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November 14, 2012

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Federal Communications Commission
Office of the Secretary

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Gregory Hlibok
Chief, Disability Rights Office
Bureau of Consumer and Governmental Affairs
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51; *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123

Dear Ms. Dortch and Mr. Hlibok:

Sorenson Communications, Inc. ("Sorenson") files the attached comments in response to the Public Notice released by the Consumer and Governmental Affairs Bureau in the dockets captioned above on October 15, 2012

Sorenson's comments contain Confidential Information protected pursuant to the *Protective Order* issued on March 14, 2012, and Highly Confidential Information protected pursuant to the *Second Protective Order* issued on May 31, 2012.[1] Sorenson is therefore filing under seal pursuant to the procedures identified in the Protective Orders. As required by paragraph 12 of the *Second Protective Order* and paragraph 4 of the *Protective Order*, we submit: (a) one copy of the comments containing Highly Confidential Information and Confidential Information to the Secretary's Office along with this cover letter; (b) two copies of the presentation in redacted form to the Secretary's Office along with this cover letter; and (c)

1 *See Structure & Practices of the Video Relay Serv. Program*, Protective Order, DA 12-402 (rel. March 14, 2012); *Structure & Practices of the Video Relay Serv. Program*, Second Protective Order, DA 12-858 (rel. May 31, 2012).

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two copies of the presentation containing Highly Confidential Information and Confidential Information to Gregory Hlibok along with this cover letter. We will also file a copy of the redacted version via ECFS. As required by paragraph 3 of the *Second Protective Order*, we have received written approval from Commission staff for the Highly Confidential designations in the filing.

Sincerely,

Charles Breckinridge
Counsel to Sorenson Communications, Inc.

Enclosures

REDACTED FOR PUBLIC INSPECTION
[redacted]
Text highlighted yellow denotes Highly Confidential Information

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

In The Matter of	)	
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Structure and Practices of the Video Relay Service Program	)	CG Docket No. 10-51
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	)	
Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities	)	CG Docket No. 03-123
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COMMENTS OF SORENSON COMMUNICATIONS, INC.

Michael D. Maddix
Director of Government and
Regulatory Affairs
SORENSON COMMUNICATIONS, INC.
4192 South Riverboat Road
Salt Lake City, UT 84123

John T. Nakahata
Christopher J. Wright
Charles D. Breckinridge
Timothy J. Simeone
WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
T: (202) 730-1300
jnakahata@wiltshiregrannis.com

Counsel to Sorenson Communications, Inc.

November 14, 2012

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I. Introduction and Executive Summary.

Imagine a world in which deaf, hard-of-hearing, and speech-disabled individuals would be able to use Video Relay Service ("VRS") only on government-selected devices, via a government-imposed VRS application providing no advanced features beyond video mail and address book dialing, and with a two-minute wait for an interpreter—if one were available at all—because the government-mandated operating margins were so small that no commercial entity would be willing to provide VRS. Such a world should be unthinkable—but apparently it is not. The Public Notice ("PN")[1] seeks comment on three proposals that would create exactly such a world, ending any hope of functional equivalence for the deaf, hard-of-hearing, and speech-impaired individuals who rely on VRS, and abandoning any pretense of implementing the Americans with Disabilities Act ("ADA"). The PN's proposals would, moreover, achieve this counterproductive result at great cost to the Telecommunications Relay Service ("TRS") Fund ("TRS Fund" or "the Fund").

These proposals would destroy the United States' world-leading VRS services—which have literally revolutionized the lives of tens of thousands of deaf, hard-of-hearing, and speech-disabled individuals—and turn a vibrant, deaf-centric sector into a service and innovation desert. Sorenson Communications, Inc. ("Sorenson") vigorously opposes each of the PN's proposals, which would mark a drastic step backward in the type and quality of American Sign Language ("ASL")-based relay services for the deaf, hard-of-hearing, and speech-disabled.

1 *See Additional Comment Sought on Structure and Practices of the Video Relay Service (VRS) Program and on Proposed VRS Compensation Rates*, Public Notice, DA 12-1644, CG Docket Nos. 10-51, 03-123 (rel. Oct. 15, 2012) ("PN").

The PN represents a dramatic departure from the analysis presented in the Commission's Further Notice of Proposed Rulemaking ("FNPRM"),[2] and an apparent disregard for both economic and technical realities. The third section of the PN is the most direct: it proposes VRS compensation rates at levels at which no VRS provider could provide service. The report by Rolka Loube Saltzer Associates ("RLSA"), the TRS Fund Administrator, proposes to set rates based on just a subset of VRS providers' actual, documented costs, with a miniscule margin calculated on an even smaller subset of capital costs, using a discredited rate-of-return methodology, originally created (but largely abandoned since) for capital intensive industries, such as telephone and electricity rather than labor intensive industries such as VRS. Because the RLSA report proposes rates based on just an arbitrary subset of actual costs, these are rates for a hypothetical firm that does not remotely resemble any VRS provider in existence today.

