Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of:	
Structure 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

SEPARATE COMMENTS OF SORENSON COMMUNICATIONS, INC. IN RESPONSE TO FURTHER NOTICE OF PROPOSED RULEMAKING

Sorenson Communications, Inc. ("Sorenson") supports many of the FCC efforts to improve interoperability in the video relay service ("VRS") marketplace. As Sorenson explains in joint comments that it is concurrently filing with several of its competitors, Sorenson supports the substance (but not the timing) of the Commission's proposal to incorporate by reference into its interoperability rules the US VRS Provider Interoperability Profile,[1] which the SIP Forum's Video Relay Service (VRS) Task Group published with industry support.[2] However, the joint comments also lay out part of Sorenson's opposition to the FCC's proposal to incorporate the Interoperability Profile for Relay User Equipment into the FCC's rules.[3] As the joint comments demonstrate, incorporating the RUE profile is inappropriate because (1) the designers of the

[1] Further Notice of Proposed Rulemaking, *Structure & Practices of the VRS Program* and *TRS and Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities*, DA 16-893, CG Docket Nos. 10-51 & 03-123 (rel. Aug. 4, 2016).

[2] SIP Forum Video Relay Service (VRS), US VRS Provider Interoperability Profile, TWG-6-1.0 (Sept. 23, 2015), http://www.sipforum.org/component/option,com_docman/task,cat_view/gid,134/Itemid,261/.

[3] Interoperability Profile for Relay User Equipment, draft-vrs-rue-dispatch-00 (July 20, 2016), https://www.ietf.org/id/draft-vrs-rue-dispatch-00.txt ("RUE profile").

RUE profile did not intend it to apply to provider-distributed endpoints, (2) when encouraging providers to participate in creating the RUE profile, FCC staff assured providers that it would not apply to provider-supplied endpoints, (3) requiring providers to use the RUE profile when designing provider-distributed endpoints would compromise VRS users' security, (4) requiring providers to use the RUE profile when designing provider-distributed endpoints would inhibit competition, and (5) the Bureau lacks authority to adopt the RUE profile into the TRS rules.

Here, Sorenson files separate comments to highlight the impact that incorporating the RUE profile into the Commission's rules would have on Sorenson's property interests. First, Sorenson owns intellectual property ("IP") that any endpoint provider would need to use when implementing the RUE profile. Additionally, adopting the RUE profile and applying it to provider-supplied endpoints would result in a physical occupation of Sorenson's property—in other words, it would effect a taking. Neither the Bureau nor the FCC has Congressional approval to engage in such a taking, and the proposal does not contemplate providing just compensation. Thus, requiring provider-supplied endpoints to comply with the RUE profile would be unconstitutional.

I. Adoption of the RUE Profile Will Implicate Sorenson's IP Rights

Sorenson reminds the Commission that requiring the Accessible Communications for Everyone ("ACE") endpoint (or all provider-supplied endpoints) to meet the RUE profile will implicate Sorenson's IP rights.[4] Although the IETF's "Internet Best Current Practices" ("BCP")

[4] As the joint comments demonstrate, the RUE specification was never intended to, and should not apply to, provider-distributed endpoints. If the Commission nonetheless requires provider-supplied endpoints to comply with the RUE profile, Sorenson would seek appropriate licensing arrangements.

concerning IP rights do not directly apply to the development of the RUE profile,[5] Sorenson has adhered to the letter and spirit of the BCP's disclosure requirements by being transparent about its IP interests.[6] Sorenson has engaged in a policy of fully disclosing the IP rights that Sorenson "believes Cover[] or ultimately may Cover" either a Contribution made by Sorenson or "a Contribution made by another Person" at a very early stage in the process.[7] Specifically, over at least the last fifteen months, Sorenson has repeatedly disclosed to FCC staff and the FCC's contract partners in the ACE program the fact that Sorenson has patents that cover various features disclosed in the several iterations of the proposed RUE profile. These patent disclosures, which detail the current Sorenson patent portfolio, provide notice of Sorenson's IP interests implicated by the current version of the RUE profile—the version that the Bureau has proposed to incorporate into the Commission's rules.

For example, Sorenson provided a list of all of its patents to VTC Secure on May 19, 2015 and to three of its subcontractors on June 2, 2015. In addition, Sorenson sent another letter to VTC Secure on February 9, 2016, reminding it of Sorenson's prior disclosure and providing an updated list of patents. Sorenson expressed its concern regarding the potential for IP disputes relating to the ACE endpoint requirements or code generated by VTC Secure, especially since the final recommendations to the FCC had not yet been specified at that time.

As the Bureau is aware from prior discussions and correspondence, Sorenson has a deep portfolio of patents that may be implicated by the RUE profile. In a further effort to ensure full disclosure (and notwithstanding Sorenson's separately requested clarifications and arguments

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[5] *See* Comments of Convo Commc'ns, CSDVRS, Purple Commc'ns, and Sorenson Commc'ns, CG Docket Nos. 03-123 & 10-51, at 2-4 (filed Sept. 14, 2016) (describing the non-IETF-based process used to develop the RUE profile).

