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Via ECFS

December 9, 2015

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> 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 are the *Comments of ASL Services Holdings, LLC* (“ASL/Global VRS”) in response to the Commission’s November 3, 2015 *Further Notice of Proposed Rulemaking* in the above-referenced proceedings, FCC 15-143.

Sincerely,

MILLER ISAR, INC.

A handwritten signature in blue ink, appearing to read 'Andrew O. Isar', is written over a white background.

Andrew O. Isar

Regulatory Consultants to  
ASL Services Holdings, LLC

Attachment

**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 ASL SERVICES HOLDINGS, LLC**

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December, 9, 2015

## SUMMARY

ASL Services Holdings, LLC (“ASL/Global VRS”) hereby comments on the Commission’s *Further Notice of Proposed Rulemaking* in the above referenced matter.<sup>1</sup> ASL/Global VRS maintains that beyond granting the interim relief proposed for smaller carriers, the Commission reframe the manner in which it views smaller provider participation in the Telecommunications Relay Service program (“Program”), acknowledge the challenges smaller providers have faced under the current rate methodology and operational framework that has undermined their growth let alone remain in the Program, and commit to reform its rate methodology and framework to enable smaller providers and new entrants to meet Commission longer term expectations.

Despite the Commission’s focus on smaller provider obligations to improve efficiency, the structure of the program based on circumstances in existence long before smaller providers began providing VRS, and a flawed rate methodology that widely averages smaller provider service costs have contributed a distortion of smaller provider “reasonable” VRS costs. This framework has virtual guaranteed that smaller providers will never be able to grow market share and therefore never become “more efficient” as the Commission maintains should occur. Even with the prospect of an interim rate freeze, the onus on smaller providers to become even more efficient than they have already demonstrated they have become in some seemingly arbitrary 16 month or less period seems an impossibility unless the Commission establishes a commitment to adopted reforms at the end of this interim period.

ASL/Global VRS appreciates the Commission’s current consideration of implementing an interim rate freeze for smaller providers and fully supports this initiative. ASL/Global VRS also looks forward to consideration of further support pending implementation of other reforms, with the benefit of active provider involvement including an analysis of actual service costs and past and present reimbursement for specialized services. Such consideration will ensure the Program’s long term success in providing quality VRS.

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<sup>1</sup> *Structure and Practice of the Video Relay Service Program*, Further Notice of Proposed Rulemaking, FCC 15-143 (rel. November 3, 2015)[*VRS FNPRM*]

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**COMMENTS OF ASL SERVICES HOLDINGS, LLC**

ASL Services Holdings, LLC (“ASL/Global VRS”) hereby comments on the Commission’s *Further Notice of Proposed Rulemaking* in the above referenced matter.<sup>2</sup> ASL/Global VRS maintains that beyond granting the interim relief proposed for smaller carriers, the Commission reframe the manner in which it views smaller provider participation in the Telecommunications Relay Service program (“Program”), acknowledge the challenges smaller providers have faced under the current rate methodology and operational framework that has undermined their growth let alone remain in the Program, and commit to reform its rate methodology and framework to enable smaller providers and new entrants to meet Commission longer term Program expectations.

**I. INTRODUCTION.**

By the *VRS FNPRM*, the Commission initially seeks comment on adoption of an interim rate freeze for small providers. ASL/Global VRS clearly supports adoption of an interim rate

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<sup>2</sup> *Structure and Practice of the Video Relay Service Program*, CG Docket Nos. 10-51 and 03-123, *Further Notice of Proposed Rulemaking*, FCC 15-143 (rel. November 3, 2015)[*VRS FNPRM*]

freeze, but is compelled to comment further on the underlying issues that have precipitated the need for such a rate freeze.

The need for the proposed interim rate freeze is deeply rooted in the Commission's current rate methodology and underlying assumptions about providers and their costs. The Commission has recently maintained that smaller providers are inherently inefficient and must achieve some ambiguous level of undefined "efficiency." The *VRS FNPRM* still suggests as much, proposing an interim rate freeze that "tolerates" some degree of "additional inefficiency in the short term."<sup>3</sup>

ASL/Global VRS maintains that the Commission must view the plight of smaller providers in context to the Commission's own Program framework. To that end, the Commission must take a historical through present day review to understand and acknowledge the journey that smaller providers have had to take since entering the market in November of 2011. By understanding the journey of ASL/Global as a smaller provider, the Commission can come to recognize that smaller providers are not inherently "inefficient," but rather have not been able to fairly compete.

Through this response it will become apparent that smaller providers: 1) entered the market under what was already a flawed rate methodology at the time; 2) have been effectively overlooked during various aspects of the Commission's structural reforms, which focused on incumbent provider operations but have had a detrimental impact on smaller providers; and 3) have been competing against entrenched virtual monopoly providers and faced significant technical interoperability challenges that still remain.

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<sup>3</sup> *VRS FNPRM* at ¶. 16, effectively stating that smaller providers are inherently inefficient.

Further, as addressed below, for the past three and a half years, smaller providers have had to meet the Commission’s growing requirements under structural reforms and a declining compensation structure while assuming the additional financial burden of implementation costs. By understanding and acknowledging these challenges faced by ASL/Global as a smaller provider, the recommendations that also follow should weigh more heavily on the Commission and be given serious consideration to ensure long term success and quality of the Program.

