

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Telecommunications Relay Services and)
Speech-to-Speech Services for) CG Docket No. 03-123
Individuals with Hearing and Speech)
Disabilities)

COMMENTS OF SORENSON COMMUNICATIONS, INC.

Michael D. Maddix
Regulatory Affairs Manager
Sorenson Communications, Inc.
4393 South Riverboat Road
Suite 300
Salt Lake City, Utah 84123

Ruth Milkman
Gil M. Strobel
Richard D. Mallen
Lawler, Metzger, Milkman & Keeney, LLC
2001 K Street NW, Suite 802
Washington, DC 20006
(202) 777-7700
gstrobel@lmmk.com

Michael B. DeSanctis
Anjan Choudhury
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

September 4, 2007

Table of Contents

I. INTRODUCTION AND SUMMARY1

II. DESCRIPTION OF SORENSON’S INTERPRETER POLICIES.....4

III. DISCUSSION.....11

**A. The FCC Lacks Jurisdiction and Should Dismiss the Filing
In Its Entirety11**

B. The FCC Lacks Authority to Preempt Applicable State Law.....18

C. The Commission Should Deny the Filing on the Merits.....22

**1. The Non-Compete Clauses Do Not Violate Any
Existing Rule.....22**

**2. The Filers’ Factual Allegations Are Speculative and
Riddled with Errors.....23**

3. The FCC Should Deny the Filing on Economic Grounds28

IV. CONCLUSION32

Attachments:

Attachment A: Declaration of Christopher Wakeland

Attachment B: Sorenson Video Interpreter Policy

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Telecommunications Relay Services and)
Speech-to-Speech Services for) CG Docket No. 03-123
Individuals with Hearing and Speech)
Disabilities)

COMMENTS OF SORENSON COMMUNICATIONS, INC.

Sorenson Communications, Inc. (“Sorenson”) submits these comments in response to the recent Public Notice in which the Commission asks whether it should void certain provisions in private contracts between Sorenson and its video interpreters, as requested by five competitors of Sorenson in a “Petition for Declaratory Ruling and Complaint” filed on May 18, 2007.¹ As explained below, the Commission has no procedural or substantive basis to grant the extraordinary relief sought by the Filers.

I. INTRODUCTION AND SUMMARY

As Sorenson has previously demonstrated,² and demonstrates in more detail below, the Commission lacks jurisdiction to void the so-called “non-compete” provisions that appear in some of the private labor contracts between Sorenson and its video

¹ Public Notice, “Consumer & Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling Regarding Video Relay Service (VRS) Provider Employment Contracts with VRS Communications Assistants (CAs),” CG Docket No. 03-123, DA 07-3512 (rel. Aug. 3, 2007); Petition for Declaratory Ruling and Complaint Concerning the Provision of Video Relay Service by Sorenson Communications, Inc., filed by Hands On Video Relay Services, Inc., CSDVRS, LLC, Snap Telecommunications, Inc., GoAmerica, Inc., and Communication Access Center for the Deaf and Hard of Hearing (May 18, 2007) (“Filing” or “Filers”). (Unless otherwise indicated, all filings cited herein were made in CG Docket No. 03-123.)

² Motion to Dismiss of Sorenson Communications, Inc. (May 29, 2007) (“Motion to Dismiss”).

interpreters. These clauses – which have long been a staple of employment contracts – are governed by state law, are lawful under state law, are eminently reasonable in their scope, and do not violate any provision of the Communications Act or the Commission’s rules. Under these circumstances, the Commission lacks authority to preempt private parties’ freedom to enter into employment agreements that are consistent with the laws of the various states. Rather than taking the unprecedented step of abrogating individual clauses in a provider’s various employment agreements, the Commission should depend on state courts of competent jurisdiction to entertain any such requests made by parties with standing. Those courts have the requisite expertise in contractual employment matters under state common law.

In any event, even if the Commission were to engage in the unprecedented and legally unauthorized exercise of jurisdiction over video relay service (“VRS”) providers’ employment agreements, it would not have a basis to grant the relief requested by the Filers for at least two reasons. First, as noted, Sorenson’s non-compete policy is lawful under the law of states where it applies. Second, it would be inconsistent with sound public policy to vitiate the non-compete clauses at issue here, because doing so would diminish the incentive of all VRS providers to engage in their own efforts to recruit, train and retain an expanding pool of competent interpreters sufficient to meet the growing demand for VRS and to compete with each other in terms of service quality.

Section 225 requires the Commission to “ensure” that VRS is provided throughout the United States “in the most efficient manner.”³ Because the demand for VRS and VRS interpreters is growing, it is necessary to expand the pool of interpreters.

³ 47 U.S.C. § 225(b)(1).

Sorenson locates, recruits, and trains interpreters in order to increase the number of qualified VRS interpreters, and Sorenson's non-compete clauses enhance the incentives to invest in training new interpreters – including non- and lower-certified individuals who otherwise would not have the skills needed to handle VRS calls. A key purpose of Sorenson's non-compete policy is to provide Sorenson a modicum of assurance that after being trained at great expense to the company, a Sorenson interpreter will stay in Sorenson's employ for some reasonable time and will not be able to transfer Sorenson's proprietary processes, practices, and technology immediately to a rival provider. By locating, recruiting, and training new interpreters, Sorenson increases the size of the interpreter labor pool, thereby moderating the upward pressure on the costs of hiring, training and retaining competent interpreters that is naturally occurring due to the ongoing increase in demand for interpreting services. If Sorenson's non-compete clauses were voided, Sorenson would experience more rapid turnover of hired interpreters, thereby causing an increase in the associated costs.

If providers were not permitted to implement a reasonable non-compete policy, competing VRS providers would have the choice of filling their interpreter ranks by recruiting and training their own interpreters, or by recruiting Sorenson-trained interpreters. If, in contrast, providers were permitted to implement a reasonable non-compete policy, such a policy would discourage Sorenson's rivals from filling their interpreter ranks by recruiting Sorenson-trained interpreters immediately after they have completed their training. That, in turn, would give all VRS providers an incentive to train their own interpreters, and, consequently, all providers would contribute to expanding the pool of qualified interpreters. Further, if all providers took an active role in training their

own interpreters, users would benefit because providers would have an enhanced ability to compete with other providers on the basis of the effectiveness of their programs in producing capable VRS interpreters.

Although certain aspects of Sorenson's interpreter training are proprietary, the sizeable effort and resources that Sorenson devotes to its recruiting and training programs could be matched by any VRS provider, although each provider would, of course, want to conduct training according to its own specifications. Sadly, however, the Filers do not want to incur those costs, but are all too eager to free-ride on Sorenson's efforts. The Filers thus have targeted Sorenson's interpreters as a primary pool from which to recruit their own interpreters. The only obstacle in the Filers' path is the reasonable non-compete policy, which provides that for a period of six months after ceasing to work for Sorenson, the interpreter shall not work for another VRS provider within the same state as the Sorenson call center in which the interpreter used to work.

The Commission should not aid the Filers in their quest to poach video interpreters from Sorenson. Instead of attempting to free-ride on Sorenson's investment in recruiting and training, the Filers should focus on their own efforts to identify and train new interpreters. The Commission should help the Filers redirect their focus by dismissing or denying the Filing in its entirety.

II. DESCRIPTION OF SORENSON'S INTERPRETER POLICIES

Sorenson realizes that the lifeblood of its business is its team of highly qualified video interpreters. Sorenson takes great pride in this team and believes its

professionalism, skill, and integrity are unrivaled in the industry.⁴ These attributes did not develop by accident. Rather, Sorenson has invested substantial resources into designing and implementing a wide range of pro-interpreter policies, which provide its interpreters with a nurturing, rewarding, and safe working environment.⁵ For example, Sorenson provides attractive benefits to its interpreters; provides its interpreters extensive initial and on-the-job training, as well as opportunities for continuing education, at an annual cost of more than \$10,000 per interpreter; encourages its interpreters to upgrade their certifications, and increases their salaries when that goal is achieved; and gives its interpreters opportunities to participate in almost 200 intensive workshops to improve their interpreting skills and earn RID continuing education units.⁶

Sorenson also structures its policies so that interpreters who work for Sorenson also can work in the community if they desire.⁷ Sorenson places no limits on community interpreting, affords its interpreters working schedules with sufficient flexibility to provide community interpreting on a part-time basis, and actively encourages its interpreters to provide community interpreting.⁸ As a result, the vast majority of Sorenson's interpreters also work as community interpreters.⁹

⁴ Declaration of Christopher Wakeland on Behalf of Sorenson Communications, Inc., appended as Attachment A, ¶ 13 (“Wakeland Decl.”).

⁵ *Id.* ¶ 14; *see generally* Sorenson's Video Interpreter Policy, appended as Attachment B (“Policy”).

⁶ Wakeland Decl. ¶¶ 14, 19; Policy at 1-2, 4.

⁷ Policy at 2-3.

⁸ Wakeland Decl. ¶ 18; Policy at 2-3.

⁹ Policy at 2-3. Sorenson also seeks to protect the safety and welfare of its interpreters in various ways, and has implemented proprietary, state-of-the-art call-handling processes and tools that interact seamlessly with its interpreters, thereby enhancing the welfare of Sorenson's interpreters as well as Sorenson's ability to staff its

Sorenson's interpreter policies focus not only on its existing labor force, but also on the new interpreters Sorenson needs to hire in order to meet growing demand in the face of the current interpreter shortage.¹⁰ As the largest VRS provider, Sorenson has sought to expand the pool of qualified video interpreters. To meet growing demand, Sorenson therefore hires not only fully-qualified certified interpreters, but also a large number of lower- and non-certified interpreters who already possess significant interpreting skills, but need some additional supervision, mentoring, and skill development in certain areas in order to be able to handle VRS calls.¹¹ Sorenson places these newly-hired interpreters in its Video Interpreting Program ("VI-P"), which provides each new hire a minimum of sixty hours of mentoring by an already-active Sorenson interpreter; only after this mentoring is completed is the new interpreter permitted to handle a VRS call.¹² The VI-P training costs Sorenson many thousands of dollars per newly-hired interpreter.¹³ This year alone, Sorenson expects to train about 150 interpreters in the VI-P, and to incur millions of dollars in ongoing training for all interpreters, as well as the opportunity cost of lost time borne by qualified Sorenson interpreters who serve as VI-P mentors.¹⁴ Sorenson incurs additional costs by

call centers efficiently and to provide the highest quality VRS. Wakeland Decl. ¶¶ 15-16, 29; Policy at 4.

¹⁰ Wakeland Decl. ¶ 17.

¹¹ *Id.* ¶¶ 7, 17.

¹² *Id.* ¶ 17; Policy at 1.

