



CSDVRS, LLC
600 Cleveland Street, Suite 1000 – Clearwater, Florida 33755
Voice: 727-254-5600 Fax: 727-443-1537 Toll Free: 888-927-3877

January 6, 2015

Via ECFS

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

RE: Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket Nos. 10-51, 03-123
Notice of Grant of Conditional Certification for CSDVRS, LLC, to Provide Video Relay Service After Its Acquisition by Kinderhook Capital Fund IV, L.P., DA 14-1887
Joint Opposition to "Opposition to Application of Kinderhook Industries, LLC for Certification to Provide Video Relay Service"

Dear Ms. Dortch:

Transmitted herewith, on behalf of CSDVRS (d/b/a ZVRS) and Kinderhook Industries, LLC, is a joint opposition to the "Opposition to Application of Kinderhook Industries, LLC for Certification to Provide Video Relay Service" filed by ASL Services Holdings, LLC on December 24, 2014.

Respectfully submitted,

/s/ Aaron Wegehaupt
Aaron Wegehaupt
VP of Operations
CSDVRS, LLC (d/b/a ZVRS)
600 Cleveland Street – Suite 1000
Clearwater, FL 33755
(727) 254-5618

cc: Robert Aldrich (via email)
Gregory Hlibok (via email)
Andrew O. Isar (via mail and email)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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
Notice of Grant of Conditional Certification for CSDVRS, LLC, to Provide Video Relay Service After Its Acquisition by Kinderhook Capital Fund IV, L.P.)	

To: Chief, Consumer and Governmental Affairs Bureau

JOINT OPPOSITION TO “OPPOSITION TO APPLICATION OF KINDERHOOK INDUSTRIES, LLC FOR CERTIFICATION TO PROVIDE VIDEO RELAY SERVICE”

CSDVRS, LLC (d/b/a ZVRS) (“ZVRS”) and Kinderhook Industries, LLC (Kinderhook Industries, LLC and, collectively with its affiliates, “Kinderhook”) hereby jointly oppose the “Opposition to Application of Kinderhook Industries, LLC for Certification to Provide Video Relay Service” (the “Pleading”) filed by ASL Services Holdings, LLC (“ASL”) on December 24, 2014.¹ As set forth below, ASL’s Pleading is both procedurally defective and substantively meritless, and therefore must be dismissed or denied.²

¹ Opposition to Application of Kinderhook Industries, LLC for Certification to Provide Video Relay Service of ASL Services Holdings, LLC, CG Docket Nos. 03-123 & 10-51 (filed Dec. 24, 2014) (the “Pleading”).

² As described further herein, it is unclear whether the Pleading is an Application for Review of the Bureau’s December 22, 2014 decision or an opposition to Kinderhook’s as yet unfiled application for full certification. The Pleading references the procedures for filing applications for review set forth in Section 1.115(d), but the Pleading itself is titled “Opposition to Application of Kinderhook Industries, LLC for Certification to Provide Video Relay Service.” This Joint Opposition has been filed within the time period set forth in Section 1.115, which

ZVRS has been certified as a provider of Video Relay Service (“VRS”) eligible for compensation from the Interstate Telecommunications Relay Service (“TRS”) Fund (the “Fund”) since September 2007, when the Consumer and Governmental Affairs Bureau (“CGB”) conditionally granted ZVRS’ application pursuant to the Commission’s certification rules.³ CGB conditionally recertified ZVRS in September 2012⁴ and subsequently granted ZVRS the only full VRS certification currently held by any VRS provider in November 2012.⁵

On November 25, 2014, ZVRS and Kinderhook filed an application (the “Application”) seeking conditional certification to allow ZVRS, as indirectly majority-owned and controlled by Kinderhook, to continue providing VRS eligible for compensation from the Fund.⁶ On December 22, 2014, CGB issued a public notice granting the Application and providing conditional certification for ZVRS to continue providing VRS following the consummation of

pertains to applications for review. To the extent that the Pleading is an unripe challenge to Kinderhook’s unfiled application for full certification, the Pleading should be dismissed as filed against a non-existent application.

