Total Factor Productivity average annual growth rate from 1950 to 2010 was approximately 1.2% to 1.5%).

CONFIDENTIAL INFORMATION *** [redacted] ***** END HIGHLY CONFIDENTIAL INFORMATION ***** The predicted losses from July 2017 through December 2020 are even greater. Assuming that the Joint Rate Proposal is adopted but not effective until July 1st, and counting ZVRS and Purple minutes together, and implementing a 1% glide path, ***** BEGIN HIGHLY CONFIDENTIAL INFORMATION ***** [redacted] ***** END HIGHLY CONFIDENTIAL INFORMATION ***** This is clearly not sustainable for the Companies or their investors. In the attached presentation, ZVRS and Purple identify rates that would allow the Companies to recover ***** BEGIN HIGHLY CONFIDENTIAL INFORMATION ***** [redacted] ***** END HIGHLY CONFIDENTIAL INFORMATION ***** While the Companies are seeking rates that will simply allow them to "break even" over the next four years, Sorenson Communications, LLC ("Sorenson") will be operating at an estimated surplus of ***** BEGIN HIGHLY CONFIDENTIAL INFORMATION ***** [redacted] ***** END HIGHLY CONFIDENTIAL INFORMATION ***** under the Joint Rate Proposal.

If all of these changes to the Joint Rate Proposal are implemented, and the glide path for the next four years approximates the 8.5% annual reductions under the current glide path, then ***** BEGIN HIGHLY CONFIDENTIAL INFORMATION ***** [redacted] ***** END HIGHLY CONFIDENTIAL INFORMATION ***** ZVRS and Purple, as a combined entity, cannot provide meaningful VRS competition if they chronically operate at a loss. No business can continue to incur uncompensated costs. When revenue is below costs for a short period of time, businesses cut back on investments.[9] As the Companies have previously explained to the Commission, this exact scenario has played out under the current glide path, which reduced rates to levels below costs and forced the Companies to make drastic cuts to research, development, and other procompetitive initiatives in an effort to simply maintain their existing market share. But when revenues persist below costs, which could happen if the Commission does not arrive at the right rates in this proceeding, then rational market actors such as the Companies will simply cease to operate. The Community will be left with little, if any, choice in VRS providers, as Sorenson is likely to be the only provider financially able to survive under such a scenario.

As the data demonstrates, the potential changes to the Joint Rate Proposal outlined above would put ZVRS and Purple in an impossible financial position, making it very difficult for them to compete. These changes also would contravene the Commission's own goals in this

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[8] *See May 22 Ex Parte* at Attachment.

[9] *See* Furchtgott-Roth Expert Report at 15, para. 33 ("Getting compensation to reflect costs for firms of different sizes is a constant challenge for the Commission. If the compensation is too generous, firms are unnecessarily enriched. If the compensation is too little, firms discontinue service or reduce the quality of service and investment. For the past 10 years, the FCC has tried to strike the right regulatory balance with rate tiers and has almost certainly erred in one direction or the other. Forcing firms into bankruptcy or reducing investments or quality of service is not a good outcome, nor is overcompensating firms.").

proceeding of maintaining "competition in the marketplace pending further structural reforms," and giving "VRS providers the long-term stability in rates to make investment decisions."[10] Implementing another glide path will not provide long-term stability in rates, and will discourage investment in VRS providers and service. As the Companies have emphasized in recent meetings, the Commission must look objectively at all the data in front of it, including the comparative analyses of the different proposals, consider the continued market imbalances that will persist even under the Joint Rate Proposal, and devise a rate structure that supports competition, choice and parity. A ratemaking decision now that threatens the near- and long-term viability of the #2 and #3 providers of VRS, Purple and ZVRS, cannot and will not support competition and choice for the Community.

Turning to the issue of whether the minutes for ZVRS and Purple should be counted together, or whether a rate should be set that would approximate this result, ZVRS Holding reiterates that counting the minutes of ZVRS and Purple together when the Companies continue to be operated separately violates the terms of the Consent Decree and would further damage the Companies at a time when stability and consistency are needed. The Consent Decree expressly states that ZVRS and Purple will operate as separate entities until they fully integrate within the next 36 months. Treating ZVRS and Purple as a single entity for purposes of billing would violate the clear and unambiguous terms of this agreement with the Commission.

