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January 17, 2012

FILED/ACCEPTED

VIA HAND DELIVERY

JAN 17 2012

Federal Communications Commission  
Office of the Secretary

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, DC 20554

Re: **REDACTED – FOR PUBLIC INSPECTION**  
*In the Matter of Structure and Practices of the Video Relay Service Program, Report and Order and  
Further Notice of Proposed Rulemaking, CG Docket No. 10-51*

Dear Ms. Dortch:

On behalf of Purple Communications, Inc. (“Purple”), and pursuant to Section 0.459 of the Commission’s rules,<sup>1</sup> please find enclosed an original and four copies of the redacted version of Purple’s Request for Review of the Decision by the TRS Administrator (“Request for Review”) and Exhibits A through H. The Confidential version of the Request for Review and Exhibits A through H is being filed simultaneously on paper with the Office of the Secretary under separate cover.

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<sup>1</sup> 47 C.F.R. § 0.459.

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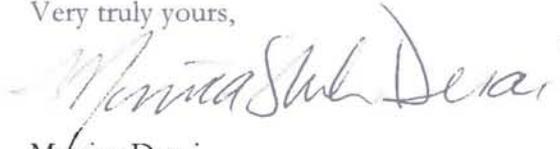
**PATTON BOGGS**<sup>LLP</sup>  
ATTORNEYS AT LAW

Ms. Marlene H. Dortch

January 17, 2012

Page 2

Very truly yours,

A handwritten signature in black ink that reads "Monica Desai". The signature is written in a cursive style with a large, looped initial "M".

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*Counsel for Purple Communications Inc.*

Enclosures

Before the  
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

FILED/ACCEPTED

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In the Matter of )

Request for Review of the Decision of the )  
TRS Administrator to Withhold TRS Funding )  
from Purple Communications, Inc. )  
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CG Docket No. 10-51 Federal Communications Commission  
Office of the Secretary

JAN 17 2012

**Request for Review of the Decision by the TRS Administrator**

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January 17, 2012

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SUMMARY

Purple Communications, Inc. (“Purple”) provides Telecommunications Relay Service (TRS), including IP-enabled text relay service, and is eligible to receive reimbursement for the provision of its services. As a provider, Purple adheres to the mandatory minimum standards of service, including the standard for Speed of Answer (SOA). For over twenty years, providers have been required to substantially, but not absolutely, comply with mandatory minimum standards of service. Historically, the SOA standard for IP-enabled text relay required providers to substantially, but not absolutely, “answer 85% of all calls within 10 seconds” as measured on a daily basis. The TRS Fund Administrator (“Administrator”), consistently issued TRS Fund reimbursements for days that did not absolutely meet the SOA benchmark.

On September 20, 2011, the Administrator notified Purple that it had adopted a new interpretation of the SOA standard. Specifically, for the first time, the Administrator applied the 85/10 SOA standard to refuse providing any reimbursement at all on those days that did not meet the benchmark with absolute exactitude. Unfortunately, the Commission and the TRS Administrator elected to apply the new interpretation retroactively to providers without notice and while they were still operating under the prior interpretation. The result, for Purple, was the withholding of { [REDACTED] } of reimbursement for services Purple already provided (or provided within { [REDACTED] } following notice of the new interpretation).

Equity and due process direct that retroactive application of the TRS Administrator’s new interpretation of the SOA standard should not be permitted. Purple acted in good faith during the time it provided service under the pre-existing interpretation. Purple provided service in reliance on that historic interpretation and in reliance on rules that specified that staffing and

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network operations should be set based on “projected call volumes.” To apply a new interpretation requiring a different unknown level of staffing and other operational changes to somehow plan for unprojected and unforeseen call volume spikes, without notice and without opportunity for Purple to adjust its operations accordingly, is simply unfair and not in the public interest. Purple is more than willing to comply prospectively with the Administrator’s new interpretation for SOA. Purple simply seeks the reimbursement to which it is entitled for the time it was operating in good faith on the prior interpretation of the SOA standard.