All VRS providers have supplied confidential cost information to the Commission, and none supports a conclusion that VRS service could be provided at the compensation levels proposed in the PN and RLSA report—either for the first year or for subsequent years. The rate formula used by RLSA to determine the end-of-transition rate levels generates a pre-tax margin of approximately two percent of "allowable" costs—with that margin shrinking further over time—meaning that all other costs (beyond the arbitrary subset included in RLSA's calculations) and any profit would have to be shoehorned into that two percent (and less in future years), which is an abject impossibility. Moreover, if a VRS provider reduced operating costs to try to increase that margin, the result would be a further decline in compensation rates the following year, because of the perverse incentives baked into the antiquated cost-of-service ratemaking that

[2] *See Structure and Practices of the Video Relay Service Program, Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Further Notice of Proposed Rulemaking, FCC 11-184, 26 FCC Rcd. 17,367 (2011) ("*2011 VRS Reform FNPRM*").

the proposal reflects. Put plainly, the rate recommendation on which the PN seeks comment supplies no commercially viable basis for providing VRS.

At the same time, however, the PN does not even attempt to address the principal structural problem of waste, fraud, and abuse identified by the FNPRM. That problem, as the FNPRM itself set forth, stems from the fact that per-minute compensation fails to align VRS with costs. Specifically, because many VRS costs do not scale on a per minute basis, there is a structural incentive for minute-pumping schemes. The rates proposed in the PN would thus not only destroy VRS entirely, but would do so without even attempting to address the root of the core issues of waste, fraud, and abuse identified in the FNPRM.

Not content with one bullet to the heart of VRS, the PN fires two more. First, the Bureau seeks comment on a proposal from CSDVRS, LLC ("ZVRS") to have the Commission mandate the creation and use of a single VRS access software application *instead* of supporting the development of interoperability standards that would allow different types of VRS hardware and software to communicate seamlessly, regardless of who develops or supports it. The approach on which the PN seeks comment is wholly unrealistic: there is no single operating system that operates on all devices capable of supporting VRS. The Commission (or its chosen application developer) would have to create and maintain many versions of this VRS access software—but upon release of the next "hot" wireless device with a new operating system, deaf consumers would be still unable to access VRS on that device until the government were to decide that demand was sufficient to justify yet another version of the standardized endpoint software for the new device. Moreover, consumers would be forced to abandon the videophones that they overwhelmingly have chosen to access VRS today in favor of equipment that will likely be more costly and less suited to the needs of deaf, hard-of-hearing, and speech-disabled individuals.

The second section of the PN then seeks comment on another proposal by ZVRS that would have the FCC convert the iTRS Database into a government-sanctioned single communications provider responsible for 1) directing all calls from a VRS endpoint (including VRS and point-to-point calls); 2) collecting usage data for all deaf, hard-of-hearing, and speech-disabled individuals; and 3) providing vertical features such as video mail and address book, but apparently no others. Under this approach to call handling, VRS innovation and features would be limited to those changes introduced in connection with the government-sanctioned platform, service reliability would be dependent on a single point of failure, and deaf, hard-of-hearing, and speech-disabled individuals would face the prospect of having all their usage data stored in this single data warehouse—an inviting target for hackers and data thieves. Nor does this proposal offer greater ability to detect fraud and abuse: a single communications provider will not be in a better position to detect usage by ineligible persons or minute-pumping schemes than today, and any issues of use by ineligible persons can be addressed by tightening the eligibility requirements, including abolishing "guest" registration for VRS (a step the FCC has already taken with respect to IP Relay). Moreover, RLSA already receives a detailed record every month for each billed and abandoned VRS call, and RLSA's auditors have access to records for every call that reaches VRS providers' hold servers, whether or not the provider sought compensation for the call. The creation of a single communications provider therefore will not add to RLSA's capability to audit VRS provider submissions for improper billing.

The core promise and statutory mandate of the ADA is TRS service for deaf, hard-of-hearing, and speech-disabled users that is functionally equivalent to that enjoyed by hearing individuals. Hearing people do not have to wait two minutes for a dial tone; need not depend on government approval for new software that works with the latest smartphones and tablets; and do not rely on a centralized, government-sponsored communications provider as their sole source for connectivity, call routing, and tracking calls. But that would be the result of adopting the proposals in the PN. Each of these proposals poses an existential threat to the VRS services upon which deaf, hard-of-hearing, and speech disabled Americans have come to rely, and the Commission should therefore reject them completely.

