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Via Electronic Comment Filing System

December 24, 2014

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: *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

Dear Secretary Dortch:

Attached for submission to the Commission is ASL Services Holdings, LLC's ("ASL/Global VRS") *Opposition to Application of Kinderhook Industries, LLC for Certification to Provide Video Relay Service*, in the above-referenced proceedings. A copy has been served on Kinderhook Industries, LLC through CSDVRS, LLC.

Sincerely,

MILLER ISAR, INC.

A handwritten signature in blue ink, appearing to read "Andrew O. Isar". The signature is fluid and cursive, written over a white background.

Andrew O. Isar

Regulatory Consultants to
ASL Services Holdings, LLC

Attachment

cc: Karen Strauss (via electronic mail)
Greg Hlibok (via electronic mail)
Eliot Greenwald (via electronic mail)
Michael Stecker (CSDVRS, LLC; via electronic mail)

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

In the Matter of)	
)	
Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities)	CG Docket No. 03-123
)	
Structure and Practices of the Video Relay Service Program)	CG Docket No. 10-51
)	

To: Chief, Consumer and Governmental Affairs Bureau

**OPPOSITION TO APPLICATION OF KINDERHOOK INDUSTRIES, LLC
FOR CERTIFICATION
TO PROVIDE VIDEO RELAY SERVICE**

Pursuant to [Section 1.115\(d\)](#) of the Federal Communications Commission’s (“Commission”) rules, ASL Services Holdings, LLC (“ASL/Global VRS” or “Company”)¹ submits this Opposition to the application for certification as an Interstate Telecommunications Relay Service Fund eligible provider of Video Relay Service (“VRS”) being filed by Kinderhook Industries, LLC² upon consummation of Kinderhook’s acquisition of CSDVRS, LLC (dba zVRS) (“ZVRS”), now following the Commission’s grant of ZVRS’ conditional certification.³ Kinderhook’s Application will intend to provide the Commission with *prima facie* evidence that ZVRS, now as a wholly owned Kinderhook company, will continue to comply with the Commission’s mandatory minimum standards, attendant regulations stipulated under Section

¹ Formerly “Gracias VRS.”

² Kinderhook Capital Fund IV, L.P. and its affiliate Kinderhook Capital Fund IV-B, L.P.

³ See, *Notice of Grant of Conditional Certification for CSDVRS, LLC, to Provide Video Relay Service After its Acquisition by Kinderhook Capital Fund IV, L.P.*, CG Docket Nos. 03-123 and 10-51, *Public Notice*, DA 14-1887 (Rel. December 22, 2014).

64.606(a)(2) of the Commission's rules,⁴ and Commission policies and fitness standards, as a provider of Telecommunications Relay Service Fund ("Fund") eligible Internet-based VRS. Yet the application cannot be viewed in isolation. Underlying the application is a presumption that the ZVRS has and will continue to conduct its operations in a reputable, ethical, and lawful manner and be "fit to serve" the public.

ASL/Global has been engaged in protracted litigation against ZVRS for more than three years resulting from ZVRS' misconduct. This litigation has raised questions regarding ZVRS' behavior, motives and character, proven costly, caused ASL/Global VRS material financial harm, and undermined ASL/Global VRS' ability to fully compete to its full potential without undue impediments. ZVRS' recent application for conditional eligibility explicitly states that the Company's management and operations will remain *unchanged* following the Kinderhook Application. A grant of Kinderhook's subsequent application pending settlement of ongoing litigation could therefore be interpreted as sanctioning or otherwise condoning ZVRS' bad, and possibly illegal, behavior until proven otherwise by the court, however unintended by the Commission. Moreover, such a grant would belie the Commission's own fitness to serve standards, while enabling ZVRS to proceed with the Kinderhook transaction and wring its hands of any liability to ASL/Global VRS, regardless of the outcome of pending litigation.

Neither ZVRS' present owners nor Kinderhook should be able to benefit from Kinderhook's grant of Fund eligibility as full owner of ZVRS until the case against the ZVRS has been definitively settled, and the legality of the Company's actions been adjudicated by the court. Only then can the Commission determine ZVRS' true fitness to serve the public as a Kinderhook owned entity. ASL/Global VRS urges the Commission to reject the Kinderhook's

⁴ 47 C.F.R. §64.606.

application when filed, or alternatively scrutinize ZVRS' conduct and hold Kinderhook's application in abeyance until the litigation is affirmatively settled.

