

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

In the Matter of)
)
Structure and Practices of the) CG Docket No. 10–51
Video Relay Service Program)
)
To: The Commission)

RESPONSE TO WAIVER REQUESTS

Purple Communications, Inc. (“Purple”) responds to those various requests for a waiver from Federal Communications Commission’s (“FCC” or “Commission”) rules prohibiting an eligible provider from contracting with or otherwise authorizing any third party to provide video interpretation services or video relay call center functions on its behalf, unless that authorized third party is also an eligible provider.

Applications for waivers still need to meet threshold requirements

The FCC is in receipt of more than a dozen requests for waivers to its April 5, 2011 Order relating to the detection and prevention of fraud and abuse in the provision of video relay services (VRS). Certain petitioners seek waivers to continue as subcontractors offering video relay interpreting services to certified VRS providers, while others seek to continue subcontracting by offering branded video relay services in addition to providing video relay interpreting services.¹

¹ The FCC might consider a different process for those providers who only intend to provide subcontracting interpreting services for certified providers in contrast to those who seek to offer their own branded relay services in

The FCC threshold requirements to grant any waiver places the burden on the petitioner to show that [1] “the waiver is in the public interest, [2] that the waiver request will not undermine the purposes of the rules in the Order, and [3] that the petitioner will come into compliance with those rules in a short period of time.”² Petitioners also need to provide evidence of ability to comply with FCC rules.³⁴

The Commission should not be concerned about the loss in capacity of service if certain call centers are closed. Providers have made it clear in past filings that they have capacity to absorb call volume that may be diverted by the closing of unauthorized providers or centers. This includes both ASL/English VRS and ASL/Spanish VRS. Customers who have been using unauthorized providers and centers make up a marginal percent of the overall volume serviced by the relay industry.⁵ A petitioner will thus have to make an argument that their request for a waiver meets a public interest other than the argument that the deaf and hard of hearing community will be injured by a loss in capacity of service providers.⁶

Given the volume of waiver requests currently pending before the Commission, and the variety of petitioners, the Commission has much to consider. Among the petitioners, one

addition to providing subcontracted interpreting services. Certain petitioners have asked for waivers while making it explicitly clear that they have no intent of becoming a branded service provider. Such waiver requests fail to meet current criteria and could warrant a separate category of waivers or certification.

² FCC Report and Order and Further Notice of Proposed Rulemaking, released April 6, 2011, CG Docket 10-51, ¶¶62.

³ Ibid, ¶63.

⁴ As the April 6, 2011 order states, “mere attestations [is] inadequate to satisfy this standard.” We endorse the proposed requirement of “evidence of an applicant’s ability to comply with [FCC’s] rules...including speed of answer [and] facility redundancy.” ¶97. This would presumably include evidence of ongoing compliance with the FCC Declaratory Ruling, February 25, 2010 excluding the calls of certified provider employees and the employees of their subcontractors from reimbursement from the TRS Fund. We believe this matter of compliance is one the Commission should explore as part of its waiver review process.

⁵ As the FCC notes in its Order, there is plenty of evidence that many of those calls serviced by unauthorized providers and centers are processed in violation of a number of FCC rules—which makes the number of legitimate calls processed by those unauthorized providers and centers even smaller.

⁶ This view is supported by the fact that many of those applicants do not provide their customers with end point hardware or software. Their customers are thus already using endpoints furnished by other providers which means that they have already registered with other providers and thus will not be denied access to relay services if certain white-label providers are not granted a waiver.

particular waiver request is unique and we encourage the Commission to consider evaluating its request accordingly.

Unique Petitioner

Purple has the utmost respect for Gallaudet University and its contributions to the deaf community through, among other things, its alumni network, faculty, staff, and student population. Unlike other petitioners who have sought waivers to enable continuance of VRS interpreting subcontractor services, Gallaudet is unique and its request for such a waiver should be considered in a different light. Specifically, Gallaudet is:

- The “world’s only university in which all programs and services were designed to accommodate deaf and hard of hearing students.”⁷
- Publicly funded through an act of Congress, first in 1864⁸ and the recipient of \$123 million dollars in appropriations in 2010.⁹
- The recipient of a \$5 million donation from Sorenson and its family foundation.¹⁰
- The party to a “Joint Video Relay Services Agreement” that calls for Sorenson to be the “exclusive provider for university promoted video relay services and IP relay services on the campus of Gallaudet for all of its faculty, staff, students, and guests.”¹¹
- Responsible for a “very small” amount of the overall VRS traffic handled in the United States;

⁷ Gallaudet University Petition for Temporary Rule Waiver, May 13, 2011, CG Docket 10-51, page 2.