Sorenson's comments are divided into three core sections. Section II addresses RLSA's rate proposal, explaining that it is based on methodology reflecting four foundational flaws. In this section, Sorenson also reinforces the importance of eliminating rate tiers and debunks unsupported assertions from other providers about the need for tiers to address supposed economies of scale. Next, in Section III, Sorenson explains that the PN's proposal to impose a single software endpoint by regulatory fiat would constitute an enormously regressive step for consumers, as it would eliminate features and incentives to innovate—while also adding dramatically to the financial burdens on the TRS Fund. Finally, in Section IV, Sorenson responds to the proposal to entrust the iTRS Database Administrator with a laundry list of networking functions and feature support. Like the proposal to mandate the use of a single software endpoint, the networking disaggregation proposal would mark a fundamentally counterproductive turn toward central planning and away from the innovative, feature-rich, and efficient services that exist in the competitive market—while doing nothing to address problems of waste, fraud, and abuse identified in the FNPRM.

II. RLSA's Proposed Rates Would Eliminate Functional Equivalence and Destroy the World-Class VRS that Has Transformed Consumers' Lives.

A. RLSA's Rate Methodology is Flawed in Four Core Respects that Render It Economically Infeasible in the Real World.

Although RLSA has submitted proposed rates, they must be discarded. Four profound fallacies render RLSA's rate proposal a dangerous fantasy that would destroy the economic basis for any for-profit entity to provide VRS services. A rate methodology cannot be rational if it does not create a business model under which an entity could reasonably be expected to provide service; as the D.C. Circuit has made clear, economic feasibility is a part of the arbitrary and capricious standard.[3] In light of the four foundational failings discussed below, the FCC could not possibly carry its burden to explain how the resulting rate would be a product of reasoned decisionmaking; it simply cannot justify why it would choose this methodology or how it creates a viable financial model for the provision of any VRS service by any entity. As discussed in Section II.F.1, below, a rational, economically viable rate would be one that mimicked the expected results of a competitive bid.

<u>First</u>, the RLSA proposal relies on a cost-of-service or rate-of-return approach to ratemaking, which has been discredited for years,[4] including on the record in this proceeding and by the FCC in virtually every other context. In his attached Declaration, Professor Michael Katz,

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[3] *See Nuvio Corp. v. FCC*, 473 F.3d 302, 303 (D.C. Cir. 2006) (technical and economic feasibility are "inquiries made necessary by the bar against arbitrary and capricious decision-making"); *see also Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 930 F.2d 936, 940 (D.C. Cir. 1991) ("Impossible requirements imposed by an agency are perforce unreasonable").

[4] *See, e.g.*, Comments of Sorenson Communications, Inc., at 37-39, CG Docket Nos. 10-51, 03-123 (filed Mar. 9, 2012) ("Sorenson FNPRM Comments"); Reply Comments of Sorenson Communications, Inc., at 39-41, CG Docket Nos. 10-51, 03-123 (filed Mar. 30, 2012) ("Sorenson FNPRM Reply Comments"); *An Economic Analysis of VRS Policy Reform*, Declaration of Michael L. Katz, Sorenson FNRPM Comments at Attachment A ¶¶ 56-63 ("Katz FNPRM Declaration").

the Commission's former chief economist, puts the fundamental point here succinctly: "A cost-based compensation system, such as the one underlying the RLSA proposal, stifles innovation and promotes inefficiency."[5] The Commission accordingly abandoned rate-of-return regulation for large incumbent local telephone companies more than 20 years ago, and it essentially ended its rate-of-return regulation of small telephone companies in the *Universal Service/Intercarrier Compensation Transformation Order* adopted in November 2011.[6] The PN does not even suggest any reasoned basis for perpetuating the use of this discredited system for VRS. Nor does the PN respond to the criticisms of cost-of-service ratemaking that are already on the record. But reasoned decisionmaking *requires* such an explanation—and that is particularly so because, as discussed below, the proposal at issue is a poster child for illustrating the flaws that result when regulators base rates on costs of service.

Second, as Sorenson and others have explained repeatedly,[7] RLSA continues to rely on an artificially limited set of costs when calculating the rate proposal, rather than considering all

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[5] Michael L. Katz, *Response to Additional Comments Sought on VRS Policy Reform*, ¶ 54 (Nov. 14, 2012) (copy attached as Attachment A) ("Katz PN Declaration").