## **II. MEANINGFUL REFORMS MUST BEGIN WITH A REFRAMING OF THE MANNER IN WHICH THE COMMISSION VIEWS SMALLER PROVIDERS.**

ASL/Global VRS is encouraged by the Commission’s apparent recognition that not all providers are created equally, beginning with the manner in which smaller providers are compensated. An interim rate freeze will keep the Tier I “patients” from hemorrhaging, but is only the first step toward recovery. Reforms are still necessary to enable smaller providers not just to recover, but to become meaningful participants to the Commission’s vision for provider efficiency, smaller provider growth, and functional equivalency to the Deaf community.

In its *VRS FNPRM*, the Commission brings attention to the plight of smaller providers, such as ASL/Global VRS, who - since their initiation of Fund eligible VRS - have been characterized as “inefficient” providers, limited in their ability to make competitive inroads against entrenched providers to reach some unstated economy of scale.<sup>4</sup> For the first time, the Commission acknowledges that not all providers are alike, much less face similar circumstances. Nevertheless, the Commission holds fast to its belief that smaller providers are inefficient and all

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<sup>4</sup> At the same time, reforms that would contribute to greater efficiencies such as an open source platform that promotes interoperability have not been implemented. Despite the prospect of full interoperability incumbent providers currently retain a technology advantage and chokehold on subscribers made possible by previous Commission-funded compensation of incumbent research and development costs unavailable to smaller providers under Commission reforms. This situation further precludes smaller providers from becoming more competitive and thereby “efficient,” as discussed below.

providers are being overcompensated, while determining what VRS costs are “reasonable.” There is an apparent disconnect here.

Since its inception, ASL/Global has become demonstrably more efficient, but not by any significant increase its market share. These efficiency gains have come *despite* assumption of added compliance costs including compliance with Commission added mandatory minimum standards resulting from the *2013 VRS Reform Order*<sup>5</sup> and declining compensation structure. Planning, operations and training costs to comply with the Telecommunications Relay Service – User Registration Database, among reforms also adopted in the *2013 VRS Reform Order*, have exacerbated ASL/Global VRS’ VRS costs under a declining compensation structure. Further ASL/Global VRS has continued to assume the uncompensated additional costs of providing specialized Spanish language VRS.

These significant strides in efficiency have not enabled ASL/Global VRS – or apparently any other Tier I provider – to gain “economies of scale” that the Commission has historically maintained are achievable, let alone become profitable. The Commission’s compensation structure has made it virtually impossible for smaller companies to invest in their operations beyond meeting the minimum requirements to remain eligible providers. Under the current structure, the Commission has created a self-fulfilling prophesy that smaller companies are inherently inefficient, while adopting a rate structure that ensured this eventuality. ASL/Global VRS’ increased efficiencies have only contributed to the company minimizing its losses. ASL/Global VRS’ increased efficiencies have certainly not enabled the Company to meaningfully compete against entrenched incumbent carriers who had nearly a decade of well

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<sup>5</sup> *Structure and Practices of the Video Relay Services Program, Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 10-51, 03-123, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 8618 (2013) (*VRS Reform Order*), *aff’d in part and vacated in part sub nom. Sorenson Communications, Inc. v. FCC*, 765 F.3d 37 (D.C. Cir. 2014).

compensated – indeed profitable – operations that enabled them to gain economies of scale and dominate the provision of video relay services (“VRS.”)<sup>6</sup>

To implement meaningful reforms, the Commission must first change the fundamental manner in which it views smaller providers. The Commission must accept that smaller providers are not similarly situated to incumbent providers under the Program’s regulatory framework and its history, not only in size, but in circumstances. Smaller providers are not inherently inefficient. Smaller providers simply cannot compete against entrenched dominant carriers who maintained a choke hold on subscribers through proprietary and only partially interoperable technology long before smaller providers began providing VRS, among other factors.

After years of operating under a rate methodology based on allowable averaged costs for all providers, the Commission should now recognize that its “holistic” view of providers has resulted in unanticipated negative consequences, particularly for disproportionately affected smaller providers. The Commission should now distinguish between smaller provider efficiency and “efficiencies” created by economies of scale.<sup>7</sup>

The Commission needs to treat smaller provider costs individually. Commission recognition of smaller company focus on marginalized communities – ASL/Global VRS on Spanish speaking members of the Deaf community, others on the Deaf-Blind community and on Deaf owned business, for example<sup>8</sup> is in itself an important first step for the Commission in acknowledging the disparity between providers. Smaller providers are more community based

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<sup>6</sup> The Commission anticipates that rate cuts will yield a more “competitive friendly” environment. A squeezing of compensation stands only to make competition less friendly and, the provision of services even more competitive.

<sup>7</sup> The logic that smaller providers are inherently inefficient because they have not achieved economies of scale is inconsistent with the Commission’s determination that even the incumbent carriers who have presumably achieved economies of scale are themselves inefficient and overcompensated. *See, e.g. VRS FNPRM* ¶ 25.

<sup>8</sup> *VRS FNPRM at* ¶ 17.

and specialize in providing service to more marginalized groups than do larger providers. Their owners have close ties to the Deaf Community and are closer to their subscribers. These distinct differences translate in disparate cost structures.

Unless the Commission acknowledges these differences, it risks failure in its reforms and will ensure that smaller providers exit the provision of VRS and few, if any, new providers will have any incentive to seek Fund eligibility.

