

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

In the Matter of)	
)	
Structure and Practices of the Video Relay)	CG Docket No. 10-51
Service Program)	
)	

**COMMENTS OF
SORENSEN COMMUNICATIONS, INC.**

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Executive Summary

Sorenson Communications, Inc. (“Sorenson”) applauds the Commission’s ongoing efforts to mitigate fraud and abuse in the provision of video relay service (“VRS”). In these comments, Sorenson strongly supports three reforms recently proposed by the FCC: requiring video interpreters (“VIs”) to work in supervised interpreting centers, prohibiting compensation schemes that encourage minute-pumping by VIs, and adopting whistleblower protections to encourage employees to report cases of waste, fraud, or abuse without fear of reprisal. Along with other sensible reforms already adopted or under consideration, these rules will encourage providers to maintain professional work environments that are inhospitable to minute-pumping, will save the Interstate TRS Fund millions of dollars per year, and will ensure that the Fund remains dedicated to advancing the statutory goals of functional equivalence and nationwide access.

Unfortunately, one rule proposed in the Notice of Proposed Rulemaking would cause precisely the opposite effects, inflicting harm on both the Fund and deaf consumers. Specifically, forcing the closure of eight VRS interpreting centers in Canada would constrict the already tight labor market for VRS, thereby putting upward pressure on VRS costs and diminishing resources available for enhancing functional equivalence and increasing access. Since Canadian interpreting centers have not been the source of any fraud, moreover, their forced closure would not constitute a credible anti-fraud measure and would not protect the Fund’s integrity, but instead would violate at least one major international treaty, as well as the Americans with Disabilities Act and the Administrative Procedure Act. The Commission has many alternative means to address

fraud directly. Moreover, banning Canadian interpreting centers would not address interpreting quality, as Canadians also use ASL, and Sorenson subjects its Canadian interpreters to the same high quality standards as their American counterparts.

Furthermore, eliminating cross-border supply of VRS would be inconsistent with the United States' longstanding promotion of open telecommunications and information service markets, and could well result in retaliatory actions. The FCC should decline to adopt this proposal and focus instead on the prudent pro-consumer and demonstrably anti-fraud reforms it has proposed.

Table of Contents

I.	INTRODUCTION AND SUMMARY	1
II.	THE COMMISSION SHOULD REQUIRE VIs TO WORK IN SUPERVISED INTERPRETING CENTERS	3
III.	THE COMMISSION SHOULD PROHIBIT COMPENSATION SCHEMES THAT ENCOURAGE MINUTE-PUMPING BY VIs	7
IV.	THE COMMISSION SHOULD ADOPT WHISTLEBLOWER PROTECTIONS.....	9
V.	THE COMMISSION SHOULD NOT FORCE SORENSON TO SHUTTER ITS CANADIAN INTERPRETING CENTERS	9
	A. Background.....	11
	B. The Proposed Rule Would Violate NAFTA.....	14
	C. The Proposed Rule Would Violate the ADA and Harm the Public	17
	D. The Proposed Rule Would Be Arbitrary and Capricious	19
	1. The Rule Would Lack Any Reasoned Basis.....	19
	2. The Rule Would Arbitrarily Treat VRS Differently from Other Forms of TRS, and Sorenson Differently from Other Providers.....	23
	3. The Rule Would Unfairly Harm Investments Made in Reliance on Prior FCC Rules.....	24
VI.	CONCLUSION	26

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COMMENTS OF SORENSON COMMUNICATIONS, INC.

I. INTRODUCTION AND SUMMARY

Sorenson Communications, Inc. (“Sorenson”) commends the Federal Communications Commission (“Commission” or “FCC”) for initiating this rulemaking on ways to mitigate fraud and abuse in the provision of video relay service (“VRS”).¹ As explained herein and in Sorenson’s forthcoming comments,² most of the FCC’s contemplated reforms are sensible and will help protect the integrity of the Interstate TRS Fund (“Fund”) and the VRS program. Indeed, Sorenson itself proposed many of these steps along with others already taken by the Consumer and Governmental Affairs Bureau in its February 25, 2010 Declaratory Ruling.³ Once adopted, the full spate of reforms

¹ *Structure and Practices of the Video Relay Service Program*, Declaratory Ruling, Order and Notice of Proposed Rulemaking, 25 FCC Rcd 6012 (2010) (“*Order*” or “*NPRM*,” as appropriate).

² The *NPRM* adopted a two-track pleading cycle, giving parties 14 days to comment on some issues and 21 days on others. These comments address the “fast track” 14-day issues. Sorenson will be submitting separate comments on the 21-day issues.

³ *Structure and Practices of the Video Relay Service Program*, Declaratory Ruling, 25 FCC Rcd 1868 (2010).

should save the Fund millions of dollars per year and, more importantly, will ensure that the Fund remains dedicated to compensating deaf-to-hearing and hearing-to-deaf calls that advance the statutory goals of functional equivalence and nationwide access.⁴

Consistent with these goals, the Commission should adopt three of the “fast track” reforms for which comment is sought in this pleading cycle. In particular, the Commission should require video interpreters (“VIs”) to work in supervised interpreting centers, prohibit compensation schemes that may encourage minute-pumping by VIs, and adopt whistleblower protections for VIs and other employees of VRS providers. Sorenson urges the Commission to adopt these pro-consumer protections quickly.