³ *Notice of Certification of CSDVRS, LLC as a Provider of Video Relay Service (VRS) Eligible for Compensation from the Interstate Telecommunications Relay Service (TRS) Fund*, Public Notice, 22 FCC Rcd 17014 (CGB 2007) (“2007 Conditional Certification”).

⁴ *Notice of Conditional Grant of Application of CSDVRS, LLC. for Recertification as a Provider of Video Relay Service Eligible for Compensation from the Interstate Telecommunications Relay Services (TRS) Fund*, Public Notice, 27 FCC Rcd 11116 (CGB 2012) (“2012 Conditional Certification”).

⁵ *The Consumer and Governmental Affairs Bureau Grants CSDVRS, LLC. Full Certification as a Provider of Video Relay Service Eligible for Compensation from the Interstate Telecommunications Relay Services (TRS) Fund*, Public Notice, 27 FCC Rcd 14504 (CGB 2012) (“2012 Full Certification”).

⁶ Application of CSDVRS, LLC (D/B/A ZVRS) and Kinderhook for Conditional Certification to Provide Video Relay Service, CG Docket Nos. 03-123 & 10-51 (filed Nov. 25, 2014).

the acquisition of ZVRS by Kinderhook, pending the filing of (and Commission action on) an application for full certification by the post-merger entity.⁷

In the Pleading, for the first time, ASL raises unsupported and unfounded allegations regarding the qualifications of ZVRS—not Kinderhook—to provide VRS eligible for compensation from the Fund.

As an initial matter, to the extent that ASL had any concerns regarding the qualifications of ZVRS, ASL could have stated those concerns on numerous occasions in the past but did not do so. Specifically, ASL did not comment on, oppose, or otherwise react to: (1) ZVRS' July 2007 Application for Certification;⁸ (2) CGB's 2007 grant of conditional certification;⁹ (3) ZVRS' June 2012 Application for Certification;¹⁰ (4) ZVRS' Supplement to its Application for Certification;¹¹ (5) CGB's September 2012 grant of conditional certification;¹² (6) CGB's November 2012 grant of full certification;¹³ or (7) the Application.¹⁴ Instead, ASL chose to file

⁷ *Notice of Grant of Conditional Certification for CSDVRS, LLC, to Provide Video Relay Service After Its Acquisition by Kinderhook Capital Fund IV, L.P.*, Public Notice, DA 14-1887 (CGB rel. Dec. 22, 2014).

⁸ *See VRS Certification Application of CSDVRS, LLC*, CG Docket No. 03-123 (filed July 16, 2007).

⁹ *See 2007 Conditional Certification*.

¹⁰ *See Internet-Based TRS Certification Application for Renewal by CSDVRS, LLC (d/b/a ZVRS)*, CG Docket Nos. 03-123 & 10-51 (filed June 15, 2012).

¹¹ *See Supplement to Internet-Based TRS Certification Application for Renewal by CSDVRS, LLC (d/b/a ZVRS)*, CG Docket No. 03-123 and 10-51 (filed Aug. 27, 2012).

¹² *See 2012 Conditional Certification*.

¹³ *See 2012 Full Certification*.

¹⁴ *See Application*.

an “Opposition” following CGB’s approval of the Application, and based this “Opposition” on facts that have been the subject of “protracted” litigation since 2011.¹⁵

Having failed to previously raise any concerns about ZVRS’ qualifications, ASL now seeks to introduce meritless issues in an ill-defined and procedurally defective pleading. ASL describes the Pleading as an “Opposition” to Kinderhook’s forthcoming post-consummation application for certification, but ASL also states that the pleading is made pursuant to Section 1.115(d) of the Commission’s rules,¹⁶ which governs applications for review of actions taken pursuant to delegated authority.¹⁷

To the extent that ASL is seeking review of CGB’s decision to conditionally grant certification to ZVRS following the acquisition of ZVRS by Kinderhook, the Pleading is deficient on its face. The Commission’s rules provide:

Any person filing an application for review who has not previously participated in the proceeding shall include with his application a statement describing with particularity the manner in which he is aggrieved by the action taken and showing good reason why it was not possible for him to participate in the earlier stages of the proceeding. *Any application for review which fails to make an adequate showing in this respect will be dismissed.*¹⁸

As described above, ASL failed to previously suggest that its contractual dispute with ZVRS has any bearing on ZVRS’ fitness to serve as a VRS provider, despite ample opportunity to do so.