[6] BCP, IP in IETF Tech. § 6.1 (March 2005), www.ietf.org/rfc/rfc3979.txt.

[7] *Id.* §§ 6.1.1, 6.1.2.

against implementation of the RUE profile), Sorenson has reviewed the RUE profile and concluded that either the ACE endpoint or the use of the ACE platform, as the RUE profile is currently drafted, may implicate one or more claims of at least Sorenson's United States Patent Nos. 7,142,643, 7,206,386, 7,016,479, 7,583,286, 7,746,985, and 9,185,211.[8]

Sorenson remains dedicated to working with the FCC to ensure high standards are fostered throughout the industry. To that end, Sorenson welcomes the opportunity to discuss reasonable and appropriate licensing terms for any of its IP that is impacted by the ACE endpoint's implementation of the RUE profile or the use of the ACE endpoint.

II. Requiring Provider-Supplied Endpoints to Conform to the RUE Profile without Just Compensation Would Be an Unconstitutional Taking

For Sorenson's endpoints to comply with the RUE profile, Sorenson would have to build features, with specifications mandated by Bureau fiat, onto the endpoints that it loans or licenses to VRS users. When combined with the FCC's requirement that Sorenson not condition the loan of its equipment or the licensing of its software endpoints to VRS users on the selection of Sorenson as their default provider,[9] requiring the installation of features that would implement the RUE profile constitutes a permanent, physical occupation of Sorenson's property.

The Commission lacks the authority to order Sorenson to allow a permanent physical occupation on its private property. The Takings Clause of the Constitution prohibits the government from taking "private property . . . for public use, without just compensation."[10]

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[8] Other types of ACE technologies, including ACE Direct, ACE Lite, and ACE Connect, may implicate other Sorenson patents. However, Sorenson does not have sufficient information about these technologies to provide the Bureau with a list of specific patents that may be implicated at this time.

[9] Report & Order & Decl. Ruling, *TRS & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities*, FCC 07-186, CG Docket No. 03-123, ¶ 94 (rel. Nov. 19, 2007) ("Report and Order").

[10] U.S. Const. amend. V.

Because the power of the purse rests with Congress, rather than the executive, agencies may not enact regulations that will necessarily result in a taking that constitutes a "permanent physical occupation," absent clear authorization from Congress to engage in a taking.[11] If a regulation creates "an identifiable class" of applications that would necessarily result in the permanent physical occupation of private property in furtherance of a public purpose, it is invalid unless (1) "any fair reading" of the statutory basis for the regulation gives the FCC the authority to engage in a physical taking, or (2) Congress implicitly gave the FCC the authority to engage in a physical takings because "the grant of authority itself would be defeated unless takings power were implied."[12] This rule applies equally to personal (as opposed to real) property.[13]

Because the Bureau and the Commission do not have Congressional approval and would not provide just compensation for allowing a permanent physical occupation of Sorenson endpoints, it cannot incorporate the RUE profile into the Commission's interoperability rules.

A. Incorporating the RUE into the Commission's rules would amount to a permanent physical occupation for all VRS providers that loan provider-supplied VRS equipment to VRS users.

As explained in Sorenson's joint comments, the RUE profile, as currently drafted, purports to govern all provider-distributed endpoints and not just the ACE endpoint, which expands application of the specification far beyond its intended purpose. Because the Bureau

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[11] *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1445-46 (D.C. Cir. 1994); *see also Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (explaining that, with a permanent physical occupation, a taking occurs "no matter how minute the intrusion, and no matter how weighty the public purpose behind it.").

[12] *Bell Atlantic*, 24 F.3d at 1445-46.

[13] *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015) ("Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.").

has not explained why it would apply the RUE profile to provider-distributed endpoints, Sorenson can only speculate about the purpose of doing so. However, it may be that the Bureau hopes that incorporating the RUE profile into the rules would facilitate device portability—*i.e.*, that it would enable users who have borrowed a device from Sorenson to port that device to another provider. This would plainly constitute a taking. By (1) forbidding Sorenson (and other VRS providers) from reacquiring Sorenson equipment or discontinuing the license to software-based endpoints if the user chooses a different default provider[14] and (2) ordering Sorenson (and other VRS providers) to build special features into their endpoints that enable the endpoints to be used seamlessly with another provider's service after a user has ported his or her number, the Bureau would effect a permanent physical occupation of Sorenson endpoints.

When a government regulation interferes with some of the most basic property rights, such as the power to exclude others from the property, it has effected a permanent physical occupation.[15] "Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish" that a permanent physical occupation has occurred, "it is clearly relevant."[16]

To have its endpoints comply with the RUE profile, Sorenson would need to build features into each endpoint that is designed to meet the specifications contained in its standard. These required features would permanently reside on Sorenson's endpoints. Furthermore, the features would be specifically designed to make it as easy as possible for a Sorenson competitor to offer VRS services on a Sorenson endpoint. Sorenson would then be precluded from re-acquiring its property, even if Sorenson stands to gain little to no financial benefit from the VRS

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[14] Report & Order ¶ 94.