By contrast, the Commission should decline to prohibit VRS providers from locating interpreting centers outside of the United States. The *NPRM* fails to note that Sorenson has opened eight interpreting centers in Canada, the most populous country after the United States in which American Sign Language (“ASL”) is the primary language of deaf individuals. Because Canada has a large supply of qualified ASL-to-English interpreters, and because there is an acute shortage of such interpreters within the United States, the eight Canadian interpreting centers help Sorenson to keep down its speed of answer and act as a critical safety valve for VRS costs, helping to maintain labor expenses for the entire industry at reasonable levels. Because these interpreting centers are located outside the United States, they also enhance the geographic redundancy needed to ensure the survivability of VRS in case of a large-scale disaster. By achieving these results, the Canadian interpreting centers advance the statutory goals of efficiency and functional equivalency, as mandated by the Americans with Disabilities Act

⁴ 47 U.S.C. § 225(a)(3), (b)(1).

(“ADA”). Compelling the closure of these centers not only would conflict with the ADA, but also would violate the North American Free Trade Agreement (“NAFTA”) and be ripe for reversal as arbitrary and capricious, in violation of the Administrative Procedure Act (“APA”). The Commission should not adopt this rule.

Finally, because the *NPRM* focuses only on VRS, Sorenson generally limits its discussion below to that form of relay. However, the other forms of Internet-based relay could benefit equally from many of the proposed reforms, and the Commission therefore should ensure that, where appropriate, its final rules apply broadly to all forms of Internet-based relay, and not just VRS.

II. THE COMMISSION SHOULD REQUIRE VIs TO WORK IN SUPERVISED INTERPRETING CENTERS

Under the FCC’s rules, it is generally the responsibility of VRS providers to ensure that VIs handle VRS calls in compliance with Commission’s minimum standards.⁵ It also is the providers’ responsibility to protect against waste, fraud, and abuse: indeed, each month providers are required to have an officer certify, under penalty of perjury, the legitimacy of the compensable minutes they submit to the Fund administrator.⁶ Notwithstanding these obligations, some VRS providers have implemented work-from-home arrangements that rely entirely on the good faith of VIs to ensure compliance with relay providers’ regulatory obligations. The Commission should not continue to

⁵ *Telecommunications Relay Services, and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling, 18 FCC Rcd 16121, ¶ 41 (2003) (“Our TRS rules place the responsibility of ensuring that [communications assistants (“CAs”)] are in compliance with our requirements on TRS providers.”); *see also* 47 C.F.R. § 64.604(c)(6)(v) (setting forth procedures for bringing complaints against providers, but not interpreters).

⁶ *Order* ¶¶ 13-14.

countenance such abdication of providers' oversight duties but instead should require all VIs to work in interpreting centers under the direct supervision of managers.

As the FCC notes, "the practice of CAs working from home raises concerns about whether the confidentiality of calls can be guaranteed."⁷ Sorenson has implemented various safeguards to ensure confidentiality: for instance, Sorenson has installed white noise emitters above all VI stations in its interpreting centers; Sorenson has implemented security protocols (including electronic entry) that prevent unauthorized personnel from entering its interpreting centers; and Sorenson's interpreting center managers actively oversee operations on the interpreting center floor to ensure that nothing is amiss. Such safeguards are unlikely to prevail in work-at-home arrangements, however. For example, if a VI is handling calls in her home, the provider cannot ensure that a family member or a refrigerator repairman will not interrupt or overhear those calls.

Confidentiality is not an obligation to be taken lightly: the Commission previously has recognized that confidentiality and privacy are essential to relay service.⁸ In work-at-home scenarios, there simply is not an effective mechanism for the VRS provider itself to gain the knowledge and exercise the oversight necessary for ensuring compliance with the FCC's rules and for certifying such compliance to the Commission.⁹

⁷ *NPRM* ¶ 19.

⁸ *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, ¶ 54 (2000) ("2000 Improved TRS Order").

⁹ In section V.E.3 of the *NPRM*, the FCC proposes to adopt a rule requiring providers to submit detailed, up-to-date information about each VRS interpreting center. The FCC asks if work-from-home interpreters should be treated as "call centers" for purposes of this proposed rule. *NPRM* ¶ 20. Sorenson believes that this legal fiction would only exacerbate the flaws already inherent in allowing VIs to work from home. For instance, treating individual interpreters as "call centers" would raise serious privacy

Continuing to allow VIs to work at home also would pose an unacceptable threat to the integrity of the Fund. While the overwhelming majority of VIs have high ethical standards, if even a small percentage of VIs are predisposed to commit unscrupulous acts absent supervision, allowing VIs to work from home could cause a significant increase in waste, fraud, or abuse. Lax at-home work conditions could even cause ethical interpreters inadvertently to threaten the integrity of the Fund. For example, when working at home, VIs themselves often record compensable minutes through unreliable, hand-written notations of start and stop times instead of using automated means. This practice can cause interpreters unwittingly to overstate the reported compensable minutes attributable to VRS – a risk that would not occur in a properly supervised interpreting center in which minutes are automatically recorded.¹⁰

Work-at-home arrangements can also endanger the lives or safety of deaf callers. Work-at-home environments often lack certain costly but important technical capabilities that are present in provider-operated interpreting centers, such as back-up power and system redundancy to avoid call interruptions.¹¹ If home work environments are not

concerns, potentially exposing the names and home addresses of each work-at-home CA, and would be unworkable in practice (for instance, the rule proposed in section V.E.3 seeks the name and contact information for the managers of each call center, but work-at-home CAs have no such managers).

¹⁰ In the context of white labeling, the Commission expressed misgivings that “[a]lthough the eligible provider is responsible for ensuring that . . . calls billed to the Fund are legitimate, in some cases it is possible that the eligible provider exercises very little oversight over the call handling operations.” *NPRM* ¶ 45. Recording minutes for work-at-home VRS interpreting raises concerns similar to those arising from white labeling: the entity responsible for compliance with the FCC’s rules is not the one performing the recording function.