¹³ Wakeland Decl. ¶ 17. These VI-P costs are in addition to the annual per-interpreter training costs of more than \$10,000 spent on all Sorenson interpreters. *Id.*

¹⁴ *Id.* ¶ 17.

encouraging its interpreters to become certified, or to obtain a higher certification, and then paying those interpreters a higher salary once they succeed in that effort.¹⁵

If Sorenson's rivals were free to hire Sorenson's new interpreters immediately after completion of their training, more rapid turnover would only raise the costs of recruiting, training, and retaining interpreters. If providers were not permitted to implement a reasonable non-compete policy, competing VRS providers would have the choice of filling their interpreter ranks by recruiting and training their own interpreters, or by recruiting Sorenson-trained interpreters. If, in contrast, providers were permitted to implement a reasonable non-compete policy, such a policy would discourage Sorenson's rivals from filling their interpreter ranks by recruiting Sorenson-trained interpreters immediately after they have completed their training. That, in turn, would give all VRS providers an incentive to train their own interpreters and, consequently, all providers would contribute to expanding the pool of qualified interpreters. Further, if all providers took an active role in training their own interpreters, users would benefit because providers would have an enhanced ability to compete with other providers on the basis of the effectiveness of their programs in producing capable VRS interpreters.

Sorenson's non-compete policy enhances its incentive to invest in recruiting, training, and retaining interpreters. This modest non-compete policy applies only for six months and only to the extent the former employee seeks to work for another VRS provider in the same state as the call center in which the interpreter used to work for Sorenson.¹⁶ The former interpreter remains free to work in any number of other areas,

¹⁵ *Id.* Sorenson also reimburses its interpreters for the costs of becoming certified or gaining a higher certification. *Id.*; Policy at 2.

¹⁶ Wakeland Decl. ¶ 21.

including community interpreting.¹⁷ Sorenson believes this provision helps justify its substantial expenditures on recruiting, training, and retaining interpreters and helps prevent disclosure of certain confidential information to Sorenson's rivals.¹⁸

Like other aspects of its business, Sorenson periodically revisits its employment agreements and, if warranted, revises their terms. When Sorenson first received the Filing, Sorenson's management asked for an overall review of interpreter policies and employment agreements on a state-by-state basis. As a result, Sorenson adopted a comprehensive Interpreter Policy Statement, which is attached hereto. Formerly, for example, the non-compete clauses in its employment agreements lasted for one year after cessation of work for Sorenson. Those provisions remain justified. Nevertheless, although many of its current interpreters are subject to this older provision, under the new Policy, Sorenson will not seek to enforce that provision for more than six months after an interpreter ceases to work for Sorenson. In any event, all of the legal arguments in these comments apply with equal force to both the new and old versions of Sorenson's non-compete provisions.

Sorenson's policies regarding its interpreters have served the public well, helping to make Sorenson the most trusted VRS provider among the deaf community and the

¹⁷ *Id.*

¹⁸ *Id.* ¶¶ 25-33. The Filers argue that Sorenson's interpreters do not have access to proprietary information and that Sorenson does not need a non-compete clause to protect such information because the employment contracts already contain a confidentiality provision. Filing at 16-18. These arguments lack merit. First, as explained in the Wakeland Declaration, Sorenson's interpreters come into daily contact with evolving, proprietary call handling processes and equipment, disclosure of which would harm Sorenson's business interests. Wakeland Decl. ¶ 33. Second, the Filers' suggestion that Sorenson replace its non-compete provision with a confidentiality provision effectively would oblige Sorenson to sue its former employees in order to protect confidential information.

most desirable VRS employer among the interpreter community. Sorenson's interpreter policies are described in more detail in the attached Policy Statement and in the attached declaration of Christopher Wakeland, Sorenson's Vice President, Interpreting.

Finally, as Mr. Wakeland attests, Sorenson's interpreter non-compete policies have been specifically designed to be consistent with state labor laws.¹⁹ The vast majority of states enforce covenants not to compete between employers and employees, so long as they are reasonable. While the definition of "reasonable" varies from state to state, generally covenants will be enforced if the employer has a legitimate protectable interest and the restrictions are reasonable in scope with regard to location, time and activity.²⁰

The non-compete covenants in Sorenson's employment agreements are both necessary to protect Sorenson's legitimate business interests and reasonable in scope. Sorenson's video interpreters are provided access to and information about Sorenson's proprietary business information and systems, which are utilized by the interpreters in performing their duties for Sorenson.²¹ In addition, Sorenson derives customer goodwill from its interpreters and provides them with extensive and specialized training upon hiring, at an annual cost to Sorenson of over \$10,000 per interpreter.²²

All of these interests have been recognized by various courts to be legitimate protectable interests supporting the enforcement of reasonable restrictive covenants.²³

¹⁹ Wakeland Decl. ¶ 20.

²⁰ See, e.g., *Allen v. Rose Park Pharmacy*, 237 P.2d 823 (Utah 1951).

²¹ See Wakeland Decl. ¶¶ 28-33.

²² *Id.* ¶¶ 14, 17.

²³ See, e.g., *Vector Security Inc. v. Stewart*, 88 F.Supp.2d 395, 400 (E.D. Pa. 2000) ("Trade secrets of an employer, customer goodwill and specialized training and skills are

The majority of the employment agreements executed by Sorenson's interpreters include a choice of law provision stating that the agreements would be governed by Utah law, which has recognized "trade secrets, the goodwill of his business, or an extraordinary investment in the training or education of the employee" as legitimate protectable interests.²⁴ Moreover, state courts and legislatures throughout the country have long recognized that substantial training expenditures and the need to protect proprietary information are important and legitimate interests that are protectable through covenants not to compete.²⁵

Sorenson's covenants are also reasonable in time, geography and scope. The restrictions endure only for six months, which has consistently been afforded a presumption of reasonableness as the very minimum necessary to protect the employer's

all legitimate interests protectable through a general restrictive covenant") (citation omitted); *The 7's Enterprises v. Del Rosario*, 143 P.3d 23 (Haw. 2006) (specialized training may serve as a legitimate protectable interest for a non-competition agreement).

²⁴ *Robbins v. Finlay*, 645 P.2d 623, 627 (Utah 1982).

²⁵ See, e.g., Fla. Stat. § 542.335(1)(b)1., 2., & 5. (recognizing trade secrets, valuable confidential business or professional information, and extraordinary or specialized training as legitimate business interests for a covenant not to compete); *Deutsch v. Barsky*, 795 A.2d 669, 678 (D.C. 2002) (noting that "investment in employee training" and protection of trade secrets are articulated legitimate protectable interests); *Voorhees v. Guyan Mach. Co.*, 446 S.E.2d 672, 677 (W.Va. 1994) (recognizing the employer's investment in an employee's skills, and confidential or unique information, such as trade secrets, as protectable interests under West Virginia law); *Alex Sheshunoff Management Serv., L.P. v. Johnson*, 209 S.W.3d 644, 655 (Tex. 2006) (providing specialized training and confidential information to an employee can render a covenant not to compete enforceable); see also *InterMetro Indus. Corp. v. Kent*, No. 3:07-cv-00075, 2007 WL 518345 (M.D. Pa. Feb. 12, 2007) (recognizing that "the Texas Supreme Court modified its ruling in *Light* by holding that a covenant not to compete is enforceable when an employee also agrees not to divulge confidential information, the employer promises to furnish the at-will employee with confidential information and specialized training, and the employer performs on its promise after the contract is formed, thus making the non-compete provision ancillary to an otherwise enforceable agreement.") (citation omitted).

legitimate interests.²⁶ The covenants also encompass only a statewide geographic area and prohibit interpreters only from working for direct competitors of Sorenson within that area, leaving them free to pursue other interpreter work anywhere. Because the non-compete covenants are reasonable and necessary to protect legitimate business interests of Sorenson, they are enforceable before courts of competent jurisdiction.

III. DISCUSSION

A. The FCC Lacks Jurisdiction and Should Dismiss the Filing In Its Entirety

As Sorenson demonstrated in its Motion to Dismiss, the Commission lacks jurisdiction to consider the Filers' request that the Commission void the non-compete clauses that appear in some Sorenson employment contracts. Not only does the Commission generally lack jurisdiction to resolve disputed provisions in labor contracts, but none of the statutory provisions cited by the Filers – sections 201(b), 225, or 2(a) of the Act – confers direct or ancillary jurisdiction in this matter.

In their Opposition to Sorenson's Motion to Dismiss, the Filers fail to show otherwise. The Filers acknowledge the FCC's long-standing policy against adjudicating

²⁶ See, e.g., Fla. Stat. § 542.335(1)(d)1. (2007) (six months or less presumed reasonable); *Padco Advisors, Inc. v. Omdahl*, 179 F. Supp. 2d 600, 606 (D. Md. 2002) (“A six month period is certainly reasonable if a covenant not to compete is to have any value at all.”); *Okuma America Corp. v. Bowers*, 638 S.E.2d 617, 620 (N.C. Ct. App. 2007) (“six-month restriction is well within the established parameters for covenants not to compete in this State”); *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 70 (2d Cir. 1999) (finding six-month restriction reasonable in duration); *Sys. & Software, Inc. v. Barnes*, 886 A.2d 762, 765-66 (Vt. 2005) (same); *Bed Mart, Inc. v. Kelley*, 45 P.3d 1219, 1223 (Ariz. Ct. App. 2002) (same); *ProPath Services, LLP v. Quest Diagnostics*, No. 3:00-cv-02391, 2002 WL 535056 (N.D. Tex Apr. 9, 2002) (same); *Super. Consulting Co., Inc. v. Walling*, 851 F. Supp. 839, 847 (E.D. Mich. 1994) (same).

private contractual disputes,²⁷ but claim that this dispute is different because it “threaten[s] . . . the achievement of functionally equivalent relay service.”²⁸ This newly-minted rationale does not withstand scrutiny.²⁹ The Filers’ Opposition (like their initial Filing) fails to cite a single precedent where the FCC has reformed a private employment contract, and does not even attempt to explain how Sorenson’s non-compete clauses have harmed functional equivalency when, by the Filers’ own admission, the quality of VRS has improved vastly during the very period when those clauses have been in effect.³⁰

²⁷ See Opposition to Motion to Dismiss Petition for Declaratory Ruling and Complaint Concerning the Provision of Video Relay Service by Sorenson Communications, Inc., filed by Hands On, *et al.*, at 3 (June 25, 2007) (“Opposition”); Motion to Dismiss at 3 & nn.4-5 (citing FCC precedents); *see also Regents of Univ. System of Georgia v. Carroll*, 338 U.S. 586, 602 (1950) (holding that the Commission is not the proper forum to litigate contractual disputes between licensees and others); *Applications of Arecibo Radio Corp.*, Memorandum Opinion and Order, 101 F.C.C. 2d 545, ¶ 8 (1985) (because the Commission does not possess the resources, expertise, or jurisdiction, the Commission normally defers to judicial determinations regarding the interpretation and enforcement of contracts); *Loral Satellite, Inc., et al.*, Order and Authorization, 19 FCC Rcd 2404, ¶ 37 (IB 2004) (“As the Commission has held, absent a showing of a violation of the Commission’s rules or federal statute, the Commission is not the proper forum to raise private contractual disputes.”); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, ¶ 108 n.327 (2005) (“The Commission has a long-standing policy of refusing to adjudicate contract law questions for which a forum exists in the state courts.”); *Federal-State Joint Board on Universal Service; American Telecommunication Systems, Inc.; Equivoice, Inc.; Eureka Broadband Corporation TON Services, Inc.; Value-Added Communications, Inc.*, Order, 22 FCC Rcd 5009, ¶ 14 (2007) (“As we have consistently indicated, we will not adjudicate claims arising out of private contractual agreements.”).