I. An Application for Fund Eligibility Has Broader Implications Regarding An Applicant's Ethical and Legal Conduct, and Fitness to Serve the Public.

An application for Fund eligibility presents evidence of an applicant's compliance with the Commission's mandatory minimum standards and attendant regulations governing the provision of Fund eligible VRS. Underlying such an application is the applicant's fitness to serve the public, as ZVRS itself recognizes.⁵ An applicant's officer or senior executive must verify that the representations made in an application are "true, accurate, and complete."⁶ It follows that the Commission expects applicants to conduct their operations in an honest, reputable, and legal manner, and holds providers to a high ethical standard as an extension of the factual evidence of regulatory compliance represented in an application as a measure of an applicant's fitness to serve.⁷ Regulatory compliance alone is not dispositive of an applicant's reputable conduct.

Indeed, the Commission's ongoing efforts to eliminate Program fraud, waste, and abuse perpetrated by disreputable providers in the past bears witness to this fact. These

⁵ *Application of CSDVRS, LLC (D/B/A ZVRS) and Kinderhook for Conditional Certification to Provide Video Relay Service and Request for Confidential Treatment*; CG Docket Nos. 03-123 and 10-51 (November 25, 2014)[ZVRS Application] Exhibit A, page 5

⁶ 47 C.F.R. §64.606(a)(2)(v).

⁷ See, e.g. *Bullets on Fitness to Hold FCC Licenses*, <https://wireless2.fcc.gov/UlsEntry/attachments/attachmentViewRD.jsp?ATTACHMENTS=361FJbDRGHLxFwv1vJ3qypGTGQXIDLgFsXDRXW9nvQB1bh1gQZGH!1693202058!358111771?applType=search&fileKey=1435596774&attachmentKey=18701182&attachmentInd=applAttach>, appended at **Attachment 1**: "The Commission considers **the character and fitness of parties seeking to become or remain FCC licensees to be of such importance that in 1985 it promulgated a Character Policy Statement** so that applicants and licensees would be aware of the Commission's character and fitness requirements for holding FCC authorizations.... The primary focus of the Commission's character requirements has involved "FCC related" behavior. In developing its character standards, the Commission "focused on specific traits which are predictive of an applicant's propensity to deal honestly with the Commission and comply with the Communications Act and the Commission's rules or policies." Character Policy Statement, 102 F.C.C. 2d at 1189...."Generally, breach of the duty to be truthful to the Commission takes two basic forms: (1) misrepresentation, and (2) lack of candor (failure to disclose). The former involves false statements of fact; the latter involves concealment, evasion, or other failure to be fully informative. [emphasis supplied].

disreputable providers had been able to demonstrate compliance with the Commission's requirements for Fund eligibility, but otherwise conducted their operations in a fraudulent manner, leading the Commission to establish additional safeguards and further scrutinize applicants' operations.⁸

On its face, ZVRS has represented the Company's compliance with Section 64.606 of the Commission's rules and attendant regulations. Indeed, ZVRS maintains that prior to acquisition by Kinderhook, it was "consistently found by the Commission as fit to serve as a VRS provider."⁹ Yet Kinderhook's forthcoming Application is an integral part of a broader process for sale of ZVRS as an ongoing concern to Kinderhook. The transaction has far broader implications for ZVRS' operations, including resolution of questions regarding a violation of law. ZVRS, in referring to Kinderhook's acquisition, states that "[T]he recent transaction has not led to any changes in ZVRS' management team or day-to-day operations, but instead has provided ZVRS with access to additional financial resources and business expertise."¹⁰ In other words, ZVRS will continue to operate as it has, now under new ownership. In that a grant of Fund eligibility can be viewed as a *de facto* sanctioning of a Company's compliance and fitness to serve, Kinderhook's application for Fund eligibility must therefore be viewed in a broader context of a ZVRS' overall conduct, ethics, legal compliance, and implications on future compliance. A complete determination cannot be made by the Commission pending litigation that brings into question the very basis of ZVRS' fitness to serve.