⁸ Ibid, page 3.

⁹ Department of Education Fiscal Year 2012 Budget Request: Gallaudet University; p M-9.; <http://www2.ed.gov/about/overview/budget/budget12/justifications/m-gallaudet.pdf>

¹⁰ <http://pr.gallaudet.edu/otg/BackIssues.asp?ID=5106>, and <http://www.washingtonpost.com/wp-dyn/articles/A26549-2004Nov4.html>

¹¹ See Exhibit A and Exhibit B. Purple received those documents from Gallaudet administrators when Purple met with Gallaudet to discuss the possibility of providing services on campus.

- “...one of over one hundred” centers used by Sorenson in the provision of its VRS. ¹²

Gallaudet’s stated dependence on Sorenson as a source of university funding¹³ creates a dilemma in evaluating Gallaudet’s waiver request: denial of the request potentially having a short term impact on university programs(factor unrelated to the FCC’s jurisdiction), while granting the request results in the perpetuation of the status quo inclusive of an exclusive marketing arrangement to a captive audience on the Gallaudet campus with Sorenson Communications, the same provider to which the university provides subcontracted video interpreting services.

Three Prong Test

As the FCC evaluates petition for waiver against the three threshold criteria, the FCC must define what is meant by “the public interest”. Is it ensuring that consumers of video relay services will not be impacted in their ability to make a phone call if a waiver is not granted? If that is the sole measure of the public interest test, it is likely most of the petitioners will fail that test, including Gallaudet. If Gallaudet’s waiver request is rejected, it is highly likely Sorenson could absorb the volume of minutes handled by Gallaudet within its “one hundred” plus call centers around the nation;¹⁴ thus essentially eliminating risk to consumer’s being able to access their service. If the Commission has a different threshold for the public interest test, a petitioner will thus have to make an argument that their request for a waiver meets a public interest other than the argument that the deaf and hard of hearing community will be injured by a loss in capacity of service providers.

¹²Gallaudet University Petition, Page 8.

¹³ Ibid, page 2.

¹⁴ Ibid, page 8.

As it relates to the second and third prongs of the test, petitioners must demonstrate they are not undermining the purposes of the rules and if they are out of compliance, they demonstrate a plan to achieve compliance in a stated time frame. Purple is in no position to evaluate the merits of each petitioner's request as it relates to their individual ability to satisfy the requirements of the Commission's rules, either now or in the future, however we do offer a point of view as to another test we believe should be applied to the waiver evaluation process.

Transparency - Arm's Length Financial Relationships

According to one definition, an arm's length financial relationship is "a transaction in which the buyers and sellers of a product act independently and have no relationship to each other. The concept of an arm's length transaction is to ensure that both parties in the deal are acting in their own self interest and are not subject to any pressure or duress from the other party¹⁵."

Purple applauds CSD for disclosing in their waiver request that they have an ownership stake in CSDVRS. Transparent financial interest is important in assessing whether an "arm's length relationship exists or whether there is a shared economic interest among provider and subcontractor and heightens the need for review of compliance pertaining to actual or implied rules regarding the exclusive use of the provider where the vested interest exists and the related submission of minutes from employees of subcontractors. This is particularly relevant in the Gallaudet filing which seeks a waiver from the Commission's pending rules.

¹⁵ Investopedia <http://www.investopedia.com/terms/a/armslength.asp>

Through the “Joint Video Relay Services Agreement” Sorenson requires the exclusive use of its equipment and services on the Gallaudet campus.¹⁶ This ban on access to other providers extends even so far as to prohibit the placement of any advertisement for non-Sorenson relay services in the student newspaper, *The Buff and Blue*¹⁷. These arrangements seem inappropriate for an entity which is also the recipient of funds from the very VRS provider for which it offers subcontracted interpreter services. Moreover, the exclusivity both limits the introduction of evolving relay technologies from multiple providers, thus stifling innovation, and forecloses Gallaudet’s potential development of diverse revenue streams from providing similar call-center services to multiple providers.