²⁸ Opposition at 5.

²⁹ The Filers did not raise a functional equivalency argument in their initial Filing. In fact, the phrase “functionally equivalent” (or any variant thereof) appears only once, and then only in passing, in the entire 31 pages of the Filing. See Filing at 30.

³⁰ See Filing at 5-6 (citing various improvements in VRS).

Bereft of any legal foundation,³¹ the Filers’ resort to a series of conclusory statements and bizarre theories that, in the Filers’ oft-repeated view, “plainly” or “certainly” demonstrate that the FCC has jurisdiction over this matter.³² There is nothing “plain” or “certain” about the Filers’ claims, however. For example, despite having had two bites at the apple, the Filers have yet to hazard an explanation as to how section 225 might plausibly be read to confer FCC jurisdiction over a disputed clause in a private employment contract. Nor have the Filers offered a plausible theory as to how Sorenson might be subject to FCC jurisdiction under section 201(b) of the Act. In its Motion to Dismiss, Sorenson explained that it is not subject to section 201(b) because VRS is an information service and not a common carrier or telecommunications service.³³ As evidence, Sorenson pointed to the Commission’s ruling that “TRS providers do not

³¹ The Filers fault the Sorenson Motion to Dismiss for not discussing “the numerous cases Petitioners cited showing the Commission will intervene in contract matters when its regulatory goals risk being frustrated.” Opposition at 5; *see also id.* at 6 n.2. Sorenson chose not to discuss these precedents for the simple reason that they are self-evidently inapposite. None of the cited cases involved private employment contracts, and all but a handful of them involved common carriers. As Sorenson noted in its Motion to Dismiss (and explains again below), Sorenson is not a common carrier. The few remaining precedents cited by the Filers involve the FCC’s assertion of ancillary jurisdiction. These decisions all predate the D.C. Circuit’s seminal *Broadcast Flag* decision, which broke new ground by enforcing strict limits on the FCC’s subject matter jurisdiction under Title I of the Act. *See American Library Ass’n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005) (“*Broadcast Flag*”). As Sorenson explained in its Motion to Dismiss (and demonstrates in more detail below), under this strict standard, the Commission may not assert ancillary jurisdiction over this matter.

³² *See* Opposition at 6 (TRS providers “are plainly common carriers”); *id.* (Sorenson “plainly is providing common carrier service”); *id.* (Sorenson “certainly [is] subject to the Commission’s jurisdiction under section 225”); *id.* at 7 (prerequisites for the assertion of ancillary jurisdiction “are plainly met here”).

³³ Motion to Dismiss at 3-4.

provide telecommunications services” and “are not telecommunications carriers.”³⁴ In response, the Filers assert that “TRS providers may not strictly be telecommunications carriers under the Act, but they are plainly common carriers.”³⁵ The Filers apparently are not aware that the FCC repeatedly has found that “the term ‘telecommunications carrier,’ which was added to the Act in 1996, has essentially the same meaning as the pre-existing term ‘common carrier,’”³⁶ and that the Court of Appeals for the District of Columbia has affirmed this finding.³⁷ Nor do the Filers seem to be aware that the Commission

³⁴ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, ¶ 81 (2000) (“*2000 Improved TRS R&O*”); see also *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Order on Reconsideration, 20 FCC Rcd 20577, ¶ 7 & n.30 (2005) (“*TRS Federal Certification Order*”) (entities that are “not traditional common carriers” under the Act may provide VRS and receive compensation from the Fund either by becoming part of a certified state program or subcontracting with an entity offering TRS and eligible for compensation from the Fund); *id.* ¶ 22 n.84 (“*non-common carriers* seeking to offer VRS or IP Relay may continue to do so by joining a certified state program or subcontracting with an entity offering TRS and eligible for compensation from the Fund”) (emphasis in original); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5442, ¶ 38 n.130 (2006) (“*Interoperability Ruling*”) (“the Commission has permitted some entities that do not provide voice telephone service (and are not common carriers) to offer VRS if they are part of a certified state TRS program”).

³⁵ Opposition at 6.

³⁶ *Salsgiver Telecom, Inc. v. North Pittsburgh Telephone Company*, Memorandum Opinion and Order, 22 FCC Rcd 9285, ¶ 8 (2007) (DA 07-2150) (citations omitted); see also *AT&T Submarine Systems, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 21585, ¶ 6 (1998); *Federal-State Joint Board on Universal Service*, Order on Remand, 16 FCC Rcd 571, ¶ 2 (2000) (“The term ‘telecommunications carrier’ includes only carriers that offer telecommunications on a common carriage basis.”) (citations omitted).

³⁷ *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921, 924-27 (D.C. Cir. 1999).

previously has identified Sorenson as being a “non-common carrier.”³⁸ As these precedents make clear, the Commission must reject the Filers’ bizarre theory that Sorenson is a common carrier.³⁹

Finally, the Filers have yet to state a plausible basis to support their claim that section 2(a) of the Act authorizes the Commission to assert ancillary jurisdiction over this matter. As the Filers recognize, such jurisdiction may be asserted only if (i) the subject of the proposed FCC regulation is covered by the general grant of jurisdiction under Title I of the Act, which extends to “all interstate and foreign communication by wire or radio”;⁴⁰ and (ii) the subject of the regulation is “reasonably ancillary” to the FCC’s performance of its duties authorized by a provision of the Act outside of Title I. Neither requirement is met here.

³⁸ *Interoperability Ruling* ¶ 39 (“TRS is a service that certain common carriers are required to offer and that *some non-common carriers such as Sorenson* have voluntarily chosen to offer”) (emphasis added, internal parentheses omitted).

³⁹ Equally meritless are the Filers’ claims that Sorenson is a common carrier because (i) it has been certified by the state of Utah as an intrastate interexchange carrier, and (ii) the FCC requires demonstration of common carrier status to receive FCC certification as an eligible TRS provider. Opposition at 5-6. With respect to the first claim, since Sorenson does not provide interexchange service (or any other telecommunications service) as part of its provision of TRS, the Commission may not treat Sorenson as an interstate common carrier in this matter. *See* 47 U.S.C. § 153(44) (“A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services”). With respect to the second claim, the FCC’s rules allow VRS providers to be certified by the FCC or operated under contract with and/or by a state. *See TRS Federal Certification Order* ¶ 4. Sorenson is eligible for reimbursement for VRS by virtue of its contract with the state of Utah. Because Sorenson has not been certified by the Commission, it has never demonstrated its common carrier status, as would be required for FCC certification, nor has it ever stated or suggested that it provides a common carrier service in connection with its provision of VRS.

⁴⁰ 47 U.S.C. § 152(a).

As the D.C. Circuit's 2005 *Broadcast Flag* decision makes clear, Title I confers subject matter jurisdiction only over activities that occur *during* the "process of radio or wire transmission."⁴¹ Thus, for example, the Commission lacks Title I subject matter jurisdiction to regulate how communications equipment performs before the commencement of a radio transmission or after the transmission's cessation. Similarly, the Commission lacks jurisdiction to regulate the non-compete clauses in employment contracts signed by video interpreters: those contracts are executed well before the commencement of any VRS call handled by that interpreter, and the non-compete clauses in those contracts have legal effect only after the interpreter ceases handling VRS calls for Sorenson.

In their Opposition, the Filers suggest that these temporal limits on the FCC's Title I subject matter jurisdiction do not apply because video interpreters "are an essential instrumentality of VRS."⁴² This theory has no merit. As the Commission recently reaffirmed, the FCC may not use its ancillary authority unless the proposed rules target activity that occurs, or equipment that is in the process of being used, "during the course of the transmission or receipt" of the communication.⁴³

Thus, although video interpreters are integral to the transmission of VRS calls, the Commission does not have *carte blanche* discretion to assert ancillary jurisdiction over all their activities. For example, the Commission lacks ancillary authority to require

⁴¹ *Broadcast Flag*, 406 F.3d at 700, 703, 705, 706, 707, 708. The Filers apparently were not even aware of this decision, relying instead on the FCC order that the *Broadcast Flag* decision overturned. See Filing at 29-30.

⁴² Opposition at 7.

⁴³ *IP-Enabled Services; Implementation of Sections 255 and 251(a)(2)*, Report and Order, 22 FCC Rcd 11275, ¶ 23 n.98 (2007) (FCC 07-110).

interpreters to get at least eight hours of sleep per night or to consume no more than two alcoholic drinks after work. Even though those regulations might result in heightened on-the-job alertness for interpreters (thereby improving the accuracy of VRS interpretations) or reduced absenteeism (thereby reducing the demand for new interpreters), the Commission lacks ancillary authority to adopt such rules because they target activity that occurs before or after (but not during) the transmission of VRS calls. Likewise, voiding Sorenson's non-compete clauses would have no effect on any interpreter activity undertaken "during the course of the transmission or receipt" of a VRS call. Under these circumstances, the Commission lacks authority to assert ancillary jurisdiction in the manner proposed by the Filers.

Finally, even if the Filers could show that the FCC has subject matter jurisdiction under Title I, the Commission could not assert ancillary jurisdiction unless voiding the non-compete clauses were "reasonably ancillary" to the performance of a non-Title I provision of the Act.⁴⁴ The Filers have not shown how this second precondition to the assertion of ancillary jurisdiction could be met, except to state (without explanation) that voiding the non-compete clauses would prevent increases in both VRS labor costs and answer speeds.⁴⁵ As explained below, however, there is no factual merit to either of these claims. Although the constrained supply of qualified interpreters has put upward pressure on all VRS providers' costs of hiring, training and retaining an expanding pool of competent interpreters sufficient to meet the growing demand for VRS, Sorenson's non-compete clauses are not part of that problem. To the contrary, those clauses are part of the solution, since they enhance Sorenson's incentive to recruit, hire, and train lower-

⁴⁴ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

⁴⁵ Opposition at 7.

and non-certified interpreters, thereby expanding the VRS labor pool. Clearly, then, voiding the non-compete clauses would provide no benefit to VRS users or to the TRS Fund. Accordingly, voiding Sorenson's non-compete clauses cannot be reasonably ancillary to the performance of any Commission duty under section 225.