⁸ "...providers' self-interest in maximizing their compensation from the Fund may make them less effective at carrying out the Commission's TRS policies. The vulnerability of the program to waste, fraud, and abuse by providers (as well as Commission attempts to reduce that vulnerability) has been well established." 28 FCC Rcd at 8623 ¶6, citing to *Structure and Practices of the Video Relay Service Program*, Declaratory Ruling, Order and Notice of Proposed Rulemaking, CG Docket No. 10-51, 25 FCC Rcd 6012, 6018-21, ¶¶ 11-16 (2010) (*VRS Call Practices NPRM*); *2011 VRS Reform FNPRM*, 26 FCC Rcd at 17372-73, ¶¶ 6-8.

⁹ZVRS Application, Exhibit A, Page 5 pointing further to the Commission's November 20, 2012 grant of certification.

¹⁰ *Ibid.*

II. ASL/Global VRS' Protracted Litigation Against ZVRS Raises Questions Regarding ZVRS' Ethical Conduct and Fitness to Serve.

On November 18, 2011, ASL/Global VRS filed a complaint against ZVRS before the Pinellas County Florida Circuit Court of the Sixth Judicial Circuit for breach of contract for failure to compensate for services rendered ("Complaint").¹¹ The Complaint specifically seeks damages for "a breach of contract action resulting from the failure of [ZVRS] to remit payments ... specifically required by the Agreement [between the parties]." Such damages and the legal fees to prosecute are significant, and has caused ASL/Global financial and material harm. For more than three years ASL/Global VRS has sought to resolve what it maintains should have been a straight-forward contractual matter. To date, this matter remains pending, in part through ZVRS' procedural delays and inattention.

Notwithstanding the protracted nature of this litigation, at its heart is whether ZVRS engaged in an unlawful breach of contract. Clearly, this is a matter for a court of competent jurisdiction to decide. Nevertheless, that these issues remain to this date pending and that ZVRS has made no taken no meaningful steps to resolve this matter if not engaging in delaying – if not outright ignoring – the matter, while falsely accusing ASL/Global VRS of malfeasance without basis, leave the very core issue of ZVRS' ethical behavior, intent, and fitness to serve in question. Until this matter is decided by the court, ZVRS' cannot in good conscious demonstrate that it is without reproach, nor that it conducts the entirety of its operations in an ethical and lawful matter, nor that it is indeed "fit to serve."

To be clear, ASL/Global VRS does not intend that this opposition serve as a venue for raising the arguments of the Company's litigation to the Commission, but rather to stress that until – or if – the litigation is resolved, ZVRS' ethics, intentions, compliance and

¹¹*Gracias VRS, LLC v. CSDVRS, LLC*, In the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida Civil Division, Case No. 11-10965 CICOI, *Complaint* (November 18, 2011).

fitness to serve remain in question. ASL/Global VRS maintains that unless the Commission considers the full broader implications of what ZVRS requests now as a Kinderhook company, within the context of the Company's actions outside of, but related to, the regulatory arena, the Commission cannot make a full and accurate assessment of whether ZVRS as a Kinderhook company has indeed met the entirety of its obligations for conditional certification it seeks, whether ZVRS should continue to enjoy the benefit of continuing certification, and moreover, whether the Company is fit to serve the public.

III. A Grant of Certification Could Unintentionally Enable ZVRS to Play Outside of Legal Boundaries and Inadvertently Sanction ZVRS' Behavior.

Because of the broader implications of Kinderhook's Application on ZVRS' operations and the questionable legality of ZVRS actions until decided by the court, the Commission should refrain from action on Kinderhook's application for fund eligibility so long as the Complaint against ZVRS remains pending. Granting Kinderhook's Application could play into a ZVRS strategy of avoiding any legal obligations if so ordered by the court following its acquisition by Kinderhook. A grant could further inadvertently give ZVRS and ultimately Kinderhook an unfair competitive advantage by undermining ASL's ability to pursue its legal claims and allowing ZVRS to sidestep its legal obligations in the absence of a final court judgment and cause ASL/Global VRS even further financial harm.