[6] *See, e.g., Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, FCC 90-314, 5 FCC Rcd. 6786 (1990); *Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing a Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and LinkUp, Universal Service Reform— Mobility Fund*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd. 17,663 (2011) ("*USF/ICC Transformation Order*"). Although the FCC never formally stated that it was ending rate-of-return regulation for small telephone companies, as of July 1, 2012, the interstate terminating access rates and revenues are no longer determined by rate-of-return regulation, but instead are based on formulas no longer tied to current costs or revenue requirements.

[7] *See* Sorenson FNPRM Comments at 34; Letter from Christopher Wright, Counsel, Sorenson Communications, Inc., to Marlene Dortch, Secretary, Federal Communications Commission, Attachment at 7, CG Docket Nos. 10-51, 03-123 (filed Sept. 17, 2012) ("Sorenson Sept. 17 Letter"); Comments of Convo Communications, LLC, at 9-10, CG Docket No. 10-51 (filed Aug. 16, 2010).

of a VRS provider's costs. There are many sizeable costs—real and non-discretionary costs—that are excluded, ranging from actual taxes paid, to research and development, to actual (not merely "allowed") costs of capital. RLSA's proposal is thus based on hypothetical costs, and not on the real world in which deaf and hard-of-hearing customers actually use VRS and VRS providers actually provide service. The PN compounds this problem by proposing to limit further the universe of costs that "count" when determining rates—suggesting that it may also exclude marketing and outreach costs[8]—which would further divorce rates from the realities of providing functionally equivalent VRS service. In sum, as Professor Katz explains, while the Commission clearly *should* base "compensation rates . . . on incentive-regulation principles," if it "nonetheless takes a rate-of-return regulation approach to rate setting" it must "treat marketing, outreach, and research and development costs as qualifying costs."[9]

The excluded costs are not trivial. Independent outside auditors have confirmed that Sorenson has actual annual costs of approximately ****BEGIN HIGHLY CONFIDENTIAL**** ****END HIGHLY CONFIDENTIAL**** that are not considered "allowable" by the Commission—and that are therefore arbitrarily excluded from RLSA's calculations. These include, *inter alia*, engineering costs, unreportable depreciation costs for expensive equipment without which most consumers could not use VRS services, costs to acquire ten-digit numbers, actual financing costs, and income taxes. The PN asks whether some of these costs ought to be added to the list of allowable costs. Of course they should if the Commission persists in using a cost-of-service approach. But the fact that they have not been considered allowable thus far underscores why the Commission should get out of the business of trying to set cost-of-service-based rates.

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8 *See* PN at 8.

9 Katz PN Declaration ¶ 57.

In particular, the Commission's persistent failure to treat the costs of providing videophones and similar equipment as "allowable" reinforces that it should not employ cost-of-service ratemaking for VRS. America's deaf population, on average, is considerably poorer and less educated than the general population.[10] At the same time, however, videophones are much more expensive than standard telephones and more comparable to smartphones. An ordinary voice telephone for a hearing person can be purchased for less than $10. An off-the-shelf videophone such as Cisco's E20 IP Videophone—now steeply discounted because it has been abruptly discontinued,[11] with no replacement announced—costs over $800[12]; a current generation iPad with a front facing camera starts at $500 and goes up considerably from there.[13] Because of the high cost of VRS-capable equipment, VRS might well have died in the cradle if Sorenson had not started providing videophones without charge to VRS users a decade ago, despite the Commission's hostility to the practice.[14] As a practical matter, the majority of deaf consumers simply would have not been able to afford the equipment to use VRS. And while the

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10 *See* Erika Steinmetz, U.S. Census Bureau, "Current Population Reports" in *Americans with Disabilities: 2002, Household Economic Studies*, *available at* www.census.gov/prod/2006pubs/p70-107.pdf (last accessed Nov. 12, 2012).

11 *See* Cisco IP Video Phone E20, at http://www.cisco.com/en/US/products/ps11329/index.html (last accessed Nov. 12, 2012).

12 *See, e.g.*, Video Conferencing Supply, Cisco E20 IP Video Phone CTS-E20-K9, at http://www.videoconferencingsupply.com/Cisco-CTS-E20-K9-p/CTS-E20-K9.htm (last accessed Nov. 12, 2012).

13 *See* Apple Store, iPad, at http://store.apple.com/us/buy/home/shop_ipad/family/ipad (last accessed Nov. 12, 2012).

14 Of course, if off-the-shelf equipment were "lower cost or more attractive to users, then VRS providers [would] have the incentive and ability to offer that equipment to VRS users in order to obtain a competitive advantage." Katz PN Declaration ¶ 20. But off-the-shelf equipment is decidedly *not* more attractive to VRS users, as illustrated by the fact that Sorenson's competitors encourage VRS users to employ *Sorenson's* videophones on other VRS systems rather than offering less desirable off-the-shelf equipment to those users. *See, e.g., http://www.purple.us/videophone* (Purple Communications' "videophone" page on its website is about using *Sorenson's* VP-200 with Purple Communications' service.).