Alternatively, Purple seeks a waiver of the new SOA interpretation for the days on which Purple did not meet the new SOA interpretation resulting from unforeseen and aberrational spikes in call volume that materially exceeded forecasted call volume, combined with partial reimbursement for those remaining days, consistent with the approach applied in the series of private letter rulings issued by Commission staff. As a further alternative and at a minimum, Purple requests at least partial reimbursement for days on which Purple’s actual SOA performance is at least 65% of calls answered in 10 seconds, consistent with the approach applied to other providers in the series of private letter rulings issued by Commission staff.

In summary, Purple should be reimbursed the complete {REDACTED} being withheld by the Administrator for services rendered on certain days in the months of July, August, September and October 2011. In the alternative, Purple seeks reimbursement of at least {REDACTED}, which represents an adjustment for unforeseen and aberrant spikes in call volume, and applying a graduated scale approach for the remaining days withheld. As a further alternative minimum, Purple should be reimbursed based on the graduated formula used by the Commission in private letter rulings, resulting in the return of {REDACTED}.



principles of equity and due process. Equity and due process direct that the Administrator should not be permitted to retroactively apply a new “absolute compliance” interpretation of the SOA rules without notice or opportunity for Purple to comply with the new interpretation or otherwise take action consistent with the new interpretation of the SOA rules.

Alternatively, Purple seeks a waiver of the SOA rules for the days on which Purple missed the SOA benchmark due to unforeseen, unprojected and aberrant spikes in call volume that exceeded both the forecasted call volume and the seven-week rolling average call volume for such days.<sup>3</sup> Upon a showing of good cause, a provider may be eligible for full reimbursement pursuant to a waiver for periods during which the SOA benchmark was missed.<sup>4</sup>

As a further alternative, consistent with the Commission’s treatment of other providers in accordance with its private letter rulings, Purple should be provided, at a minimum, a partial reimbursement for days on which its actual SOA performance is at least 65% of calls answered in 10 seconds.<sup>5</sup>

## **I. BACKGROUND**

### **A. Purple Provides Services in Full Compliance With Commission Rules**

Purple offers text relay, video relay, telephone captioning, and community interpreting services. This breadth of services, coupled with its technical acumen, distinguishes Purple as an industry leader in innovation and service to its customers. Recently, Purple was featured on

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<sup>3</sup> Purple seeks relief in connection with any “spike” in call volume that exceeded 110% of the forecasted volume for any day in question for the months of July through October, 2011.

<sup>4</sup> Letter from Catherine W. Seidel, Chief, Consumer and Government Affairs Bureau, FCC, to Marin Beaulac, Nordia, Inc. (Jan. 23, 2008) (“Nordia”) (See Exhibit A); Letter from Catherine W. Seidel, Chief, Consumer and Government Affairs Bureau, FCC, to Davida Grant, Senior Counsel, AT&T Services, Inc.(Jan. 23, 2008) (“AT&T”) (See Exhibit B).

<sup>5</sup> *Id.*



placed, not put in a queue or on hold.”<sup>6</sup> For IP Relay, the SOA is calculated on a daily average basis.<sup>7</sup>

Prior to September 20, 2011, neither the Administrator nor any predecessor had *ever* interpreted the 85/10 SOA benchmark to require an “all or nothing approach.” Indeed, the opposite is true. In interpreting the TRS rules in the *Publix* decision, the full Commission addressed this issue and explicitly determined that “absolute” compliance with the TRS mandatory minimum standards was not required for reimbursement:

We recognize that *absolute compliance* with each component of the rules *may not always be necessary* to fulfill the purposes of the statute and the policy objectives of the implementing rules, and that not every minor deviation would justify withholding funding from a legitimate TRS provider. *We therefore hold that a TRS provider is eligible for TRS Fund reimbursement if it has substantially complied with Section 64.604.*<sup>8</sup>

The Commission emphasized that its approach permitted a provider to remain eligible for reimbursement despite not absolutely meeting the mandatory minimum standards, as long as the provider “satisfied the underlying purposes of those requirements.”<sup>9</sup>

Similarly, in a series of letter decisions, the Commission’s Consumer and Governmental Affairs Bureau explained that a bright line “all or nothing” approach to assessing penalties related to SOA is contrary to public policy and not in the public interest, because providers would be incentivized to stop providing service altogether as soon as they realize, on any given day, that they will miss the 85/10 mark. Accordingly, the Bureau chose to apply a waiver of the

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<sup>6</sup> 47 C.F.R. § 64.604(b)(2)(ii).

