

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

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

**REPLY COMMENTS OF SORENSON COMMUNICATIONS, INC.**

Michael D. Maddix  
Director of Government and Regulatory Affairs  
Sorenson Communications, Inc.  
4192 South Riverboat Road  
Salt Lake City, UT 84123

Regina M. Keeney  
Richard D. Mallen  
Lawler, Metzger, Keeney & Logan, LLC  
2001 K Street NW, Suite 802  
Washington, DC 20006  
(202) 777-7700  
rmallen@lawlermetzger.com

*Counsel for Sorenson  
Communications, Inc.*

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## **EXECUTIVE SUMMARY**

The initial comments in this proceeding demonstrate that the three-year, incentive-based rate plan for video relay service (“VRS”) – adopted unanimously by the FCC in November 2007 – was succeeding beyond expectation in making VRS more functionally equivalent, more available to deaf users of American Sign Language (“ASL”), more efficient, and more technologically advanced, as contemplated by the Americans with Disabilities Act (“ADA”). The Commission deserves praise for creating a stable and predictable rate environment in which VRS providers would invest in these statutory goals, thereby improving the lives of deaf Americans as Congress intended. On May 14, 2009, however, the Commission inexplicably chose to jeopardize this progress by proposing to abandon the three-year plan in mid-course. Not a single commenter supports this proposal, and seven consumer groups and all providers that commented agree that the three-year plan should continue to apply until July 1, 2010, as the FCC promised. Commenters also agree that abandoning the plan would thwart the ADA’s goals and run afoul of various laws, including the mandate that the Commission ensure that all deaf ASL users have access to “functionally equivalent” VRS.

On this record, the FCC has but a single rational option: to rescind or reject the May 14 NPRM, and to adopt for the entire 2009-2010 rate year the VRS rates dictated by the three-year plan. The Commission should take these steps as quickly as possible. The FCC also should promptly commence two new rulemakings: one to examine the VRS rate methodology to apply after June 30, 2010, and another to examine how to minimize practices that artificially inflate the size of the Interstate TRS Fund without advancing functional equivalence.

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**I. INTRODUCTION AND SUMMARY**

In its initial comments, Sorenson Communications, Inc. (“Sorenson”) described the arbitrary processes and erratic results that plagued the FCC’s video relay service (“VRS”) rate-setting efforts from the inception of VRS in 2000 until the adoption of the three-year VRS rate plan in November 2007.<sup>1</sup> The three-year plan put an end to those problems by heralding a sustained period of rate stability and predictability during which providers could implement the long-term plans and investments needed to make VRS more functionally equivalent and more available, as mandated by Congress.<sup>2</sup> As the initial comments confirm,<sup>3</sup> the three-year plan was succeeding beyond expectations in serving the deaf, with better and more widely available service, new technology, and new

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<sup>1</sup> Comments of Sorenson Communications, Inc. at 9-16 (July 6, 2009) (“Sorenson Comments”). (Unless otherwise indicated, all comments cited herein were filed in CG Docket No. 03-123.)

<sup>2</sup> 47 U.S.C. § 225(a)(3), (b)(1).

<sup>3</sup> See, e.g., Sorenson Comments at 16-18; Comments of Snap Telecommunications, Inc. at 1-7 (June 15, 2009) (“Snap Comments”).

features – until the Commission inexplicably chose to release the May 14, 2009 NPRM.<sup>4</sup> With that decision, the Commission at a stroke swept away the three-year plan, leaving in its place more uncertainty than ever before existed in the ten-year history of VRS. Now, VRS rates are in effect on a day-to-day basis, and may (or may not) be flash-cut at any time to levels based on providers’ historical NECA-allowed costs, which do not reimburse VRS providers for their actual costs of providing service.<sup>5</sup> In response to this unprecedented uncertainty, Sorenson and other providers have already had to shelve key programs that were predicated on a stable three-year rate plan, and each day that this uncertainty persists increases the likelihood that providers will have to cut those programs permanently, to the detriment of the deaf community.<sup>6</sup>

As explained below, the Commission should advance the goals of the Americans with Disabilities Act (“ADA”) and staunch the damage it has caused by rescinding the May 14 NPRM immediately, and by adopting through June 30, 2010 the VRS rates that are now in effect on an interim basis. Not a single commenter supports abandoning the three-year rate plan in mid-stream, and seven consumer groups and all providers that commented agree that the three-year plan should continue to apply until July 1, 2010.

