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

FILED/ACCEPTED

NOV 29 2012

Federal Communications Commission
Office of the Secretary

In The Matter of	)	
	)	
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

REPLY COMMENTS OF SORENSON COMMUNICATIONS, INC.

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November 29, 2012

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I. INTRODUCTION AND EXECUTIVE SUMMARY

The record now firmly establishes that the proposals contained in the Public Notice ("PN") would destroy Video Relay Service ("VRS") as we know it, depriving deaf and hard-of-hearing consumers of an extraordinary technology that has revolutionized their ability to communicate.[1] The flawed rate proposal presented by Rolka Loube Saltzer Associates ("RLSA") and the counterproductive disaggregation proposals presented by CSDVRS, LLC ("ZVRS") would mark an abrupt retreat from years of progress, while fully abdicating the mandate in the Americans with Disabilities Act ("ADA") for the provision of functionally equivalent service.

Although the commenters present a variety of perspectives on VRS reform, there is one issue on which every party agrees: the RLSA rate proposal would devastate VRS. The Consumer Groups rightly state that "[t]he goal of functional equivalency must be the basis for any rate structure."[2] But the RLSA proposed rates flunk that test: the comments confirm unambiguously that the Commission will fail to satisfy its statutory mandate if it adopts anything like the rates proposed by RLSA. Those rates are based on an economically infeasible rate-of-return model designed for a structurally incomparable industry and have since been repudiated even in that entirely unanalogous context. As commenters universally agree, this fundamentally flawed approach results in proposed rates that cannot support the kind of VRS to which deaf, hard-of-hearing, and speech-disabled individuals are entitled under the statute and upon which they have

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1 *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, 27 FCC Rcd. 12,959 (2012) ("PN").

2 Comments of Consumer Groups at i, CG Docket Nos. 10-51 and 03-123 (filed Nov. 14, 2012) ("Consumer Groups PN Comments").

come to rely, much less afford any funding for innovation and VRS improvements. No VRS provider today has total costs that approach the $3.40-per-minute ultimate rate that RLSA proposes—and none claims that it could operate at that level.

Underscoring the inadequacy and infeasibility of rates based on a rate-of-return approach constrained by the arbitrary subset of costs deemed "allowable," commenters recognize that RLSA's "allowable" costs are wholly detached from reality and do not represent the total actual costs of any real-world VRS provider. Moreover, commenters have agreed that setting profit levels based on booked capital makes absolutely no sense in a labor-intensive, capital-light industry like VRS, which relies far more substantially on human interpreters than it does on infrastructure. The resulting miniscule VRS-provider profit margins on just the subset of costs termed "allowable" would make it nearly impossible for providers to even pay their taxes, much less attract capital, invest in developing new services and equipment, or cover other costs that the "allowable" costs rate-of-return methodology ignores.

Furthermore, driving VRS providers into bankruptcy is not a magic wand that can reduce costs without causing severe and lasting service disruption. Any bankruptcy—and the lead-up to a bankruptcy—would likely result in large cuts in technical support, in field staff for installation and service calls, and in research and development. To the extent interpreters fled the economic insecurity of a provider bankruptcy—which is likely—wait times would increase both for the bankrupt provider and, if the bankrupt provider was large enough, across the industry. Small VRS providers simply do not have the capacity to absorb the significant VRS traffic currently being handled by larger providers. At a minimum, RLSA's rate proposals would result in a stripped-down, low-performance version of VRS—but they would be far more likely to end VRS as we know it. The potential for provider bankruptcies does not render feasible an economically infeasible rate.

It is also now crystal clear that ZVRS's single-application proposal is nothing but a brazen attempt to grab market share at the expense of competition, innovation, and consumer choice. Commenters have overwhelmingly recognized the benefits that endpoint competition brings consumers and rejected the idea of a centrally planned, single-application replacement for the equipment and applications they prefer today. Commenters also agree that, to ensure interoperability, industry-wide standards development is a far superior option to forcing consumers onto mass-market equipment devoid of the specially-designed features they value highly. Adopting ZVRS's misguided proposal would ensure that each and every VRS user would be forced to use featureless applications on devices that are further removed from functional equivalence than the equipment they use today.