<sup>7</sup> 47 C.F.R. § 64.604(b)(2)(ii)(C).

<sup>8</sup> *In re Public Network Corp.; Customer Attendants, LLC; Revenue Controls Corp.; Revenue Controls Corp.; SignTel, Inc.; and Focus Group, LLC*, Order to Show Cause and Notice of Opportunity for Hearing, 17 FCC Rcd 11487, 11495 (2002) (“*Publix*”) (emphasis added).

<sup>9</sup> *Id.*

SOA standard in certain cases, or the application of a graduated formula in other instances, to assess any penalties associated with missing the SOA benchmark:

We further believe that, absent waiver of the 85/10 rule for a particular day, it is appropriate to apply a graduated formula where the provider misses compliance with the rule, but meets the test for at least 65 percent of its call volume on that particular day, and where the provider provides a plausible explanation for its lack of full compliance with the 85/10 rule on the particular day. Otherwise, we find it proper to require an entire day's compensation from the provider, because below the 65 percent threshold the failure to provide service is so severe that the service is not being provided on a functionally equivalent basis to voice telephone services.<sup>10</sup>

The Bureau recognized the strong public interest rationale supporting either a waiver as appropriate or partial reimbursement as appropriate:

For one thing, it averts a situation where a relatively small miss causes a provider to lose all compensation for the day, which could give the provider incentive to provide poor service or no service for the remainder of the day once it calculates that it would miss compliance with the 85/10 rule. In addition, a graduated formula takes into account that, on those days the provider missed compliance, it still provided a service of value, but also acknowledges that it should return some portion of its reimbursements for those days due to its noncompliance with the rule, and that the portion should increase commensurate with the degree of its noncompliance.<sup>11</sup>

Furthermore, the Commission's TRS rules reflect that the Commission expects providers to operate based on projected calling volumes, for both staffing and network capacity. Pursuant to Sections 64.604(b)(2)(i) and (ii), compliance with speed of answer requirements must be viewed by the Commission in the context of rules connecting TRS operations, projected call volumes and staffing. Specifically, TRS facilities must:

(1) "ensure adequate TRS facility staffing to provide callers with efficient access under projected calling volumes, so that the probability of a busy response due to CA

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<sup>10</sup> See Nordia at 5; see also AT&T at 5.

<sup>11</sup> *Id.* (emphasis added)

unavailability shall be functionally equivalent to what a voice caller would experience in attempting to reach a party through the voice telephone network”; and

(2) “ensure that adequate network facilities shall be used in conjunction with TRS so that under projected calling volume the probability of a busy response due to loop trunk congestion shall be functionally equivalent to what a voice caller would experience in attempting to reach a party through the voice telephone network.”<sup>12</sup>

If the Commission had intended providers to base staffing on any possible level of call volume, including unprojected call volumes, it would not have inserted “projected calling volumes” language into the rules. Otherwise, if providers had been expected to ignore projected calling volumes to meet the 85/10 standard under any circumstances whatsoever, including adding some unknowable number of additional staff to take into account the possibility of unpredicted spikes in calls, the TRS Fund size would dramatically increase and unnecessary inefficiencies would be created.

**C. The Administrator, Without Providing Notice of the Change in Interpretation of the SOA Standard, Withheld Reimbursements Owed to Purple**

The TRS Fund underwent an administration change in July of 2011. Effective July 1, 2011, RLSA was appointed the new Administrator of the interstate TRS Fund by the Commission. The TRS Fund had previously been managed by the National Exchange Carrier Association (“NECA”).

On September 20, 2011, the Administrator notified Purple that all reimbursements owed to Purple from the TRS Fund for the entire month of July would be withheld because Purple did not strictly meet the 85/10 mandatory minimum standard for {█} out of 31 days in July. The Administrator subsequently realized, after discussions with Purple and Commission staff, that

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<sup>12</sup> 47 C.F.R. §§ 64.604(b)(2)(i) and (ii).