¹¹ See Comments of Sorenson Communications, Inc., PS Docket No. 10-92, at 4-8 (June 25, 2010) (“*Sorenson Survivability Comments*”).

equipped with such features, they may lose power during outages or as a result of disasters, potentially thwarting the ability of deaf individuals to place emergency calls or causing in-progress emergency calls to be interrupted. Users of traditional telephone services need not worry about these risks: when a hearing person places a 911 call, for instance, he or she can be assured that it will be routed through secure, “hardened” facilities with appropriate safeguards – and not through unsecured locations, such as a person’s bedroom.¹² Deaf individuals deserve the same level of assurance, and indeed have a right to it by virtue of the ADA’s functional equivalence mandate.

Even if a VI’s home were sufficiently secure, emergency VRS callers could face other risks if at-home interpreting were permitted. For instance, Sorenson always handles 911 calls with a “team” of two interpreters in order to ensure that these urgent calls are interpreted with the utmost accuracy.¹³ It is doubtful that a similar teaming arrangement could be readily implemented for 911 calls placed through an at-home interpreter. Likewise, in some instances a routine VRS call can transform into an emergency call. For example, if a deaf caller suddenly experiences sharp pain in his chest during a routine in-progress VRS call, he may ask the VI to connect to 911. A Sorenson VI can handle this scenario promptly. Simply by the push of a button, the VI can transform a routine VRS call into a 911 emergency call and ensure that the call is routed to the proper Public

¹² See, e.g., Network Reliability and Interoperability Council, Best Practices Nos. 7-5-0569, 7-7-0488, and 7-7-8018, *available at*: <<https://www.fcc.gov/nors/outage/bestpractice/ProcessBestPractice.cfm>>; see also National Emergency Number Association (“NENA”), NENA Technical Information Document on Network Quality Assurance, Standard No. 03-501 v.4, *available at*: <<http://www.nena.org/standards/technical/network/network-quality-assurance>>.

¹³ Of course, Sorenson bills the Fund only for the conversation time of every VRS call, regardless of whether a team is involved.

Safety Answering Point. It is far from clear that at-home interpreters have the same capability. Further, Internet access service to an interpreter's home is likely to be far less reliable than the premium business-level service purchased by Sorenson for its interpreting centers. As a result, any VRS call routed through a VI's home – including a 911 call – is more likely to experience problems (as a result of jitter, latency, or congestion, for example) than a call routed through a call center.

For the foregoing reasons, the Commission should require Internet-based TRS providers, as a condition precedent to receiving compensation from the Fund, to

- (i) ensure that VIs work in interpreting centers under direct supervision of a manager; and
- (ii) automatically record session and conversation time to at least the nearest second, with more accurate recordings permitted.¹⁴

III. THE COMMISSION SHOULD PROHIBIT COMPENSATION SCHEMES THAT ENCOURAGE MINUTE-PUMPING BY VIs

Sorenson pays all of its VIs by the hour and does not link the salary or any other compensation or benefit of its VIs to the number of compensable minutes they relay. Sorenson's VIs therefore do not get additional compensation for working through scheduled hourly breaks or for working overtime.¹⁵ To the contrary, if a VI wanted to skip her hourly break, a Sorenson manager would likely discourage her from doing so, pointing out that periodic breaks are necessary to protect interpreters' physical and mental health (without breaks, for example, interpreters are more likely to develop

¹⁴ See Petition for Rulemaking of Sorenson Communications, Inc., CG Docket No. 03-123, at 17-18 and App. A at 5 (Oct. 1, 2009) ("*Sorenson VRS Call Practice Petition*").

¹⁵ *But see NPRM* ¶ 21 (observing that in the past some CAs have "been paid bonuses for working through scheduled breaks or working overtime in order to relay more minutes").

repetitive motion injuries or stress arising from handling calls such as those placed to 911).

This strict per-hour approach to compensation protects interpreters and ensures that they do not have a financial incentive to increase the number or duration of VRS calls. To protect VIs and the integrity of the Fund, the Commission should require all providers to pay their VIs by the hour irrespective of the number of minutes they relay, without bonuses or other benefits that are linked to handling more compensable minutes or to working through scheduled breaks.¹⁶

The need for this rule would be especially urgent if the Commission, erroneously, were to continue to permit interpreters to work from home.¹⁷ In a well run call center, a provider can readily track the number of on-the-job hours logged by each interpreter and then pay appropriate wages at the per-hour rate. When an interpreter works from home, however, the provider cannot readily track on-the-job hours. Instead, the provider can (at best) track only the number of compensable minutes relayed by the at-home interpreter.¹⁸ In this circumstance, it would make sense for the provider to pay interpreters on a per-compensable-minute basis, rather than a per-hour-worked basis. Doing so would give at-home interpreters a financial incentive to inflate artificially their volume of compensable minutes. The Commission should not tolerate this risk to the Fund's integrity.

¹⁶ See *Sorenson VRS Call Practice Petition*, App. A at 10 (proposing new rule that would prohibit "linking the salary, bonus, or other compensation or benefit of any CA to relay calls or minutes").

¹⁷ See *NPRM* ¶ 21.

¹⁸ If an at-home interpreter manually records conversation minutes, then the provider will have no means of tracking even this metric.

IV. THE COMMISSION SHOULD ADOPT WHISTLEBLOWER PROTECTIONS

As the Commission correctly notes, today employees of VRS providers can find themselves in an uncomfortable position: although they “are often in the best position to detect possible fraud and misconduct by the provider,” they also may be “reluctant to report possible wrongdoing because they fear they may lose their job or be subject to other forms of retaliation.”¹⁹ To eliminate this quandary, the Commission should adopt the whistleblower protection rule proposed in the *NPRM*. This rule is identical to the one proposed by Sorenson in its *VRS Call Practice Petition*,²⁰ except it adds a provision requiring providers to inform their employees that they can report fraud and misuse directly to the Commission’s Office of Inspector General.²¹ Sorenson supports this addition and therefore urges the Commission to adopt proposed rule section 64.604(a)(6)(iii) to provide guidance and protection for honest employees, agents, and contractors in reporting suspected violations of the Commission’s TRS rules.

