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REDACTED - FOR PUBLIC INSPECTION

ORIGINAL

EX PARTE OR LATE FILED

June 21, 2017

Accepted / Filed

JUN 21 2017

Federal Communications Commission
Office of the Secretary

VIA ELECTRONIC FILING AND HAND-DELIVERY

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 and revenues. These materials fall under Item 3 in Appendix A of the *Second Protective Order*: "Information that provides granular information about a Submitting Party's past, current or future costs, revenues, marginal revenues, or market share, and future dividends."

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 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.

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[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).

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.
595 Menlo Drive
Rocklin, CA 95765

Attachment

cc: Eliot Greenwald
Robert Aldrich
Michael Scott
TRSReports@fcc.gov

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JUN 21 2017

Federal Communications Commission
Office of the Secretary

June 21, 2017

VIA HAND DELIVERY AND ELECTRONIC FILING

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 19, 2017, Sherri Turpin, Chief Executive Officer, and Michael Flanagan, Chief Financial Officer for 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 and Gregory Simon, spoke on the phone with Amy Bender, Legal Advisor to Commissioner O'Rielly and, separately, with Claude Aiken, Legal Advisor to Commissioner Clyburn.

On June 20, 2017, Sherri Turpin, Michael Flanagan, Harold Furchtgott-Roth, Jennifer Richter, and Gregory Simon spoke on the phone with Zenji Nakazawa, Public Safety and Consumer Protection Advisor to Chairman Pai.

During each of the aforementioned calls, Turpin emphasized the following two points regarding the proposed Video Relay Service ("VRS") compensation rates in the Further Notice of Proposed Rulemaking[1] in the above-referenced proceedings:

1. **It is Absolutely Essential that the Commission Grant the Joint Rate Proposal Rates, at Least for Tier I and Tier II, for the Non-Dominant VRS providers.[2]**

Turpin emphasized that the viability of the Non-Dominant Providers, including ZVRS and Purple, is dependent upon the Commission's adoption of rates that are at least equivalent to

[1] *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) ("*FNPRM*).

[2] The non-dominant VRS providers are ZVRS; Purple; Convo Communications, LLC ("Convo"); and ASL Services Holdings, LLC d/b/a GlobalVRS (collectively, the "Non-Dominant Providers").

the Tier I and Tier II rates set forth in the Joint Rate Proposal.[3] As emphasized in the meetings, adoption of the proposed rates for Tier I ($4.82) and Tier II ($4.35) is only minimally sufficient to help sustain the Non-Dominant Providers, including ZVRS and Purple. Turpin explained that there is no padding built into the Joint Rate Proposal rates for Tier I and Tier II. Even if the proposed Tier I and Tier II rates are adopted, ZVRS, Purple, and the other non-dominant providers will continue to operate at a loss. Rates for Tier I and Tier II must be set at a level that not only allows the Non-Dominant Providers to survive, but also to thrive, supporting competition and choice for VRS services. There are no lower rates for Tier I and Tier II that can or should be adopted by the Commission. Without grant of the Tier I and Tier II rates, the Non-Dominant Providers will undoubtedly be financially distressed, or worse.

Moreover, and importantly, if the Non-Dominant Providers had known that the new rates may not be granted retroactive to January 1, 2017, higher rates would have been proposed for Tier I and Tier II beginning July 1, 2017. Without retroactive treatment, it is absolutely critical that the Commission adopt the Tier I and Tier II rates as proposed.

2. Authorizing Retroactive Treatment for the New Rates for the Emergent Rate, Tier I and Tier II, Back to January 1, 2017, is Essential to Stem the Losses Incurred by the Non-Dominant Providers Under the Glide Path.

Turpin also emphasized in the meetings the importance of partially compensating theNon-Dominant Providers for losses incurred under the glide path. The higher rates proposed and under consideration for the Emergent tier, Tier I and Tier II is a tacit acknowledgement that the glide path rates cut too deeply for the Non-Dominant Providers. The rates have not been sufficiently compensatory, imperiling the viability of the Non-Dominant Providers, and relief is needed. Indeed, Convo submitted a filing just last week explaining that "retroactive compensation of the new tiered rate to a date no later than January 1, 2017 was necessary for it to be able to begin paying back the debt it incurred to survive the resumption of the rate glide path."[4] Convo, ZVRS and Purple have all incurred debt and operated at a loss for a substantial period of time because of the glide path rate cuts, which were substantial. Retroactive treatment of the rates for these companies is absolutely essential to get them partially back on their feet.

Turpin suggested retroactive treatment of the rates could be accomplished in one of two ways. First, the Commission could apply the new Emergent rate, Tier I and Tier II rates retroactive to January 1, 2017. This outcome would be consistent with the Joint Rate Proposal's recommendation that "[t]he effective date of the proposed rates should be retroactive to January 1, 2017 because, as demonstrated by previously submitted cost data, and as will be shown in cost data submitted by the individual non-dominant providers subsequent to this filing, the current

[3] *See* Letter from Paul C. Besozzi and Benjamin D. Tarbell, Squire Patton Boggs (US) LLP, Counsel to Purple Communications, Inc. to Marlene H. Dortch, Secretary, FCC, in CG Docket Nos. 10-51 & 03-123, at 8 (filed Jan. 31, 2017) ("Joint Rate Proposal").

[4] *See* Letter from Jeff Rosen, General Counsel, Convo Communications, LLC to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 03-123 & 10-51 (filed June 14, 2017).