B. The FCC Lacks Authority to Preempt Applicable State Law

The contractual clauses at issue in this proceeding have been designed to be lawful and enforceable under applicable state law.⁴⁶ If the Commission were, erroneously, to assert jurisdiction and void those clauses, it would be preempting the laws of those jurisdictions.⁴⁷ Any such preemption would be both unlawful and unwise.

As an initial matter, section 414 of the Act states: "Nothing in this Act contained shall *in any way* abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."⁴⁸ Voiding the non-compete clauses in Sorenson's employment contracts would not merely "abridge or alter" the attendant common law remedies currently available to Sorenson under state law, but would eliminate those remedies *in toto*. This preemptive abrogation of "remedies now existing at common law" would violate the express mandate of section 414.

Even if the Commission somehow could sidestep section 414, it should not do so. As the Commission has recognized, preemption is an extraordinary remedy that, in the

⁴⁶ See Wakeland Decl. ¶ 20. Tellingly, the Filers have not identified even a single state in which Sorenson uses an agreement that is contrary to the laws of that jurisdiction.

⁴⁷ Even if the FCC believed the non-compete clauses were not enforceable under state law, that belief would only be a prediction, based on law outside the FCC's expertise and facts unknown to the FCC, as to how a court of competent jurisdiction would rule in a particular case. The Commission should not be in the business of making such predictions, and certainly should not act on them in a way that preempts courts' traditional authority over private contracts.

⁴⁸ 47 U.S.C. § 414 (emphasis added).

absence of an express Congressional directive, the FCC “does not exercise . . . lightly, and employs . . . *only as necessary* to carry out the provisions of the Communications Act.”⁴⁹ The Commission’s disinclination to preempt is especially strong when the object of the contemplated preemption is private parties’ freedom of contract.⁵⁰ As the Commission has found in various contexts, the integrity of private contracts is a fundamental value that the Commission generally strives to protect:

[P]reserv[ing] the integrity of contracts . . . is vital to the proper functioning of any commercial enterprise, including the communications market. In fact, the long-term health of the communications market depends on the certainty and stability that stems from the predicable performance and enforcement of contracts.⁵¹

Thus, even in the limited circumstances – not applicable here – where the Commission has authority to rewrite private contracts, it has exercised that authority only if the parties seeking contractual reformation have conclusively shown that great harm to the public interest would result absent contractual reformation.⁵²

⁴⁹ *Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support Structures, and Amendment of Section 97.15 of the Commission’s Rules Governing the Amateur Radio Service*, Memorandum Opinion and Order, 17 FCC Rcd 333, ¶ 7 (2001) (citation omitted, emphasis added) (“*Amateur Radio Order*”).

⁵⁰ See, e.g., *Amateur Radio Order* ¶¶ 1-2, 8 (stating that the FCC is “reluctant to preempt private parties’ freedom of contract,” absent a compelling reason, and refusing to preempt covenants, conditions, and restrictions contained in private agreements voluntarily entered into); *Don Schellhardt*, Letter, 22 FCC Rcd 4025 (WTB 2007) (same).

⁵¹ *Ryder Communications, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 13603, ¶ 24 (2003); see also *Amateur Radio Order* ¶ 8 (refusing to preempt private covenants, given “the importance of preserving the integrity of contractual relations”).

⁵² For example, under the so-called Sierra-Mobile doctrine, the Commission may revise the terms of a private contract only if (i) the contract is between two common carriers concerning communications services, and (ii) it has been demonstrated that the contract’s terms inflict a “substantial and clear detriment to the *public* interest,” as

The Filers have not come close to making the strong showing that might justify preempting the contractual clauses at issue in this proceeding. The Filers have not suggested that Congress has expressly or implicitly preempted VRS providers' freedom of contract or authorized the Commission to do so. Nor have the Filers identified any provision of the Act whose fulfillment *necessitates* preemption of the contractual clauses at issue here; as noted, absent such a showing the Commission has refrained from preempting private parties' freedom of contract. Finally, the Filers have not demonstrated any harm to the public interest,⁵³ much less the "substantial and clear detriment" that might justify contractual reformation.⁵⁴ Instead, the Filers merely theorize that the "likely" impact of the relevant clauses is to (i) raise the overall cost of VRS; (ii) impede new entry into the VRS market; and (iii) force smaller firms to exit the market.⁵⁵ These unsupported claims are readily refuted. With respect to the first claim,

opposed to merely "*private economic harm.*" *IDB Mobile Communications, Inc. v. COMSAT Corporation*, Memorandum Opinion and Order, 16 FCC Rcd 11474, ¶¶ 14-15 (2001) ("*IDB Mobile*") (emphasis in original); *see also id.* ¶ 15 (proponents of contractual reformation under Sierra-Mobile face a high burden of proof, one that is "much higher than the threshold for demonstrating unreasonable conduct under sections 201(b) and 202(a) of the Act").

⁵³ The Filers speculate that they might suffer private harm by virtue of the non-compete clauses. These claims are unsupported by any data and, in any event, are not relevant to assessing whether the public has been harmed.

⁵⁴ *IDB Mobile* ¶ 15. As noted, the Sierra-Mobile doctrine applies only to contracts between two common carriers, and thus does not apply to the instant contractual dispute. Nonetheless, that doctrine is instructive because it shows that, even where the Commission has exercised jurisdiction to reform contracts, it has done so only where a high evidentiary burden – demonstrating "substantial and clear" harm to the public interest – has been satisfied.

⁵⁵ Letter from John S. Sanders, Bond & Pecaro, to George L. Lyon, counsel to Hands On (April 23, 2007), attached as Exhibit 4 to Filing ("Sanders Letter"). Although Mr. Sanders is not an economist and does not hold an advanced degree in economics, the Filers would have the Commission believe that the Sanders Letter offers a meaningful "economic analysis" of the contractual clauses here at issue. Filing at 12. As

the Filers have placed no evidence into the record to indicate that the non-compete clauses have raised the overall cost of VRS, and there is no reason to believe that the clauses have had this effect.⁵⁶ The second and third claims are belied by the rapid expansion of the number of VRS providers, and the fact that not a single provider has ever exited the market.⁵⁷ Moreover, providers other than Sorenson have been able to grow rapidly (about 45 percent in the last eleven months alone), notwithstanding the contractual clauses that the Filers claim are so harmful.⁵⁸ Thus, all available evidence contradicts the Filers' claims that the relevant contractual clauses have harmed the VRS business or the public. The record therefore lacks a sound basis for the Commission to preempt the freedom of Sorenson and interpreters to enter into mutually beneficial employment agreements.

Were the Commission nonetheless now to take the unprecedented step of voiding such agreements, it would weaken the contractual foundation on which competition in the

demonstrated below, however, the Sanders Letter reflects neither sound economics nor analytic rigor; as a result, it is inadequate, superficial, and flawed and fails to demonstrate any harm to the public interest.

⁵⁶ As noted, unlike many providers, Sorenson expands the interpreter labor pool by investing in the upfront training of interpreters who otherwise would not be qualified to handle VRS calls. The non-compete clauses help ensure that Sorenson reaps at least some return on its large initial investment in human resources. These clauses enhance Sorenson's incentives to train new interpreters and expand the labor pool, thereby moderating the upward pressure on the costs of hiring, training, and retaining interpreters that is naturally occurring due to the ongoing increase in demand for interpreters.

⁵⁷ Although the ownership and/or name of some providers has changed, the number of providers has never decreased.

⁵⁸ See *infra* at 31 & note 90. This growth has occurred even though the VRS market has been burdened by a cumbersome and flawed rate-setting methodology. See Joint Comments of CAC, *et al.* on Rate Methodology FNPRM at 3 (Oct. 30, 2006); Hands On Reply Comments on Rate Methodology FNPRM at 1 (Nov. 13, 2006); Comments of Sprint Nextel on Rate Methodology FNPRM at 1 (Oct. 30, 2006); Reply Comments of AT&T on Rate Methodology FNPRM at 1 (Nov. 13, 2006).

VRS industry has flourished. Providers would be emboldened to scrutinize all sorts of contracts entered into by competitors, and then petition the FCC to void any provision that is not to their liking. The rise of such regulatory opportunism would enervate the competitive culture that has hitherto vitalized the VRS industry. Innovation, outreach, and service quality would suffer, harming the deaf community. And, deprived of the assurance of stable contracts, prospective providers would be less likely to enter the VRS business, and existing providers would have more difficulty attracting capital. By declaring open season on private contracts, moreover, the Commission would undermine other communications sectors. Rather than harm the public interest in these ways, the Commission should dismiss or deny the Filing for seeking relief that is beyond the proper ambit of the FCC's authority.

C. The Commission Should Deny the Filing on the Merits

Beyond the procedural barriers described above, the Filing fails on the merits for the reasons described below.

1. The Non-Compete Clauses Do Not Violate Any Existing Rule

As the Filers have acknowledged, Sorenson's non-compete clauses do not violate any existing provision of the FCC's rules.⁵⁹ While the Commission has some discretion to adopt new rules through adjudicatory proceedings, sound public policy dictates that complex, industry-wide issues – such as those involved in the instant proceeding – not be resolved in a series of *ad hoc* adjudications that single out the practices of a particular

⁵⁹ Opposition at 7 (conceding there is “some merit” to Sorenson's claim that the FCC's existing rules do not prohibit non-compete agreements and withdrawing the complaint against Sorenson).

provider.⁶⁰ If the Commission declines to dismiss the Filing, it should examine all practices implicated by the Filing, including contractual non-compete provisions in the interpreter labor contracts of any VRS provider or their affiliates or sub-contractors.⁶¹

2. The Filers' Factual Allegations Are Speculative and Riddled with Errors

Although the Filing is long on rhetoric and speculation, it is short on hard facts. Moreover, what few facts are alleged are both unsupported and, in many cases, false.

The Filing is supported only by a one-page fact declaration whose main assertion is that Sorenson's non-compete clauses have "made it difficult" for one of the Filers (Hands On) to open an unidentified call center located somewhere in the Southwest.⁶² The exact nature of this "difficulty" is not specified, however, much less distinguished from the general difficulty that all providers are facing because of the current shortage of

⁶⁰ *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, ¶ 218 (2002) ("[A] rulemaking proceeding is generally, a better, fairer and more effective method of implementing a new industry-wide policy than is the ad hoc and potentially uneven application of conditions in isolated, proceedings affecting or favoring a single party. . . . This preference is based on the principle that a rulemaking under the Administrative Procedure Act's provisions for notice and broad public participation assures fairness, the opportunity to develop the record and mature consideration.") (citations omitted).