V. THE COMMISSION SHOULD NOT FORCE SORENSON TO SHUTTER ITS CANADIAN INTERPRETING CENTERS

The Commission should not require VRS interpreting centers to be located in the United States.²² As explained below, this prohibition would violate NAFTA and would harm the public by making VRS less functionally equivalent and less efficient, in contravention of the ADA. Moreover, because the prohibition lacks any reasoned basis and would unfairly harm investments made by Sorenson in Canada, it would be subject to

¹⁹ *NPRM* ¶ 49.

²⁰ *Sorenson VRS Call Practice Petition*, App. A at 5.

²¹ *NPRM* ¶ 50 and App. C.

²² *See NPRM* ¶ 18.

reversal as arbitrary and capricious. And, because the prohibition, in effect, targets only Sorenson's Canadian interpreting centers, the FCC's concerns about fraud and quality standards are misplaced, since these interpreting centers have not been implicated in any fraud schemes and are operated under the same high standards as Sorenson's U.S. centers.²³ Forcing the closure of these interpreting centers therefore will do nothing to diminish fraud or enhance the quality of interpreting.

Rather than pursuing this unlawful and misguided path, the Commission should focus on various safeguards proposed in the *NPRM*, as well as other measures that Sorenson has proposed. As described above, for example, requiring VIs to work in supervised interpreting centers will both deter fraud and enhance the quality of VRS interpreting, particularly for 911 calls. As Sorenson will describe in its forthcoming comments, moreover, the Commission should implement a number of other safeguards, including, *inter alia*, adopting procedures for the Fund Administrator to follow in delaying or suspending payments; requiring VRS providers to employ computerized algorithms to detect anomalous calling patterns, which may indicate illicit minute-pumping schemes; and permitting VIs to disconnect hearing-to-hearing VCO calls and VRS calls where the VI is confronted with a blank screen for a minimum period of time.

²³ Foreign outbound call "boiler rooms" have been a source of fraud, but these boiler rooms are not VRS interpreting centers. Instead, the boiler rooms are staffed by individuals paid to place fraudulent calls to U.S. recipients in order to manufacture VRS calling minutes. Those foreign outbound-calling boiler rooms have nothing to do with the quality or integrity of VRS interpreting and would not be deterred by the proposed prohibition on non-U.S. interpreting centers. To distinguish those legitimate VRS interpreting centers from outbound-calling boiler rooms that have been a source of fraud, Sorenson refers here to its locations in which interpreting occurs as "interpreting centers."

Taking these and other steps will deter fraud and improve service quality in lawful ways that promote the public interest.

A. Background

The critical prerequisite for providing high quality VRS is an adequate supply of interpreters who can quickly and accurately translate from ASL to spoken English and vice versa. As VRS has become more popular, however, it has become increasingly difficult for providers to locate, recruit, and train a sufficient number of interpreters. Not only are qualified interpreters in short supply, but it takes many years to train individuals to translate from ASL to English and even longer to train them to handle VRS calls in accord with the FCC's minimum standards. Complicating the task is the absence of large geographic concentrations of interpreters within the United States. Because interpreters are widely dispersed, providers must operate numerous interpreting centers in various locations, each of which is reasonably close to a sufficient "pocket" of local interpreters. The process of locating a new pocket, selecting an appropriate site for a call center, building the call center and provisioning it with equipment and utilities, assigning a management team, and hiring and training the new interpreters takes at least six months, and often longer than a year.²⁴

Providers eligible to collect from the Fund have already opened more than 100 VRS interpreting centers in the United States, and new locations are becoming increasingly difficult to find. Without growth in the pool of qualified interpreters (giving rise to larger or new pockets of interpreters), the labor costs of providing VRS will

²⁴ See Declaration of Christopher Wakeland, ¶ 12 (Sept. 4, 2007), Attachment A to Comments of Sorenson Communications, Inc., CG Docket No. 03-123 (Sept. 4, 2007).

skyrocket, putting upward pressure on the size of the Fund and constraining the labor supply available for community interpreting.

One bright spot in this otherwise gloomy landscape is the unique geography of ASL usage. It is well known that ASL is the primary language of deaf individuals who live in the United States. Perhaps less well known in the United States is the fact that ASL is the first language of deaf Canadians as well.²⁵ Because both ASL and spoken English are prevalent in Canada, it is not surprising that Canada has large numbers of qualified ASL-to-English interpreters.²⁶ In fact, at least 550 skilled interpreters reside in Canada,²⁷ making that country a logical place to locate VRS interpreting centers. Sorenson accordingly has opened eight interpreting centers in Canada, employing over several hundred interpreters. Like their American counterparts, the vast majority of these interpreters have been certified by an appropriate body, and they all receive extensive

²⁵ See generally Canadian Association of the Deaf, "Language," available at: <<http://www.cad.ca/en/issues/language.asp>>; Nova Scotia Public Prosecution Service, "Sign Language Interpreter Services," at 4 (stating that ASL is "the language used by most Deaf people in the US and Canada"), available at: <http://www.gov.ns.ca/pps/publications/ca_manual/AdministrativePolicies/SignLanguageInterpreterServices.pdf>; Health Canada, "Language Barriers in Access to Health Care," § 3.3.3 ("Most of the Deaf community in Canada uses American Sign Language (ASL) for communication"), available at: <<http://www.hc-sc.gc.ca/hcs-sss/pubs/acces/2001-lang-acces/context-eng.php>>.