Finally, the record confirms that ZVRS's proposal to expand the functions of the iTRS Database Administrator into a single communications provider is simply one more effort by ZVRS to "level the playing field"—not by improving its own performance but by forcing consumers to accept a system that will be less reliable, less private, and more susceptible to fraud than the system in place today. Sorenson joins other commenters, however, in supporting a limited expansion of the database's operations to address the potential for waste, fraud and abuse. In particular, Sorenson agrees that the database could be expanded to include storage of basic registration and verification information (though not the collection of that information from end users) for use on a call-by-call basis to confirm end user validity. Implementation of any additional "expanded" operations would be a logistical nightmare, would undermine effective customer support, and would further complicate VRS-provider compensation. Commenters have voiced strong opposition to broad expansion of the Database Administrator's operations, and supporters have failed to articulate any justification for the harm it would inflict.

II. THE COMMISSION *MUST* ADOPT RATES THAT PERMIT FUNCTIONALLY EQUIVALENT VRS SERVICE, AND THE RATES PROPOSED IN THE PN WOULD NOT COME CLOSE TO DOING SO.

As Sorenson set forth in its comments on the PN, Section 225 imposes on the Commission the solemn responsibility to ensure, to the extent possible, nationwide availability of VRS that is "functionally equivalent" to the voice communications services enjoyed by the hearing population.[3] This fundamental goal of functionally equivalent VRS must drive the Commission's rate-setting analysis. The Consumer Groups put this point plainly and simply in their PN Comments: "[T]he goal of functional equivalency must be the basis for any rate structure."[4] The statutory mandate of functional equivalence is not optional. Because the ultimate rates that would be generated under RLSA's proposal and underlying methodology are economically infeasible and thus arbitrary and capricious, its proposal—including its proposed transitional first-year rates—lack any rational basis and must be rejected.

A. The Comments Confirm that the 2004 Rate-of-Return Model is Fundamentally Flawed, and RLSA's Resulting Rate Proposals Are Economically Infeasible and Will Harm Consumers.

1. Commenters agree that the rate-of-return methodology proposed by the PN is irredeemably flawed.

In their PN comments, the Consumer Groups identify the core reasons why the Commission should reject rate-of-return regulation for VRS. In particular, the fundamental goal of VRS rate-setting should be "functional equivalency," which requires a "rate sufficient to keep up with technological advances that advance functional equivalency" rather than "look[ing] at

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[3] *See* 47 U.S.C. § 225(b)(1) (availability); (a)(3) (functional equivalence).

[4] Consumer Groups PN Comments at i.

historical costs."[5] Rate-of-return regulation, the Consumer Groups further explain, is simply not a sensible path to functional equivalence. Instead, to "provide carriers with an incentive to innovate and provide better service more efficiently," the Commission must "transition towards a more incentive-based form of regulation [for VRS] with better incentives for efficient operations"—just as the Commission has done in other contexts.[6] "Imposing a rate-of-return methodology for the VRS industry alone, when the Commission has moved away from rate-of-return for communications services provided to the hearing population, would be a step backwards."[7] This echoes the Commission's own conclusions more than two decades ago when it adopted price caps for AT&T:

> The attractiveness of incentive regulation lies in its ability to replicate more accurately than rate of return the dynamic, consumer-oriented process that characterizes a competitive market. In general, such regulation operates by placing limits on the rates carriers may charge for services. In the face of such constraints, a carrier's primary means of increasing earnings are to enhance its efficiency and innovate in the provision of service. . . .The system also is less complex than rate of return regulation and easier to administer in the long run, which should reduce the cost of regulation.[8]

With rate of return regulation, in contrast:

> The dynamic process that produces socially beneficial results in a competitive environment is strongly suppressed. In fact, rather than encourage socially beneficial behavior by the regulated firm, rate of return [regulation] actually discourages it.[9]

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5 *Id.* at 22-23.

6 *Id.* at 24 (internal citation omitted).

7 *Id.*

8 *Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 89-91, 4 FCC Rcd. 2873, 2893 ¶ 36 (1989) ("AT&T Price Cap Order").