In light of the pending litigation, a grant of a Kinderhook Application could be interpreted as sanctioning or otherwise condoning bad, if not unlawful, behavior due to the context in which the application is brought, however unintended such an interpretation might be by the Commission. The grant of any Application should be made with a clear view of the entirety of the applicant's operations and behavior. ZVRS' behavior outside the regulatory arena raises questions as to the Company's true intent, ethics, legal compliance and fitness to serve the

public under the Commission's fitness standards. ZVRS' true character cannot be determined until the pending litigation has been resolved.

III. Conclusion.

ZVRS should receive no special treatment by the Commission; it must resolve its legal obligations before any further consideration should be given to Kinderhook's Application. For the reasons set forth above, ASL/Global VRS urges the Commission to reject Kinderhook's Application or alternatively hold the Application in abeyance until the Complaint is settled and ZVRS' fitness to serve be fully considered by the Commission.

Respectfully submitted this 24th day of December, 2014,

ASL Services Holdings, LLC

By: 

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ATTACHMENT 1

BULLETS ON FITNESS TO HOLD FCC LICENSES

- The Commission considers the character and fitness of parties seeking to become or remain FCC licensees to be of such importance that in 1985 it promulgated a *Character Policy Statement* so that applicants and licensees would be aware of the Commission's character and fitness requirements for holding FCC authorizations. *See Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 102 F.C.C. 2d 1179 (1985) ("*Character Policy Statement*").
 - o Although the character standards were originally applied to broadcast licensees, the Commission has found that the standards "can provide guidance in the common carrier area as well," *MCI Telecommunications Corp.*, Order and Notice of Apparent Liability, 3 FCC Rcd 509, 515 n.14 (1998), and has routinely applied the standards to carriers holding Title III licenses, e.g., *Southern New England Telecommunications Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 21292, 21305 (1998).
- The primary focus of the Commission's character requirements has involved "FCC related" behavior. In developing its character standards, the Commission "focused on specific traits which are predictive of an applicant's propensity to deal honestly with the Commission and comply with the Communications Act and the Commission's rules or policies." *Character Policy Statement*, 102 F.C.C. 2d at 1189.
- "Generally, breach of the duty to be truthful to the Commission takes two basic forms: (1) misrepresentation, and (2) lack of candor (failure to disclose). The former involves false statements of fact; the latter involves concealment, evasion, or other failure to be fully informative. Thus, an applicant's duty can be breached by affirmative misrepresentations and/or by a failure to come forward with a candid statement of relevant facts, whether or not such information is particularly elicited by the Commission." *Applications of Westel Samoa, Inc.*, Memorandum Opinion and Order, Hearing Designation Order, Notice of Opportunity for Hearing, and Order to Show Cause, 12 FCC Rcd. 14,057 (1997) at ¶ 38 ("*Westel*").
 - o "Mr. Breen's failure to timely inform the Commission about material facts of which he was aware constitutes a breach of duty to the Commission and raises a substantial and material question of fact as to whether Mr. Breen lacked candor before the Commission. As the majority shareholder in Westel, Mr. Breen's misconduct calls into question whether Westel is qualified to be a Commission licensee. Accordingly, Westel's applications will be designated for a hearing in this consolidated proceeding." *Westel* at ¶ 48.
- In particular, the Commission has described the duty of licensee candor as "basic and well known." *See Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240, 243 (D.C. Cir. 1980), cert. denied, 449 U.S. 834 (1980) ("*Sea Island*").
 - o The Commission has explained that "As we noted in the Character Policy Statement, we are authorized to treat even the most insignificant

misrepresentations as serious.” *Applications of PCS 2000, L.P.*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 1703 (1997) at ¶ 47.

