



June 29, 2012

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Re: Sorenson outside counsel response to CSDVRS and Purple objection to Acknowledgments of Confidentiality in CG Docket Nos. 10-51 and 03-123.

Dear Ms. Dortch:

Sorenson Communications, Inc. (“Sorenson”) and Wiltshire & Grannis (“W&G”)—partners Christopher Wright, John Nakahata, and Charles Breckinridge and associate Peter McElligott (collectively “Outside Counsel”)—file this response to the objections raised by Purple Communications, Inc. (“Purple”) and CSDVRS, LLC (“CSDVRS”) to the access of Outside Counsel to Confidential or Highly Confidential information filed pursuant to the First and Second Protective Orders in the above-referenced dockets.¹ Specifically, Purple and CSDVRS argue that Outside Counsel should not be allowed to access confidential information in this proceeding because they are allegedly “involve[d] in the competitive decision making process for Sorenson.”² The objections of Purple and CSDVRS are fundamentally misplaced—these competitors’ understanding of “competitive decision making” is dramatically overbroad, and would improperly include essentially all regulatory advocacy.

At the outset, it bears emphasis that W&G, and specifically Outside Counsel, do *not* function as Sorenson’s General Counsel or Chief Legal Officer, nor anything of the sort. W&G advises Sorenson on compliance with legal and regulatory requirements—such as regulatory minimum standards—as requested by the client and in some inter-provider disputes in which litigation may be possible, but has *no* involvement in Sorenson’s decision making regarding matters over which VRS providers compete, including quality of service, product development or launch, or negotiating commercial agreements with vendors or users. W&G is not involved in personnel or management decisions; it is not involved in decisions regarding company growth or direction; and it has no voice in the day-to-day operations of Sorenson. W&G does not sit on the

¹ Letter from John Goodman, Chief Legal Officer, Purple Communications, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 03-123 & 10-51 (filed June 25, 2012) (“Purple Objection”); Letter from Jeff Rosen, General Counsel, CSDVRS, LLC to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 03-123 & 10-51 (filed June 21, 2012) (“CSDVRS Objection”).

² See, e.g., Purple Objection at 1.

Board or have any ownership interest in Sorenson. W&G does not detail its lawyers to any of its clients, including Sorenson.

Moreover, Sorenson employs numerous other law firms in a broad array of capacities, all of whom are overseen by Sorenson and not by W&G. Sorenson has other outside counsel for corporate issues, for employment matters, for contract disputes, for litigation and investigations (other than those handled by W&G), for intellectual property, and more—in short, for all the things corporations need legal counsel. But CSDVRS’s suggestion that W&G is “omnipresent” in Sorenson’s affairs is misguided. W&G certainly attempts to be “omnipresent” in advocating Sorenson’s positions on those regulatory matters at the FCC that it handles, but it is by no means “omnipresent” in Sorenson’s legal affairs. And advancing Sorenson’s positions as *advocates* before the FCC certainly does not mean that W&G is involved in deciding on Sorenson’s direction and competitive strategies—it simply is not.

The First and Second Protective Orders define “Competitive Decision-Making” as “a person’s activities, association, or relationship with any of its clients involve[ing] advice about or participation in the relevant business decisions or the analysis underlying the relevant business decisions of the client in competition with or in a business relationship with the Submitting Party.”³ But, again, W&G does not provide Sorenson with “advice about” or “participate[] in” business decisions relating to competition with Purple, CDSVRS, or other TRS providers. W&G *advises* Sorenson about its regulatory options and responsibilities, and *Sorenson* presumably uses that advice in making business decisions. W&G *advocates* Sorenson’s positions at the FCC. But W&G has no seat and gets no vote at the decision-making table.

The Federal Circuit case of *U.S. Steel v. United States*, 730 F.2d 1465 (Fed. Cir. 1984), contains the most widely cited discussion explaining the term “competitive decision-making.” The court stated that this phrase should be understood as “shorthand” for “counsel’s activities, association, and relationship with a client that are such as to involve counsel’s advice and participation in . . . the client’s decisions . . . made in light of similar or corresponding information about a competitor.” *Id.* at 1468 n.3. In other words, the “competitive decision making” standard is about situations where the client is making decisions where more or better information about a competitor could change the client’s competitive approach. The court further explained that the concern in this sort of situation is the possibility of “inadvertent disclosure” of such information by the lawyers—where such disclosure “may be predicted, and cannot be adequately forestalled in the design of a protective order,” it may make sense to deny the lawyers “access” to begin with to prevent the inadvertent disclosure. *Id.* at 1467-68.