### **III. SMALLER PROVIDERS ENTERED A “MARKET” WITH AN ALREADY FLAWED RATE METHODOLOGY AND HAVE BEEN CAUGHT IN THE CROSSFIRE OF STRUCTURAL REFORM SINCE.**

#### **A. The Commission’s Rate Methodology *is* Flawed and Must Be Fixed.**

The Commission has justified its rate making process on the wide discretion it maintains.<sup>9</sup> ASL/Global VRS readily acknowledges that the Commission has such discretion to “draw lines” but unless the Commission establishes rates directly from providers cost data, it is drawing those lines based on averaged widely disparate provider cost data, which only further exacerbates an approximation of costs in lieu of retail rates.<sup>10</sup> The Commission too has acknowledged that the rate methodology has known flaws dating back to the *2013 VRS Reform*

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<sup>9</sup> See *2013 VRS Reform Order* footnote 537 citing to *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000) (the Commission “has wide discretion to determine where to draw administrative lines,” and can be reversed only for abuse of discretion). The Commission has also relied on the U.S. Court of Appeals for the District of Columbia ruling in Sorenson’s appeal (*VRS FNPRM* ¶ 7) to justify its current approach noting that the Court, “upheld the Commission’s compensation rate decision, finding that the Commission’s determinations regarding allowable costs were reasonable” and “... this (four year) rate reduction plan was upheld by the court of appeals” (*VRS FNPRM* ¶ 12). ASL/Global VRS notes too, however, that the Court also underscored the Commission’s obligation to compensate providers for their reasonable costs of providing VRS, and remanded the matter of compensating providers for the increased costs of implementing the accelerated speed of answer requirements. It follows that other reforms implemented under the *2013 VRS Reform Order* which contributed to reasonable provider costs should also be considered for inclusion in compensation rates. Citing further from the Court’s order, “...we need hardly do more than note that the Commission is, by its own interpretation of the ADA, required to reimburse providers *for all costs necessarily incurred to meet the mandatory minimum standards established by the agency...* of which speed-of-answer metric is one...[Emphasis supplied.]” This has not occurred.

<sup>10</sup> See *2013 VRS Reform Order* ¶ 217, “we take further action to achieve VRS compensation rates that ‘better approximate the actual cost of providing VRS’.”

*Order*, if not before. Ultimately these approximations have had an adverse impact particularly on smaller providers such as ASL/Global VRS.

ASL/Global VRS and all providers have repeatedly stressed that the Commission's current rate methodology is flawed. Failure to amend the current one size fits all approach to compensation, while pursuing significant and continued reforms, only makes a bad situation worse, and simply delays the likely inevitable exit of certainly smaller providers, and possibly incumbent providers as well. From ASL/Global VRS' perspective, the key to rate reform is to move toward a more individual provider-based approach to cost determination.

**B. Structural Reform Brought About a Weighted Average Approach that Grossly Distorted Smaller Provider Actual Costs.**

Developing compensation structure based on a weighted average of provider costs has provided only a general correlation to smaller provider costs, but has remained based on the aggregate of all provider allowable costs.<sup>11</sup> So while a weighted average cost approach appears to approximate capturing smaller provider costs, the approach still woefully minimizes smaller provider costs by an exaggerated amount. As the Commission itself notes, smaller companies do not have the economies of scale – nor are they capable of achieving these economies of scale as noted - to spread their costs over a broad customer base as do the dominant providers.<sup>12</sup> When factored into the whole of all providers, smaller provider costs appear grossly minimized, even with the limited benefit of weight averaging by size. A weighted average approach does not take into account smaller provider actual costs.

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<sup>11</sup> “In this FNRPM, the term “average,” when used to describe multiple providers’ costs, means a weighted average of provider costs weighted in proportion to each provider’s total minutes.” *See, VRS FNPRM* at footnote 5.

<sup>12</sup> Yet as noted above, even the large incumbent carriers who have presumably achieved economies of scale are also deemed inefficient by virtue of being “overcompensated.”

**C. Smaller Provider Costs Were Not Fully Taken Into Account at the Time the Glide Path Rates Were Adopted as a result of Structural Reforms.**

This adverse impact of this weighted average approach is exacerbated by the fact that actual smaller provider compliance costs had not fully been incorporated into the glide path rates when adopted. The Commission stated, that “RLSA’s use... of a combination of provider’s projected costs, *and actual historical costs* is appropriate for setting rates for the transition period.”<sup>13</sup> At the time the glide path rates were adopted, the adopted rate reductions were based on a scant year of smaller provider *historical* costs.<sup>14</sup>

According to the Commission, “In the *VRS Reform Order*, the Commission found that, *for many years*, VRS compensation rates had exceeded providers’ average allowable costs, causing overcompensation of VRS providers.<sup>15</sup> ASL/Global VRS was not granted interim eligibility to draw from the TRS Fund until November 2011 and did not begin drawing from the TRS Fund until January 2012. Other smaller providers were similarly granted interim Fund eligibility at this time. To the extent that ASL/Global VRS costs were taken into account, these costs covered no more than a year and a half period, between January 2012 and mid-2013. The Company’s costs could not have been part of the “many years” over compensation reference made by the Commission as the basis for adopting the glide path rates. Moreover, ASL/Global VRS’ actual operating expenses only covered an exceptionally limited period of time as compared to the incumbent providers at the time, and did not incorporate added compliance costs the Company assumed to implement other reforms brought about by the *2013 VRS Reform Order*. ASL/Global VRS’ costs were further minimized by inclusion in the overall provider

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<sup>13</sup> *2013 VRS Reform Order* at ¶ 211, emphasis supplied, footnote in original omitted.

<sup>14</sup> *VRS FNPRM* at footnote 12.