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<sup>4</sup> *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Public Notice and Notice of Proposed Rulemaking, 24 FCC Rcd 6029 (2009) (FCC 09-39) (“NPRM”).

<sup>5</sup> *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Order, DA 09-1451, ¶ 3 (rel. June 26, 2009) (adopting “for now NECA’s proposed rates for VRS,” but emphasizing that “the Commission could decide to revise the VRS rates at the completion of [the] rulemaking” initiated by the May 14, 2009 NPRM); ¶ 18 (“We adopt NECA’s proposed VRS rates pending any future rulemaking order further addressing the VRS rates.”); ¶ 25 (prescribing the tiered VRS rates to apply “until such time as the Commission further addresses these rates pursuant to the *2009 Rate PN and NPRM*.”).

<sup>6</sup> See Sorenson Comments at 22-24 and at Attachment A, Declaration of Pat Nola, ¶¶ 7-9 (“Nola Decl.”); Snap Comments at 7-9.

Commenters also agree that abandoning the three-year plan would run afoul of various laws, including the ADA and the Administrative Procedure Act. This broad consensus underscores the wisdom of adhering to the Commission's 2007 commitment to keep rates predictable for three years.

The Commission also should promptly release a new NPRM that proposes to keep in place an incentive-based VRS rate methodology for the next multi-year rate cycle. The Commission separately should seek comment on how to combat fraudulent and other illicit practices that are undermining the legitimacy of all forms of relay.

## **II. THE RECORD IS DEVOID OF ANY BASIS THAT COULD JUSTIFY MODIFYING VRS RATES BEFORE JUNE 30, 2010**

The record in this proceeding is clear and one-sided. Of the thirteen parties that filed initial comments, not one supports the Commission's proposal to abandon the three-year VRS rate plan in mid course. Not one suggests that changing VRS rates in mid course would be consistent with the Commission's statutory mandate to ensure that functionally equivalent VRS is made available to all deaf ASL users, to the extent possible.<sup>7</sup> Not one supports the FCC's suggestion that VRS rates should be based on providers' historical allowable "costs," or its suggestion that those "costs" are anywhere close to the true costs that VRS providers have incurred. Not a single commenter supports the Commission's claim that the historical "cost" data mentioned in the NPRM is new information that could justify abandoning the three-year rate plan a full year ahead of schedule. And, not a single commenter has identified any new development that might justify the Commission's abrupt departure from its commitment to a three-year period during which stable, predictable, and automatically decreasing VRS rates would prevail,

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<sup>7</sup> 47 U.S.C. §225(a)(3), (b)(1).

rates that have encouraged providers to invest in and improve the quality and availability of VRS.<sup>8</sup>

Instead, the vast majority of commenters, including seven consumer groups, agree that the three-year rate plan should continue to apply, without modification, for the 2009-2010 rate year, and that the Commission should promptly commence a new proceeding regarding whether to adjust the existing VRS rate methodology after June 30, 2010.<sup>9</sup>

Commenters also agree that, if the Commission erroneously were to adopt new VRS rates for 2009-2010 based on historical NECA-allowed costs, that decision would diminish the functional equivalence and availability of VRS,<sup>10</sup> contrary to the statutory mandate and the legitimate expectations of deaf and hard-of-hearing consumers; would founder on a