9 *Id.* at 2889 ¶ 29. The Commission explained its conclusion as follows:

Other commenters agree with Sorenson and the Consumer Groups that RLSA's proposed rate-of-return approach is fundamentally flawed and indefensible. Purple Communications, Inc. ("Purple"), for example, argues that "[t]he rates for VRS should be regulated by price cap methodology," because "the stability provided by the price cap would optimize the incentives for VRS providers to lower costs and engage in long-term planning and investment in their VRS businesses thereby facilitating great competition and consumer choice."[10] And ZVRS delivers a blistering critique of rate-of-return ratemaking, explaining that it requires a never-ending and always imprecise effort to calculate providers' costs, figure out which fit into "allowable" buckets and which do not, and so on. The result is by definition a proposal that cannot be squared with reality—and ZVRS shows in detail that RLSA's cost calculations in fact bear no

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> The distorted incentives created by rate of return regulation are easily illustrated. In a competitive environment, where prices are dictated by the market, a company's unit costs and profits generally are related inversely. If one goes up, the other goes down. Rate of return regulation stands this relationship on its head. Although carriers subject to such regulation are limited to earning a particular <u>percentage</u> return on investment during a fixed period, a carrier seeking to increase its dollar earnings often can do so merely by increasing its <u>aggregate</u> investment. In other words, under a rate of return regime, profits (i.e., dollar earnings) can go up when investment goes up. This creates a powerful incentive for carriers to 'pad' their costs, regardless of whether additional investment is necessary or efficient. And, because a carrier's operating expenses generally are recovered from ratepayers on a dollar-for-dollar basis, and do not affect shareholder profits, management has little incentive to conserve on such expenses.

Id. at 2889-90 ¶ 30; *see also Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, FCC 90-314, 5 FCC Rcd. 6786, 6790 ¶ 30 (1990) ("Unfortunately, a regulatory system that simply corrects for a tendency to pad investments or expenses is not a system that can also drive LECs to become more efficient and productive. But incentive regulation, by limiting the amount carriers can charge for their services and continually exerting downward pressure on those price ceilings, can.").

10 Comments of Purple Communications, Inc. at 16-17, CG Docket Nos. 10-51 and 03-123 (filed Nov. 14, 2012) ("Purple PN Comments").

relationship to the costs that ZVRS incurs.[11] In short, commenters agree that a rate proposal reflecting rate-of-return methodology is "based on flawed assumptions"[12] and would "quash new development efforts of current providers, as there would be no business incentive to operate or innovate."[13]

In addition to rejecting rate-of-return regulation as outmoded and inefficient, many commenters criticize other aspects of RLSA's methodology. In particular, nearly all commenters argue that RLSA should not limit recoverable costs to an artificially constrained set of "allowable" costs as it has done in the past. The Consumer Groups, again, reject rate-of-return ratemaking for VRS altogether, but also note that "[t]o the extent the FCC nevertheless evaluates rate-of-return as an option, [the] Consumer Groups support the concept that the Commission should reimburse VRS providers for the cost to finance their ongoing operational expenses."[14] The Consumer Groups go on to state that "VRS providers should be able to include costs for marketing, outreach, research and development," including "increasing [the] awareness of the general (hearing) population" of VRS.[15] ZVRS points out that RLSA's "2012 calculated weighted average costs" dramatically undercounted ZVRS's actual operating costs, including indirect costs such as "operations support, finance, research & development, engineering, legal, risk management, other corporate overhead and a modest executive team," as well as costs for

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[11] *See* Comments of CSDVRS, LLC at 4-9, CG Docket Nos. 10-51 and 03-123 (filed Nov. 14, 2012) ("ZVRS PN Comments").

[12] Purple PN Comments at 12.

[13] ZVRS PN Comments at 14.

[14] Consumer Groups PN Comments at 26.

[15] *Id.* at 25.

"marketing & outreach."[16] Purple likewise argues that "inclusion of outreach, marketing, and research and development costs is absolutely necessary."[17] Recognizing the challenge inherent in identifying actual costs with accuracy, regulatory agencies—including the Commission—have increasingly chosen to use price-cap approaches instead, which provide incentives for companies to become more efficient without involving industry and regulators in extended debates about the permissibility of different categories of costs.[18]

To the extent that the Commission persists in pursuing rate-of-return regulation, commenters also criticize the PN's proposals for arbitrarily setting the rate of return at 11.25 percent of booked capital plant. The Consumer Groups identify a major problem with this approach: "The rate of return...should not be fixed at 11.25% or any arbitrary number, but

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[16] ZVRS PN Comments at 3-6.