¹⁵ See *Gracias VRS, LLC v. CSDVRS*, Case No. 11-10965 CICOI, Complaint (Fl. 6th Cir. Ct. Nov. 18, 2011).

¹⁶ Pleading at 1.

¹⁷ See generally 47 C.F.R. § 1.115.

¹⁸ *Id.* § 1.115(a) (emphasis added).

ASL furthermore provides no reason whatsoever, let alone a “good reason,” why it could not have done so.¹⁹

To show that it is “aggrieved” by CGB’s approval of the Application, ASL must demonstrate a direct causal link between the challenged action and its alleged injury, and show that the injury would be prevented or redressed by the relief requested.²⁰ The Pleading simply fails to meet its burden to demonstrate a direct causal link or show that the injury would be prevented or redressed by the relief requested. Although ASL argues that “enabling ZVRS to proceed with the Kinderhook transaction and wring its hands of any liability to ASL/Global VRS” and granting certification could “undermin[e] ASL’s ability to pursue its legal claims ... and cause ASL/Global VRS even further financial harm,”²¹ these assertions are simply wrong.²² ZVRS will continue to exist in its current form following its acquisition by Kinderhook and the granting of full certification. As a result, ASL will continue to have all of the legal remedies

¹⁹ There appears to be no “good reason” why ASL could not have filed comments on the Application prior to CGB’s approval. Indeed, the litigation that, according to ASL, has raised questions regarding ZVRS’ behavior, motives, and character, has, by ASL’s own admission, been going on for more than three years, *see* Pleading at 2, and as noted above, ASL has had ample opportunity to raise any concerns over the last several years, but has failed to do so. ASL cannot attempt to intervene at the eleventh hour without offering a valid explanation, which it has not done.

²⁰ *See, e.g., Application for Review of an Order and Consent Decree of the Enforcement Bureau by Diogenes Telecommunications Project*, Order, 29 FCC Rcd 6289, 6293 (2014); *Sunburst Media-Louisiana, LLC*, Memorandum Opinion and Order, 29 FCC Rcd 9777 ¶ 5 (2014) (citing *Applications of AT&T Inc. and Deutsche Telecom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 27 FCC Rcd 4423, 4425 (2012); *Applications of WINV, Inc. and WGUL-FM, Inc. for Renewal and Assignment of License of WINV(AM), Inverness, Florida*, Memorandum Opinion and Order, 14 FCC Rcd 2032, 2033 (1998)).

²¹ Pleading at 2, 6.

²² Moreover, the suggestions are vague regarding whether they apply to CGB’s December 22, 2014 grant of conditional certification or to the potential future grant of full certification for ZVRS as owned by Kinderhook. In any event, the Pleading clearly fails the Commission’s standard that a party must plead with “particularity” how it was aggrieved by a Bureau’s action.

available to it currently, including the ability to continue pursuing litigation against ZVRS. Accordingly, the Pleading necessarily fails to meet both threshold requirements of Section 1.115(a).²³

Importantly, the Commission's rules make clear that dismissal in these circumstances is not discretionary. Instead, they indicate that an application for review "will be dismissed" if it fails to make the requisite showings. Given that ASL made no effort to explain its untimely intervention in this proceeding, or how it has been aggrieved by the CGB's action, the Pleading must be dismissed.

