Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF SORENSON COMMUNICATIONS LLC
RE CONVO'S REQUEST FOR CLARIFICATION

In its May 2019 Order,[1] the Commission prohibited the distribution of non-service-related equipment as an inducement for a user of Video Relay Service ("VRS") to enroll, use, or change default providers. Sorenson supported the concept of this rule. But the Commission completely failed to address the most important aspect of the problem before it: What is the test for distinguishing between service- and non-service-related equipment, and how does that test apply to the items that VRS providers were routinely furnishing to some of their users—iPads, laptops, and (in the case of ZVRS and Purple) the NVIDIA Shield? The issue continues to grow as Purple and ZVRS have expanded their offerings to include the iPhone X.[2] By prohibiting

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1 *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 and Further Notice of Proposed Rulemaking, 34 FCC Rcd. 3396 (2019) ("Order").

2 Although we assume that the analysis for iPads and iPhones would be the same, the Commission should clarify that, as well. It is not a coincidence that ZVRS and Purple have led the way with these activities. Both have continued to benefit from separate treatment to apply Tier 1 rates, even as they have had the ability to integrate their operations. *See Structures and Practices of the Video Relay Service Program; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech*

"non-service-related inducements" but refusing to answer these basic questions, the Commission adopted a rule that no one knows how to apply in the real world, and that is subject to differential interpretation and, potentially, enforcement. The Commission should correct this error by quickly clarifying what standard providers should use to determine whether equipment is service- or non-service-related. It should also quickly clarify how this test applies to the equipment already being distributed by providers—especially including multifunctional smart devices such as smartphones, iPads, laptops, and the NVIDIA SHIELD that are capable of running multiple applications.

The questions regarding iPads, laptops, and NVIDIA SHIELD were not theoretical questions that could be deferred to a future date. They were *the* fundamental question before the Commission. Providers have been asking the Commission to address iPads and laptops for years, with ZVRS and Purple leading the charge until recently, when they began offering their "Complete" package. At least as early as 2012, ZVRS raised questions about the permissibility of giving away "multi-function products including iPads, television sets, laptops and other accessories."[3] ZVRS argued that the Commission should ban the distribution of these "multi-function products" but should permit free distribution of "purpose built VPs" that serve "no

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Disabilities, Report and Order and Order, 32 FCC Rcd. 5891, 5921 ¶ 57. Notably, neither the Tier 1 nor Tier 2 rates are scheduled to decline prior to July 2021.

[3] Letter from Jeff Rosen, General Counsel of ZVRS, to Marlene Dortch, Secretary, FCC, at 1 (Aug. 27, 2012) ("It was pointed out historically product distribution in VRS was limited to purpose built video phones ('VPs'), the most common example being the VP100/200s and more recently the Z20s. With the giveaways of multi-function products, matters have escalated beyond providing consumers with the means to access VRS and Point-to-Point ('P2P') video calling and have created excessive benefits for consumers equivalent to 'cash' rewards."

function other than making video calls."[4] Purple similarly called on the Commission to address the issue, stating that the regulatory status of iPads was "unresolved."[5]

The Commission has long recognized that there are legitimate reasons for VRS providers to make service-related VRS equipment available at no or reduced charge. Sorenson has long provided videophones that have the sole purpose of supporting access to VRS. It has also distributed television-capable monitors to users, which helps to ensure that they have adequate screen resolution, HDMI ports and, for voice carryover, speakers. Sorenson has also on occasion provided routers, cables, or other devices to assist with ensuring reliable in-home transmission of VRS, and flashers that help alert a deaf person to an incoming call. In drawing the line between service-related and non-service-related, the Commission has appropriately placed these types of equipment within the category of service-related.