At a minimum, and to avoid actual or implied quid pro quo arrangements, all petitioners should factually demonstrate an “arm’s length” relationship between themselves and the certified provider offering VRS to consumers prior to receiving any consent or waiver. Furthermore, Purple urges the FCC to examine the broader relationship with Sorenson and Gallaudet in light of the Commission’s rules on marketing practices, conditional exclusivity, and the submission of billable minutes used by employees of subcontractors (all employees of Gallaudet, a Sorenson subcontractor, would presume to be subject to the applicable rules).

Moving forward with a robust, healthy and competitive relay industry

Over a year ago, the FCC set out to bring reform to the VRS industry and it has made great strides in bringing much needed clarity and consistency to the TRS program. The

¹⁶ Ibid.

¹⁷ Although it appears the exclusivity provisions of the agreement may have expired in 2010, the persistence of anti-competitive behavior on the Gallaudet campus was evidenced just this month, when on May 19, Purple was informed that a Purple-branded kiosk residing on the Gallaudet campus in a public location had to be removed because it did not comply with the “Sorenson agreement” pertaining to exclusivity.

EXHIBIT A

Gallaudet University Excerpt from Sorenson Agreement

"1. Telecommunication Relay Services. Until October 31, 2010, or in the event that the Joint Video Relay Services Agreement is terminated pursuant to Section 3.2.2 or Section 3.2.3 of the Joint Video Relay Services Agreement prior to October 31, 2010, through such earlier date of termination, Sorenson shall be the exclusive provider for university promoted video relay services and IP relay services on the campus of Gallaudet for all of its faculty, staff, students and guests. During such period, Gallaudet shall exclusively use Sorenson equipment and services and not authorize the placement of equipment or services on its campus that would directly compete with the video relay and IP relay services offered by Sorenson. Both parties shall coordinate the co-marketing of Sorenson services and issue a mutually agreed upon press release announcing the exclusive agreement for video relay and IP relay services being offered on the Gallaudet campus."

EXHIBIT B

Gallaudet University Interpretation of Sorenson Agreement

Gallaudet University's exclusive agreement with Sorenson Communications ("Sorenson") and the impact the agreement has on the advertising and promotion, on the Gallaudet campus, of other companies offering products or services that are similar to Sorenson's products and services is interpreted as follows:

- Sorenson is the sole provider to Gallaudet University of equipment and services for University promoted purposes. This includes the installation of public video relay booths and the exclusive use of Sorenson equipment and services for on-campus, University sponsored events.
- The University does not restrict the on-campus, *private* use of other video services in non-public settings as long as the equipment's technical requirements meet University standards. "Private use" and "non-public settings" include faculty offices and student dorm rooms.
- The University will not permit the on-campus public advertisement or promotion of non-Sorenson VRS or IP Relay equipment and services on the Gallaudet campus. This includes events sponsored through official University groups such as student groups and events such as Homecoming, athletic events and commencement.
- The Kellogg Conference Hotel is exempt from the Sorenson exclusive as it is operated by a private contract management company and by contract, is allowed to accept and promote businesses for the commercial benefit of the company and of Gallaudet. Advertisement or promotion of non-Sorenson equipment or services is restricted to the interior of the Center and can not be visible from the exterior of the building. However, all public, permanent VRS equipment in the center is solely provided by Sorenson. This includes the public VRS booths, videophones installed in sleeping rooms, and videophones used by the Center staff.
- The exclusive does not apply to venues or events not on the campus of Gallaudet University even if Gallaudet is an official sponsor of the event. This includes off-campus events such as the Academic Bowl.
- Non-Sorenson VRS companies are allowed to advertise non-VRS or non-IP Relay services, at the University's discretion and approval, as long as the company adheres to the advertising restrictions mandated by the Sorenson exclusive agreement. Companies whose sole business is to provide VRS services are prohibited from any on-campus promotion or advertising.

Questions regarding the interpretation of this agreement may be directed to Gary Aller, Executive Director of Business and Support Services, gary.aller@gallaudet.edu, 202.448.6968.