⁶¹ See Wakeland Decl. ¶ 24.

⁶² Declaration of Ronald E. Obray, attached as Exhibit 2 to Filing, ¶ 3 ("Obray Decl."). The Filers also have provided the Commission with only a single, unexecuted, unverified agreement that they claim is representative of Sorenson's contracts. In fact, Sorenson uses a variety of different contracts. Any sweeping decision to void all of the relevant non-compete provisions would require, at a minimum, a review of each type of contract used by Sorenson and the legal and policy implications of reforming those contracts in the manner requested.

qualified interpreters.⁶³ Moreover, the declaration admits that, notwithstanding the alleged “difficulty” caused by the non-compete clauses, “Hands On is in the process of opening an additional call center in the southwestern United States.”⁶⁴ And, in a recent *ex parte* presentation, Hands On predicts that it will “open several more call centers in 2007.”⁶⁵ Clearly, whatever “difficulty” Hands On has experienced has had little if any effect.⁶⁶

Of the scant facts alleged in the Filing, many are dubious and some are demonstrably false. For example, the Filers state that Sorenson’s non-compete clauses “appear” to impose a nationwide restriction; in fact, the plain language of the clauses

⁶³ The declaration does not even allege that Hands On or any other Filer has attempted to hire, without success, a former Sorenson interpreter who was subject to a Sorenson non-compete clause.

⁶⁴ Obray Decl. ¶ 2. Sorenson believes that Hands On in fact recently opened this call center and is now using it to process VRS calls.

⁶⁵ See Letter from George L. Lyon, Jr., counsel to Hands On, to Marlene H. Dortch, FCC Secretary (June 26, 2007), attached presentations at 2.

⁶⁶ See Wakeland Decl. ¶ 10 (attesting that Hands On has repeatedly opened call centers in locations where Sorenson had previously opened a call center). Businesses in competitive markets face “difficulties” every day. What distinguishes successful from unsuccessful businesses is their ability to overcome these problems. Sorenson, for example, also finds it difficult to open new call centers. See Wakeland Decl. ¶ 12. Sorenson overcomes these difficulties through hard work and ingenuity. For example, Sorenson constantly seeks to improve its software and technology, which allows it to maximize interpreter utilization. Sorenson also conducts extensive research to locate small pockets of interpreters (including lower- and non-certified interpreters) around the nation. Once it locates such a pocket, Sorenson has to take a number of additional steps (including sending out advance teams) to make sure the prospective location is suitable for supporting a viable call center. Once that determination is made, Sorenson must undertake a number of other steps before it can open the new call center, including hiring the new interpreters, training those interpreters, locating an appropriate site for the new call center, outfitting that site with the necessary equipment and utilities, and assigning and relocating a management team for the new center. After it locates a potentially viable pocket of interpreters, it typically takes Sorenson at least six to seven months of effort before a new call center begins to operate, and often takes over a year. Wakeland Decl. ¶ 12.

makes clear that the restriction is only statewide.⁶⁷ The Filers suggest that the “potential labor pool for VRS” consists of slightly more than 6,400 interpreters nationwide; in fact, there are about 11,000 – 12,000 interpreters who hold either a RID or state certification.⁶⁸ The Filers claim that the non-compete clauses “hinder competition in the VRS marketplace”; this claim cannot be squared with the fact that both the number of VRS providers and the number of reimbursable minutes handled by Sorenson’s competitors have expanded while Sorenson’s non-compete clauses have been in effect.⁶⁹ The Filers deem it “doubtful” that Sorenson’s interpreters have access to confidential business information; in fact, Sorenson’s interpreters come into contact with competitively sensitive or proprietary information on a daily basis.⁷⁰ The Filers characterize the training provided by VRS providers to newly hired interpreters as being “very limited”; while this may be true for the Filers, it is not true for Sorenson, which provides extensive

⁶⁷ Filing at iii; *id.* at 2 (purporting to excerpt from a Sorenson employment contract a non-compete clause that states, “Employer and Employee acknowledge and agree that the geographic scope of this covenant is *any state in the United States*, or in any substantially similar political subdivision of any other country, that Employee helps Employer do business in while Employee is employed with Employer”) (emphasis added).

⁶⁸ Filing at 8; Wakeland Decl. ¶ 5; *see also* Stax Analysis at 3, attached to Reply Comments of Sorenson on Rate Methodology FNPRM (Nov. 13, 2006). The fact that the labor pool is larger than what the Filers suggest does not diminish the severity of the labor shortage faced by VRS providers. Given the rapid growth in VRS, all providers, including Sorenson, are finding it difficult to locate qualified interpreters. As explained below, Sorenson is in the same position as every other provider in locating and hiring these new interpreters, with the notable exception that, unlike some other providers, Sorenson works to expand the labor pool by hiring lower- and non-certified interpreters and then improving their skills through extensive training.

⁶⁹ Filing at 15; *see infra* at 31.

⁷⁰ Filing at 17 n.17; Wakeland Decl. ¶ 33.

initial and on-the-job training to its interpreters, particularly those who are non- or lower-certified.⁷¹

The Filers also insinuate that Sorenson's non-compete clauses exacerbate the interpreter shortage that currently threatens the provision of VRS.⁷² This claim is wrong. As explained above, to meet growing demand and expand the interpreter labor pool, Sorenson hires a large number of lower- and non-certified interpreters and then trains them in its VI-P, at a cost of many thousands of dollars per newly-hired interpreter.⁷³ Sorenson incurs additional costs by encouraging its interpreters to become certified, or to obtain a higher certification, and then paying those interpreters a higher salary once they succeed in that effort.⁷⁴

By training new interpreters to provide high-quality VRS, Sorenson significantly increases the pool of qualified interpreters. Sorenson believes it is unique in this regard: most, and perhaps all, of Sorenson's competitors hire only certified interpreters and do not seek to hire non- or lower-certified interpreters or to provide them the extensive

⁷¹ Filing at 23; Wakeland Decl. ¶¶ 8, 17, 26. The Filing also claims that Sorenson is the "only" VRS provider that uses non-compete clauses with its interpreters. Filing at 2. It is Sorenson's understanding, however, that one or more other providers (or their affiliates or subcontractors) also use non-compete clauses with their interpreters, and that these clauses are stricter than Sorenson's provision in that they prohibit a current employee from doing community interpreting work for another employer. *See* Wakeland Decl. ¶ 24. In any event, were the Commission to consider the Filing on the merits, it would have to investigate the usage of non-competes among all VRS providers. Any ruling by the Commission would have to apply equally to all providers, and their affiliates or subcontractors.

⁷² Filing at ii, 12, 15-16 & Sanders Letter at 3-5.

⁷³ Wakeland Decl. ¶ 17.

⁷⁴ *Id.* Sorenson also reimburses its interpreters for the costs of becoming certified or gaining a higher certification. *Id.*

training they receive at Sorenson.⁷⁵ By expanding the pool of qualified interpreters, Sorenson serves the public interest by striving to ensure that the supply of interpreters keeps pace with new demand, and by improving the careers and well-being of interpreters who otherwise would not be able obtain certification or provide VRS.

Given the high cost of Sorenson's interpreter training, it is reasonable for Sorenson to seek to have the interpreters it has trained continue to work for Sorenson rather than being poached by a competitor immediately after their training.⁷⁶ One of the purposes of the non-compete clauses is to prevent this scenario from occurring.⁷⁷ To that end, Sorenson's policies place reasonable and limited restrictions on interpreters: for a period of only six months, and only within the state in which the interpreter used to work for Sorenson, the interpreter agrees not to move to a competing VRS provider. Interpreters are still free to work in the community and provide ASL-to-English interpreting in a variety of other contexts and locations.⁷⁸ As a result, the deaf community receives the benefits of an expanding and well-trained interpreter pool, with much of the training paid for by Sorenson.

⁷⁵ *Id.* ¶ 8. For example, both Hamilton and Hands On require new interpreters to be certified. *See* Hamilton Video Relay VRS Interpreter Opportunities, *available at*: <<http://www.hamiltonrelay.com/videorelay/interpreteropp.htm>> (requiring RID certification (CI, CT, CI/CT, CSC), NAD (V), or top-level state screening); Hands On VRS Employment, *available at*: <https://secure.hovrs.com/employment/employment_2.aspx> (requiring RID certification (CI, CT, CSC, NIC), NAD level IV or V; or ACCI level IV or V); *see also* Filing at 7.

⁷⁶ Wakeland Decl. ¶ 27.

⁷⁷ *Id.* ¶ 26-27.

⁷⁸ *See* Brief Comment of Darryl Crouse, founder and former president of Snap (July 5, 2007) ("There is an abundance of work available in the [ASL-to-English] interpreting profession.").

Like other allegations in the Filing, the claim that Sorenson's non-compete clauses exacerbate the interpreter shortage simply fails to withstand scrutiny. When the Filing is stripped of false or dubious claims, no factual basis remains on which the Commission could predicate a finding that the public interest has suffered any harm as a result of Sorenson's non-compete clauses. Certainly, on this record, the Commission cannot find that the public interest has suffered the clear and substantial harm that might warrant the extraordinary relief requested by the Filers.

3. The FCC Should Deny the Filing on Economic Grounds

The Filing's "economic analysis" – embodied in the Sanders Letter attached to the Filing – also is fundamentally flawed. This "analysis" is muddled and superficial, relying on faulty economics and failing to demonstrate that the Sorenson non-compete clauses have caused or will cause any harm to the public.⁷⁹ In particular, the Sanders Letter suffers from at least two major flaws.

⁷⁹ Mr. Sanders cites to three articles to support his general conclusion that labor markets generate the greatest benefits when employment decisions can be made "at will." Sanders Letter at 4-5. None of these articles is relevant to the instant proceeding. The first citation is to a presentation by Morris Kleiner to the Federal Trade Commission and the Department of Justice. This presentation focuses entirely on whether occupational licensing by the government is beneficial and is unrelated to non-compete clauses between a private business and its employees. The second cite is to an article by Mark Garmaise that presents an econometric analysis of non-compete agreements between firms and their executives. Among the conclusions that Mr. Sanders neglects to mention is that greater enforceability of non-compete agreements *encourages* a firm to invest in its managers. For the executives studied by Professor Garmaise, this is offset by a reduction in the executives' own investment in their skills. Mr. Sanders gives us no reason to believe that this finding would apply to non-management VRS interpreters. Finally, the article by Courtney McGrath from Kiplinger Personal Finance is an advice column for employees facing a decision whether to accept a severance package with a non-compete clause. It is hard to see the relevance of this column to the policy matters at issue here.