VRS rates are not sustainable for all providers and do not allow for the investment necessary to grow market share in the VRS marketplace."[5] Alternatively, Turpin suggested that the Commission could take the dollars that would have been recovered under the Emergent rate, Tier I and Tier II if the rates were made retroactive to January 1, 2017 and, instead, build that recovery into the rates for the second half of 2017 (i.e., July 1, 2017 to Dec. 31, 2017). ZVRS and Purple proposed rates to accomplish this latter scenario, at least for Tier I and Tier II, on Slide 1 of the confidential presentation that was attached to its *ex parte* filing of June 6, 2017.[6]

As ZVRS and Purple have explained in previous filings, 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.[7] 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 *****

The Commission has the legal authority to apply the new rates (Emergent, Tier I and Tier II) retroactively, and doing so would be sound policy. First, as to legal authority, the proposal to apply the rates retroactively was the subject of notice and comment in this rulemaking.[8] Indeed, the *FNPRM* notes that the Commission has retroactively applied adjustments to TRS compensation rates and contribution factors on a number of different occasions, and it asks whether such retroactive adjustments are appropriate here.[9] The answer is "yes." A retroactive

[5] *See* Joint Rate Proposal at 10.

[6] 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 June 6, 2017).

[7] *See id.*

[8] When an agency promulgates a rule, it must provide the public with adequate notice of the proposed rule followed by an opportunity to comment on the rule's content. 5 U.S.C. § 553(b)(3) (requiring agencies to provide notice of proposed rulemaking that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved"). However, the final rule need not be the one proposed in the Notice of Proposed Rulemaking. Rather, "[a]n agency's final rule need only be a logical outgrowth of its notice." *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006) (quotation omitted).

[9] *FNPRM* at para. 102 (citations omitted); *see also, e.g., Structure and Practices of the Video Relay Service Program, Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, FCC 16-25, 31 FCC Rcd. 2339, 2345, para. 14 (Mar. 3, 2016) ("*VRS Partial Rate Freeze Order*"); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order on Reconsideration, 21 FCC Rcd. 8050, 8056, paras. 12-13 (2006) (retroactive rate payment by 2 months to coincide with the fund year period beginning July 1, 2003); Memorandum Opinion and Order, 21 FCC Rcd. 8063, 8072-73, para. 21 (2006) (analysis of the rate setting process); Order, 19 FCC Rcd. 2993, 2996, para. 8 (CGB 2004) (increase fund contribution); Order, 19 FCC Rcd. 24981, 24982, para. 4

adjustment is not only appropriate here, but it is also essential to the future of competition in the VRS market.

Second, applying the Emergent, Tier I and Tier II rates retroactively is supported by sound Commission policy and precedent. As the Commission acknowledges, on numerous occasions, the Commission and the Consumer & Governmental Affairs Bureau have applied adjustments to TRS rates and contribution factors retroactively to the beginning of a Fund Year. For example, in its 2016 *VRS Partial Rate Freeze Order*, the Commission applied TRS compensation rates retroactive to the beginning of the 2015-2016 Fund Year.[10] The Commission concluded that retroactive application of a $5.29 per minute compensation rate to the smallest VRS providers "will generally provide a reasonable level of support for the operations of the smallest VRS providers and will not risk providing significant overcompensation for such providers," and would "not impose a heavy cost burden on the TRS Fund."[11] The Commission further explained the policy justifications for adopting the 16-month rate freeze, noting that it "allows the smallest VRS providers the opportunity to achieve market share growth and improvements in efficiency while benefitting from further implementation of structural reforms – such as the establishment of the ACE platform, which will address interoperability and other matters and is scheduled for launch this year."[12] The same justifications are present here. Retroactive treatment of the new rates for the Emergent tier, and Tiers I and II will support the Non-Dominant VRS Providers, will not risk providing overcompensation to them because they are all operating at a loss, will not impose a heavy cost burden on the Fund, and will allow the Non-Dominant Providers the opportunity to achieve market share growth while waiting for further implementation of structural reforms and interoperability, which still have not been implemented by the Commission.

Moreover, in regulations, the Commission has often used the concept of a "true-up" to account for differences between projected revenues or costs and actual revenues or costs.[13] In each of these instances, the Commission reviews historical information more accurately to measure rates or contributions.

For all of these reasons, the Commission should provide retroactive compensation to help the Non-Dominant Providers recover losses incurred under the glide path, either by applying new

(CGB 2004) (retroactive rate payment to reflect adjustment with the rate calculation to include allowable capital investment and address challenges to disallowances by providers); Order, 23 FCC Rcd. 1680, 1682, para. 7 (CGB 2008) (increase fund contribution).

[10] *See VRS Partial Rate Freeze Order*, 31 FCC Rcd. at 2345, para. 14; *see also, e.g., Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Order on Reconsideration,* 21 FCC Rcd. 8050, 8056, paras. 12-13 (July 12, 2006) (concluding that final VRS rate adopted by the Commission on June 30, 2004 should be fully retroactive to July 1, 2003 and directing appropriate supplemental payments to VRS providers reflecting the difference in rates during the relevant time period).

[11] *VRS Partial Rate Freeze Order,* 31 FCC Rcd. at 2345, paras. 13-14.

[12] *Id.*

[13] *See, e.g.,* 47 C.F.R. §§ 51.915; 51.917; 54.301; 54.304; 76.922.

rates retroactive to January 1, 2017 or by building that recovery into the prospective rates for the Emergent tier, Tiers I and II.

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

Respectfully submitted,

/s/

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595 Menlo Drive
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cc: Amy Bender
Claude Aiken
Zenji Nakazawa