²⁶ See Comments of the Association of Visual Language Interpreters of Canada ("AVLIC"), CG Docket No. 10-51, at 2 (June 23, 2010, filed June 28, 2010) ("Canadian call centers can and do provide qualified ASL interpreters" who comply with strict guidelines of either the Registry of Interpreters for the Deaf ("RID") or AVLIC).

²⁷ See, e.g., AVLIC Online Directory, available at: <<http://www.avlic.ca/store/directory.php>> (listing Canadian AVLIC members by province). Many American VIs are members of AVLIC, just as many Canadian VIs are members of RID.

initial and ongoing training and mentoring provided by Sorenson.²⁸ In addition, all of Sorenson's Canadian interpreters are members of the Association of Visual Language Interpreters of Canada ("AVLIC") and therefore are bound by AVLIC's Code of Ethics, which is similar to the Code of Professional Conduct adopted by the Registry of Interpreters for the Deaf ("RID").²⁹

Sorenson's Canadian interpreting centers have been a boon to deaf and hearing Americans who use VRS. By expanding the pool of qualified interpreters, these interpreting centers relieve upward pressure on the size of the Fund and enable interpreters in the United States to devote more time to community interpreting. Because these interpreting centers are operated by Sorenson, moreover, they comply with the highest professional and legal standards and are subject to the full panoply of FCC rules. Any action by a Canadian interpreting center in violation of the FCC's rules would subject Sorenson to appropriate FCC enforcement action; to date, however, Sorenson's Canadian interpreting centers, no less than its U.S. interpreting centers, have achieved the highest standards in the industry. By adding more than several hundred interpreters to Sorenson's work force, moreover, these interpreting centers have helped Sorenson reduce its hold times, advancing functional equivalence for tens of thousands of deaf individuals in the United States and alleviating the interpreter shortage for all providers and for community interpreting organizations.

²⁸ Most of Sorenson's Canadian interpreters are certified or assessed by RID, AVLIC, or a Canadian provincial body. In addition, Sorenson performs its own screening and training of all its Canadian interpreters (as it does in the United States).

²⁹ Compare AVLIC Code of Ethics and Guidelines for Professional Conduct, available at: <<http://www.avlic.ca/resources.php?coe>>, with RID Code of Professional Conduct, available at: <<http://www.rid.org/ethics/code/index.cfm>>.

Regrettably, the pro-consumer benefits flowing from Canadian interpreting centers have now been placed in jeopardy. In the May 27, 2010 *NPRM*, the Commission tentatively concluded to adopt a rule requiring VRS interpreting centers to be located in the United States.³⁰ Although this rule appears to be drafted neutrally – to prohibit any non-U.S. interpreting center, regardless of location – in reality it targets Canadian interpreting centers. After the United States, Canada has the largest number of ASL-to-English interpreters, and, to the best of Sorenson’s knowledge, it is the only country other than the United States in which VRS interpreting centers are now located or where it would make sense to locate a call center of any significant size. The lack of ASL interpreters in other countries, the fact that ASL is not widely used outside of North America, and the significant time it would take to train interpreters to translate from ASL to English, create substantial barriers to locating an interpreting center in any country other than Canada. Therefore, in practice the proposed rule uniquely targets Canadian interpreting centers for immediate closure upon adoption. As explained below, such a rule would be unlawful and contrary to the public interest.

B. The Proposed Rule Would Violate NAFTA

Under the U.S. Constitution, “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”³¹ Given this supremacy, it is axiomatic that a federal agency lacks authority to adopt rules that are inconsistent with any treaty ratified by Congress. The Commission in particular has

³⁰ *NPRM* ¶ 18.

³¹ U.S. Const. art. VI, cl. 2.

repeatedly stated that it lacks authority to modify treaty requirements,³² and the Commission has been admonished by courts in the rare instances when it has failed to be mindful of those requirements when fashioning rules.³³ Here, although the *NPRM* does not mention the issue, the proposed prohibition on Canadian interpreting centers would violate NAFTA.

The prohibition would violate NAFTA by unlawfully discriminating against Canadian VRS operations,³⁴ and by imposing unlawful “local presence” requirements on the provision of VRS in the United States.³⁵ For example, the “local presence” prohibition in NAFTA Article 1205 proscribes requiring “any form of enterprise” to be located within the United States as a condition of providing service to the United States. The United States excepted certain facilities and services, such as telecommunications transport networks and services, from, *inter alia*, application of NAFTA Articles 1202 and 1205, but expressly indicated that the exception does *not* apply to enhanced

³² See, e.g., *Commonwealth of Pennsylvania; Licensee of Private Land Mobile Radio Stations WPWF792, WPWD808*, Order Proposing Modification, 25 FCC Rcd 5369, ¶ 6 (2010) (“[T]he Federal Communications Commission lacks the authority to waive or modify the provisions of international treaties.”); *State of New York, Office for Technology; Licensee of Private Land Mobile Radio Stations WPLP920, WPWR391, WPJI660 and WQFG910, DA 10-859*, Order Proposing Modification, 25 FCC Rcd 5389, ¶ 5 (2010) (same).

³³ See, e.g., *American Bird Conservancy v. FCC*, 516 F.3d 1027 (D.C. Cir. 2008).

³⁴ North American Free Trade Agreement, Dec. 17, 1992, available at: <<http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpiID=ALL>> (“NAFTA”), at art. 1202 (requiring the United States to treat Canadian service providers no less favorably than U.S. service providers); art. 904(3) (requiring the United States to accord national treatment to Canadian services when enforcing standards-related measures); art. 907 (prohibiting, among other things, rules affecting U.S.-Canadian cross-border services that discriminate between similar services for the same use).