First, Mr. Sanders fails to acknowledge that non-compete clauses often benefit firms and workers alike without reducing the overall level of competition in the marketplace. For example, such clauses often benefit firms by preventing spillover of an employer's proprietary knowledge. Preventing a firm's rivals from having immediate access to that firm's proprietary knowledge is especially important in certain high-technology and rapidly-evolving industries such as VRS. Using a non-compete clause to achieve this end is less costly and more efficient than the alternatives, including trying to enforce trade secret laws (such as those cited by the Filers).⁸⁰ Non-compete clauses also benefit employees by preserving the incentive for a firm to train its workers in various skills. Absent a non-compete agreement, firms may be reluctant to invest in such training.⁸¹ By encouraging firms to enhance the knowledge and skills of employees, non-compete clauses makes employees more useful, benefiting the public interest.

The VRS business is a textbook example of a field where the use of non-compete clauses makes economic sense. The business is evolving at a rapid pace and relies on various advanced technologies and processes.⁸² At Sorenson, moreover, interpreters come into contact with proprietary variants of those technologies and processes.⁸³ Sorenson is eager to train new interpreters, and most new interpreters are eager to receive this training.⁸⁴ Sorenson's non-compete clauses provide Sorenson with the necessary

⁸⁰ See Ronald Gilson, "The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete," 74 N.Y.U. L. Rev. 575 (June 1999); *cf.* Filing at 17-18.

⁸¹ See Paul Grout, "Investment and Wages in the Absence of Binding Contracts: A Nash Bargaining Approach," *ECONOMETRICA*, Vol. 52, Issue 2, pp. 449-60 (March 1984).

⁸² Wakeland Decl. ¶ 24.

⁸³ *Id.* ¶¶ 28-33.

⁸⁴ See *id.* ¶¶ 8, 14-15, 17.

assurance that other firms will not gain the entire benefit of this training with none of the associated cost, and that Sorenson will have at least six months before a former Sorenson interpreter could be in a position to transfer any proprietary information to Sorenson's rivals.⁸⁵

The second fundamental flaw of the Sanders letter is that it relies on a demonstrably false claim about the market for VRS interpreters: that Sorenson's employment contracts place other providers at a competitive disadvantage relative to Sorenson by impeding them from having sufficient staff to meet the demand for the services.⁸⁶ In fact, Sorenson and its rivals compete on equal footing for the services of interpreters to meet growing demand, and Sorenson's non-compete clause gives it no advantage in this critical area. As an initial matter, Sorenson has not come close to monopolizing the interpreter pool, as Mr. Sanders suggests.⁸⁷ In fact, by Mr. Sanders' own estimate, Sorenson's workforce comprises no more than about twenty percent of the pool, properly defined.⁸⁸ Moreover, the shortage of ASL interpreters puts pressure on all VRS providers, which face the same costs in attracting new interpreters in this tight labor market. These costs are unaffected by the non-compete clauses in Sorenson's

⁸⁵ See Wakeland Decl. ¶¶ 25, 27.

⁸⁶ Filing at 10; Sanders Letter at 4, 5.

⁸⁷ See Sanders Letter at 2; Opposition at 7. Mr. Sanders' analysis of monopolization, and his application of that analysis to labor contracts for VRS interpreters, is riddled with errors. For example, Mr. Sanders mistakenly speaks of Sorenson's "monopolization" of a large portion of the VRS labor market when he should have analyzed whether Sorenson has "monopsony" power in that market. Sorenson does not have monopsony power over the input market of VRS interpreters. Mr. Sanders' single-minded focus on the HHI of the VRS market (a measure traditionally used in the merger context for assessing the degree of concentration in an output market) is symptomatic of the lack of sound economic analysis in his letter.

⁸⁸ Sanders Letter at 1.

employment contracts, and Sorenson derives no advantage from those clauses in attracting new interpreters.⁸⁹

In light of these facts, it is not surprising that Mr. Sanders is unable to cite any hard evidence that Sorenson's non-compete clauses have caused Sorenson's rivals to suffer any economic harm. In fact, what evidence is available shows the non-compete clauses have not harmed Sorenson's rivals. Using Mr. Sanders' assumption that Sorenson's share of reimbursable minutes has remained constant at about 80 percent, providers other than Sorenson have increased their output by about 45 percent in the last eleven months alone, from 731,000 monthly minutes to 1,063,000 monthly minutes.⁹⁰ Their ability to grow at this rapid pace is powerful evidence that entry and expansion have not been deterred by the non-compete clause or by any cost disadvantage faced by smaller firms.

For the foregoing reasons, the Filing, including the Sanders Letter, is devoid of any sound factual or economic predicate that could justify voiding the Sorenson non-

⁸⁹ This is a case where the market will address problems of onerous non-compete clauses. Given the growth in VRS and the current tightness of the labor market, interpreters could avoid the non-compete clause if they found no offsetting benefits (such as better training, pay, or working conditions). New interpreters could simply choose to work for one of the ten providers other than Sorenson or to take any number of non-VRS interpreting jobs. If this were to occur – and, it is instructive that it has not – the market alone would force Sorenson to cease including those clauses in its employment contracts. As in other situations, the Commission should not interfere with self-correcting market forces. *See, e.g., Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Rcd 12475, ¶ 198 (2004) (“we have not mandated particular interpreter certifications [because] [w]e trust that any VRS provider that employs CAs who are not able to interpret effectively and accurately will rapidly lose business to VRS providers that employ VRS CAs who can do so, and therefore this issue is self-correcting”).

⁹⁰ *See* NECA, TRS Monthly Fund Reports, August 2006 through July 2007, available at: <http://www.neca.org/source/NECA_Resources_4285.asp>.

compete clauses. In the absence of any such predicate, any FCC decision to void the non-compete clauses would be arbitrary, capricious, and/or an abuse of discretion, in violation of the Administrative Procedure Act.

IV. CONCLUSION

Granting the requested relief would contravene the limits of the FCC's jurisdiction; unlawfully preempt state law; require the FCC to abuse its discretion by relying on erroneous factual claims and unsound economic theories; undermine the integrity of private contracts; and exacerbate the shortage of video interpreters. For these and other reasons explained above, the Commission should dismiss or deny the Filing in its entirety.

Respectfully submitted,

/s/ Ruth Milkman

Ruth Milkman
Gil M. Strobel
Richard D. Mallen
Lawler, Metzger, Milkman & Keeney, LLC
2001 K Street NW, Suite 802
Washington, DC 20006
(202) 777-7700
gstrobel@lmmk.com

/s/ Michael B. DeSanctis

Michael B. DeSanctis
Anjan Choudhury
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Michael D. Maddix
Regulatory Affairs Manager
Sorenson Communications, Inc.
4393 South Riverboat Road
Suite 300
Salt Lake City, Utah 84123

September 4, 2007

Attachment A

**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

**DECLARATION OF CHRISTOPHER WAKELAND ON BEHALF OF
SORENSEN COMMUNICATIONS, INC.**

Based on my personal knowledge and on information learned in the course of my business duties, I, Christopher Wakeland, declare as follows:

1. My name is Christopher Wakeland. I am employed by Sorenson Communications, Inc. ("Sorenson") as Vice President, Interpreting. In that position, I am responsible for overseeing the interpreting operations for Sorenson Video Relay Service ("VRS"). In the course of my duties, I have been involved with establishing the criteria for hiring new interpreters, determining the salaries and benefits paid to new and existing interpreters, identifying potential new sources of interpreters, determining the sizes and locations of new call centers, making new call centers operational, developing and implementing training programs for new interpreters, and approving the employment agreements used for all Sorenson interpreters. I also keep apprised of key facts concerning the competitive environment in which Sorenson operates, including the salaries Sorenson's rivals offer new interpreters, the locations in which those companies plan to open new call centers, the date on which any new call center opens, and

the extent to which other VRS companies attempt to hire away Sorenson interpreters.

2. Separate and apart from my duties as a Sorenson employee, I am a National Certified American Sign Language Interpreter. In that capacity, I hold the Registry of Interpreters for the Deaf (“RID”) Certificate of Interpretation (“CI”), and a Utah Master Level Interpreter Certification Certificate.
3. I have been asked to describe the market for video interpreters, the steps Sorenson takes to locate and recruit new interpreters to meet its growing needs, the steps Sorenson takes to open new call centers, Sorenson’s policies and practices with respect to interpreters, the nature of Sorenson’s employment contracts, and the reasons Sorenson asks its employees to sign non-compete clauses.

Market for Video Interpreters

4. Sorenson began offering VRS in 2003. Several providers entered the business before Sorenson, and at least five other providers have entered since Sorenson began offering service. Over time, Sorenson has grown by conducting extensive outreach to identify and educate deaf individuals about the benefits of VRS and by offering users a high-quality video relay service. A key part of this service is the video interpreters that Sorenson recruits and trains to provide users with seamless interpreting between American Sign Language (“ASL”) and spoken English.
5. VRS is a growing business and Sorenson is constantly looking for new interpreters. Finding new interpreters is becoming increasingly difficult as demand for VRS continues to grow much more rapidly than the supply of

qualified interpreters. Today, I estimate that nationwide, there are about 6,000 ASL interpreters who hold a national certification from the RID and another 5,000 to 6,000 who hold a state certification.

Locating and Recruiting New Interpreters

6. Sorenson has developed several strategies to meet its ever-growing need for new video interpreters. For example, Sorenson offers prospective new interpreters attractive salaries and benefits and has adopted a number of pro-interpreter policies that make Sorenson a rewarding place to work. I describe these policies more fully below.
7. Sorenson seeks to find potential interpreters through a variety of methods, including by conducting vigorous outreach and extensive research to identify new sources of qualified interpreters. Most of the interpreters Sorenson hires are also either certified by RID (CSC, CI, CT, NIC or NAD 4 or 5) or hold an interpreter certification issued by a state (such as Texas BEI level 3, 4, or 5; Utah Intermediate and Masters levels; or Missouri and Kansas levels 4 and 5). However, due to the constrained labor market, Sorenson has also had to recruit and hire a number of interpreters who either are not certified or have a lower-level certification. These individuals already possess significant interpreting skills, but need some additional supervision, mentoring, and skill development in certain areas in order to be able to handle VRS calls. As I describe more fully below, Sorenson provides these non- and lower-certified interpreters with the training and mentoring they need to provide high-quality VRS.
8. I am not aware of any VRS provider other than Sorenson that carefully searches

for the most promising non- and lower-certified interpreters and then recruits, hires, and trains them extensively to prepare for and pass a state or RID interpreting exam and become work-ready for handling VRS calls. To the best of my knowledge, most (and perhaps all) of Sorenson's rivals hire only nationally certified interpreters. Hands On, for example, states on its website that it will hire only interpreters who have a RID certification (CI, CT, CSC, NIC), a NAD level IV or V certification, or an ACCI level IV or V certification with a minimum of three years experience.