In its June 1, 2017, *ex parte* letter, Sorenson argues that ZVRS' reliance on the Consent Decree is unjustified because the Consent Decree contains "no mention of the then-existing compensation rates," and because the Consent Decree provides that "[t]he Parties agree that if any provision of the Consent Decree conflicts with any subsequent Rule or Order adopted by the Commission (except an Order specifically intended to revise the terms of this Consent Decree to which the Companies do not expressly consent), that provision will be superseded by such Rule or Order."[11] Sorenson contends that "[t]he proposed rules under consideration in this proceeding are rules of general applicability that were not adopted as of the time the Consent Decree was entered, and, as a result, cannot be considered an order specifically intended to revise the terms of the decree."[12]

The Companies do not dispute that the Consent Decree is silent about then-existing rates, nor do they contend that the Consent Decree prevents the Commission from adopting new compensation rates as a rule of general applicability. However, Sorenson's proposal that the Commission treat the Companies as a single entity for purposes of counting their minutes does not implicate *rates*. Instead, it suggests a *process* for how ZVRS and Purple's billable minutes should be calculated, submitted and reimbursed. The Consent Decree was not silent with respect to that issue. The Consent Decree expressly states that ZVRS and Purple "will operate and

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[10] *FNPRM* at para. 88.

[11] Letter from John T. Nakahata, Counsel to Sorenson Communications, LLC to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 10-51 & 03-123, at 2 (filed June 1, 2017), quoting Consent Decree, 32 FCC Rcd. at 1621, para. 32.

[12] *Id.*

submit Requests for Reimbursement to the TRS Fund Administrator as separate VRS Providers, each with its own certification," until they fully integrate within 36 months from the Effective Date of the Consent Decree.[13] Treating ZVRS and Purple as a single entity for purposes of reimbursement would violate the clear and unambiguous terms of this agreement with the Commission.

The proposal to combine ZVRS and Purple's minutes for purposes of determining the Companies' compensation also does not implicate a "rule of general applicability." Any such rule would apply only to ZVRS and Purple because they are the only two providers that share common ownership. Moreover, any ostensibly "general" rule requiring that all commonly-owned subsidiaries must combine their minutes for purposes of determining their reimbursement rate would improperly single out the Companies because they are the only two VRS providers that currently share common ownership. Any rates adopted with the *intent* of encouraging the Companies to integrate faster, when they have been promised three years to complete the integration process, would also violate the terms of the Consent Decree, which states that the Commission may not adopt an order "specifically intended to revise the terms of [the] Consent Decree" without the Companies' express consent.[14]

In addition, the Commission has failed to give the Companies and their investors fair notice that their minutes could be combined for purposes of determining their compensation rate. The Consent Decree was just agreed to and completed in February with no suggestion that this could occur. The Supreme Court recently upheld a challenge against the Commission's adoption of such an abrupt change. In *FCC v. Fox Television Stations, Inc.*, the Supreme Court struck down the Commission's application of a new principle that fleeting expletives and a brief moment of indecency were actionably indecent.[15] The Court reasoned that the sudden change in the Commission's interpretation "fail[ed] to provide a person of ordinary intelligence fair notice of what was prohibited."[16] Although the *Fox* case concerned violations for actionable indecency, the Court noted that this lack of notice "would be true with respect to a regulatory change this abrupt on any subject."[17] Here, the Companies have continued to bill the Fund separately following adoption of the Consent Decree, and the Commission has not combined their minutes for purposes of determining their compensation rates. Although the *FNPRM* seeks comment on appropriate VRS compensation rates and minutes thresholds under a tiered rate structure, it does not tee up the issue of how ZVRS, Purple, or any other VRS provider's minutes should be counted. A sudden change to the Commission's billing practices is unwarranted, would violate principles of fair notice and would undermine the Companies' reliance on the terms of the Consent Decree which were specifically negotiated and agreed with the Commission. This lack of fair notice would be further exacerbated by the fact that the Consent Decree contains explicit

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[13] Consent Decree, 32 FCC Rcd. at 1615-16, para. 16.

[14] *Id.* at 1621, para. 32.

[15] *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012).

[16] *Id.*, 132 S. Ct. at 2318 (internal quotations omitted).

[17] *Id.*

and unambiguous language that the Companies will operate and bill the Fund separately until they have fully integrated.

ZVRS and Purple applaud the Commission for its diligence in seeking to set VRS rates in a manner that will be most beneficial for the Community, all VRS providers, rate payers and the Commission's own goals in this proceeding. The Companies hope that the information provided in this *ex parte* submission provides helpful context and clarity as the Commission completes its work on this important item.

Please contact me if you have any questions or require any additional information.

Respectfully submitted,

/s/

Gregory Hlibok
Chief Legal Officer
ZVRS Holding Company
595 Menlo Drive
Rocklin, CA 95765

Attachment

cc: Nicholas Degani
Zenji Nakazawa
Amy Bender
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Eliot Greenwald
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Michael Scott
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ATTACHMENT

REDACTED IN ITS ENTIRETY