To the extent that ASL did not intend for the Pleading to be a stealth application for review, the Pleading nonetheless fails. Even assuming *arguendo* that ASL's ongoing civil litigation with ZVRS raises questions that CGB should consider as it reviews the Application or Kinderhook's qualifications to provide VRS,²⁴ the Pleading is late and untimely because it addresses an application that has already been approved by the Commission. It is too late to file

²³ To the extent that the Pleading could survive the requirements of Section 1.115(a)—and it cannot—the Pleading still fails to meet other procedural requirements for applications of review. Applications for review must "specify with particularity" from among specific factors why Commission consideration is warranted. These factors can be that the Bureau's action (i) conflicts with statute, regulation, case precedent, or established Commission policy; (ii) involves a question of law or policy which has not previously been resolved by the Commission; (iii) involves application of a precedent or policy which should be overturned or revised; (iv) includes an erroneous finding as to an important or material question of fact; or (v) includes a prejudicial procedural error. 47 C.F.R. § 1.115(b). ASL makes no showings of any of these factors, let alone "specif[ies] with particularity ... the factor(s) which warrant Commission consideration of the questions presented." *Id.* Moreover, an application for review "must set forth fully the applicant's arguments and all underlying facts." See, e.g., *Dallas Ingemuson, Assignor, & Jennifer Beckman, Assignee*, Memorandum Opinion and Order, 29 FCC Rcd 13623 ¶ 1 n. 3 (2014). But, other than noting the pending litigation, ASL provides no facts whatsoever to support its claims.

²⁴ It, however, defies logic to suggest that ASL's concerns about ZVRS should influence the Commission's consideration of *Kinderhook's* qualifications to provide VRS. Moreover, the Commission already has found that ZVRS is qualified to provide VRS.

comments on the Application except as an application for review of CGB's decision (and, as discussed above, an application for review fails here).

Finally, the Pleading should be dismissed or denied because it rests entirely on allegations raised in private litigation.²⁵ The Commission "has consistently indicated it will not adjudicate claims arising out of private contractual agreements; the appropriate forum for private litigation is the courts."²⁶ Although ASL claims that it "does not intend" the Pleading to "serve as a venue for raising" its breach of contract argument,²⁷ ASL's entire "Opposition" stems from that breach of contract claim. Notably, ASL proffers no evidence of any wrongdoing by ZVRS. Instead, ASL merely indicates that it has private litigation pending with ZVRS in state court, and states that ZVRS' fitness to serve as a VRS provider "remain[s] in question" until that case is resolved.²⁸

In essence, ASL improperly asks the Commission to intervene in private litigation by holding ZVRS' certification hostage until that litigation is resolved. The use of the Commission's processes in this manner is inappropriate—if not abusive—and must fail under established Commission precedent.²⁹

²⁵ The Pleading acknowledges that on November 18, 2011, "ASL/Global VRS filed a complaint against ZVRS . . . for breach of contract . . ." Pleading at 5.

²⁶ *Metromedia Co.*, Memorandum Opinion and Order, 1 FCC Rcd 1227, 1227 (CCB 1986); *see also, e.g., PCS 2000, L.P.*, Memorandum Opinion and Order, 12 FCC Rcd 1681, at ¶ 23 (1997); *Environmental v. FCC*, 661 F.3d 80, 85 (D.C. Cir. 2011); *Listeners' Guild v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) (endorsing "the Commission's longstanding policy of refusing to adjudicate private contract law questions").

²⁷ Pleading at 5.

²⁸ Pleading at 5-6.

²⁹ In other contexts, ASL's actions would also implicate the Commission's Greenmail rules. For instance, Section 1.935(c) of the Commission's wireless radio services rules forbids persons from "mak[ing] or receiv[ing] payments in exchange for withdrawing a threat to file or refraining from filing a petition to deny, information objection, or any other pleading against an application." *See* 47 C.F.R. § 1.935(c).

For the reasons set forth above, CGB should dismiss or deny the Pleading.

Respectfully submitted,

/s/ Christian Michalik

Christian Michalik
Managing Director
Kinderhook Industries, LLC
521 Fifth Avenue, 34th Floor
New York, NY 10175
(212) 201-6780

/s/ Aaron Wegehaupt

Aaron Wegehaupt
VP of Operations
CSDVRS, LLC (d/b/a ZVRS)
600 Cleveland Street – Suite 1000
Clearwater, FL 33755
(727) 254-5618

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