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June 7, 2005

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **Ex Parte Submission** in the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities
CC Docket No. 98-67, CG Docket No. 03-123

Dear Ms. Dortch:

On June 6, 2005, Daryl Crouse, President, Snap Telecommunications, Inc. ("Snap"), Larry Irving, current Board Member for two of Snap's partners, Aequus Technologies, Inc. and WorldGate Services, Inc., Jeff McCaw, Controller, Goodwill Industries International, Inc., and the undersigned met with Commissioner Adelstein and his legal advisor for wireline issues, Scott Bergmann, on behalf of Snap. During the meeting, the parties urged the Commission to direct the Disability Rights Office and the National Exchange Carriers Association to consider Snap to be eligible for participation in the Interstate TRS Fund as a video relay services provider under the Commission's existing rules.

Attached is a document that was distributed and used during the discussion.

Kindly direct any questions about this matter to my attention.

Respectfully submitted,
/s/
Frank Buono

cc: Scott Bergmann
Thomas Chandler, Chief, Disability Rights Office

The Commission Should Recognize Snap Telecommunications, Inc. as an Eligible Video Relay Service ("VRS") Provider, Which Will Foster Greater Competition and Broadband Deployment and the Delivery of Innovative Technologies and Services to the Disabled

I. Although Snap is Clearly Eligible to Receive Reimbursement for its VRS Minutes Under the Existing TRS Eligibility Rules, Snap Has Been Unjustifiably Denied Reimbursement.

A. The Commission's TRS eligibility rules establish **three** distinct ways for a TRS/VRS provider to be eligible for reimbursement from the Interstate TRS Fund:

> *"TRS providers eligible for receiving payments from the TRS Fund are:*
> *(1) TRS facilities operated under contract with and/or by certified state TRS programs pursuant to § 64.605; or*
> *(2) TRS facilities owned by or operated under contract with a common carrier providing interstate [TRS] services operated pursuant to § 64.604; or*
> *(3) Interstate common carriers offering TRS pursuant to § 64.604."* 47 C.F.R. § 64.604(c)(5)(iii)(F)

B. Snap is eligible under criterion #3, since it is an interstate common carrier[1] offering TRS/VRS services pursuant to § 64.604 including the mandatory minimum standards applicable to VRS providers. Snap is also eligible to provide services via its VRS facilities under criterion #2.

C. However, Snap has unjustifiably been denied participation in the Interstate TRS Fund.

1. On February 17, 2005, Snap submitted to NECA (the FCC's authorized TRS Fund Administrator) its "Notice of Intent to Participate" in the Interstate TRS Fund. NECA rejected this Notice and refused to reimburse Snap unless it was certified to provide VRS by a state as part of the state's TRS program.

2. In short, NECA insisted on eligibility under **criterion #1** even though Snap is already eligible under **criteria #s 2 and 3**, neither of which requires state certification. The FCC's Disabilities Rights Office (DRO) endorsed this NECA approach in discussions with Snap.

3. Thus, even though the FCC's rules still allow for **three** ways to be eligible for TRS Fund reimbursement, NECA and the DRO currently allow only **one** path to eligibility. Eligibility criteria #s 2 and 3 have essentially been read out of the rules.

4. Limiting eligibility to participate in the Interstate TRS Fund solely to VRS providers that are state certified under criterion #1 is not only flatly inconsistent with the plain language of the eligibility rules set out above, but it also is at odds with the Commission's decision to treat VRS purely as an ***interstate*** service (at least on an interim basis).[2] Since the Commission, and not the states, has primary jurisdiction over interstate TRS services under the ADA statute, it makes no sense, and contravenes the ADA, for the DRO and NECA to require that the states must certify and oversee a new VRS provider as the *sine qua non* for such provider's ability to participate in this *interstate* fund.

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[1] South Carolina has granted Snap a Certificate of Public Convenience and Necessity (CPCN) to provide local and interexchange access services on a common carrier basis. *See Application of USA Video Relay, Inc. for a Certificate of Public Convenience and Necessity to Provide Video Relay Services under Title IV of the Americans with Disabilities Act*, Order Granting Certificate, Order No. 2005-95, Dkt. No. 2004-320-C (rel. Mar. 2, 2005), *available at* http://dms.psc.sc.gov/attachments/82AF5EE6-0408-618C-968F23B7F2FE8769.pdf.

[2] *See Telecommunications Relay Service*, Second Report & Order, Order on Reconsideration, and Notice of Proposed Rulemaking, 18 FCC Rcd. 12379, ¶ 138 (2003) ("The Commission has previously found that . . . VRS should be reimbursed . . . on an interim basis, from the Interstate TRS fund.") ("*TRS Order and Further NPRM*").