TRS Fund might accordingly be smaller, tens of thousands of deaf persons would not have experienced the life-altering advantages provided by VRS, in furtherance of the ADA's goals.

In the FNPRM, the Commission recognized the need to change course by concluding that the costs of providing videophones are actual costs of providing VRS that should be taken into account in setting rates.[15] The Commission should not back away from that conclusion, as the PN now contemplates. The appropriate analogy for functional equivalence here is wireless service, where phones are relatively expensive and providers routinely subsidize the cost of that equipment. Accordingly, if the Commission does decide to pursue a cost-of-service approach to rate setting (which it certainly should not), it cannot rationally ignore these costs because they are necessary for consumers to obtain functionally equivalent access to VRS.

Pretending that VRS providers' real-world costs do not exist cannot make them go away—it only results in a rate unmoored from reality. It bears particular emphasis that, in the real world, no one provides VRS at a lower cost per minute than Sorenson—even when Sorenson's debt costs, discussed below, are taken into account. Yet due to the flawed methodology at work, RLSA has proposed a rate that is far below the costs that Sorenson (and every other competitor) actually incur.

Third, there is no justification in the record (or anywhere else) for limiting the return to booked capital costs in a low-capital, labor-intensive industry like VRS. That is like saying that the only return an office temp agency may legitimately earn is on its investments in desks and office computers, rather than in its workers. It is simply not possible to run any kind of service-oriented business—one that relies on human beings (video interpreters), not equipment or other capital investment, as the core of the product—on the model underlying RLSA's proposal. The

[15] *See 2011 VRS Reform FNPRM,* 26 FCC Rcd. at 17,393 ¶ 51.

absurdity of RLSA's figures is illustrated by its calculation of six cents per minute as the appropriate return on investment for 2012.[16] Six cents per minute represents a pre-tax profit of barely more than ****BEGIN HIGHLY CONFIDENTIAL**** ****END HIGHLY CONFIDENTIAL**** percent on Sorenson's actual costs as documented in the recent audit—or less than two percent on RLSA's average of the subset of "reportable" costs of all VRS providers.

Moreover, while the six cents per minute of pre-tax "profit" contemplated by RLSA's proposal purportedly includes an "allowance for taxes,"[17] the *actual* taxes that Sorenson pays are ****BEGIN HIGHLY CONFIDENTIAL**** ****END HIGHLY CONFIDENTIAL**** *than this entire six-cents-per-minute margin*. As Sorenson has set forth in its detailed financial submissions to the Commission, in the real world—as opposed to the thoroughly imaginary world of RLSA's proposals—it pays approximately ****BEGIN HIGHLY CONFIDENTIAL**** ****END HIGHLY CONFIDENTIAL****cents per minute in taxes.[18] In other words, the total "return" that RLSA envisions in its parallel-universe ratemaking proposal would fall well short of covering the real-world taxes that VRS providers must pay (real-world taxes that are not even entirely "allowable"), to say nothing of the other real-world costs that VRS providers bear but that are ignored by RLSA's approach.

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16 *See* PN at 8-9. Because RLSA's figures for 2010 and 2011 are nine cents and eight cents, the current rolling three-year average return on investment would likely be seven or eight cents rather than six cents. But because the return is trending down, it appears the return on investment might go even lower than six cents in the near future. In any event, seven or eight cents per minute is a grossly inadequate return.

17 *Id.* at 9.

18 *See* Letter from John Nakahata, Counsel, Sorenson Communications, Inc., to Marlene Dortch, Secretary, Federal Communications Commission, at Attachment, CG Docket Nos. 10-51, 03-123 (filed July 11, 2012) ("Sorenson July 11 Letter").

Fourth, the rate of return on book capital investment—11.25 percent—that RLSA applies is completely arbitrary and indefensible. As Sorenson explained at length in its FNPRM comments, this rate was inexplicably imported from a wholly dissimilar context and inserted without any justification in the VRS ratemaking process.[19] More specifically, the 11.25-percent figure was calculated from data relating to capital-intensive monopoly telephone companies (companies with major infrastructure investments) in the 1980s and the first seven months of 1990. But VRS is not a monopoly industry—any VRS provider can lose any customer to another provider at any time—nor is it dependent on substantial investments in infrastructure or other capital equipment. As a result, data relating to monopoly telephone service from more than 20 years ago clearly has no bearing on the appropriate rate of return for VRS providers. The Commission might as well have plucked the number out of thin air.