As for smart devices capable of running multiple applications extending far beyond VRS, the Commission has not been clear. When the Commission proposed to prohibit non-service-related inducements, providers made clear that no matter what rule was adopted, the Commission needed to draw a clear line that clarified whether multi-use devices such as iPads and laptops were "service-related" or "non-service-related." Sorenson explained that there was already uncertainty about these devices and that the uncertainty was undermining competition:

> Regardless of what policy the Commission adopts, the Commission should adopt a clear rule that applies equally to all providers. If the Commission bans non-service related inducements, it should clarify what that means. For example, Sorenson has not in recent years distributed iPads to users who use the software version of its endpoint out of uncertainty over whether the Commission would construe this as a non-service related inducement. Sorenson has continued to receive reports,

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4 *Id.*

5 Comments of Purple Communications, Inc., in Response to Notice of Proposed Rule Making On IP CTS, CG Docket Nos. 03-123, 13-24 (Feb. 26, 2013) (noting that providers were "offering free iPads, televisions and other inducements to entice users to port to their services, an issue still unresolved in the VRS industry").

> however, that companies such as ZVRS have continued to do so, putting Sorenson at a competitive disadvantage. To maintain a level playing field, the Commission should therefore clarify what counts as a non-service related inducement and should enforce that policy uniformly.[6]

Accordingly, Sorenson stressed that the Commission should "ensure it has a clear policy on what kinds of items are improper for providers to offer callers."[7]

When the Commission released a draft order that did not address the status of smart multi-use devices and which articulated no comprehensible standard for distinguishing between service-related and non-service-related devices, Sorenson once again emphasized the need for certainty regarding iPads, laptops, and other similar multi-use equipment such as the NVIDIA SHIELD:

> The Draft Order does not, however, address the category of inducements that have been commonly offered recently by some providers—devices such as iPads and tablets, laptops, and streaming media players with video game system capabilities like the NVIDIA SHIELD. These devices can be used for VRS and point-to-point calls but that is not their only function . . . . The Commission should resolve these issues in the pending order to end the uncertainties that providers have expressed for years on this topic.[8]

Sorenson and ZVRS subsequently filed a series of *ex partes* addressing whether the NVIDIA SHIELD should be considered "service-related" or "non-service-related."[9] Although Sorenson argued that the NVIDIA SHIELD was not service-related, it emphasized that the most important

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[6] Reply Comments of Sorenson Communications, LLC, Regarding Part III and Sections IV.C-E And G-H of the Further Notice of Proposed Rulemaking, at 23, CG Docket Nos. 10-51, 03-123 (June 26, 2017).

[7] *Id.* at 24.

[8] Letter from John T. Nakahata and Julie A. Veach, Counsel for Sorenson Communications LLC, to Marlene Dortch, Secretary, FCC, at 7, CG Docket Nos. 10-51, 03-123 (Apr. 30, 2019) ("Sorenson April 30 *Ex Parte*").

[9] Letter from Gregory Hlibok, Chief Legal Officer, ZVRS Holding Company, to Marlene Dortch, Secretary, FCC, CG Docket Nos. 10-51 and 03-123 (May 2, 2019); Letter from John T. Nakahata, Counsel for Sorenson Communications LLC, to Marlene Dortch, Secretary, FCC, CG Docket Nos. 10-51, 03-123 (May 6, 2019) ("Sorenson May 6 *Ex Parte*").

thing was to end the confusion regarding the status of iPads, laptops, and the NVIDIA SHIELD. As Sorenson explained, "The confusion over whether the NVIDIA SHIELD is non-service-related supports Sorenson's request that the Commission clarify in this Order whether the existing equipment that VRS providers commonly offer users—including iPads or other tablets, laptops, and the NVIDIA SHIELD—will be (1) permitted, (2) permitted under certain conditions, or (3) prohibited."[10] Sorenson noted that "iPads, laptops such as MacBooks and Chromebooks, and the NVIDIA SHIELD are all concrete examples that the Commission can use to illustrate where, and under what conditions, it is drawing a line between service-related and non-service related equipment," and it argued that "the present lack of clarity would only foster uncertainty and undermine compliance and enforcement."[11]

The Commission should end the confusion by clearly stating—once and for all—what standard it will use to determine whether smart multi-use equipment is "service-related" and how that standard applies to the equipment that VRS providers are already distributing, including smartphones, tablets, laptops, and the NVIDIA SHIELD. If providers are required to limit the functionality of these devices in order for them to qualify as "service-related," the Commission should say so explicitly and provide technically feasible, interpretative enforcement guidance. It should not force providers to guess about what is permissible and what is not.