5. Moreover, the Commission itself expressly recognized in its June 2004 VRS Order that there are still **three** ways to be eligible for reimbursement from the Interstate TRS Fund.[3] With respect to the latter two ways, the Commission observed the following:

> In these circumstances [*i.e.*, criteria #s 2 and 3], because of the absence of any certification process, there is no means by which the Commission can determine whether the providers are offering the TRS services in compliance with our rules. For this reason, we sought comment on whether, and if so, how, we should amend our rules to address the eligibility of TRS providers for compensation from the Interstate TRS Fund in those circumstances not presently covered by our rules.[4]

While the Commission thus properly acknowledged that there is currently no requirement for certification, state or federal, under criteria #s 2 and 3, it is asking (now in a pending Further NPRM) whether there *should be* a federal certification requirement. It is of course perfectly acceptable for the Commission to inquire in an NPRM whether it should change its rules to address a potential problem it believes may exist under such rules. ***However, it is an entirely different proposition and not acceptable as a matter of law or policy for the Commission, the DRO, or NECA to ignore the currently applicable rules in the interim period before such rules are actually changed***.[5]

Furthermore, in the interim period before the Commission determines how it may wish to change its rules regarding certification, it can ensure compliance with its rules by VRS providers that become eligible under criteria #s 2 or 3 through the TRS complaint process in 47 C.F.R. § 64.604(c)(6), which the Commission has previously noted "provides a mechanism by which we can learn about service problems and take necessary corrective action when it is not possible for a state to address the matter."[6]

D. While criterion #1 remains **theoretically** available as an avenue for VRS eligibility, as a **practical** matter it is a dead end as well. Snap has expended considerable efforts and resources to become eligible through a certified state TRS program. After being turned away by states that had previously certified other VRS providers years ago, Snap inquired with many other states. None expressed an interest in certifying Snap *or any other entity* as a VRS provider under the state's TRS program. It is our sense that criterion #1 is no longer a viable option for new entrants because states are either completely uninformed about TRS Fund eligibility for VRS providers (since VRS is a *non-mandatory* service under the FCC's rules), or they are reluctant to certify and vouch for a new VRS provider due to the additional costs and burdens that might entail in terms of the state's oversight and audit responsibilities.[7]

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[3] *See id.* ¶ 99 ("In addition [to eligibility criterion #1], our regulations ***currently provide*** that TRS providers may establish their eligibility by showing that they are 'owned by or operated under contract with a common carrier providing interstate [TRS] services,' or are '[i]nterstate common carriers offering TRS pursuant to § 64.604.'") (emphasis added) (citations omitted).

[4] *Id.*

[5] *See, e.g., A.D. Transport Express, Inc. v. U.S.*, 290 F.3d 761, 766 (6th Cir.2002) ("When an agency promulgates regulations, it is, however, bound by those regulations. It may not attempt to subvert the rule-making process through interpretations that find no support in the regulation's language."); *Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C.Cir.1979) ("[W]e do not believe the Commission should have authority to play fast and loose with its own regulations.").

[6] *TRS Order and Further NPRM* ¶ 104.

[7] Although the CPCN Snap received from South Carolina to provide local and interexchange access services also authorized Snap to provide VRS services in the state, the DRO and NECA have told Snap that the CPCN is insufficient under criterion #1.

E. *The upshot of the above analysis is that there is currently **no way** for Snap or any other entity to enter the VRS marketplace. The current misinterpretation of the eligibility rules has effectively created an intractable barrier to entry.*

II. Allowing Snap to Participate in the VRS Market Will Benefit Consumers in Multiple Ways, Including By Fostering Greater VRS Competition and Broadband Deployment, As Well As The Introduction of Innovative Technologies and Services and Additional Experienced Interpreters.

A. Greater VRS Competition. Today's VRS market is extremely dysfunctional, with a monopoly provider and a handful of fledgling companies. The current misinterpretation of the eligibility rules has permitted one VRS provider to effectively lock up 65% of the market. Unless the Commission quickly opens the market to new competitors like Snap, this provider will further solidify its entrenched position with little incentive to improve its service, which has been consistently criticized by the disabled community and others for dangerously-long wait times (sometimes *many minutes* before a call is even connected to an interpreter), lack of interoperability with other VRS services, and various other quality issues. Snap and the disabled community need Commission action to break the logjam that is denying greater competition and better service to VRS customers.

B. More Advanced, Consumer-Friendly Video Phone. Snap will make use of an advanced video phone - the Ojo™ (http://broadband.motorola.com/consumers/products/ojo/index2.html) - that is far superior in quality, user-friendliness, performance, and efficiency than anything currently in the VRS marketplace. The Ojo, which implements leading industry standards DOCSIS, SIP, and PacketCable™, will use a regular telephone number (rather than an IP address) so that it is easily accessible from either a video call or a TTY call. The Ojo has video mail functionality comparable to the standard telephone answering machine combo. Because the Ojo uses advanced transmission and error concealment technologies, it provides superior video quality at a lower data rate (110 Kbps) than existing video phones.