<sup>15</sup> *Id* at ¶ 4 citing to the *VRS Reform Order* at ¶ 188 [emphasis supplied].

costs at the time, creating a further dichotomy between calculated provider costs and ASL/Global VRS' actual service costs.

**D. Expansion of the Tier I Cap during Structural Reform Exacerbated the Dichotomy Between Smaller Provider Actual and Averaged Costs.**

An adoption of a significant larger Tier I usage universe - zero to 500,000 minutes of use per month - further distanced ASL/Global VRS' actual VRS costs from calculated provider costs. Prior to the *2013 VRS Reform Order*, Tier I applied to a provider's first 50,000 monthly minutes. The Commission concluded that the Tier I upper limit should be "adjusted during the transition so as to ensure that smaller providers have a full opportunity to achieve efficient operations."<sup>16</sup> This adjustment resulted in further lumping ASL/Global VRS' actual costs in with those of incumbent providers under the expanded Tier I minutes, contributing yet further to an averaging of costs and distancing from smaller provider true costs. How the Commission determined that a 450,000 minute per month increase in the upper Tier I limit was appropriate is not addressed.<sup>17</sup>

ASL/Global VRS understands that the Commission's intent has been to move toward a unified market-based cost structure, suggesting broader limits in all tiers. Yet such a dramatic increase in the upper Tier I limit less than a year and a half since ASL/Global VRS and other small providers began providing services failed in motivating providers to become more efficient. Instead, this dramatic increase made it more challenging for providers to reach Tier II

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<sup>16</sup> *2013 VRS Reform Order* at ¶ 201.

<sup>17</sup> The *VRS FNPRM* at footnote 49 citing to the *VRS Reform Order* at ¶ 203 notes that "in 2010, the Fund administrator found no significant cost differences between providers operating in the 50,000-500,000 minutes range and those operating in the below 50,000 range." This must have certainly been the case as the smaller providers, including ASL/Global VRS *had not yet begun providing VRS at that time*. If the Fund Administrator's assessment was the basis for increasing the Tier I cap, then this increase was based on incumbent provider costs at the time, did not take smaller provider costs into account, and further skewed the cost structure toward lower incumbent provider costs. This too added to the disparity between actual and averaged provider costs for smaller companies.

and in their then nascent stages – a condition that has remained virtually unchanged as smaller providers have struggled to meet their increasing obligations to the Commission.

Far from creating an incentive for smaller provider “efficiency,” the changed Tiers created a trap for smaller providers, however inadvertent. Tier I providers have had such a steep hill to climb to reach Tier II in a virtually impossible effort to compete against entrenched providers, only to be “rewarded” by lower compensation rates if reaching Tier II. At the same time, the most significant rate reductions occurred in Tier I (19 %) and Tier III (20%)<sup>18</sup> limiting what smaller providers were earning.

If the intent has been to provide efficiency incentives for smaller providers, the Tier I upper limit should more appropriately have been – and now should be - set at 100,000 minutes per month with the potential for increased compensation for every additional 100k threshold until it reaches the 500k monthly minute mark. The ultimate incentive is indeed to be able to cut costs through growth and improved – more efficient – operations. This cannot be achieved when companies operate at a loss under a framework that virtually guarantees this situation to continue seemingly indefinitely.

The net effect of weighted averaging, and other averaging of all provider costs, has become an averaging of averages. This distances ASL/Global VRS “average” provider costs so far from its actual costs, that it is no wonder that ASL/Global VRS and all smaller providers remain woefully undercompensated for their actual costs. Cost averaging and weighting, at least as performed under the current rate methodology have skewed true costs. This approach is not workable in the long term, and actually undermines the Commission’s intended move to market

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<sup>18</sup> *VRS FNPRM* ¶12.

based costs by distorting true provider costs. The Commission should determine smaller provider costs based on their actual, verifiable cost studies.

**E. The Commission’s Dictation of Allowable Costs during Structural Reform has Been Exceptionally Narrow and Further Contributed to an Inaccurate Basis for Additional Reductions in Compensation.**

The Commission has historically cited to the Fund Administrator’s findings of over compensation as a basis for rate reductions, while also significantly limiting what is considered to be an allowable cost. This is less a matter of providers being overcompensated for their costs, and more one of providers being “overcompensated” on the basis of what the Commission maintains is an actual cost of providing service. This approach has created a further deviation between actual VRS costs and compensation rates.

By severely limiting what costs the Commission maintains are allowable as opposed to considering providers’ actual service costs, the Commission has effectively given itself justification to reduce compensation. Beyond currently leading to smaller providers operating at a loss, this approach certainly precludes any reinvestment in company operations and an inability to obtain access to funding for reinvestment to improve operational efficiencies – a “Catch 22” of sorts. The manner in which allowable costs are considered has to be readdressed before smaller providers exit the market, as occurred in the provision of IP Relay.

The Commission should also allow providers to request *ad hoc* compensation to implement new reforms that require the expenditure of additional resources, as was done when the Commission implemented ten-digit dialing.<sup>19</sup> Providers have already assumed significant additional costs to implement the added reforms adopted in the *2013 VRS Reform Order*, but

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<sup>19</sup> See, *Telecommunications Relay Services and Speech-to-Speech for Individuals with Hearing and Speech Disabilities, E911 Requirements for IP-Enabled Service Providers*, CG Docket No. 03-123, WC Docket No. 05-196, Report and Further Notice of Proposed Rulemaking, 23 FCC Rcd. 11591 (June 24, 2008) [*Numbering Order*].

were never accorded an opportunity to seek added compensation, despite being compelled to assume those costs under a declining compensation structure. The costs associated with new Commission reforms must be compensable either directly, or factored into a revised compensation rate that accounts for those costs. This approach too, would move toward a more direct correlation of individual provider costs and compensation levels.