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<sup>8</sup> See, e.g., Comments on 2009 VRS Rate NPRM of Telecommunications for the Deaf and Hard of Hearing, Inc., Association of Late-Deafened Adults, Inc., National Association of the Deaf, Deaf and Hard of Hearing Consumer Advocacy Network, California Coalition of Agencies Serving the Deaf and Hard of Hearing, American Association of the Deaf-Blind, and Hearing Loss Association of America, at i, 2, 5-6 (June 26, 2009) (“Consumer Groups Comments”); Letter from Karen Peltz Strauss, Legal Consultant to CSDVRS, LLC, to Marlene H. Dortch, FCC Secretary, CG Docket No. 03-123, at 2 (filed June 18, 2009); Comments on Public Notice and Notice of Proposed Rulemaking of Purple Communications, Inc., at 2-3, 6-7 (June 18, 2009) (“Purple Comments”); Snap Comments at i-ii, 7-11.

<sup>9</sup> Consumer Groups Comments at 5-6; Purple Comments at 2, 10-16; Snap Comments at ii, 16-20; Sorenson Comments at 20-39; see also Comments of Alfred Sonnenstrahl at 3 (July 6, 2009) (“The Commission’s NPRM on immediate revision of the ordered three-year rates . . . is in violation of the agreement.”); Comments of TeleCommunications Systems, Inc. at 2 (July 6, 2009) (“TCS Comments”) (the FCC should “quickly open a proceeding to review the rate levels and mechanisms for TRS”); Comments of the United States Telecom Association at 9 (July 6, 2009) (“USTelecom Comments”) (“We commend the Commission for undertaking this critical inquiry now and to ensure that as the three-year rate schedule nears its end, a new methodology will be put in place.”).

<sup>10</sup> See Consumer Groups Comments at 5; Snap Comments at 7, 11; Purple Comments at 11; Sorenson Comments at 8-9, 20.

number of legal infirmities;<sup>11</sup> would undermine substantial investment providers made in reliance on the commitment to a three-year plan;<sup>12</sup> would introduce new uncertainty into providers' budgets and planning;<sup>13</sup> and would drive at least some providers out of business.<sup>14</sup>

This one-sided record leaves the Commission with but a single rational option: to rescind or otherwise reject the May 14 NPRM, and to adopt for the duration of the 2009-2010 year the tiered VRS rates dictated by the three-year plan.<sup>15</sup> Sorenson urges the Commission to take these steps as quickly as possible.

### **III. THE FCC SHOULD QUICKLY RELEASE TWO NEW NPRMs: ONE ADDRESSING VRS RATES FOR THE NEXT MULTI-YEAR PERIOD, AND ONE ADDRESSING FRAUD AND OTHER ILLICIT PRACTICES**

The United States Telecom Association ("USTelecom") suggests that the Commission should examine the VRS rate methodology to apply after June 30, 2010, and also take steps to minimize waste, fraud, and abuse.<sup>16</sup> Sorenson agrees and urges the

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<sup>11</sup> See Consumer Groups Comments at 7-8; Purple Comments at 7; Snap Comments at 8-11; Sorenson Comments at 27, 37-43; Sonnenstrahl Comments at 3.

<sup>12</sup> See Snap Comments at i-ii, 1-5, 9; Purple Comments at 2, 6; Sorenson Comments at 36-37.

<sup>13</sup> See Consumer Groups Comments at 5; Purple Comments at 2, 5-6; Snap Comments at 1; Sorenson Comments at 17, 20-21.

<sup>14</sup> See Snap Comments at 9 & n.15; Purple Comments at 2, 4; Sorenson at 22-24.

<sup>15</sup> See *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

<sup>16</sup> See USTelecom Comments at 2, 9-10, 19. USTelecom mistakenly claims that TRS is an "accommodation for people with hearing and speech disabilities." *Id.* at 1. As Sorenson and others have explained, however, TRS is not an accommodation. Although Titles I-III of the ADA mandate certain "accommodations," Title IV, which governs TRS, does not. Rather, the express language of section 225 and its legislative history confirm that the purpose of Title IV (and hence TRS) is not to provide an "accommodation," but "to ensure universal service to the hearing- and speech-impaired community." House Report H.R. 101-485 Pt. 2 at 130-31; see also 47 U.S.C. § 225(b)(1)

Commission to issue separate NPRMs addressing each issue as soon as possible.<sup>17</sup>

Sorenson takes the opportunity here to articulate certain key principles that should shape those NPRMs.

