

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Purple Call Forwarding Petition) CG Docket No. 10-51
for Clarification or Waiver)

REPLY COMMENTS OF SORENSON COMMUNICATIONS, INC.

Sorenson Communications, Inc. submits these Reply Comments pursuant to the recent Public Notice seeking comment on Purple Communications Inc.'s "Petition for Clarification or Waiver."¹ While no party, including Sorenson, disputes the potential desirability of a call forwarding solution, such a solution must be implemented in a way that is consistent with the Commission's procedural rules and that does not upset the Commission's carefully crafted numbering regime.

DISCUSSION

As Sorenson explained in its initial comments, Purple has failed to show special circumstances justifying a waiver of the Federal Communications Commission's rules.² And, as Convo Communications noted, the Commission should conduct a notice-and-comment

¹ Petition for Clarification or Waiver of Purple Communications, Inc., CG Docket No. 10-51 (June 2, 2010) ("Purple Petition") (seeking a waiver of 47 C.F.R. § 64.613(a)); *Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51, Public Notice, "Comments Sought on Purple Communications, Inc. Petition for Clarification or Waiver to Implement Call Forwarding Service for Internet-Based Telecommunications Relay Service Users," DA 10-1253 (rel. July 2, 2010) ("Public Notice").

² Comments of Sorenson Communications, Inc. CG Docket No. 10-51, at 2-4 (July 16, 2010) ("Sorenson Comments").

rulemaking before changing the rule for all providers.³ No party effectively disputed these points.⁴

Snap agreed that a provider-specific waiver is inappropriate, but attempted to rehabilitate Purple's Petition by recasting it as a request for an industry-wide waiver.⁵ Putting aside the question of whether the Commission has the authority to transform Purple's Petition into a broader request that applies to all providers, an industry-wide waiver would effectively constitute a rule change and should only be implemented – if at all – pursuant to a Notice of Proposed Rulemaking (“NPRM”).⁶ Granting Purple's Petition without further proceedings would show an utter disregard for the procedural safeguards that the FCC and Congress put in place to protect against *ad hoc* changes to established rules. These safeguards were adopted for the precise purpose of ensuring that any potential rule changes are carefully evaluated and that all of the consequences are considered before the Commission takes action.⁷

³ Comments of Convo Communications, Inc., CG Docket No. 10-51, at 4 (July 16, 2010) (“Convo Comments”); *see also* Sorenson Comments.

⁴ Some parties simply glossed over the substantive and procedural defects in Purple's Petition. *See, e.g.*, Comments of CSDVRS, LLC, CG Docket No. 10-51, at 1-2 (July 16, 2010) (essentially arguing that the Commission should overlook the procedural defects in Purple's Petition). Other parties appear to be under the mistaken impression that the procedural defects were cured when Purple's Petition was placed on Public Notice. *See* Comments of Telecommunications for the Deaf and Hard of Hearing, Inc., *et al*, CG Docket No. 10-51, at 8 (July 16, 2010) (mischaracterizing Sorenson's initial filing and conflating a Commission-level Notice of Proposed Rulemaking with a Bureau-issued “Public Notice.”); *c.f.*, 47 C.F.R. §0.361(a) (reserving to the full Commission the authority to issue Notices of Proposed Rulemaking); *Sprint Corp. v. FCC*, 315 F.3d 369, 376 (D.C. Cir. 2003) (“the authority delegated to the Bureau by the Commission to issue public notices does not extend to issuance of NPRMs”).

⁵ Comments of Snap Telecommunications, Inc., CG Docket 10-51, at 1 (July 16, 2010) (“Snap Comments”); *see also* Sorenson Comments at 4 (granting Purple a provider-specific waiver would be unlawful).

⁶ Sorenson Comments at 5-8.

⁷ *See* Convo Comments at 4. An agency may not develop and apply new rules that would constitute a sudden change in direction to the detriment of those who have relied on past policy without following the Administrative Procedure Act's (“APA's”) rulemaking procedures. *See*,

As courts have repeatedly found, an agency seeking to repeal or modify a rule – such as the one at issue here – that was promulgated by means of the APA’s notice-and-comment procedures must use those same procedures to accomplish the modification or repeal.⁸ As then-Judge Scalia aptly summarized, “the APA clearly provides that a rule can only be repealed by rulemaking.”⁹ An agency may not circumvent the APA’s rulemaking procedures by using an indirect means to overturn or amend its own rules.¹⁰ As the Commission has previously found, “a rulemaking proceeding is generally, a better, fairer and more effective method of implementing a new industry-wide policy than is the ad hoc” use of waivers or other

e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974); *Cities of Anaheim, et al. v. FERC*, 723 F.2d 656, 659 (9th Cir. 1984); *Pfaff v. U.S. Dep’t of Hous. and Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996); *Patel v. INS*, 638 F.2d 1199, 1204 (9th Cir. 1980); William D. Araiza, *Administrative Law Discussion Forum: Limits on Agency Discretion to Choose between Rulemaking and Adjudication: Reconsidering Patel v. INS and Ford Motor Co. v. FTC*, 58 Admin. L. Rev. 899, 905-913 (2006).