An honest appraisal of what costs are allowable, including additional costs for the provision of niche services such as ASL/Global VRS provision of Spanish language services addressed above, must also be addressed as part of a rate methodology reform. Outreach and technology costs should again be reimbursed as direct service costs. And providers should be given an opportunity to address proposed Commission rates if being changed. Ultimately the Commission should broaden its allowable cost parameters, in part by recognizing the provision of VRS is not a capital intensive, but rather a labor intensive industry, which requires a different set of allowable costs.

#### **F. Structural Reforms Comes at Provider Cost.**

Significant structural reforms should not take – nor have they taken - place in a provider cost vacuum. Only by evaluating provider direct costs can the Commission benefit from a more accurate view of the impact of its reforms on providers and engage in proactive, rather than reactive regulation. The Commission appears to have realized this when adopting the *Numbering Order*. According to the Commission’s *Numbering Order Public Notice*,<sup>20</sup>

The Commission also determined that VRS and IP providers could be compensated for their costs of implementing the mandates of the *Numbering*

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<sup>20</sup> *Public Notice*, Consumer and Governmental Affairs Bureau Modifies Cost Submission Timeframes Associated with Implementation of the Numbering System for Internet-Based Telecommunications Relay Services, CG Docket No. 03-123, WC Docket No. 05-196, DA 08-2130 (September 22, 2008).

*Order*<sup>21</sup> The Commission noted that although VRS and IP Relay providers presently are compensated based on a per-minute rate calculated pursuant to the Commission's rules, the providers' additional costs necessary to implement the numbering and emergency call handling requirements have not been factored into the present compensation rates.<sup>22</sup> The Commission therefore concluded that it would 'compensate these costs separately from the other costs presently encompassed by the per-minute compensation rates.'<sup>23</sup>

ASL/Global VRS is unaware that any of the reforms adopted in the *2013 VRS Reform Order* were subject to similar consideration. To the extent that the Commission may differentiate between the reforms adopted under the *Numbering Order* and those equally substantial reforms adopted under the *2013 VRS Reform Order*, such a differentiation is not known or understandable.

The Commission has historically recognized that major structural reforms come at a cost to providers. This suggests that the implementation of ongoing significant structural reforms - those that will require major changes in provider operations and underlying costs such as the provider registration and TRS-User Registration Database interfaces and processes, among others, should be subject to discrete compensation. Otherwise, it is incumbent on the Commission to establish why structural reforms are not subject to additional compensation.

#### **IV. SMALLER PROVIDERS HAVE BEEN EXPECTED TO COMPETE IN AN EXCEPTIONALLY UNBALANCED MARKET DOMINATED BY A SINGLE PROVIDER THAT HAS MAINTAINED MARKET SHARE THROUGH PROPRIETARY, OFTEN NON-INTEROPERABLE EQUIPMENT.**

In the near twenty years since implementation of the 1996 Telecommunications Act, a handful of the hundreds of competitive local exchange carriers who sought to compete against the dominant incumbent local exchange carriers that controlled their networks including last mile

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<sup>21</sup> Citing to the *Numbering Order* at 11626, paras. 96 to 101.

<sup>22</sup> Citing to the *Numbering Order* at 11626, paras. 96 to 98.

<sup>23</sup> Citing to the *Numbering Order* at 11626, para. 98 and 11645-66, paras. 147-49 "(seeking comment on whether, and to what extent, costs should be passed on to the Internet-based TRS users, rather than paid for by the Fund..

facilities at the time, have achieved any meaningful “economies of scale” and competitive gains since. That any of these competitive local exchange carriers were able to effectively gain market share was a direct function of pro-competitive state and federal regulatory policies, successful court challenges, and the efforts of well-funded competitive providers to provide competitive services and earn a profit. Though not a perfect analog to the circumstances currently faced by smaller providers, the wireline industry experience shows the significant challenges faced in any industry/market/program that is dominated by a single provider even when supportive conditions are in place.

With a four year operating experience, ASL/Global VRS and all small providers should be congratulated for what they have been able to accomplish in providing competitive services, particularly when operating under the current Program framework and interoperability impediments address above. To their credit, the dominant provider(s) have been more forthcoming in promoting interoperability with their proprietary equipment, but only in recognition of the Commission’s efforts to ensure full interoperability. Nevertheless, ASL/Global VRS has continued to struggle with ensuring that its services are interoperable with all proprietary equipment, and witnessed marginal improvements. The Commission’s interoperability platform remains months, if not years away. Until then, ASL/Global VRS and others remain challenged to pursue interoperability on their own despite improved provider cooperation. Nevertheless, the potential 16 month rate freeze changes nothing in this regard.

As noted, the expectation that smaller providers will somehow in the up to 16 months of rate freezes be able to compete more effectively is from ASL/Global VRS’ perspective unrealistic, particularly with the backdrop of history in other dominated markets and the Company’s experience under the current Program framework.