The root problem here is the Commission's 2004 statements to the effect that VRS providers should earn almost no profit.[20] At that time the Commission envisioned VRS as a service to be provided by large telephone companies essentially at incremental cost, as an adjunct to their general telecommunications operations. As Professor Katz puts it in his attached Declaration, the Commission "assume[d] that carriers [providing voice telephone service] are required to—and will—provide VRS services even if they are unable to make any profit on them."[21] But the Commission's 2004 vision and the hostility to profit underlying it drove *every* telecommunications carrier from the VRS market; all "carriers providing voice telephone service

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[19] *See* Sorenson FNPRM Comments at 41-45.

[20] *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, FCC No. 04-137, 19 FCC Rcd. 12,475, 12,542-45 ¶¶ 177-82 (2004).

[21] Katz PN Declaration ¶ 62.

have ceased providing VRS services."[22] And that same hostility now prevents the remaining standalone VRS providers from obtaining capital from the public equity markets.

As a result, the Commission "should... revisit the premises underlying its 2004 Order."[23] VRS has succeeded since 2004 only because the FCC has not actually set rates that reflect the letter of its 2004 statements—and, significantly, shifted to a *de facto* price-cap methodology in 2007. Reversion to the letter of the Commission's 2004 Order would limit deaf Americans to second-class service rather than functional equivalence. The Commission should repudiate its 2004 statements limiting profit to an 11.25 percent return on booked capital investment—which, again, is a nonsensical approach in a labor-intensive industry and which provides no margin on expenses, including interpreter labor. A return that is so limited is simply insufficient to run any business and undermines long-term planning and investment. For the same reason, the Commission should affirmatively undertake price-cap rate-setting designed to permit viable, functionally equivalent VRS service and to provide the stability necessary to foster capital investment and spur innovation. The ongoing fits-and-starts approach to VRS ratemaking—particularly when coupled with potentially devastating proposals like the three contained in the PN—has the predictable effect of freezing the capital markets for VRS providers.

B. Cost Data Already in the Record Confirms that RLSA's Proposed Rates are Economically Infeasible.

Cost data already in the record confirms that RLSA's proposed final, post-transition rate of \$3.40 per minute is economically unfeasible, as is its proposed 11-percent first-year drop in the Tier 3 rate (from \$5.07 per minute to \$4.51 per minute).[24] Of the three largest VRS

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[22] *Id.*

[23] *Id.* ¶ 65.

[24] This proposed 11-percent cut in the Tier 3 rate follows on the heels of the 18-percent reduction in the Tier 3 rate in 2010.

providers, all of whom have filed confidential cost data with the Commission, none has total costs per minute that even approach $3.40 per minute or RLSA's first year proposal of $4.51 per minute.[25] Indeed, ZVRS has already told the Commission that it "would fail" under RLSA's rates.[26]

Sorenson's costs certainly do not demonstrate that it could provide service at $3.40 per minute. For 2011, Sorenson's average cost per minute was ****BEGIN HIGHLY CONFIDENTIAL**** ****END HIGHLY CONFIDENTIAL****, without any profit margin. Although this included ****BEGIN HIGHLY CONFIDENTIAL**** ****END HIGHLY CONFIDENTIAL**** in financing costs, those costs are real costs and cannot simply be disregarded. And even setting aside these financing costs, a $3.40 rate would provide Sorenson with no margin at all to cover any capital costs or profit.

Nor is it plausible that Sorenson's financing costs could simply and neatly be eliminated through bankruptcy without substantial service disruption and loss of innovation. Were Sorenson to enter bankruptcy, it would have to ensure that its highly skilled VRS workforce would remain, rather than shifting to other non-VRS community interpreting opportunities. This is not a fanciful concern, as Sorenson has seen its workforce decline since its 2010 layoffs even as it has sought to maintain interpreter levels. A large scale loss of interpreters would threaten the viability of the bankrupt estate; however, at $3.40 per minute, Sorenson would not have any resources to pay

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[25] *See* Sorenson July 11 Letter; Letter from John Goodman, Chief Legal Officer, Purple Communications, Inc., to Marlene Dortch and Gregory Hlibok, Federal Communications Commission, CG Docket Nos. 10-51, 03-123 (filed Sept. 18, 2012) ("Purple Sept. 18 Letter"); Letter from Jeff Rosen, General Counsel, CSDVRS, LLC, to Marlene Dortch and Gregory Hlibok, Federal Communications Commission, CG Docket Nos. 10-51, 03-123 (filed July 24, 2012) ("ZVRS July 24 Letter").