[17] Purple PN Comments at 17.

[18] *See, e.g., AT&T Price Cap Order* at 2890-91 ¶¶ 31-32. The Commission explained:

> [A]dministering rate of return regulation in order to counteract these incentives is a difficult and complex process, even when done correctly and well. This is so primarily for two reasons. First, such regulation is built on the premise that a regulator can determine accurately what costs are necessary to deliver service. In practice, however, a regulator may have difficulty obtaining accurate cost information as the carrier itself is the source of nearly all information about its costs. Furthermore, no regulator has the resources to review in detail the thousands of individual business judgments a carrier makes before it decides, for example, to install a new switching system.
>
> The second inherent difficulty associated with administering rate of return regulation relates to its requirement that determinations be made about how to allocate a carrier's costs among services that often are provided jointly or in common. Such determinations tend to become more economically problematic as they become more detailed. The history of this Commission's experience in this area over the past several decades reflects the difficulty of implementing cost allocation systems.

Id.

instead should be adjusted to reflect the current market realities."[19] ASL Services Holdings, LLC ("ASL/Gracias") similarly argues that the "11.25% rate of return on investment adopted in 1990 is inconsistent with current cost structures 22 years following its adoption and should be re-examined."[20] Not surprisingly, the "underlying assumptions that supported this rate of return have changed in the more than two decades since adoption, resulting in an artificially lower rate of return that bears little relationship with current costs, risks, and challenges."[21] ZVRS points out that "utilizing the same [ratemaking] approach for the VRS industry, an industry which does not require capital investment anywhere near that of LECs, is not logical or reasonable."[22] Similarly, Purple states that "[w]ith respect to the amount of capital costs that are allowed to be recovered…a traditional rate of return investment analysis approach is not a suitable option for VRS, which is a labor-intensive industry."[23]

Of course, no commenter suggests that the amount of profit permitted under RLSA's proposal—about 6 cents per minute, or less than 2 percent of either RLSA's proposed $4.51 per minute rate for Tier 3 minutes in 2013 or its ultimate rate target of $3.40 per minute—is

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[19] Consumer Groups PN Comments at 26.

[20] Comments of ASL Services Holdings, LLC at 13, CG Docket Nos. 10-51 and 03-123 (filed Nov. 14, 2012) ("ASL/Gracias PN Comments").

[21] *Id.*

[22] ZVRS PN Comments at 13 (citation omitted). ZVRS argues, however, that the problem with applying the 11.25 percent rate of return to VRS could be addressed by adding interpreter costs to those to which the rate of return must be applied: "ZVRS believes the FCC [c]ould…attract new capital (new investors funds) to the VRS industry by applying the ROIC methodology to both the invested capital and CA workforce costs." *Id.* at 14. In fact, however, while this approach would be a modest improvement over *not* including workforce costs in the rate base, it certainly would not address the fundamental problems of using rate-of-return regulation in the first place, including both the incentive to drive up costs to increase returns and the disincentive to lower costs to become more efficient. *See supra,* nn.8-9 and accompanying text.

[23] Purple PN Comments at 18.

adequate. To the contrary, ZVRS explains that the "minimal rate of return" reflected in the proposal would ensure that "most providers would never be able to attract future investors, nor be able to operate at a competitive level and will simply leave the industry."[24] In a labor-intensive industry, a rate-of-return approach (if used at all notwithstanding the litany of reasons to reject it) ought to provide for the recovery of a provider's total *actual* costs plus a return on all of those costs. As outside auditors have documented, Sorenson's actual costs (as opposed to the costs considered "allowable" by RLSA) are *****BEGIN HIGHLY CONFIDENTIAL***** *****END HIGHLY CONFIDENTIAL***** per minute.[25] Sorenson is the lowest-cost VRS provider, with all other providers reporting higher average costs per minute. Accordingly, any rate-of-return approach ought to call for recovery of at least *****BEGIN HIGHLY CONFIDENTIAL***** *****END HIGHLY CONFIDENTIAL***** per minute plus an adequate return. This would likely result in a rate above the blended $5.14 per minute rate Sorenson currently receives, and certainly not in one that is substantially below $5.14 per minute.