³⁵ NAFTA art. 1205 (prohibiting a requirement that Canadian companies locate their businesses in the United States as a condition of offering services within the United States).

services.³⁶ Because VRS is *not* a telecommunications service,³⁷ the prohibitions on discrimination and local presence requirements contained in NAFTA Articles 1202 and 1205 apply to VRS.

Moreover, as discussed above, banning Canadian call centers is not a plausible anti-fraud measure, nor does it address any known issue with interpreter quality. Canadian interpreting centers have not been a source of fraud, and the Commission has many other means of addressing the fraud that actually occurs irrespective of the geographic location of the interpreting center.³⁸ With respect to interpreter quality, Sorenson is the only operator of Canadian centers and it imposes the same high quality standards on all of its interpreters, whether in the U.S. or Canada, and is subject to the FCC's rules.³⁹

Furthermore, the United States and the FCC have long supported liberalization of cross-border supply for telecommunications and information services.⁴⁰ As the Commission recognized, for example, “[b]y removing obstacles to entry to all telecommunications service markets, including our own, we believed that we could

³⁶ NAFTA art. 1206 and United States Schedule to Annex II.

³⁷ See, e.g., *2000 Improved TRS Order* ¶ 81 (“TRS [a set of services that includes VRS] cannot be considered ‘telecommunications’” and “TRS providers do not provide telecommunications services [and] are not telecommunications carriers”); *accord*, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 11591, ¶¶ 122, 123 n.293 (2008).

³⁸ See discussion, *supra*, at 1-3 and *infra* at 21-22.

³⁹ See discussion, *infra*, at 20-21.

⁴⁰ See, e.g., *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891 (1997).

deliver tangible benefits to U.S. consumers, U.S. companies and the world at large.”⁴¹

The FCC should not now reverse course for VRS, and potentially incite retaliatory actions, by adopting the proposed rule.

In light of these inconsistencies with U.S. treaty obligations and sound trade policy, Sorenson urges the FCC to reject the proposed rule or, at a minimum, to discuss the issues raised herein with the United States Trade Representative, who has been sent a copy of this filing.

C. The Proposed Rule Would Violate the ADA and Harm the Public

The ADA requires the Commission to ensure that “functionally equivalent” VRS is made available “in the most efficient manner.”⁴² A prohibition on Canadian interpreting centers would make VRS less functionally equivalent and less efficient, contrary to the statute and to the detriment of consumers.

If Sorenson’s Canadian interpreting centers were forced to close, Sorenson would have to launch an aggressive hiring campaign, seeking to add more than several hundred new interpreters to its U.S. interpreting centers. Bidding wars would inevitably erupt as Sorenson sought to hire interpreters away from other providers, and the salaries of interpreters would spike, causing the provision of VRS to be less efficient, contrary to the ADA. Moreover, to the extent that the interpreter force across all providers did not immediately expand to offset the lost Canadian interpreters, average hold times for the industry would increase, causing VRS to be less functionally equivalent.⁴³ Neither of

⁴¹ *Id.* ¶ 4.

⁴² 47 U.S.C. § 225(a)(3), (b)(1).

⁴³ *See, e.g., Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, 20 FCC Rcd 13165,

these results could be squared with the ADA, and even if that were not the case, it would harm the public to make VRS more expensive to provide, thereby putting upward pressure on the size of the Fund, or to subject consumers to longer hold times.

The proposed rule also would impose greater strain on the existing shortage of interpreters available for community interpreting. The Commission has previously sought to ensure that community interpreting not be crowded out by an expanding demand for video interpreters.⁴⁴ To further this goal, Sorenson encourages its interpreters – including those in Canada – to work part time, affording them ample opportunity to perform community interpreting. The proposed rule would eliminate a sizable percentage of the qualified video interpreters employed by Sorenson. Even if Sorenson could secure significantly more hours from its part-time interpreters in the United States to satisfy the FCC’s minimum service standards, it would be difficult, if not impossible, to do so without reducing the availability of interpreters for community interpreting. The result would harm local populations and likely subject community interpreting organizations to wage pressures as well.

The proposed rule would further degrade functional equivalence and harm the public by diminishing the geographic redundancy of VRS interpreting centers. As

¶ 1 (2005) (“speed of answer is central to the provision of ‘functionally equivalent’ TRS”).

⁴⁴ See *id.* ¶ 18 (sharing concern raised by RID and others that new speed-of-answer requirements could, by prompting providers to hire more VIs, leave “fewer community interpreters available to meet the needs of persons with hearing disabilities in other circumstances (*e.g.*, in schools, hospitals, business meetings, etc.)”); *id.* ¶ 20 (expressly seeking to avoid compromising the availability of interpreters for community interpreting).

Sorenson recently explained,⁴⁵ if the United States were to suffer a major disaster, interpreting centers within entire regions of the country could be rendered inoperable. In such a situation, it would be critical for VRS providers to have multiple interpreting centers in regions unaffected by the disaster, including in Canada. If the Commission were to force Sorenson to close its eight Canadian interpreting centers, the VRS industry footprint would be less geographically diverse, potentially restricting the ability of deaf individuals to place emergency calls during a large-scale disaster. Such a result would diminish functional equivalency as well. For example, the Commission does not require VoIP providers to make use of Internet backbone facilities that are located only in the United States. As a result, if a disaster were to take out U.S. Internet backbone facilities, a VoIP user could still have his or her call routed through a Canadian Internet backbone connection. The Commission should permit similar geographic diversity for deaf VRS users.

D. The Proposed Rule Would Be Arbitrary and Capricious

If adopted in its proposed form, the prohibition on non-U.S. interpreting centers would be arbitrary and capricious for at least three reasons: it would lack any reasoned basis; it would unlawfully treat similarly-situated parties differently; and it would unfairly harm investments Sorenson made in reliance on regulations that permitted the operation of Canadian interpreting centers.