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the SOA for IP Relay is calculated on a daily basis, and not a monthly basis, so RLSA later released the funds for the {█} days in July that Purple met the 85/10 SOA benchmark. However, the Administrator continued to interpret the SOA standard as requiring an “all or nothing” interpretation for reimbursement, and withheld funding for the entirety of the {█} days in July and subsequently withheld funding for {█} days in August, {█} days in September, and {█} days in October on which Purple did not meet the new interpretation of the 85/10 standard. The total funds withheld for these days totaled {█}. Prior to September 20, 2011, consistent with *Publix*, no Administrator had interpreted the SOA standard using RLSA’s new approach. Purple attempted to work with RLSA to explain that RLSA’s new interpretation was inconsistent with many years of precedent.

In November 2011, there was an industry-wide meeting during which numerous providers explained to RLSA that the new interpretation was inconsistent with precedent and had been specifically rejected by the Commission and the Consumer & Governmental Affairs Bureau. The providers also argued that flash-cutting to a new approach without notice was unfair, as they had, in good faith, relied on the historic interpretation in providing services. The industry-wide group meeting was followed by a separate meeting between Purple executives and the Administrator in which Purple presented, for each day in July-October 2011 for which RLSA had denied reimbursement under the new strict interpretation, detailed information and evidence of: (i) forecasting and operational efforts implemented to meet the SOA requirement based on those forecasts; (ii) efforts to combat questionable call activity; and (iii) forecasted and actual

call volume activity.<sup>13</sup> Purple provided the Administrator with a 57-page presentation setting forth this information (“Presentation”). The Presentation is attached as Exhibit C.

Purple explained that given the operational realities of relay call centers in the context of the FCC’s prescribed rules, including rules envisioning staffing based on projected call volumes, a new strict interpretation of the SOA standard should be harmonized with: (1) an allowance for unplanned call volume and the suspension of penalties in the event of significant, unforeseen, unprojected call volume spikes; and (2) a proportional penalty structure that provides a graduated formula to levy penalties in relationship to the magnitude of a performance shortfall, consistent with the Commission’s prior decisions.

On November 7, 2011, Purple filed an appeal with the Administrator regarding its decision to withhold reimbursement of payment for the months of July and August 2011, and petitioned the Administrator for future release of reimbursement payments for the months of September and October 2011.<sup>14</sup>

On December 22, 2011, the Administrator sent a letter to Purple denying the appeal.<sup>15</sup> The Administrator asserted that it lacked the authority to apply anything but its new interpretation of the 85/10 standard:

Conspicuously missing from the Administrator’s responsibilities is a delegation of authority to waive, or otherwise amend or interpret, the Commission rules applicable to the TRS Fund Administration. Absent such a delegation of authority, RLSA believes that we are without the requisite authority to either

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<sup>13</sup> Letter from David Rolka, President, Rolka Loube Saltzer Assocs., to John Goodman, Chief Legal Officer, Purple Commc’n, at 1 (Dec. 22, 2011) (“TRS Decision”) (Exhibit D).

<sup>14</sup> Letter from John Goodman, Chief Legal Officer, Purple Commc’n, to David Rolka, President, Rolka Loube Saltzer Assocs., at 1-14 (Nov. 7, 2011) (“Amended Appeal”). A slightly amended appeal was filed on November 8, 2011. That amended appeal is attached hereto as Exhibit E.

<sup>15</sup> TRS Decision at 3.

interpret or apply operational criteria which would have the effect of modifying the express language of a rule. RLSA also believes that we are without authority to waive the implementation of the Commission rules.<sup>16</sup>

The Administrator also indicated that since the time of its September 20, 2011 decision, it had reviewed the Nordia and AT&T letter rulings and noted, among other things, that the rulings “were neither known to exist at the time of the change of administration to RLSA” and “have been superseded by contemporary consultation between the Administrator and the Commission.”<sup>17</sup>

## II. COMMISSION PRECEDENT, EQUITY, AND DUE PROCESS DIRECT THAT PURPLE’S REIMBURSEMENT BE RELEASED

As the courts have explained, “[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.”<sup>18</sup> In fact, in *Satellite Broadcasting Company v. FCC*, the D.C. Circuit indicated that if the Commission used its regulatory power to effectively “punish a member of the regulated class for reasonably interpreting Commission rules” the result would be that “the practice of administrative law would come to resemble ‘Russian Roulette.’”<sup>19</sup> In a subsequent case, the D.C. Circuit further established an “ascertainably certainty” standard that is applicable to the situation at hand: “If, by reviewing the regulations and other public statements issued by the agency, a regulated party

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<sup>16</sup> TRS Decision at 2.