⁸ *Am. Fed’n of Gov’t Employees v. Fed. Labor Relations Auth.*, 777 F.2d 751, 759 (D.C. Cir. 1985); *see also Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982), *aff’d & reh’g denied sub nom. Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 & 463 U.S. 1250 (1983); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997), *cert. denied sub nom. Pollin v. Paralyzed Veterans of Am.*, 523 U.S. 1003 (1998) (“Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to ‘repeals’ or ‘amendments.’”) (italics in original) (quoting 5 U.S.C. § 551(5)); *Patel*, 638 F.2d at 1203-05; *SBC Inc. v. FCC*, 414 F.3d 486, 498 (3d Cir. 2005) (“if an agency’s present interpretation of a regulation is a fundamental modification of a previous interpretation, the modification can only be made in accordance with the notice and comment requirements of the APA”).

⁹ *American Federation*, 777 F.2d at 760 (Scalia, J., concurring).

¹⁰ *Patel*, 638 F.2d at 1204 & n.5 (agency’s use of adjudication to add a new criterion to a rule adopted in a notice-and-comment rulemaking “was an improper circumvention of rulemaking procedures” and was therefore an “abuse of discretion”); *see also Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100 (1995) (agency may not adopt “a new position inconsistent with . . . existing regulations.”); *American Federation*, 777 F.2d at 759 (if agency wishes to adopt a position that is inconsistent with its own rules, it must follow “established rulemaking procedures”); *Ruangswang v. INS*, 591 F.2d 39, 43-46 (9th Cir. 1978).

adjudicatory processes.¹¹ Simply put, granting Purple’s Petition without issuing an NPRM would violate the APA and would “fall well outside the limits of good – or acceptable – government.”¹²

In this case, if the FCC were to act rashly by granting Purple’s Petition without adequate notice and comment, it would risk upsetting the Commission’s carefully constructed numbering regime, which was the product of a hotly-debated rulemaking proceeding. This unjustified rush to action is even more troubling given the utter lack of transparency about Purple’s plans. Purple has failed to provide an adequate explanation of the actions it is currently taking to implement its “call-forwarding” solution, much less a careful review of how its current and proposed activities would affect other aspects of the Commission’s numbering rules.¹³ The Commission would be remiss if it did not consider all relevant options and their potential consequences: As Convo notes, there may well be “more relatively efficient and safer methods to implement call forwarding” than the one Purple proposes.¹⁴

Moreover, Purple’s Petition does not even go to the heart of Telecommunications Relay Services (“TRS”). Rather, Purple claims to need the waiver only to implement call forwarding in conjunction with “point-to-point” calls – non-TRS calls that are not subject to section 225 and

¹¹ *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) (citations omitted) (service rules for new terrestrial service in the 12.2-12.7 GHz band to be established by rulemaking rather than *ad hoc* waivers); *see also Consumer Energy Council*, 673 F.2d at 446 (“The value of notice and comment prior to repeal of a final rule is that it ensures that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal.”).

¹² *Pfaff*, 88 F.3d at 749.

¹³ Sorenson Comments at 2-3.

¹⁴ Convo Comments at 4.

over which the Commission's jurisdiction is, at best, limited.¹⁵ The FCC should not throw aside its core rules governing the routing of TRS calls simply so that Purple can implement its preferred approach to providing a feature that it is not even required to provide.¹⁶ At a minimum, Purple should be required to explain exactly what it is currently doing to enable call forwarding for TRS calls and what specific actions it proposes to take to provide call forwarding for non-TRS (point-to-point calls). Only then can parties fully understand the implications of Purple's proposal and file informed comments on the merits of Purple's proposed actions.

¹⁵ Purple Petition at 2-4; *see, e.g.*, 47 U.S.C. § 225(a)(3) (defining TRS as involving communication with hearing individuals); *see also Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (limiting the Commission's ability to assert ancillary jurisdiction.)

¹⁶ *See* Sorenson Comments at 2-3. In fact, Purple has failed to show that it has even considered an approach to providing call forwarding that would comply with the FCC's existing rules.

CONCLUSION

For the foregoing reasons, the Commission should deny Purple's Petition. The rule change Purple seeks should be adopted only if the FCC finds it to be meritorious after it has issued an NPRM and developed a complete record regarding Purple's proposal and its potential implications.

Respectfully submitted,

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July 23, 2010

Certificate of Service

I hereby certify that on this 23rd day of July, 2010, I caused a true and correct copy of the foregoing Reply Comments of Sorenson Communications, Inc. to be mailed by electronic mail to:

Best Copy and Printing
fcc@bcpiweb.com

/s/ Rebecca Zissel
Rebecca Zissel