C. Enhanced VRS Features. Snap will also offer enhanced features that current VRS competitors have not yet deployed, including caller ID and call waiting. Snap has also partnered with Aequus Technologies (http://www.aequustechnologies.com/), a company using innovative technologies to make textbooks accessible to the hearing-impaired. Snap intends to leverage this expertise and experience to perform outreach to the hearing-impaired community. The outreach campaign targets the next generation of deaf and hard-of-hearing citizens and how they will utilize the telephone system. Snap is also conducting trials of placing public video telephone booths in local communities. The location of a public video telephone booth will be in partnership with organizations such as Goodwill Industries International.

D. More Qualified VRS Interpreters. Through its relationship with Communication Access Network of America, Inc. (http://www.caninterpreters.com/), Snap will offer access to a new network of experienced interpreters across the United States. This will provide a significant benefit to the hearing-impaired, particularly in light of the current national shortage of VRS interpreters and the resultant problems such as unacceptable call connection wait times. In addition, Snap and its partners are committed to funding scholarships at universities and schools for the deaf to increase the population of qualified interpreters.

E. Greater Broadband Deployment. VRS is an additional compelling application for broadband networks, and its use is not limited to the hearing-impaired community alone. The Commission has recognized the potential of VRS to stimulate greater broadband deployment: "[A]s the Commission embarks on a broader initiative to stimulate the deployment of broadband services, we are mindful that VRS can improve existing services for persons with disabilities and can be a

demand driver for broadband connections."[8] Snap's entry into the VRS marketplace will have a marked effect on broadband deployment given the technology and service enhancements it will introduce as described above.

III. The Commission Should Make Clear that Snap is Currently Eligible to Participate in the Interstate TRS Fund.

A. Possible Options for Commission Action. The Commission can take one of the following two actions (or both) to provide Snap the relief it needs to bring the foregoing benefits to consumers. Neither of these actions would require a new proceeding to be initiated.

1. Instruct DRO and NECA. The Commission should follow its existing rules under 47 C.F.R. § 64.604(c)(5)(iii)(F) and direct the DRO and NECA to accept Snap's 2/17/05 "Notice of Intent to Participate" and add Snap to the list of VRS providers eligible for reimbursement from the Interstate TRS Fund; and/or

2. Grant the Hands On Petition. The Commission should expeditiously grant the pending petition for reconsideration by Hands On Video Relay, at least to the extent it asks the Commission to affirm that interstate common carriers providing TRS/VRS services pursuant to 47 C.F.R. § 64.604 are eligible for reimbursement under criterion #3.[9]

B. Expedite VRS Rulemaking. In addition to taking one (or both) of the above actions so that Snap can begin to offer VRS service immediately, the Commission should accelerate resolution of its pending VRS rulemaking. This Further NPRM inquires, among other things, about whether a federal program is necessary to certify and/or oversee VRS providers and whether VRS should be mandatory.[10] Answers to these and other important questions are needed as soon as possible to bring greater certainty to the VRS marketplace. Snap is not suggesting that this action should be *in lieu of* one or both of the above options. Even if the Commission were to adopt a federal certification program for VRS in this rulemaking, that would likely take too much time to implement and thereby unnecessarily delay the above benefits to the disabled, as well as unreasonably delay relief to Snap whose investors and partners are insisting upon an expeditious launch of Snap's VRS service.

C. Snap Can't Do it Without the Commission's Assistance. Commissioner Adelstein has previously recognized that "VRS allows ASL and hearing individuals to have real time conversations that more closely mirror the speed and natural flow of voice-to-voice conversations."[11] "I wholeheartedly believe that…the Commission must strive for universal, or functionally equivalent, access to all telecommunications products and services."[12] Snap agrees with Commissioner Adelstein yet respectfully submits that the current state of the VRS marketplace is a far cry from providing "functionally equivalent" service to the disabled as required by the ADA. We therefore ask for the Commission's involvement by taking one or more of the above actions, which will allow Snap to bring the VRS marketplace closer to this "functionally equivalent" mandate.

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[8] *See TRS Order and Further NPRM* ¶ 243.

[9] *See Petition for Partial Reconsideration by Hands On Video Relay Service Inc.*, CC Dkt. 90-571, CC Dkt. 98-67, CG Dkt. 03-123, at 2-7 (filed Oct. 1, 2004). Note that even if the Commission were to require a provider to be a ***voice*** common carrier to be eligible under the rules, Snap would still qualify since it ***is*** a voice common carrier per the South Carolina CPCN cited above.

[10] *See TRS Order and Further NPRM* ¶ 250.

[11] *In the Matter of Telecommunications Relay Services,* Report & Order, Order On Reconsideration, and Further Notice of Proposed Rulemaking, Separate Statement of Commissioner Adelstein, 19 FCC Rcd. 12475 (2004).

[12] *TRS Order and Further NPRM*, Separate Statement of Commissioner Adelstein.