<sup>17</sup> *Id.* (emphasis added).

<sup>18</sup> *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

<sup>19</sup> *Id.* at 3. (“The Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules. Otherwise the practice of administrative law would come to resemble ‘Russian Roulette.’ The agency’s interpretation is entitled to deference, but if it wishes to use that interpretation to cut off a party’s right, it must give full notice of its interpretation.”)

acting in good faith would be able to identify, with ‘ascertainable certainty,’ the standards which the agency expects to conform, then the agency has fairly notified a petitioner of the agency’s interpretation.”<sup>20</sup>

For two decades, the Commission and the Administrator never applied an “absolute” interpretation of the SOA standard in calculating reimbursements. While the Commission is free to change its interpretation, doing so without notice and opportunity to meet the new interpretation is unfair and inequitable. Given the *Publix* decision, the private letter rulings issued by the Commission, rules envisioning staffing based on projected call volumes, and many years of actual Fund administration, there is no reasonable way to argue that Purple could with any level of certainty ascertain that the RLSA interpretation would suddenly and without notice change to the Administrator’s new “all or nothing” that can only be described as “absolute compliance.”

Furthermore, the D.C. Circuit concluded that when deciding the appropriateness of retroactive application of a new rule, all of the relevant factors “boil down . . . to a question of concerns grounded in notions of equity and fairness.”<sup>21</sup> The retroactive application of a new rule

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<sup>20</sup> *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995); see also *Trinity Broad. of Fla. v. FCC*, 211 F.3d 618, 632 (D.C. Cir. 2000) (“Where, as here, the regulations and other policy statements are unclear, where the petitioner’s interpretation is reasonable, and where the agency itself struggles to provide a definite reading of the regulatory requirements, a regulated party is not ‘on notice’ of the agency’s ultimate interpretation of the regulations, and may not be punished.”) (quoting *Gen. Elec. Co.* at 1333-34.)

<sup>21</sup> See *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (declining to “plow laboriously” through the Clark-Cowlitz factors, which “boil down to a question of concerns grounded in notions of equity and fairness”) (citation omitted). The Clark-Cowlitz test is a five-factor balancing test to determine if it would be equitable to apply a new rule retroactively. The factors include: (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied

will be denied “when to apply the new rule to past conduct or to prior events would work a ‘manifest injustice.’”<sup>22</sup> In the *Verizon Telephone Cos.* case,<sup>23</sup> the court stated that for a “manifest injustice” to occur from retroactive liability, the provider must have had reasonable reliance on the old rule.<sup>24</sup> According to the *Verizon* analysis, for reliance to be considered “reasonable,” the relied upon rule must be “settled” and “well-established.”<sup>25</sup> “Settled” means that the relied upon interpretation had not been in dispute, while “well-established” refers to an interpretation that spans more than a solitary proceeding.<sup>26</sup>

Based upon these factors, Purple acted in reasonable reliance in provisioning IP Relay service and expecting to be reimbursed for those days that RLSA denied reimbursement. The reasonable reliance was based on the Commission’s years of consistent reimbursement for IP Relay services rendered on days when the 85/10 SOA standard was substantially, but not strictly, met, combined with Commission rules requiring staffing based on projected call volumes – not unprojected spikes. First, up until September 20, 2011, the Commission had never applied a strict compliance standard. The Commission specifically articulated a substantial compliance

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relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard. *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081-86 (D.C. Cir. 1987) (en banc) (citing *Retail, Wholesale & Dep’t Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972)).