- *See also* 47 C.F.R. § 1.17 (providing that no person, in any investigation or adjudicatory proceeding, shall “intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading”).
- In many cases, the Commission has disqualified companies from holding FCC authorizations. *See, e.g., Radio Carrollton*, Memorandum Opinion and Order, 69 F.C.C.2d 1139 (1978) at ¶¶ 11,17 (“Thorburn's testimony on this matter before the Commission evinces an unmistakable lack of candor bordering on deception, conduct the Commission cannot and will not tolerate. . . . Through this conduct, Faulkner has demonstrated that it does not possess the qualifications to be a licensee. Accordingly, we conclude that the public interest would not be served by a renewal of Faulkner's license.”)
- The Commission has found that “[o]nce we find that we cannot rely on a licensee’s representations to us, the only suitable penalty is revocation of the license.” *Sea Island*, 60 F.C.C.2d at 157 (revoking license because the owner and officers of the licensee company made deliberate misrepresentations and other misleading and deceptive statements to the Commission in order to conceal improper financial practices); *RKO General, Inc.*, Decision, 78 F.C.C.2d 1 (1980), *aff’d*, 670 F.2d 215 (D.C. Cir. 1981) (denying an application based upon applicant’s lack of candor in proceedings before the FCC).
- In *Pass Word, Inc.*, a radio common carrier falsely certified to the FCC that it had completed its construction obligations (pursuant to a construction permit), in order to obtain a grant of its licenses. The FCC revoked Pass Word’s licenses:
 - o “Among [the] documents are forms and letters filed with the Commission certifying the operative status of facilities for which construction permits had been issued. As detailed herein, the Commission finds that Pass Word and Bacon filed documents with the Commission in 1974 representing that construction of certain facilities had been completed in accordance with the term of the construction permit, and that equipment and service tests would begin shortly, when in fact the facilities were not ready for operation. The record establishes that equipment essential for operation of the facilities was not on hand when the representations were made, and that construction was completed and service commenced long after the expiration of the construction permits. Moreover, the record establishes that Bacon, individually and as the chief operating officer of Pass Word, concealed facts in correspondence, pleadings and forms filed over a three-year period regarding construction of the facilities and the Commission's inquiry pertaining thereto. The facts establish that the concealment was deliberate and that Bacon deliberately made misrepresentations to the Commission.” *Pass Word, Inc.*, Order to Revoke Licenses, 76 F.C.C.2d 465 (1980) at ¶ 10, *aff’d*, *Pass Word, Inc. v. FCC*, 673 F.2d 1363 (D.C. Cir. 1982).

- o “Section 312(a)(3) explicitly grants authority to the Commission to revoke a license for willful or repeated failure to operate substantially as set forth in the license. Had we been apprised that the 454 MHz channels had not been constructed and ready to operate by the expiration date of the construction permits and why, we would have been warranted in refusing to grant a license to cover those channels and in revoking the construction permit. Bacon did not in fact construct the channels in a timely manner and demonstrated no diligence in attempting to do so. Bacon willfully failed to construct and provide service and thus to operate as set forth in the licenses. It is important that a permittee, having received a valuable privilege, take immediate steps to construct the facilities that are to be dedicated to public service. A disregard for the construction period terms not only deprives the public of the service which has been represented as unfulfilled, but also ties up the frequency so another applicant is unable to meet the need. Thus, even if these had been no deliberate misrepresentation, revocation would have been appropriate in the factual situation described herein.” *Id.* at ¶ 122.
- o The FCC rejected Pass Word’s request for a monetary forfeiture in lieu of revocation, stating “There is no question that revocation is an appropriate remedy under the Act where there has been a repeated pattern of deliberate misrepresentation and concealment to this Commission. Section 312(a)(1). *FCC v. WOKO, Inc.*, 329 U.S. 223 (1949). *Sea Island Broadcasting Corp.*, 60 F.C.C. 2d 146 (1976), *aff’d*, F. 2d, No. 76-1735 (D.C. Cir. Jan. 14, 1980). This same standard is applied to common carrier licensees. *The Telephone Co., et al.*, 65 F.C.C. 2d 605 (1977).” *Id.* at ¶ 121.
- The FCC has specifically disqualified licensees based on misleading renewal applications. *See RKO General, Inc.*, 78 FCC 2d 1, 98 (1980) (submissions to the Commission 'containing statements that are 'technically correct' but misleading as to the known facts' amount to lack of candor). In affirming the Commission's disqualification of the licensee in RKO solely on the grounds of lack of candor, the Court of Appeals stated:
 - o “Section 1.65 of the Commission's Rules requires applicants to inform the Commission within thirty days whenever 'there has been a substantial change' regarding any matter that may be 'of decisional significance in a Commission proceeding involving the pending application.' This requires that an applicant inform the Commission 'of all facts, whether requested in [renewal] Form 303 or not, that may be of decisional significance so that the Commission can make a realistic decision based on all relevant factors.’” *RKO General, Inc. v. FCC*, 670 F.2d 215, 229 (1981) (internal citations omitted).