**A. The FCC Should Release an NPRM on VRS Rates for the Period After June 30, 2010**

In seeking comment on VRS rates for the period after June 30, 2010, the Commission should inquire as to what rate methodology will provide the best incentives to achieve the statutory goals of functional equivalence, universal access, maximum efficiency, and improved technology.<sup>18</sup> The Commission should ask the public to provide two types of data. First, in order to assess to what extent the tiered incentive-based plan adopted in November 2007 succeeded in advancing the goals of section 225 and the ADA, the Commission should collect information regarding growth in VRS penetration, the ASL interpreter pool, growth in ASL interpreters, VRS industry structure, and VRS service quality. The Commission also should gather data regarding how the VRS rate(s) under a future incentive-based plan should be adjusted annually to take account of the variable effects of inflation and efficiency gains.

Even before collecting this data, ample evidence shows that the existing incentive-based methodology has succeeded in advancing the statutory goals of

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(incorporating by reference the universal service mandate of section 1 of the Act); Comments of Sorenson Communications, Inc., at 16-19 (Oct. 30, 2006).

<sup>17</sup> Neither of these issues was teed up in the May 14 NPRM, which is narrowly limited to VRS rates for the 2009-10 rate year. See NPRM ¶ 1 (“In the *Notice of Proposed Rulemaking (NPRM)*, we seek comment on whether . . . we should modify the compensation rates for Video Relay Service (VRS) for the 2009-2010 Fund year.”); *id.* ¶ 11 (“in this *NPRM*, we seek comment on whether we should recalculate the VRS rates for each tier for the 2009-2010 Fund year”); *id.* (“we seek comment on whether, for the 2009-2010 Fund year, we should adopt new VRS rates”).

<sup>18</sup> 47 U.S.C. § 225(a)(3), (b)(1), (d)(2).

functional equivalence, universal availability, maximum efficiency, and improved technology by expanding the availability of VRS and improving its quality and efficiency. The Commission therefore should tentatively conclude that the existing incentive-based methodology should remain in place on a long-term basis.

The Commission also knows, from its long experience with price caps LECs, that the incentives unleashed by an incentive-based methodology can work only if they are not undermined by rate-setting decisions based on providers' "costs." This principle is equally true for VRS. As the U.S. Court of Appeals for the Tenth Circuit recently confirmed, the incentive-based methodology that currently governs VRS compensation dictates that providers are to be "compensat[ed] . . . regardless of their actual costs in providing TRS."<sup>19</sup> Simply put, an incentive-based methodology for VRS rates best serves the key statutory goals of the ADA, and as long as an incentive-based methodology is used, providers' costs have no place in the rate-setting process.<sup>20</sup> Nor should providers' cost data be used to reinitialize the VRS rates for the forthcoming multi-year rate cycle. In analogous contexts, the FCC has found that it would be improper to use cost or earnings data to reinitialize rate levels because doing so would effectively keep in place the "perverse incentives of rate-of-return regulation" and blunt the incentives for achieving efficiency gains that the incentive-based methodology was designed to encourage.<sup>21</sup> Those concerns are particularly relevant here, where the

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<sup>19</sup> *Sorenson Communications, Inc. v. FCC*, 567 F.3d 1215, 2009 U.S. App. LEXIS 12070 at \*14 (10th Cir., June 4, 2009).

<sup>20</sup> See Consumer Groups at 7 ("[U]nder a price cap structure, costs have no relevance during the time period when the price caps are to be in effect."); see also Sorenson Comments at 7-8.