<sup>22</sup> See *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098 (D.C. Cir. 2001) (citing *Clark-Cowlitz Joint Operating Agency v. FERC*, 264 U.S. App. D.C. 58, 826 F.2d 1074, 1081 (D.C. Cir. 1987)) (en banc) (quoting *Thorpe v. Housing Auth. of the City of Durham*, 393 U.S. 268, 282 (1969)); see also *Consol. Freightways v. NLRB*, 892 F.2d 1052, 1058 (D.C. Cir. 1989).

<sup>23</sup> *Verizon Tel. Cos.*, 269 F.3d at 1098.

<sup>24</sup> See *id.* at 1111.

<sup>25</sup> *Id.*

<sup>26</sup> See *id.*

interpretation of the TRS mandatory minimum standards in the *Publix* decision, and over the course of many years of administering and overseeing the Fund did not in practice require absolute compliance for reimbursement. Providers had no reason to anticipate RLSA's sudden application of strict compliance requirement for reimbursement. Moreover, since 2002, when the Commission articulated the substantial compliance standard, IP Relay service providers have never been required to forfeit payments for entire days on which they did not, with exactitude, meet the speed-to-answer benchmark. As a result, the new strict compliance interpretation is an abrupt departure from the "substantially complied" interpretation which had historically and consistently governed IP Relay since its inception.<sup>27</sup> Because the substantial compliance standard was settled and well-established, Purple's reliance on it was reasonable. Thus, to prevent Purple from suffering a "manifest injustice," the retroactive application of a "strict compliance" interpretation of minimum SOA standards must not be permitted.

In addition, the text of the SOA rule makes it unreasonable to conclude that Purple should have ascertained back in July, August, and early September that the Administrator would withhold funding if Purple did not meet an "absolute compliance" interpretation. Specifically, as explained above, Section 66.6049(b)(2)(i) and (ii) require that TRS facility: (1) "ensure adequate TRS facility staffing to provide callers with efficient access under projected calling volumes, so that the probability of a busy response due to CA unavailability shall be functionally equivalent to what a voice caller would experience in attempting to reach a party through the voice telephone network"; and (2) "ensure that adequate network facilities shall be used in conjunction with TRS so that under projected calling volume the probability of a busy response

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<sup>27</sup> See *Clark-Cowlitz Joint Operating Agency*, 826 F.2d at 1081-86.

due to loop trunk congestion shall be functionally equivalent to what a voice caller would experience in attempting to reach a party through the voice telephone network.”<sup>28</sup>

This is exactly what Purple has done. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The new interpretation of the SOA rule has raised the service level requirement for providers. To meet the new interpretation, providers must recalibrate operations and materially increase staffing and resources for call centers to handle the increase in call volume. For example, on { [REDACTED] } the forecast reflected that { [REDACTED] } agents would be needed at peak levels. However, on that day, due to an aberrational spike, { [REDACTED] } agents would have been required to meet the new interpretation of the SOA standard – an additional { [REDACTED] } agents. The following table reflects the number of additional bodies Purple would have been needed on a sample of four dates to maintain an absolute 85/10 SOA based on actual versus forecasted volumes:

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<sup>28</sup> 47 C.F.R. § 64.604(b)(2)(i) and (ii) (emphasis added).

<sup>29</sup> { [REDACTED]

<sup>30</sup> See Exhibit C.



being withheld by the Administrator for services rendered on certain days during the months of July, August, September, and October 2011.

**III. IN THE ALTERNATIVE, PURPLE SEEKS A WAIVER OF THE NEW SOA INTERPRETATION FOR THOSE DAYS THAT PURPLE EXPERIENCED AN UNFORESEEN SPIKE ABOVE FORECASTED CALL VOLUMES**

Under the Commission's rules, the agency may waive any provision of the rules "if good cause therefor is shown."<sup>31</sup> In fact, the Commission has stated that a provider experiencing an unforecasted spike in call volume on a particular day should, in some circumstances, receive relief from any penalties or withholdings related to a missed SOA via a waiver:

A provider supplying evidence that call volumes on a specific day or a portion thereof represented such a pronounced and unforeseen divergence from normal call volumes, and are beyond the providers control, could, in appropriate cases, qualify for a waiver of the 85/10 rule.<sup>32</sup>