**V. THE COMMISSION MUST NOW TAKE AFFIRMATIVE ACTIONS TO CORRECT THE CONDITIONS THAT LEAD TO THE NEED FOR SMALLER PROVIDER INTERIM RELIEF.**

**A. The Rate Freeze Should be Immediately Implemented and Continue Until the Commission's Existing Rate Methodology and Allowable Costs Respective to Each Provider are Corrected and Other Reforms Fully Implemented.**

Smaller providers have demonstrated, and the Fund Administrator has confirmed, that smaller providers are operating at a loss.<sup>24</sup> ASL/Global VRS has *never* recouped its costs for providing VRS since initiating its service in December 2011 – four years ago. The Company has continued to serve the Deaf Community under these circumstances out of a commitment to the Deaf, as have the other small providers where no shareholder-driven for profit business would have done so. There are limits to ASL/Global VRS' ability to continue providing VRS indefinitely if there is no return commitment from the Commission to consider fundamental changes to its rate methodology that have precipitated this very situation. The temporary rate freeze may allow for the company to stabilize, but not grow.

The Commission proposes an interim, short term partial rate freeze for smaller carriers of up to 16 months. A short term rate freeze is intended to be “sufficient to provide smaller providers with a reasonable window of opportunity to achieve the necessary scale and efficiencies to be able to continue providing service.”<sup>25</sup> By this statement, it is clear that the Commission clings to the notion that smaller providers have remained inherently inefficient, despite its acknowledgement to the contrary. The Commission appears to believe that by freezing rates for up to sixteen months, without addressing other critical aspects of the Commission's reforms, that smaller providers will somehow be able to accomplish during the interim rate freeze period what has eluded them for the past four years. But how can smaller

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<sup>24</sup> See, *VRS FNPRM* at ¶ 14.

<sup>25</sup> *VRS FNPRM* at ¶ 19.

providers in 16 months or less somehow compete with entrenched providers who historically gained prominence under a regulatory framework that remains unchanged?

The Commission seemingly places the entire onus on smaller providers,<sup>26</sup> but fails to address what *it* is proposing to do to change an underlying rate methodology that the Commission itself has acknowledge needs to become more accurate.<sup>27</sup> In its *2013 VRS Reform Order* the Commission instituted a four year glide-path toward market based rates, in anticipation of setting VRS compensation rates on a “competitive bidding process.”<sup>28</sup> Nearly three years into the process, the Commission seems no closer to moving toward market based rates than it did at the time that order was released. Yet all providers and smaller providers in particular, have continued to labor under decreasing compensation and increased mandatory minimum standards with no end in sight toward an undefined “market-based” competitive bidding process. Whether the interim rate freeze period is six months, twelve months, or sixteen months, what happens at the end if the Commission is unwilling to make further reforms to its rate methodology?

The Commission must rethink its own reforms and methodology before imposing a now seemingly arbitrary minimum rate freeze period. The rate freeze should be extended until the Commission has proposed a plan to correct a rate methodology and reconsider the allowable cost limitations it has imposed that contributed to the current situation in the first place. The rate freeze should also remain until the structural reforms imposed under the *2013 VRS Reform Order* have been implemented and the associated provider compliance costs been addressed. Until

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<sup>26</sup> Beginning with the establishment of an undefined standard that by the conclusion of the interim rate freeze period smaller carriers will have achieved “necessary scale and efficiencies” presumably to continue serving the public.

<sup>27</sup> See *2013 VRS Reform Order* ¶ 217, “we take further action to achieve VRS compensation rates that ‘better approximate the actual cost of providing VRS’.”

<sup>28</sup> One that smaller providers are ill equipped to compete in based on the current framework and rate methodology that undermines their growth – see footnote 9, above.

then, the rate freeze should remain in place to avoid “jeopardizing [small provider] continuation of service” as the Commission recognizes.<sup>29</sup>

**B. The Commission’s Existing Rate Methodology Must be Corrected First Before Further Rate Reductions are Considered.**

The very fact that a rate freeze is needed by smaller providers is symptomatic of a much greater and perilous challenge: the current flawed rate methodology. A freezing of Tier 1 rates is a welcome, important initial step needed to address smaller providers’ ensured continuation in VRS, is only an interim step. The *2013 VRS Reform Order* “glide path” rate reductions were predicated on a number of Commission presumptions regarding the ability of smaller providers to compete against an entrenched oligopoly of providers addressed above, a stalled move toward market-based rates, and progress toward implementing a number of reforms.

More than two and a half years following the *2013 VRS Reform Order*, the Commission should immediately reevaluate its rate methodology and definition of Tier 1 monthly minute thresholds. ASL/Global VRS maintains that the Commission should move toward a more individual provider-based approach to cost determination, as noted. In addition, Tier 1 thresholds should have an incremental change in rate for every additional 100k minutes until the 500k threshold is met. This will allow smaller provider to continuously adjust to the anticipated Tier 2 per minute rates as their scale of economies grows.

**C. Structural Reforms That Impose Additional Costs on Providers should be compensated**

The *2013 VRS Reform Order* implemented a number of reforms that have added to the providers’ compliance costs. Among them, a new registration process and Telecommunications Relay Service – User Registration Database interface, customer proprietary network information

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<sup>29</sup> *VRS FNPRM* at ¶ 18.

protections, and interoperability-oriented open sourced platform. The Commission has also pursued improved speed of answer metrics that have compelled providers to assume increased staffing costs. None of these added provider costs have been taken into account. This is in stark contrast to the Commission's authorization of provider compensation for ten-digit number dialing, addressed above.