<sup>21</sup> *Price Cap Performance Review for Local Exchange Carriers; Access Charge Reform*, Fourth Report and Order, 12 FCC Rcd 16642, ¶ 167 (1997); see also *id.* ("we

underlying “cost” data does not reflect the providers’ actual costs. Therefore, the FCC also should tentatively conclude that providers’ “cost” data will not be collected under the incentive-based methodology to govern VRS rate setting.

Finally, the Commission should seek comment on whether any sound public policy would be served by maintaining a tiered VRS rate structure. VRS is a labor-intensive business in which compensable minutes-of-use are transmitted via highly skilled employees (video interpreters) who translate from ASL to spoken English or Spanish and vice versa. Unlike the telephone network with its fixed plant, a VRS system has a very limited ability to carry additional minutes of use without adding capacity (*i.e.*, hiring additional interpreters). If an interpreter is handling a VRS call, that interpreter cannot simultaneously handle another call; instead, such excess call volume must be handled by hiring a sufficient number of new video interpreters. As a result of these variable labor costs, one would expect any economies of scale in the VRS business to be minimal, as Sorenson and other providers have previously stated.<sup>22</sup>

Given this fact, the Commission should re-examine whether a tiered VRS rate structure makes economic sense or advances the statutory goals of functional equivalence, maximum efficiency, universal availability, and improved technology. The

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have declined . . . many parties’ suggestions that we reinitialize access rates based on LECs’ individual rates of return”).

<sup>22</sup> *Ex parte* letter from Sprint Nextel Corporation, Snap Telecommunications, Inc., and Sorenson Communications, Inc., Corrected Version, CG Docket No. 03-123, at 1 (June 27, 2007) (“Because most of the costs of providing VRS are expenses (particularly the costs of compensating interpreters) that increase as traffic volumes increase, Snap, Sorenson, and Sprint Nextel do not believe that a tiered rate structure with substantial differences between each successive rate level can be justified on the theory that increased VRS volumes will produce substantial economies of scale.”). In 2007 and again more recently, several parties have made unsupported general claims that the VRS business is susceptible to significant economies of scale. Neither the FCC nor any party has offered any evidence to support this claim, however.

Commission also should tentatively conclude that a tiered structure with large rate differentials would send the wrong economic signals, because it would erroneously suggest that VRS is susceptible to large economies of scale, and because it would reward inefficient providers that have not been able to attract customers, while punishing efficient providers that have attracted large customer bases.<sup>23</sup>

**B. A Separate NPRM Should Address Fraud and Other Illicit Practices**

As Sorenson has explained, the problem of fraud and other practices that create manufactured minutes is a policy and enforcement issue and not a rate-related one.<sup>24</sup> Other commenters appear to agree. USTelecom, for example, urges the Commission and NECA to combat illicit practices through an array of enforcement measures, including increasing oversight and examination of relevant provider data, conducting regular audits of providers, withholding payment to providers pending a resolution of suspected fraud, allocating additional personnel and financial resources, clarifying that certain practices violate the TRS rules, and prioritizing enforcement of these rules.<sup>25</sup>

Sorenson agrees that the Commission should step up its efforts to ensure that NECA compensates only legitimate minutes that promote functional equivalence – *i.e.*, minutes that are generated by calls that meet the statutory definition of TRS, minutes that

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<sup>23</sup> See Snap Comments at 17 (arguing that the rate differential between any tiers should be small).

<sup>24</sup> Sorenson Comments at 25. Sorenson repeatedly has urged the Commission to enforce its existing rules regarding waste, fraud, and abuse. Letter from Regina M. Keeney, Counsel for Sorenson, to Marlene H. Dortch, FCC Secretary, CG Docket No. 03-123 (May 12, 2009); Letter from Ruth Milkman, Counsel for Sorenson, to Marlene H. Dortch, FCC Secretary, CG Docket No. 03-123 (Nov. 25, 2008); *see also Ex Parte* Comments of the National Association for State Relay Administration, CG Docket No. 03-123 (dated Nov. 10, 2008; filed Nov. 19, 2008).