[26] *See* Letter, Jeff Rosen, General Counsel, CSDVRS, LLC, to Marlene Dortch, Federal Communications Commission, CG Docket Nos. 10-51, 03-123 (filed Oct. 25, 2012) ("ZVRS Oct. 25 Letter").

retention incentives or to take other measures to maintain its highly skilled workforce. A bankruptcy thus raises the specter of a substantial degradation of VRS service.

Were Sorenson to be placed into bankruptcy by its inability to pay its financing costs, customer service, outreach to unserved users and innovation in new endpoints, including software applications for off-the-shelf equipment such as mobile phones and tablets, is also likely to be curtailed. A trustee or creditor's committee focused on near-term maximization of cash flow would rationally cut these areas. Each would harm the VRS consumer as well as the longer term prospects for the business. The idea that Sorenson's capital costs could be eliminated through bankruptcy without significant service disruption is fantasy.

Nor do the claims of Purple Communications ("Purple") that it could provide service at \$4.27 per minute (if it handled over 2 million minutes per month) and ZVRS that it could operate at \$4.50 per minute (if it handled over 5 million minutes per month) support RLSA's rate proposals.[27] First, neither of these rates even approaches RLSA's proposal for a post-transition rate of \$3.40. Second, even if the Commission credits these claims—which are wholly unsubstantiated, lack sufficient back-up to ascertain their derivation, and are not confirmed by any economic expert—neither claims to be able to reach these cost thresholds immediately, as opposed to at some undisclosed future date. Third, as discussed in detail in Section II.D, *infra*, neither of these claims provides sufficient supporting documentation to elevate their claims above rank speculation.

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[27] *See* Letter from Kelby Brick, Vice President, Purple Communications, Inc., to Marlene Dortch, Secretary, Federal Communications Commission, Attachment at 3, CG Docket Nos. 10-51, 03-123 (filed Apr. 19, 2012) ("Purple Apr. 19 Letter"); Letter from Jeff Rosen, General Counsel, CSDVRS, LLC, to Marlene Dortch, Secretary, Federal Communications Commission, at Attachment 1 at 8, CG Docket Nos. 10-51, 03-123 (filed July 10, 2012) ("ZVRS July 10 Letter").

There is simply no basis in the record upon which the Commission could conclude that either RLSA's initial rate or its rate that it would reach after a three year transition are remotely economically feasible. Instead, the likelihood is that these rates will destroy VRS service.

C. RLSA's Rate Methodology Will not Address Fraud and Abuse.

The FNPRM correctly recognized that the current per-minute approach to VRS compensation is prone to waste, fraud, and abuse.[28] The Commission explained that "a tiered, per-minute compensation model may not be the most appropriate for VRS because it does not align compensation with costs."[29] Because many of the costs of providing VRS do not "scale on a per minute basis,"[30] there is a "structural incentive to increase the number of VRS minutes billed to the Fund (leading to fraud)."[31] The structural incentive to engage in minute-pumping fraud is easy to understand: to the extent that the per minute rate contains costs—such as general overhead, outreach, or customer service—that do not increase in the same proportion with the number of minutes, once the provider has billed a sufficient number of minutes to cover those costs, the portion of the rate attributable to those costs becomes a profit margin that increases total profits with every additional minute. Reflecting this structural vulnerability, providers have concocted a variety of minute-pumping schemes over the short history of VRS—ranging from outright fraud, to "softer" strategies like encouraging commercial call centers to employ deaf call-takers using a particular provider's VRS service. This is no different than with respect to

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28 *See 2011 VRS Reform FNPRM*, 26 FCC Rcd. at 17,396 ¶ 59.

29 *Id.* at 17,394 ¶ 54.

30 *Id.* at 17,395 ¶ 56.

31 *Id.* at 17, 394 ¶ 54.

access stimulation schemes that the Commission has addressed through its intercarrier compensation orders.[32]

RLSA's rate proposals do nothing at all to address this structural problem—simply lowering the per-minute rate does not change the incentive to engage in illicit minute-pumping activities in order to increase profit. In fact, to the extent that the PN's rate proposals would render all provision of VRS uneconomic, those proposals may actually heighten the motivation for cash-strapped providers to engage in fraud and abuse simply in order to survive. Accordingly, as Sorenson discussed in its comments and reply—and as the FNPRM itself appeared to recognize[33]—what is really needed is not draconian cuts to VRS compensation *rates*, but rather a "compensation mechanism [that] would better align the compensation methodology with the providers' cost structure."[34] In its comments, Sorenson agreed with the Commission's proposed per-user rate structure and also urged it to adopt simple rules to bar providers from disfavoring high-volume subscribers.[35] Alternatively, Sorenson recognized in its reply comments that a "hybrid" approach to compensation—combining per-minute compensation for usage-sensitive costs with per-user compensation for fixed costs—also merits serious consideration.[36] Curiously, the PN does not even seek further comment on the "hybrid" approach to compensation, which would have addressed the structural incentive for minute-pumping fraud, provided a way to continue to permit dial-around use, and addressed consumer concerns with

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[32] *See USF/ICC Transformation Order*, 26 FCC Rcd. at 17,874-90 ¶¶ 656-701.