In addition, the Commission has consistently waived its rules "where particular facts would make strict compliance inconsistent with the public interest" and stated that it can take equitable considerations into account when granting a waiver.<sup>33</sup> In the TRS context, the Consumer and Government Affairs Bureau recently granted waivers to providers applying for TRS certification in which it recognized the importance of having adequate time and notice to comply with a rule.<sup>34</sup> In the case of *CSDVRS, LLC*, the Bureau found a TRS provider's

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<sup>31</sup> 47 C.F.R. § 1.3.

<sup>32</sup> See Nordia at 3.

<sup>33</sup> *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); see, e.g., Nordia at 2.

<sup>34</sup> *Notice of Conditional Grant of Application of Convo Communications, LLC For Certification as a Provider of Video Relay Service Eligible for Compensation from Interstate Telecommunications Relay Service Fund*, Public Notice, 26 FCC Rcd 15956, 15958-59, n.21 (2011); *Notice of Conditional Grant of Application of Hancock, Jahn, Lee & Pucket, LLC, d/b/a Communications Axess Ability Group for Certification as a Provider of Video Relay Service*

explanation of internal system changes and the fact that it corrected the issue at hand sufficient to warrant a waiver of the TRS rules and allowance of reimbursement.<sup>35</sup> As discussed in this appeal, Purple had neither adequate time nor notice to apply the new interpretation of the SOA rule to the disputed days in July, August, September, and October 2011. Moreover, Purple is now able to meet the new strict interpretation of the SOA standard.

Here, as set forth in the attached Exhibit C, Purple has presented call volume data for each day it seeks reimbursement that demonstrates the special circumstances surrounding this request. In each case, the call volume markedly exceeded the forecasted call volume and the seven-week average call volume for such day.

Call volume spikes can occur for multiple reasons, including aberrant weather patterns or significant national or global events. Also, despite robust blocking and prevention methods, Purple receives calls to its network which turn out to be questionable. The Commission has made it a point to reiterate to providers, however, that despite indications of misuse, “under applicable TRS regulations, TRS providers cannot refuse to make an outbound call requested by

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*Eligible for Compensation from the Interstate Telecommunications Relay Service Fund*, Public Notice, 26 FCC Rcd 15965, 15967-68, n.27 (2011); *Notice of Conditional Grant of Application of ASL Services Holdings, LLC for Certification as a Provider of Video Relay Service Eligible for Compensation from the Interstate Telecommunications Relay Service Fund*, Public Notice, 26 FCC Rcd 15960, 15963-64 n.27 (2011). See also *In re Structure and Practice of the Video Relay Service Program*, Order, 26 FCC Rcd 15660 (2011).

<sup>35</sup> Letter from Joel Gurin, Chief, Consumer and Government Affairs Bureau, FCC, to William Banks, CSDVRS, LLC, 25 FCC Rcd 1257 (Feb. 3, 2010) (“CSDVRS”); see also Letter from Joel Gurin, Chief, Consumer and Government Affairs Bureau, FCC, to Gil M. Strobel, Lawler, Metzger, Kenney & Logan, 25 FCC Rcd 5836 (May 27, 2010) (“Sorenson”) (finding explanation of technical difficulties was sufficient to warrant a waiver of the TRS rules and justified allowance of reimbursement).

a TRS user.”<sup>36</sup> The Commission explains that as part of the mandate of functional equivalency, communications assistants are prohibited from refusing calls:

Under the functional equivalency mandate, TRS is intended to permit persons with hearing and speech disabilities to access the telephone system to call persons without such disabilities. TRS is intended to operate so that when a TRS user wants to make a call, a CA is available to handle the call. The Commission has noted that the “ability of a TRS user *to reach a CA prepared to place his or her call ... is fundamental to the concept of ‘functional equivalency.’* For this reason, the TRS regulations provide that CAs are prohibited from refusing calls.<sup>37</sup>

The underlying rationale for prohibiting CAs from refusing calls stems from the concept that CAs are intended to be “invisible conduits” that merely serve to process calls – they are not allowed to make independent judgments regarding calls, and are prohibited from “policing” calls:

The Commission has received complaints from vendors, consumers, and TRS providers that people are using the IP Relay to make telephone purchases using stolen or fake credit cards. Although such purchases are illegal, and the Department of Justice and the FBI can investigate, *due to the transparent nature of the CA’s role in a TRS call the CA may not interfere with the conversation.*

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<sup>36</sup> *Telecommunications Relay Service (TRS) Providers Must Make All Outbound Calls Requested By TRS Users and May Not “Block” Calls to Certain Numbers at the Request of Consumers*, Public Notice, DA 05-2477, 20 FCC Rcd 14717 (Sept. 21, 2005) (“2005 TRS Provider Public Notice”) (emphasis added); see also 47 C.F.R. § 64.604(a)(3)(i).

<sup>37</sup> 2005 TRS Provider Public Notice at 14718 (citing *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, ¶ 39 (Mar. 6, 2000) (FCC 00-56) (“2000 Improved TRS Order”) (emphasis added) (“all relay services either mandated by the Commission or eligible for reimbursement from the interstate TRS Fund must comply with the mandatory minimum standards”) (also citing 47 C.F.R. § 64.604(a)(3)(i) (stating that “[c]onsistent with the obligations of telecommunications carrier operators, CAs are prohibited from refusing single or sequential calls or limiting the length of calls using relay services”)) (emphasis supplied).

*The TRS statutory and regulatory scheme do not contemplate that the CA should have a law enforcement role by monitoring the conversations they are relaying.*<sup>38</sup>

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

Granting a limited waiver of the SOA rules under these special circumstances will serve the public interest, because immediate disbursement of these funds are important for Purple to continue to meet the Commission's standards and provide high quality services to its customers. In addition, Purple has met the TRS Administrators new interpretation of the SOA rules every day since [REDACTED].

Withholding these funds has created a significant financial hardship for Purple. A retroactive penalty in excess of \$5,000,000 is extremely impactful for a small company that's sole business is delivering services to Americans with hearing or speech disabilities. Operating with the reasonable and good faith belief in the established reimbursement model, Purple incurred all the cost of delivering IP Relay services in July, August and September, by the time

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<sup>38</sup> See *FCC Reminds Public of Requirements Regarding Internet Relay Service and Issues Alert*, Public Notice, 19 FCC Rcd 10740 (2004) (emphasis added); see also *IP Relay/VRS Misuse FNPRM*, FCC 06-58, 21 FCC Rcd 5478 at ¶ 12; see also 47 C.F.R. § 64.604(a)(2).

the Administrator communicated the new standard, and had made full preparations to deliver those services in October. Had Purple known *in advance* that a 20+ year payment/penalty practice was being abandoned effective July 1, along with the concept of staffing based on projected call volumes as articulated in the TRS rules, Purple could have been proactive in adding a significant and unknown number of additional staff at peak times to prepare for unprojected spikes in calls.

Accordingly, in the alternative, Purple seeks a waiver of the SOA benchmark for those days on which the actual call volume exceeded 110% of the forecasted call volume based on the seven-week rolling average daily volume. Purple seeks reimbursement of { [REDACTED] }, for service provided on those days detailed in Exhibit G, pursuant to a waiver of the SOA rule for good cause, combined with and a graduated scale approach as described below in Section IV for those days detailed in Exhibit H, for the remaining days withheld.

**IV. AS A FURTHER ALTERNATIVE, PURPLE REQUESTS THAT IT BE REIMBURSED FOR DAYS ON WHICH IT HANDLED AT LEAST 65% OF CALLS IN TEN SECONDS**

As a further equitable alternative, the Commission should partially reimburse Purple for the days in which it missed the 85/10 SOA standard based on the “sliding scale” approach the Commission used with other providers and documented in a series of letter rulings. In those letter rulings, the Commission provided proportional reimbursement on a graduated scale on policy grounds. This table used by the Commission for providing reimbursement on a graduated scale is included with the Nordia and AT&T rulings attached hereto as Exhibits A and B. The Commission applied this graduated formula where the provider met the 10-second test for at