³ *Structure and Practice of the Video Relay Service Program and Telecommunications Relay Services and Speech-to-Speech Services for Individual with Hearing and Speech Disabilities*, Protective Order, CG Docket Nos. 10-51 & 03-123, ¶ 3 (rel. Mar. 14, 2012); *Structure and Practice of the Video Relay Service Program and Telecommunications Relay Services and Speech-to-Speech Services for Individual with Hearing and Speech Disabilities*, Second Protective Order, CG Docket Nos. 10-51 & 03-123, ¶ 2 (rel. May 31, 2012).

Against this backdrop, it is clear that Purple and CSDVRS misunderstand the basic purpose of the “competitive decision making” standard, and are analyzing from the wrong direction. Purple and CSDVRS essentially argue that W&G should be barred from accessing confidential or highly confidential information *in this proceeding* because of W&G’s purported knowledge of Sorenson’s (or its owners’) regulatory strategy and objectives. But, as *U.S. Steel* explains, the purpose of the “competitive decision making” standard is to prevent inadvertent disclosure of competitive information that could change Sorenson’s decisions *outside* of the regulatory arena, in the realm of competition for TRS customers.

Relatedly, all of the examples that CSDVRS presents in an attempt to illustrate how “omnipresent” W&G is in Sorenson’s affairs actually illustrate only that W&G is deeply involved in advocating on Sorenson’s behalf *in this proceeding*.⁴ Every citation is to a filing at the FCC. But, again, representing Sorenson’s positions before the Commission is not the same as participating in the formulation of Sorenson’s competitive strategies outside of the regulatory arena. *Nothing* that CSDVRS cites illustrates any entry by W&G into the latter domain, and there is none. Nor does Purple’s assertion that the “majority of Purple’s interactions” on regulatory matters “have been conducted” through W&G in any way illustrate Outside Counsel’s participation in Sorenson competitive decision making. To the contrary, representing clients on regulatory matters such as those cited by Purple is exactly what regulatory counsel is for. Indeed, in the parallel world of litigation, it would be extremely unusual for opposing parties to “interact” directly—they interact through litigation counsel. Likewise, on regulatory matters, it is entirely proper to interact through regulatory counsel.

Of course, the in-house individuals who provide regulatory counsel to CSDVRS and Purple presumably wear other hats as well, and likely *are* involved in competitive decision making. But those situations are specific to CSDVRS and Purple—it is not the norm. The norm is that outside counsel, like W&G, are *not* involved in competitive business decisions, just as W&G is not. The Commission should not let the peculiar circumstances of CSDVRS and Purple—which drive them to attempt to portray Sorenson’s outside counsel in a light similar to their in-house counsel—dictate a rule with respect to highly confidential material that would make no sense in the run-of-the-mill case. The line that CSDVRS and Purple wish to draw would yield the bizarre result that outside regulatory counsel generally would not fall within a Commission’s protective order’s definition of “outside counsel.”

In sum, W&G’s role as outside counsel to Sorenson is not one of “competitive decision making,” but one of advising and advocating. Moreover, W&G recognizes and respects that the Acknowledgments of Confidentiality that each of us executed require that the confidential or highly confidential information obtained pursuant to those Acknowledgments be kept privileged and not shared with anyone who does not meet the terms of the First or Second Protective Order and who has not executed an Acknowledgment—including with personnel from Sorenson, Madison Dearborn Partners, and any other Sorenson owner or director. Information that W&G obtains will not be used to further the business decisions of Sorenson outside of the regulatory proceeding that is the subject of the protective orders. Instead, W&G anticipates that review of

⁴ CSDVRS Objection at 2-3.

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confidential and highly confidential information will be undertaken to assess accuracy of statements made and to ensure the Commission is presented with a complete picture of the VRS industry.

Respectfully submitted,

/s/

Christopher J. Wright

John T. Nakahata

Charles D. Breckinridge

Peter J. McElligott

WILTSHIRE & GRANNIS LLP

1200 Eighteenth Street, N.W.

Washington, D.C. 20036

T: (202) 730-1300

cwright@wiltshiregrannis.com

cc: Greg Hlibok
Nick Alexander
John Goodman
Jeffrey Rosen

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CERTIFICATE OF SERVICE

I certify that on June 29, 2012, I caused a copy of the foregoing Letter and Acknowledgments of Confidentiality to be served on each of the following individuals by first class mail and email.

Jeff Rosen
General Counsel
CSDVRS, LLC
600 Cleveland Street, Suite 1000
Clearwater, FL 33755
jrosen@zvrs.com

John Goodman
Chief Legal Counsel
Purple Communications, Inc.
595 Menlo Drive
Rocklin, CA 95765
john.goodman@purple.us

/s/

Christopher J. Wright