In effect the Commission has put the proverbial cart before the horse. Implement reforms first and only then address provider cost compensation methodology. Yet as reform implementation becomes more drawn out, if not protracted, smaller providers have hemorrhaged. Even with the proposed temporary rate freezes, smaller providers do not stand a high probability of remaining in the Program without further reforms. The Commission must fully implement a process for smaller providers to submit costs for regulated reforms. In addition to compensation of initial documented costs of structural reform, consideration of how maintenance of such reforms affect the overall rate methodology to provide fair compensation inclusive of current reform.

**D. The Rate Freeze Should Date Back to Implementation of Reforms and Additional Compensation Should be Given to Smaller Providers.**

In its *2013 VRS Reform Order*, the Commission addressed the challenges of balancing competing concerns of maintaining sufficient incentives for smaller providers to improve efficiency and ensure that smaller providers have a reasonable opportunity to compete effectively.<sup>30</sup> Nearly two and a half years into these reforms, the Commission has, far from achieving this balance, placed smaller companies at the precipice of leaving the market altogether. It has not been until recently that the Fund Administrator has confirmed, and the

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<sup>30</sup> *2013 VRS Reform Order*. ¶ 204.

Commission tacitly acknowledged, that smaller providers have been operating at a loss. For more than three years, the smaller providers' actual costs have been seemingly ignored, or at least well hidden by the Commission averaging cost methodology.

In addition, structural reform brought about cuts in Research and Development and Removal of Outreach funding which larger providers were able to capitalize on for years. As a result, larger companies were able to build their customer base with additional funds and considerations given to them. Smaller providers have not only been expected to satisfy the mandatory minimum standards within the industry, but also have been expected to make inroads into an already saturated market with significantly less funding to operate. On such basis, the interim rate freeze should more appropriately be held at pre-glide path rates or frozen at the rates in effect when the smaller provider's Fund eligibility was granted. Smaller providers should further be compensated at the difference between the frozen rate and the rate at which they were compensated beginning from the implementation of the glide path reductions.

**E. A Clear Plan Should be Established Following the Conclusion of the Glide-Path Reductions**

The "glide path" rate reductions had been viewed as interim step, with the end game of moving toward market based rates by 2017. When the glide path rates were adopted, the Commission envisioned that its structural reforms would take no more than four years to implement.<sup>31</sup> Today there is no indication that Commission reforms will occur by 2017. There is also no indication of what the Commission will do at the end of the glide path period in 2017 to move to market based rates, or what "market based rates would be look like or be based on."<sup>32</sup>

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<sup>31</sup> See, *VRS FNPRM* at footnote 12, citing to the *VRS Reform Order*, 28 FCC Rcd. At 8692, ¶ 212.

<sup>32</sup> To be sure, the current single provider [Federal Video Relay Services](#) contract compensates Sprint at a rate of more than \$11.60 per VRS minute under an *increasing* annual compensation schedule. A sole source, least cost bid vendor approach does not appear to be consistent with the Commission's intent to reduce VRS costs. It is also

What occurs at the end of the glide path period must be established now while there is still time, and with the benefit of provider and public input, not as a last minute temporary fix.

Since ASL/Global VRS began providing VRS, the relative “market share” of incumbent providers has not meaningfully changed. At best, smaller providers as a group have been able to gain perhaps up to three percent of the VRS “market.” This is due to the framework in which the smaller providers have operated, as noted. Further, promised additional Commission reforms that would support smaller provider growth have not materialized: the neutral platform remains pending further contributing to Deaf Community reluctance to give up proprietary dominant provider equipment and service; address books have been difficult to port; smaller providers with limited funds have been unable to invest more broadly in technology; and gains in interoperability have been limited and possible<sup>33</sup> only as a result of more recent provider cooperation as Commission’s technology solutions too remains pending; and the Commission has not, in ASL/Global VRS’ view been sufficiently proactive in enforcing its interoperability requirements.<sup>34</sup>

To the extent that there are no further reforms, including a change in policies that support incumbent provider dominance, any future implementation of market-based rates will likely lead toward an oligopoly or monopoly in the form of a single dominant provider who – by a dominance gained through the Commission’s past framework – will be able to underbid any remaining provider. The sheer market size of the dominant provider ensures that it will remain

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unworkable for the VRS program. No provider can meet the economies of scale of the dominant provider who would be the presumptive winner of any low cost bid, unless hypothetically provided through the Commission’s MITRE platform.

<sup>33</sup> Interoperability improvements have demonstrably contributed to ASL/Global VRS’ growth, underscoring its importance, not only for users, but for smaller companies to be able to demonstrate the value of their services and win over new subscribers.

<sup>34</sup> ASL/Global VRS has further experienced instances of degraded service quality for other provider users electing to use the Company’s service. There has been no venue for addressing these concerns with the Commission.

the low cost bidder. This is contrary to the Commission's and Deaf Community's pro-competitive desires.

**F. The Costs of Commission Recognized “Well-Defined” Specialized Services Such as Spanish VRS Translation Should be Compensable.**

A separate rate structure for “well-defined categories of specialized services” as the Commission is now considering is entirely appropriate and should be implemented.<sup>35</sup> To be considered a “well-defined” category, the Commission should either make the determination of what constitutes a well-defined category, as arguably it has in its compensation of Spanish language VRS or deaf-blind services, or upon granting of a provider petition for good cause shown.

In the case of Spanish language VRS, ASL/Global VRS has long maintained that it's underlying costs for attracting, training, supporting, and retaining tri-lingual ASL, Spanish and English video interpreters far exceeds the cost of providing VRS.<sup>36</sup> This is consistent with the added costs of providing government contracted VRS for government employees who need the service over the costs of providing conventional telephone service to employees.