[15] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982).

[16] *Id.* at 436.

user's continued possession of the equipment or license to use a software-based endpoint. Indeed, Sorenson actually must continue to pay the costs associated with obtaining licenses for third-party software installed on its endpoints, continually upgrading its endpoints to ensure ongoing interoperability and fix bugs, and providing technical support for the endpoints.

Access to communications equipment, apps, or networks without the consent of the property owner is a violation of a property owner's right to exclude, and constitutes a trespass.[17] Therefore, forcing Sorenson build features into its endpoints would amount to a trespass.

Admittedly, a trespass that occurs from the government-mandated features on a given piece of equipment or app may not always amount to a "taking" in the constitutional sense; this is because a trespass that occurs from the government regulation of the *use* of property does not always amount to a taking.[18] But where a government's regulatory regime *as a whole* "effectively destroys" key property rights, the trespass that occurs from the government-mandated feature on a given piece of equipment rises to the level of a permanent occupation.[19] Put another way, agencies cannot enact regulatory regimes that amount to giving "an interloper . . . a government license" to occupy private property without consent.[20]

In light of the FCC's overall regulatory treatment of VRS providers, requiring provider-supplied endpoints to comply with the RUE profile rises to the level of a permanent occupation without just compensation. The Bureau's proposal would force Sorenson to build features into

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[17] *See Fidlar Techs. v. LPS Real Estate Data Sols., Inc.*, 82 F. Supp. 3d 844, 859 (C.D. Ill. 2015), *aff'd*, 810 F.3d 1075 (7th Cir. 2016) (citing cases).

[18] *See Loretto*, 458 U.S. at 435-36.

[19] *Id.*; *see also Horne*, 135 S. Ct. 2419 (evaluating a regulatory regime as a whole when determining whether the government effected a taking).

[20] *Bldg. Owners & Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 98 (D.C. Cir. 2001) (quoting *FCC v. Fla. Power Corp.*, 480 U.S. 245, 253–54 (1987)); *see also Bell Atlantic*, 24 F.3d at 1446.

its endpoints that would be expressly designed to facilitate giving Sorenson's competitors access to Sorenson endpoints. When a VRS user selects one of Sorenson's competitors as his or her default provider, a Sorenson competitor would receive all or most of the economic benefit associated with the use of the Sorenson endpoint, and free-ride on the costs Sorenson pays to develop its IP, to license software from third parties, and to maintain the endpoints. Despite its inability to make a reasonable profit and the continuing costs that Sorenson must pay to maintain the endpoint, FCC regulations prevent Sorenson from re-acquiring the endpoint, and also exclude that endpoint from compensable costs. Under these circumstances, the trespass mandated by the Bureau (i.e., the required incorporation of RUE-compliant features on each Sorenson endpoint) becomes a permanent, physical taking of the Sorenson endpoint without just compensation.

B. The Bureau does not have Congressional authorization or provide for just compensation.

The FCC could require all providers to comply with the RUE profile while avoiding the constitutional issue, if it were to (1) get Congressional authority to do so,[21] and (2) provide "commercially reasonable payment" for the use of Sorenson's endpoints by other VRS providers.[22] However, the FCC has done neither. It has never even asked for Congressional authority to permanently occupy Sorenson and other VRS providers' endpoints. And it has steadfastly declined to reimburse providers for any of the costs associated with endpoint equipment.[23] Thus, the Bureau may not constitutionally require Sorenson or any other VRS provider to make its endpoints RUE-compliant.

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[21] *Bell Atlantic*, 24 F.3d at 1446; *GTE Sw. Inc. v. Pub. Util. Comm'n of Texas*, 10 S.W.3d 7, 13 (Tex. App. 1999).

[22] *Cellco P'ship v. FCC*, 700 F.3d 534, 549 (D.C. Cir. 2012).

[23] Notice of Proposed Rulemaking, *TRS & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities*, 23 FCC Rcd. 10663, 10670 (2008) ("[T]he Commission has made clear

CONCLUSION

For the reasons stated in these comments and in its concurrently filed joint comments, Sorenson requests that the Commission only require that the ACE endpoint—and not provider-supplied endpoints—comply with the RUE profile. Sorenson welcomes a continued dialogue with the Commission and its partners regarding appropriate licensing arrangements for Sorenson's IP, as the FCC continues its work to launch the ACE endpoint.

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Respectfully Submitted,

__/s/ Adrienne E. Fowler_____

HARRIS, WILTSHIRE & GRANNIS LLP
John T. Nakahata
Mark D. Davis
Adrienne E. Fowler
1919 M Street NW, 8th Floor
Washington, DC 20036
(202) 730-1300
Counsel for Sorenson

that the costs of customer equipment, equipment distribution, and installation of the equipment or any necessary software is not compensable from the Fund.").