1. The Rule Would Lack Any Reasoned Basis

The *NPRM* recites three “concerns” that allegedly justify the proposed rule. Even a cursory examination, however, reveals each of these concerns to be spurious, and

⁴⁵ See *Sorenson Survivability Comments* at 4.

Sorenson is aware of no other rationale that could justify the prohibition. In the absence of any reasoned basis, a decision adopting the proposed rule would be ripe for reversal as arbitrary and capricious.

The first concern expressed in the *NPRM* is that “ASL is generally not the primary form of sign language used in countries outside North America,”⁴⁶ and therefore “VRS providers may not be able to find qualified ASL interpreters to staff [non-U.S.] call centers.”⁴⁷ This concern is unfounded. By focusing on interpreters “outside North America,” the *NPRM* ignores the large supply of qualified ASL-to-English interpreters who live *within North America* in countries other than the United States – namely, Canada.⁴⁸ As noted, moreover, Sorenson already operates eight interpreting centers in Canada, each of which is fully staffed with interpreters who skillfully handle VRS calls in accord with the FCC’s rules. Contrary to the concern raised in the *NPRM*, therefore, providers can find – and in Sorenson’s case have found – a large supply of qualified ASL interpreters to staff Canadian interpreting centers.

The second concern – that “VRS call centers outside the United States may lack appropriate supervision and otherwise not operate in compliance with our rules”⁴⁹ – is also belied by the facts. Sorenson’s Canadian interpreting centers are supervised closely and to the same extent as its U.S. interpreting centers. For example, both sets of

⁴⁶ *NPRM* ¶ 17.

⁴⁷ *Id.*

⁴⁸ Several cities in Canada have a greater supply of qualified interpreters than many states in the United States. For example, five of Sorenson’s Canadian interpreting centers employ 25 or more interpreters. By contrast, there are at least nine entire states that have fewer than 25 RID-certified interpreters residing in their borders.

⁴⁹ *NPRM* ¶ 17.

interpreting centers have the same training programs, quality standards, management structures, and security features, and both are subject to the same queue for distribution of VRS calls to the next available interpreter. Sorenson's Canadian interpreting centers are fully subject to and operate in compliance with the FCC's rules, and its Canadian interpreters have never been subject to an FCC enforcement action or even an informal complaint filed with the FCC. The FCC already receives reports of consumer complaints, which it monitors, and Sorenson is not aware of any significant consumer complaints concerning the quality of its Canadian interpreters. The Commission's concern that Canadian interpreting centers lack supervision is therefore baseless.

Equally unfounded is the third concern, that non-U.S. interpreting centers may be a source of fraud. While some *callers* located outside the United States were indicted for placing fraudulent VRS calls via providers other than Sorenson, the indictments do not suggest any involvement by non-U.S. *interpreting centers*.⁵⁰ To the contrary, those fraudulent calls presumably were processed through U.S. interpreting centers. Likewise, reports suggest that one VRS provider improperly billed for international VRS calls in which neither party was located in the United States.⁵¹ While such international calls are not VRS calls and are not compensable, here too it appears that the calls were processed

⁵⁰ See, e.g., Indictment ¶ 9, *United States v. Yeh, et al.*, No. 09-cr-856 (D.N.J. Nov. 18, 2009) (listing locations of call centers involved in scheme to defraud the Interstate TRS Fund, all of which were located within the United States).

⁵¹ See, e.g., Letter to Michael J. Prendergast, General Counsel, Purple Communications, Inc. from Steven VanRoekel, Managing Director, FCC, at Attachment A (Feb. 19, 2010) (listing erroneous payments for VRS minutes associated with international-to-international calls in the amount of approximately \$1.74 million), appended as Exhibit A to Declaration of Daniel R. Luis, Addendum 1 to Petitioner's Emergency Motion for Stay, *Purple Communications, Inc. v. FCC*, No. 10-1054 (D.C. Cir. March 4, 2010).

through U.S. interpreting centers. Finally, although one individual has indicated that an unidentified provider (perhaps one not eligible to collect from the Fund) employs interpreters in Mexico, these interpreters allegedly worked from home, not at supervised interpreting centers.⁵² As explained above, allowing interpreters to work from home – whether in the United States or elsewhere – is a legitimate concern for the FCC to address, as is regulation of non-eligible providers. Here, too, the concerns are separate from issues arising from Canadian interpreting centers. Simply put, the FCC should not confuse its legitimate concerns regarding international VRS calls, calls handled by interpreters working from home, or calls processed through non-eligible providers with illusory concerns regarding Canadian interpreting centers.⁵³

In short, the three concerns cited by the *NPRM* are groundless, and Sorenson is aware of no other rationale that could provide the “reasoned basis” necessary to justify a prohibition on Canadian interpreting centers.⁵⁴ Under these circumstances, any order adopting such a prohibition would be ripe for reversal as arbitrary and capricious.

⁵² See Comments of Kristie Casanova de Canales, CG Docket No. 10-51, at 1 (June 8, 2010).

⁵³ Sorenson addresses home-based interpreters above, and will address international calls and the identity of the provider handling calls in future comments.