Opening New Call Centers

9. Sorenson opens call centers in areas where it believes there are sufficient concentrations of interpreters who are already qualified or who may become qualified through the training Sorenson provides. To date, Sorenson has opened over 60 call centers nationwide. These centers range in size, depending on the available supply of interpreters in the area.
10. Many of Sorenson's rivals have opened VRS call centers in locations where Sorenson has already opened a call center. For example, Hands On has opened call centers in at least five cities where Sorenson previously had opened a call center. In my opinion, this tendency to follow Sorenson into a particular location shows that Sorenson's rivals are not frozen out of a particular geographic area by Sorenson's presence in that area. Only occasionally will other providers open VRS call centers in locations where Sorenson does not have a call center.
11. Sorenson continues to look for additional sources of interpreters and locations for new call centers. The reason behind this is simple. The RID-certified pool is

growing more slowly than demand, and interpreter training programs on average are graduating between 8 to 10 interpreters per year who are not ready for VRS work until 4 to 7 years after graduating. As a result, there is a pressing need to expedite the training, mentoring, and development of interpreters to be qualified to handle VRS calls in order to meet the FCC's speed-of-answer requirements and the skill-set demands of VRS users.

12. Any VRS provider that wants to expand capacity must at some point be willing to open new call centers, which involves substantial research and on-the-ground legwork. Sorenson approaches this process by first scouring the nation to locate pockets of available interpreters, including lower- and non-certified individuals. Once a potentially viable pocket has been located, Sorenson sends an advance team to meet with the interpreters. The team inquires about the needs and wishes of the interpreters, including the salary they would want if they were to work for Sorenson. The team also assesses the extent to which other local entities are competing for the interpreters' time and whether the local interpreter population is likely to grow in the future. If, based on these factors, the new location appears to be viable, Sorenson must then take a number of additional steps in order to open the new call center, including: (i) hiring the new interpreters; (ii) locating an appropriate site for a call center (for instance, a site that has good lighting, public transportation, and access to high-speed Internet service); (iii) ordering equipment and utilities needed for the site; (iv) building the call center; (v) assigning a management team for the call center; and (vi) flying the newly-hired interpreters to a nearby call center for initial intensive training. After Sorenson has located a

potentially viable pocket of interpreters, it typically takes a minimum of six to seven months to open the call center, though that process sometimes takes longer than a year.

Sorenson's Policies and Practices Concerning Interpreters

13. Sorenson prides itself on having a highly motivated and highly qualified team of video interpreters. I believe that the professionalism, skill, and integrity of this team are unrivaled in the VRS business.
14. To encourage these attributes, Sorenson has adopted a number of pro-interpreter policies, which are designed to provide its interpreters with a nurturing, rewarding, and safe working environment. For example, Sorenson: encourages each interpreter to work in the local community regardless of employment status; provides extensive initial and ongoing training to its interpreters, at an annual cost of more than \$10,000 per interpreter; and provides attractive salaries that are commensurate with the wages in each local area to its full-time, part-time, and contract interpreters. The full-time interpreters receive health insurance and each interpreter receives extensive initial and on-the-job training and opportunities for continuing education. Sorenson also encourages its interpreters to upgrade their certifications, and increases their salaries when that goal is achieved. As a commitment to making sure interpreters are not over-worked and are available for community work, Sorenson places caps on the number of allowable hours that each level of employment is allowed to work.
15. Sorenson also seeks to protect the safety and welfare of its interpreters in various ways, including training its interpreters to handle emergency, obscene, or

harassing calls in a manner that is designed, consistent with FCC rules, to minimize the substantial stress these calls inflict on interpreters; and implementing a cutting-edge counseling program for interpreters who experience “vicarious trauma” as a result of handling such calls.

16. As I describe more fully below, Sorenson also implements proprietary, state-of-the-art call-handling processes and tools that interact seamlessly with its interpreters. Sorenson constantly seeks to improve such in-house capabilities in order better to accommodate its business needs as well as those of its interpreters.
17. Sorenson’s interpreter policies focus not only on its existing labor force, but also on the new interpreters Sorenson needs to hire in order to meet growing demand in the face of the current interpreter shortage. As noted, to meet growing demand, in addition to hiring highly certified interpreters, Sorenson hires lower- and non-certified interpreters, many of whom lack the necessary skills and training to provide VRS. Sorenson places these newly-hired interpreters in its Video Interpreting Program (“VI-P”), which provides each new hire at minimum sixty hours of mentoring by an already-active Sorenson interpreter; only after this mentoring is completed is the new interpreter permitted to handle a VRS call. The VI-P training costs Sorenson many thousands of dollars per newly-hired interpreter, in addition to the annual per-interpreter training costs of more than \$10,000 for all Sorenson interpreters. This year alone, Sorenson expects to train about 150 interpreters in the VI-P, and will incur millions of dollars in ongoing training for all interpreters, as well as the opportunity cost of lost time borne by qualified Sorenson interpreters who serve as VI-P mentors. Sorenson incurs

additional costs by encouraging its interpreters to become certified or to obtain a higher certification, paying for those costs, and then paying those interpreters a higher salary once they succeed in that effort.

18. Sorenson is sensitive to the needs of the deaf community and respects the desire of many interpreters to split their time between VRS interpreting and community interpreting. Accordingly, Sorenson provides interpreters with the flexibility to work only part time for Sorenson and encourages its interpreters to engage in community-based interpreting while they are employed by Sorenson.
19. Sorenson also has devoted substantial resources to developing almost 200 intensive workshops to permit Sorenson's interpreters to improve their interpreting skills. Each of these workshops is presented by a highly-qualified individual and confers on attendees credit in the form of RID continuing education units ("CEUs"). These workshops are described in detail in a confidential, 90-page Sorenson catalogue that allows Sorenson interpreters readily to choose workshops that interest them and then request a particular presentation in that interpreter's call center. I am not aware of any other VRS provider that has devoted the time, money, or human resources to developing a similar catalogue or set of training opportunities for interpreter employees.

Sorenson's Employment Agreements

20. All Sorenson interpreters sign agreements reflecting the terms of their relationships with Sorenson. Interpreters sign these agreements of their own free will and are afforded an opportunity to have the agreement reviewed by an attorney prior to signing. Sorenson uses different agreements depending on the

type of interpreter and the state in which the interpreter will be working. All of the agreements were drafted by labor lawyers from a firm hired by Sorenson. Each agreement is tailored to the specific employment laws of the states in which it is to be used.

21. Sorenson has a modest non-compete policy, which provides that for a period of six months after ceasing to work for Sorenson, he or she will not work for another VRS provider within the state in which the interpreter used to work for Sorenson. The interpreter remains free to work for any number of non-VRS employers. For example, Sorenson's employment agreements in no way impede an interpreter's ability to work for any agency or non-VRS company that has need of interpreters in any capacity. Thus, a current or former Sorenson interpreter may perform community interpreting work at any time.
22. The deaf community as a whole has a high demand for interpreters, and, as a result, many non-VRS jobs are currently available for interpreters.
23. Like other aspects of its business, Sorenson periodically revisits its employment agreements and, if warranted, revises their terms. Formerly, for example, the non-compete clauses in its employment agreements lasted for one year after cessation of work for Sorenson. Although many of its current interpreters are subject to this older provision, Sorenson has decided that it will not seek to enforce that provision for more than six months after an interpreter ceases to work for Sorenson.
24. The VRS business is evolving at a rapid pace and relies on various advanced technologies and processes. Like many employers, particularly in high tech

industries, Sorenson uses non-compete clauses in its contracts with its employees, including the interpreters it hires to provide VRS. This is not an unusual practice in our field. In fact, I know of at least one interpreting agency that uses non-compete clauses: Sign Language Associates (“SLA”), which is a contract provider for CSDVRS. It is my understanding, however, that unlike Sorenson, this agency prevents its full-time interpreters from working for any other interpreting agency, including agencies devoted to community interpreting. It is also my understanding that various other interpreting agencies in different parts of the country have non-compete clauses that prohibit their current employees from working for any other entity as an interpreter in any capacity, including to provide community interpreting. Sorenson, on the other hand, explicitly allows its former interpreters as well as its current interpreters to work in the community, or for any employer other than another VRS provider.

Justifications for the Non-Compete Provisions

25. Sorenson uses non-competes for several reasons including to: (1) protect its investments in recruiting, training, and retaining interpreters; and (2) protect its confidential information.
26. *Protecting investments in interpreters:* As explained above, Sorenson makes substantial investments in identifying and recruiting potential interpreters, training new interpreters and providing continuing education to existing interpreters. These investments include: researching the demographics of interpreters and building call centers in areas calculated to be attractive to a critical mass of interpreters; training new hires on Sorenson’s systems and protocols; providing

mentoring to new interpreters to prepare them for the rigors of VRS interpreting; training non- and lower-certified interpreters in Sorenson's VIP; and offering continuing education to certified interpreters so they can maintain their certification.

27. I believe that without the non-compete clauses, Sorenson would not be able to protect its substantial investment in interpreter recruitment and training and would run the very real risk that competitors would wait for Sorenson to identify and train new interpreters and then cherry-pick those interpreters once they were fully qualified. In fact, Sorenson's competitors already try to hire Sorenson's interpreters, specifically targeting Sorenson employees in their recruitment efforts.
28. *Protecting confidential information:* Sorenson also uses non-compete clauses to protect confidential information about its business, which continues to evolve at a rapid pace. This confidential information is extensive and often complex, and Sorenson therefore has created a dedicated team of employees who provide all video interpreters proprietary training that is specific to being a video interpreter at Sorenson. Another team is dedicated to providing non-proprietary training to improve interpreters' general skills both for VRS and community interpreting.
29. Sorenson's interpreters use proprietary, state-of-the-art equipment, software, and processes that Sorenson has integrated into a single call-handling application. To the best of my knowledge, this application, which Sorenson refers to as "the Client," is unique in the VRS business. The Client contains at least 60 features that are seamlessly integrated in a way that frees the interpreter from having to

perform a number of administrative tasks, thereby permitting the interpreter to focus on his or her primary task of providing high-quality translation of ASL to English and vice versa.