These added costs assumed by ASL/Global VRS to provide Spanish language translation are based on certain characteristics unique to Spanish language calls

1. Linguistic Challenges: English VRS accounts for regional differences and accents, but which can be generally understood by most English-speaking callers; Spanish ASL Deaf callers will have Spanish subset language intrusions with significant variance across Hispanic cultures. This requires culturally sensitive and trained Spanish language interpreters. The limited pool of trilingual interpreters drives up recruitment and training costs.

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<sup>35</sup> VRS FNPRM at ¶ 22.

<sup>36</sup> See, e.g., *In the Matter of 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, *Comments of ASL Services Holdings, LLC* (August 19, 2013) at page 35.

2. Spanish VRS calls typically last longer than other VRS calls. This requires the potential to require more interpreters to complete a call, which in turn drives up staffing costs at a given time.
3. Spanish VRS calls are complicated with multi-caller conversations, which is more commonplace. This results in training linguistically to handle such differences
4. More teaming is needed to assist in translating certain regional Spanish expressions that do not easily translate.
5. Interpreter fatigue is more common particularly in tri-lingual calls.
6. Such a small pool of interpreters require generally higher compensation rate for those who are ASL/Spanish bilingual but trilingual as well English/ASL/Spanish
7. Lack of significant investment by National Associations (ie. RID and National Interpreting Programs) in training, evaluating, and mentoring of new ASL /English/Spanish Interpreters places the onus of doing so entirely on providers.
8. There are virtually no written materials in Spanish, requiring providers to constantly provide translations for training, website, and operational materials.
9. Smaller rural pockets require more outreach. These areas are often overlooked by the larger incumbent providers.<sup>37</sup>

The Commission recognizes the role that smaller companies provide in serving “niche VRS markets.”<sup>38</sup> Title IV of the Americans with Disabilities Act is inclusive to all Deaf and bring attention to the needs of smaller, but key, specialized “niches” such as Spanish, Oral, Hard of Hearing, Late Deafened, Deaf/Blind entail special needs that smaller, *Community focused* providers such as ASL/GlobalVRS, provide as core services. These specialized services require interpreters with specialized skill sets and corresponding labor costs, specialized training, technology, marketing, and management.

ASL/Global VRS proposes that additional costs associated with the provision of well-defined specialized services be established through provider specific cost studies verified by the Fund Administrator and ultimately approved by the Commission, even if on a case by case basis.

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<sup>37</sup>ASL had assumed the costs of providing translated materials for Purple and ZVRS at the time that it had operated as a white label Spanish language provider for the companies prior to the Commission’s prohibition on third party provision of VRS.

<sup>38</sup> *VRS FNPRM* ¶ 21.

## VI. CONCLUSION.

Despite the Commission's focus on smaller provider obligations to improve efficiency, the structure of the program based on circumstances in existence long before smaller providers began providing VRS, and a flawed rate methodology that widely averages smaller provider service costs have contributed a distortion of smaller provider "reasonable" VRS costs. This framework has virtually guaranteed that smaller providers will never be able to grow market share and therefore never become "more efficient" as the Commission maintains should occur. Even with the prospect of an interim rate freeze, the onus on smaller providers to become even more efficient than they have already demonstrated they have become in some seemingly arbitrary 16 month or less period seems an impossibility unless the Commission establishes a commitment to adopted reforms at the end of this interim period.

The glide path rate reductions which contributed to the current precarious position of smaller providers are simply symptomatic of a much deeper issue of how the Commission has justified its narrowing and lowering of reasonable costs. The glide path rates themselves were predicated on cost structures that never fully took smaller provider costs into consideration as the Commission itself acknowledges. It has not been until recently that the Fund Administrator has confirmed what smaller providers have known all along and attempted to demonstrate to the Commission – that the level of compensation neither covers their reasonable costs, nor accounts for the additional costs they assume in providing specialized services.

Beyond the issue of whether to implement an interim rate freeze, a rate freeze cannot be implemented in isolation. Now is the time to correct a flawed rate methodology and declining rate structure *first* – before other costly reforms are implemented. Smaller providers – and indeed all providers, should be compensated if able to demonstrate to the Commission the added

costs of providing specialized services. Smaller providers should not only be subject to a rate freeze, but should be reimbursed for the difference between the glide path rates that did not take smaller provider costs into consideration and the rates that are based on actual smaller provider costs, to more fully compensate smaller providers for their true VRS costs.

Smaller providers have endured more than three years of rate reductions with the promised structural reforms promised by the Commission being only marginally closer to reality than they were when the glide path rates were implemented. The rate freeze is a step to remedy the adverse effects of major reforms implemented under the *2013 VRS Reform Order* and targeted toward eliminating fraud waste and abuse in which smaller providers played no part. ASL/Global VRS urges the Commission to return the Program to its true purpose of serving the Deaf, reasonably compensating providers based on their actual cost data, eliminating preconceived notions of inefficiency, and actively encouraging provider involvement before major reforms are implemented.

ASL/Global VRS appreciates the Commission's current consideration of implementing an interim rate freeze for smaller providers and fully supports this initiative. ASL/Global VRS also looks forward to consideration of further support pending implementation of other reforms, with the benefit of active provider involvement including an analysis of actual service costs and past and present reimbursement for specialized services. Such consideration will ensure the Program's long term success in providing quality VRS.

[Signature on Following Page.]

Respectfully submitted this 9<sup>th</sup> day of December, 2015.

ASL SERVICES HOLDINGS, LLC

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