⁵⁴ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“[A]n agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”); see also *Chicago v. Federal Power Comm'n*, 458 F.2d 731, 742 (D.C. Cir. 1971) (“A regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.”); *ALLTEL v. FCC*, 838 F.2d 551, 556-557 & 561 (D.C. Cir. 1988) (the FCC’s adoption of its average schedule eligibility rule was held to be arbitrary and capricious and was remanded because the FCC failed to provide a reasoned explanation for its decision and failed to make a connection between the category of companies that would be subject to the new regulations and those who

2. The Rule Would Arbitrarily Treat VRS Differently from Other Forms of TRS, and Sorenson Differently from Other Providers

It is a fundamental tenet of administrative law that agencies must administer their delegated powers fairly and rationally, a precept that includes not “treat[ing] similar situations in dissimilar ways.”⁵⁵ Here, that tenet is in jeopardy. The Commission is proposing to target only VRS interpreting centers for extraterritorial closure, even though other forms of relay are similarly situated. For example, there is no difference between VRS and IP Relay that could justify exempting the latter, but not the former, from a prohibition on extraterritorial location. Indeed, if anything, what differences there are between the two forms of relay militate more strongly in favor of applying the prohibition to IP Relay than to VRS. Unlike VRS, IP Relay does not face an acute shortage of skilled interpreters; unlike VRS, IP Relay calls have long been plagued by foreign scammers seeking to defraud U.S. merchants;⁵⁶ and, unlike VRS, international IP Relay

were actually engaged in the behavior the regulation was designed to prevent); *see also* 5 U.S.C. § 553.

⁵⁵ *Burinskas v. NLRB*, 357 F.2d 822, 827 (D.C. Cir. 1966) (citing *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965)); *see also National Muffler Dealers Ass’n v. United States*, 440 U.S. 472, 477 (1979) (in “area[s] of limitless factual variations, like cases will be treated alike”) (internal citations omitted); *South Shore Hosp., Inc. v. Thompson*, 308 F.3d 91, 101 (1st Cir. 2002) (“The goal of regulation is not to provide exact uniformity of treatment, but, rather, to provide uniformity of rules so that those similarly situated will be treated alike.”).

⁵⁶ *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Misuse of Internet Protocol (IP) Relay Service and Video Relay Service*, Further Notice of Proposed Rulemaking, 21 FCC Rcd 5478, ¶ 6 (2006) (citing complaints and evidence of IP Relay fraud in which a person places an IP Relay call, “usually from outside the United States” to a U.S. business, orders goods, pays with a stolen credit card, and arranges for the goods to be shipped to a location outside the United States).

calls are not compensable.⁵⁷ Under these circumstances, it would not be rational for the Commission to exempt IP Relay interpreting centers from a rule requiring providers to locate interpreting centers within the United States.

This arbitrariness of selectively targeting VRS would be exacerbated by the fact that the proposed rule would force only one provider – Sorenson – to shut down interpreting centers, while permitting other providers to continue operating non-U.S. interpreting centers without consequence. For instance, at least one provider currently operates an IP Relay call center in the Philippines. Such arbitrary targeting of both VRS and Sorenson cannot be rationally explained.

3. The Rule Would Unfairly Harm Investments Made in Reliance on Prior FCC Rules

Courts have recognized that a rule that “alter[s] future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule . . . may for that reason be ‘arbitrary’ or ‘capricious,’ see 5 U.S.C. § 706, and thus invalid.”⁵⁸

⁵⁷ See, e.g., *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, 19 FCC Rcd 12224, ¶ 48 n.121 (2004) (noting that the Fund “does not currently reimburse providers for the costs of providing international calls via IP Relay”); see also *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, ¶ 129 (2004) (noting that the Interstate TRS Fund does not reimburse providers for international calls made via IP Relay, although it does reimburse providers for international VRS calls).

⁵⁸ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring); see also *Indep. Petroleum Ass’n of Am. v. DeWitt*, 279 F.3d 1036, 1039 (D.C. Cir. 2002), cert. denied 537 U.S. 1105 (2003) (“The legal effect of [this] secondary retroactivity is to add a nuance to ordinary review for whether the agency has been arbitrary or capricious: we review to see whether disputed rules are ‘reasonable, both in substance and in being made retroactive.’”), quoting *U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 233-35 (D.C. Cir. 2000) (analyzing whether secondary retroactivity was “so unfair” as to render rule arbitrary and capricious); cf. *Revision of Rules and Policies for*

From the inception of VRS in 2000, it has always been lawful for providers to locate interpreting centers in Canada or elsewhere outside the United States. In reliance on this permissive regime, Sorenson (i) made large investments to locate, recruit, and train qualified Canadian interpreters; (ii) entered into multi-year commercial property leases for its eight Canadian interpreting centers; and (iii) entered into multi-year contracts for telecommunications and other services needed for those interpreting centers. If the proposed rule were adopted and took effect immediately, as proposed,⁵⁹ these investments would be rendered substantially worthless, and Sorenson would have to pay laid off interpreters certain statutory benefits plus salaries for scheduled hours. The arbitrariness of such a retroactive annulment of investment would be especially acute here, where the investments promoted functional equivalence and efficiency and benefited deaf Americans, as Congress mandated.

the Direct Broadcast Satellite Service, Report and Order, 11 FCC Rcd 9712, ¶ 74 (1995), *aff'd sub nom. DirecTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997) (rejecting restrictive cross-ownership rules because the industry had made investments in reliance on an earlier decision).

⁵⁹ *NPRM* ¶ 18 (tentatively concluding that the “rule should become effective immediately upon publication of the summary of the order adopting it in the Federal Register”).

VI. CONCLUSION

For the foregoing reasons, the Commission should require VIs to work in supervised interpreting centers, prohibit compensation schemes that may encourage minute-pumping by VIs, and adopt whistleblower protections. The Commission should not, however, require VRS calls centers to be located in the United States.

Respectfully submitted,

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September 7, 2010

Certificate of Service

I hereby certify that on this 7th day of September, 2010, I caused a true and correct copy of the foregoing Comments of Sorenson Communications, Inc. to be mailed by electronic mail to:

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/s/ Laura Johnson
Laura Johnson