30. While certain features of the Client may, by themselves, be proprietary, it is even clearer that the entire integrated application is highly proprietary. An analogy may help explain what I mean. Today, many households are filled with various electronic devices – such as stereos, televisions, DVD players, thermostats, electric blinds, and home security systems – that operate via remote control. It can be bewildering and cumbersome to try to keep track of and use a separate remote control for each device, and many families therefore try to use a single “Universal Remote” that controls all the electronic systems in their house. The Sorenson Client is analogous to a Universal Remote. It integrates a number of disparate features into a single software/equipment “package,” thereby making the life of the video interpreter much easier than it otherwise would have been and, by extension, improving the quality of the video interpreting provided by the interpreter. If Sorenson’s interpreters were free to disclose even the broad contours of the Client, Sorenson’s rivals would be able to begin reverse engineering their own versions of the Client, to the detriment of Sorenson.
31. Apple’s iPhone is another good example of what I mean. Almost none of the individual features of the iPhone are new. However, the ingenious manner in which Apple integrated and presented those features – within a single, seamless, easy-to-use interface – is highly original. Prior to the public release of the iPhone, this integrated sequencing was highly confidential and proprietary. Sorenson’s

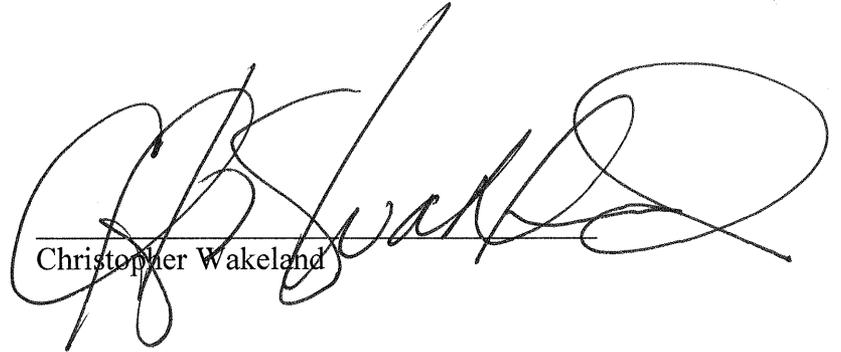
Client contains a number of features that have been integrated and sequenced in unique ways that are every bit as ingenious, confidential, and proprietary as those of the pre-release iPhone. Even if an interpreter does not understand how every feature works, he or she would be able to describe the integration and sequencing of those features in a way that could be very valuable to Sorenson's competitors.

32. Sorenson's interpreters are also trained to handle the unique demands of VRS. For example, Sorenson trains its interpreters to handle emergency, obscene, or harassing calls in a manner that is designed, consistent with FCC rules, to minimize the substantial stress these calls inflict on interpreters. Sorenson also has implemented a cutting-edge counseling program for interpreters who experience "vicarious trauma" as a result of handling such calls. The precise features of these and many other training processes are proprietary and are not divulged to the public. Like its Client, moreover, Sorenson is constantly updating these processes to better accommodate its business needs as well as those of its interpreters.
33. Sorenson's Client, as well as its other processes and tools, confer a business advantage on Sorenson, and it would hurt Sorenson's competitive position if interpreters were to share that information with competitors. While working at Sorenson, video interpreters come into contact with this information on a daily basis. In addition, interpreters are often aware of the timing of new software releases or other business plans (such as the planned release of a new videophone). It is also worth noting that all Sorenson employees are subject to non-compete requirements. Sorenson did not single out interpreters; rather, all its

employees come into contact with sensitive information that could be exploited by competitors in a rapidly evolving, high tech industry.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on September 4, 2007.



Christopher Wakeland

Attachment B

	POLICIES & PROCEDURES Video Interpreter Policy
Approved by: <i>Pat Noh</i>	Date <i>8/28/07</i>

VIDEO INTERPRETER POLICY

I. PURPOSE:

To establish an outstanding working environment for Sorenson's video interpreters (Interpreters), in a manner that encourages Interpreters to enhance their professional development and help the local communities in which they work.

II. POLICY:

Sorenson Communications, Inc. (Sorenson), which provides Sorenson Video Relay Service (VRS), encourages all Interpreters to pursue and maintain the highest standards of excellence, and seeks to provide a rewarding, nurturing, and safe working environment amenable to that pursuit. Sorenson also seeks to support the local communities in which its call centers are located, including by encouraging Interpreters to provide community interpreting.

III. PROCEDURES AND PRACTICES:

To achieve the foregoing Policy, Sorenson has implemented the following procedures and practices:

A. Training

Sorenson provides extensive initial and ongoing training to its Interpreters. For example, Sorenson:

- Provides one week of initial training to all newly hired Interpreters, focusing on how to interact with Sorenson's proprietary call-handling application, known as "the Client" (discussed further below);
- Provides periodic ongoing training to all Interpreters regarding any updates to the Client;
- As part of its Video Interpreting Program ("VI-P"), provides each newly hired Interpreter who is non- or lower-certified a minimum of sixty hours of mentoring by an already-active Sorenson Interpreter;

- Places newly-hired Interpreters who have not yet reached the required proficiency standards for VI-P training on a fast-track training course to make them ready for the VI-P;
- Provides all Interpreters with professional training on how to effectively handle emergency (enhanced 911) VRS calls and other unpredictable call situations; and
- Trains Interpreters to effectively interact with specialized populations, such as the Deaf-Blind community.

B. Professional Development

Sorenson encourages its Interpreters to enhance their professional development. For example, Sorenson:

- Provides full-time Interpreters 100% reimbursement of the annual fees for RID or state licensure;
- Provides full-time Interpreters 100% reimbursement for registration fees for annual conferences of professional interest to Interpreters;
- Provides full-time Interpreters 100% reimbursement for the testing fee costs for the national and state interpreting exams;
- Provides part-time Interpreters who work more than 20 hours per week 50% coverage for national and state testing and certification fees;
- Provides part-time Interpreters who work fewer than 20 hours per week 25% coverage for national and state testing and certification fees;
- Provides paid time to attend professional development training;
- Provides a unique diagnostic assessment to allow Interpreters to assess their strengths and weaknesses and accordingly develop an interpreting plan, the implementation of which is supported by Sorenson;
- Maintains an internal screening system that enables each Interpreter to measure his or her performance against that of peers in the interpreter community;
- Upon hiring an Interpreter, provides a screening process to assess if the Interpreter has the skills to work in a VRS setting or be referred to the VI-P program or back out into the community for further training;
- Provides Interpreters professional skill-building workshops on a regular basis; and
- Whenever feasible, permits Interpreters to work on a "visiting" basis at other Sorenson call centers or to transfer to another call center.

C. Support for Community Interpreting

Sorenson imposes no limits on community interpreting, and seeks to structure its policies to enable Interpreters employed by Sorenson to work in the community if they desire. As

a result, the vast majority of Sorenson's Interpreters also work as community interpreters. Sorenson facilitates this by:

- Affording Sorenson Interpreters flexible work schedules that permit them to provide community interpreting on a part-time basis;
- Implementing custom-made software (described below) that helps Interpreters design a flexible working schedule; and
- Actively encouraging its Interpreters to provide community interpreting.

Sorenson also:

- Provides internal and external workshops for the local interpreting community, including workshops designed to enhance the skills of community interpreters; and
- Donates the proceeds from workshops to a local charity either supporting the Deaf community or educational scholarship funds for Interpreter Training Programs.

D. Contractual Provisions

Each Interpreter signs an Employment Agreement at the commencement of his or her tenure at Sorenson. These Agreements contain various provisions, including commitments by the Interpreter:

- Not to disclose Sorenson's Confidential information to third parties; and
- Not to work for a VRS provider other than Sorenson for a period of six months after the Interpreter ceases to work for Sorenson, within the same state as the call center in which the Interpreter used to work for Sorenson.

Sorenson periodically revises its Employment Agreements. Under older Employment Agreements, the Interpreter agreed not to work for a VRS provider other than Sorenson for a period of one year after the Interpreter ceased to work for Sorenson, within the same state as the call center in which the Interpreter used to work for Sorenson. Sorenson will not enforce any of these older provisions beyond the six-month restriction contained in the newer agreements. In addition, these non-compete provisions are not included in contracts in any state where they would be inconsistent with state law (*e.g.*, California).

E. Software, Scheduling, and the "Client"

Sorenson's Interpreters use proprietary, state-of-the-art technology, software, and processes that Sorenson has developed and integrated into a single call-handling application, known as "the Client." The Client contains at least 60 features that are seamlessly integrated in a way that frees the Interpreter from having to perform a number of administrative tasks, thereby permitting the Interpreter to focus on his or her primary task of providing high-quality translation of ASL to English/Spanish and vice versa. Sorenson continually seeks to modify the Client to make it more user-friendly and useful for its Interpreters. Sorenson also:

- Has implemented a unique scheduling program that was tailored to meet the needs of its Interpreters (for example, this software helps Interpreters design flexible schedules that accommodate community interpreting on a part-time basis);
- Permits Interpreters to set up individualized work schedules and to “bid” for particular hours of work; and
- Uses an automated biometric clock-in that ensures accuracy in the accounting of Interpreter time for VRS calls.

F. Benefits

Among the various benefits provided to Interpreters are the following:

- Participation, with some costs defrayed, in insurance plans for Major Medical and Dental, for full-time Interpreters;
- Participation, at company cost, in plans for Long Term Disability insurance, Life insurance, and Accidental Death and Dismemberment insurance for full-time Interpreters;
- Participation in Short-Term Disability and supplemental insurance at group rates for full-time Interpreters;
- Participation in a 401K Retirement Plan for both full-time Interpreters and part-time Interpreters who meet the qualification requirements as set forth by the federal government;
- Workers Compensation coverage for full- and part-time Interpreters and independent contractors, with costs fully paid for by Sorenson; and
- Pre-tax dollar benefits to qualifying Interpreters through the company’s Section 125-Cafeteria Plan.

G. Health, Safety, and Well-Being

VRS interpreting can be a demanding profession. In order to protect the mental and physical health of its Interpreters, as well as their safety and well-being, Sorenson:

- Provides around-the-clock, no-cost access to employee assistance programs that help Interpreters maintain good mental health and provide legal and financial advice;
- Allocates to each call center a budget for providing chair massages for Interpreters;
- Prepares for emergencies that may affect a call center; and
- Provides individualized professional counseling for Interpreters at risk of suffering “vicarious trauma” as a result of handling traumatic VRS calls (such as 911 emergency calls).

H. Focus Groups and Feedback

Sorenson continually seeks to update its processes and technologies to better meet the needs of its Interpreters. For example, Sorenson provides forum opportunities on a regular basis to:

- Discuss pertinent issues specific to VRS and best practices for Interpreters; and
- Actively seeks Interpreter feedback on various issues as a result of Interpreter participation in these focus groups.