The Commission's failure clearly to articulate which conduct is permitted is bad public policy because it may lead providers to engage in conduct the Commission intended to prohibit and gives a competitive advantage to providers who are willing to engage in borderline conduct that has not been clearly prohibited. It is also a failure of reasoned decisionmaking under the

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[10] Sorenson May 6 *Ex Parte* at 2.

[11] *Id.*

Administrative Procedure Act. *See, e.g.*, *ACA International v. Federal Communications Commission*, 885 F.3d 687, 699 (D.C. Cir. 2018) ("Administrative action is 'arbitrary and capricious [if] it fails to articulate a comprehensible standard' for assessing the applicability of a statutory category. If a 'purported standard is indiscriminate and offers no meaningful guidance' to affected parties, it will fail 'the requirement of reasoned decisionmaking.'") (citations omitted, alteration in original).

Moreover, the lack of clarity also limits the Commission's ability to enforce the rule. To the extent that a violation of Section 64.604(c)(8)(v) results in ineligibility for compensation, this sanction is a "penalty." *See Kokesh v. S.E.C.*, 137 S.Ct. 1635 (2017) (holding that disgorgement is a penalty). But a rule is void for vagueness where it triggers a penalty without providing ascertainable certainty about what conduct is prohibited. As the D.C. Circuit has previously explained, "[a] vague rule 'denies due process by imposing standards of conduct so indeterminate that it is impossible to ascertain just what will result in sanctions.'" *Timpinaro v. SEC*, 2 F.3d 453, 460 (D.C. Cir. 1993).

Finally, the Commission should decline Convo's request to "clarify" that its new rule places "some reasonable bound on the provision of service-related equipment" to users that port.[12] In adopting the rule, it clearly stated that the new rule does not apply to service-related equipment. At this point, any "clarification" that expands the rule to cover service-related equipment would be a *new* rule, which cannot be adopted without notice and a new rulemaking proceeding.

[12] Convo Communications, LLC, Request for Expeditious Clarification of 47 C.F.R. § 64.6404(c)(8)(v), CG Docket Nos. 10-51, 03-123 (Aug. 19, 2019).

The Commission should, however, provide clearer enforcement guidance as to the scope of its purported interpretation of existing rules in Paragraph 37 of the May 2019 order. That paragraph, which purports to "remind" providers of pre-existing rules regarding distribution of service-related equipment, already sweeps far beyond any permissible interpretation of existing rules. And the statements in that paragraph also are so vague that they do not provide sufficient notice about what conduct is prohibited.[13] Rather than leave these standards to be clarified through enforcement actions — which then could not impose sanctions retroactively without violating due process because of lack of fair notice — the Commission should issue clarifying enforcement guidance. Sorenson's previously proposed rules provide a strong starting point for such guidance, differentiating between conduct that would be *per se* impermissible and conduct that should be subject to a reasonableness standard.[14]

Respectfully submitted,

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[13] *See* Sorenson April 30 *Ex Parte* at 8. Sorenson provided recommended alternative language—with footnotes to the Commission's existing orders—that summarized the Commission's lawfully adopted orders on the subject. *See id.* at B-1. The statements are also unlawful because they fail to articulate a comprehensible standard, because they sweep far beyond any legislative rule lawfully adopted by the Commission and were adopted without proper notice or comment, and because they were adopted without addressing Sorenson's comments on them.

[14] *Id.*

CERTIFICATE OF SERVICE

I certify that on September 30, 2019, true and correct copies of the foregoing were served by first-class mail upon the following:

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