[33] *See 2011 VRS Reform FNPRM*, 26 FCC Rcd. at 17,396 ¶ 59.

[34] *Id.*

[35] *See* Sorenson FNPRM Comments at 46-49.

[36] *See* Sorenson FNPRM Reply Comments at 41-45.

respect to incentives to discriminate against high-volume users.[37] The PN's failure to do so "entirely fail[s] to consider an important aspect of the problem."[38]

Regardless of the *best* way to reform VRS compensation, however, one thing is absolutely clear: The PN's rate proposals would not only destroy VRS entirely, but would do so without even attempting to address the core structural issue of waste, fraud, and abuse identified in the FNPRM. Any order adopting RLSA's rate proposals in whole or in part would need to offer a rational explanation for why the Commission failed even to attempt to address the underlying economic causes of the problem of waste, fraud, and abuse highlighted by the FNPRM.

D. As the FCC Itself Has Already Concluded, Sound Economic Policymaking Requires the Elimination of Rate Tiers.

RLSA's recommendation appears to contemplate the elimination of tiered rates over a three-year period, at which point the unitary rate would be approximately $3.40 per minute.[39] The PN, however, asks whether the Commission should "retain, modify, or eliminate" the tiered rate structure, without any recognition of the NPRM's strong conclusion that "the tiered rate

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[37] This omission of any mention of a hybrid rate structure is all the more illogical because a hybrid rate structure appears to accompany the CSDVRS proposal for an enhanced VRS user database, on which the PN also seeks comment. *See* ZVRS July 10 Letter at Attachment 2; Letter from Jeff Rosen, Counsel, CSDVRS, LLC, to Marlene Dortch, Secretary, Federal Communications Commission, at 2-3, CG Docket Nos. 10-51, 03-123 (filed Aug. 27, 2012).

[38] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[39] *See* Supplemental Filing of the Telecommunications Relay Services Administrator Regarding Reasonable Rates for VRS Service, at 5, CG Docket Nos. 10-51, 03-123 (filed Oct. 15, 2012). RLSA's actual proposal is for a rate of $3.396/minute, based on an average of 2010 and 2011 reported costs and 2012 projected reportable costs.

structure supports an unnecessarily inefficient market structure, and apparently provides insufficient incentive for VRS providers to achieve minimal [sic] efficient scale."[40]

The record demonstrates that it would be irrational for the Commission to retain tiered rates. In particular, Sorenson provided expert declarations from Professor Katz at the comment and reply comment stages, demonstrating that tiers serve no valid economic purpose, but instead reward "firms that have been less successful at offering services that VRS users find attractive."[41] The other VRS providers have offered no expert testimony to rebut either the Commission's conclusion in the NPRM or Professor Katz's analysis. Accordingly, there is no basis on which the Commission may reasonably depart from its proposal to abandon tiers.

Purple Communications and ZVRS have submitted financial figures not supported by any expert declaration purporting to show that Sorenson's costs are lower than its competitors' costs because Sorenson provides more minutes of service.[42] As an initial matter, even if their numbers were accurate for higher volumes of service—and as explained below, they are not—they would not support the use of tiers. Rational buyers do not choose to pay more because a seller is smaller or less efficient, and the Commission is essentially a buyer of VRS. The Commission has never explained why it makes sense for it to pay a smaller provider more for providing an incremental minute of service to a customer than it would pay Sorenson to provide the same minute of service to the same customer. As the FNPRM pointed out, compensating all minutes at the Tier 3 rate of

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[40] *Compare* PN at 9 *with 2011 VRS Reform FNPRM*, 26 FCC Rcd. at 17,419 ¶ 141; *see also 2011 VRS Reform FNPRM*, 26 FCC Rcd. at 17,374 ¶ 8 n. 30 (rate tiers should be eliminated because they reduce "the efficiency of the Fund by providing ongoing support for numerous high-cost, subscale providers").

[41] Katz FNPRM Declaration at ¶ 15.

[42] *See* Purple Sept. 18 Letter, Attachment at 7; ZVRS July 24 Letter, Attachment at Tab 2.