<sup>25</sup> USTelecom Comments at 16-18.

are not artificially inflated, and minutes that are submitted by eligible providers that are accountable to the public. Sorenson is planning to file shortly a petition for rulemaking in which it asks the FCC to require relay providers to certify their compliance with a Code of Conduct that will help ensure that NECA compensates only legitimate minutes. Sorenson urges the Commission to move quickly on the petition once it is filed by releasing an NPRM devoted to the problem of stemming harmful practices that undermine the legitimacy and functional equivalence of all forms of relay and needlessly inflate the size of the Fund.

Beyond these steps, the Commission should devote more resources to enforcement activities, such as conducting periodic audits of provider data, procedures, and practices. The Commission also should adopt new measures to ensure the legitimacy of minutes by clearing its backlog of pending matters. For example, the Commission should issue decisions responding to the NASRA *ex parte* identifying four practices that appear to violate the FCC's no-incentives rules;<sup>26</sup> the Sorenson Petition for Declaratory Ruling on illicit revenue-sharing schemes;<sup>27</sup> the 2004 rulemaking proceeding on the abuse of CAs during IP Relay and VRS calls;<sup>28</sup> and the 2006 rulemaking proceeding on the misuse of VRS and IP Relay.<sup>29</sup> Issuing decisions in these proceedings will clarify

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<sup>26</sup> *Ex Parte* Comments of the National Association for State Relay Administration, CG Docket No. 03-123 (dated Nov. 10, 2008; filed Nov. 19, 2008) (“NASRA *ex parte*”).

<sup>27</sup> Comments and Petition for Declaratory Ruling of Sorenson Communications, Inc., CG Docket No. 03-123, at 1-11 (April 24, 2009).

<sup>28</sup> *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, ¶¶ 255-258 (2004).

<sup>29</sup> *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Misuse of Internet Protocol (IP) Relay*

ambiguities in the Commission's rules and close major loopholes that are currently being exploited to place calls that should be deemed illegitimate.

#### IV. CONCLUSION

It has been said that promises are like babies: easy to make, but hard to deliver. Here, however, the opposite is true. The Commission labored long and hard to find a VRS rate methodology that provided the proper incentives to advance the statutory goals of functional equivalence, universal availability, maximum efficiency, and improved technology. Finally, after two NPRMs and years of deliberation,<sup>30</sup> the Commission unanimously rejected the flawed, year-to-year "cost"-based approach to VRS rate setting, and committed to an incentive-based methodology that advanced these statutory goals by guaranteeing stable and predictable rates for three years. Once the Commission made this promise, however, the difficult work was over and the Commission should have found it easy to keep its commitment. Indeed, the three-year rate plan *was designed* to be easy to maintain because it was self-executing; all the Commission had to do was approve the new tiered rates that were dictated by the plan for 2009-2010. That the Commission chose not to take that simple step is baffling, especially since abandoning three-year plan would require a rational basis, something that does not exist, and would wreak hardship on consumers by forcing providers to cut outreach, research and

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*Service And Video Relay Service*, Further Notice of Proposed Rulemaking, 21 FCC Rcd 5478 (2006).

<sup>30</sup> *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, ¶¶ 234-240 (2004); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Further Notice of Proposed Rulemaking, 21 FCC Rcd 8379, ¶¶ 1, 24-42 (2006).

development, and quality of service. The Commission should avoid these consequences by showing that it knows not only how to make promises, but how to keep them as well.

Respectfully submitted,

Michael D. Maddix  
Director of Government and Regulatory Affairs  
Sorenson Communications, Inc.  
4192 South Riverboat Road  
Salt Lake City, Utah 84123

/s/ Regina M. Keeney  
Regina M. Keeney  
Richard D. Mallen  
Lawler, Metzger, Keeney & Logan, LLC  
2001 K Street NW, Suite 802  
Washington, DC 20006  
(202) 777-7700  
*rmallen@lawlermetzger.com*

*Counsel for Sorenson Communications, Inc.*

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