In short, there is broad agreement in the comments that 1) the Commission cannot ensure the "functional equivalence" of VRS by relying on the discredited rate-of-return methodology

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[24] ZVRS PN Comments at 13-14.

[25] A portion of Sorenson's documented per-minute costs consists of interest payments, which are not considered allowable. But there is no reasonable basis for disallowing financing costs, especially since Sorenson's debt costs are similar to those of many other communications companies. And to the extent that some of Sorenson's debt obligations represent the costs of paying dividends, the Commission cannot reasonably refuse to set rates that permit providers to earn a reasonable profit and also refuse to permit providers to borrow money. Furthermore, the interest costs that can be attributed to dividend payments amount to a return of approximately *****BEGIN HIGHLY CONFIDENTIAL***** *****END HIGHLY CONFIDENTIAL***** percent on Sorenson's actual costs. If VRS were operated under a federal government contract model, this level of recovery would be entirely reasonable.

reflected in RLSA's proposal; 2) if the Commission decides to go down this unpromising path, it at least should not continue to arbitrarily exclude the real costs of providing service; 3) in a labor-intensive, capital-light industry like VRS, the return component of the rate cannot defensibly apply only to booked capital plant; and 4) there is simply no basis whatsoever for using the 11.25 percent rate-of-return figure derived from decades-old data in a very different industry. A reasonable rate-of-return approach that counted the actual costs of VRS providers and allowed a reasonable profit would lead to a rate above the $5.14 rate Sorenson has proposed.

2. The rate proposals would deeply harm VRS consumers and video interpreters, and those harms will only be exacerbated if VRS providers go bankrupt.

a. Adopting RLSA's proposals would harm consumers and video interpreters.

Not a single VRS provider suggests that it could provide service at the proposed rate levels.[26] Clearly, however, the collapse of the VRS industry would not harm only VRS providers—the negative impact on VRS consumers and on video interpreters would also be dramatic.

With respect to the negative effects of the PN's rate proposals on consumers, the Consumer Groups provide some sobering observations. While acknowledging that they do not have sufficient information about VRS providers' operations to comment on specific rates, the

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[26] Only ASL/Gracias's comments might be read to support the rate proposal—but ASL/Gracias apparently did not recognize the enormous cut RLSA is proposing, instead voicing its support for a two-tiered system with a $6.2335 rate at the lower tier and $5.0668 at the higher: "ASL/Gracias VRS does not oppose the RLSA-proposed two-tiered compensation methodology consisting of a $6.2335 per minute rate for the first 500,000 minutes per month and $5.0668 per minute beginning with the 500,001st minute each month generally." ASL/Gracias PN Comments at 12. It seems very likely that ASL/Gracias *would* oppose the rates *actually* proposed in the PN.

Consumer Groups do warn that "[i]f the reimbursement rate is set below-cost...the Consumer Groups can apply common sense to what will happen."[27] Common sense dictates, of course, that "service quality will diminish, service improvements that bring consumers closer to functional equivalency will not be made, consumer choice will be reduced" and the "VRS program will fail to meet the ADA mandate that all consumers have access to functionally equivalent communications services." [28] As a result, the Consumer Groups counsel that before undertaking dramatic changes like those proposed by RLSA, "the Commission must gather data about the potential impacts its proposals may have on consumers and the provision of VRS services as a whole."[29] Moreover, "the Commission must clearly and concisely explain how such data has been evaluated before suggesting or adopting significant reforms."[30]

While indeed sobering, the Consumer Groups' comments do not come close to capturing the full impact of the proposed rates on consumers. As Sorenson stated in no uncertain terms in its comments on the PN, "the rate recommendation on which the PN seeks comment supplies no commercially viable basis for providing VRS."[31] Other VRS providers agree. ZVRS, for example, writes that RLSA's proposal reflects such a "minimal rate of return" that "most providers would never be able to attract future investors, nor be able to operate at a competitive level and will simply leave the industry."[32] And ZVRS plainly counts itself among the providers

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[27] Consumer Groups PN Comments at 7.

[28] *Id.*

[29] *Id.* at 8.

[30] *Id.*

[31] Comments of Sorenson Communications, Inc. at 3, CG Docket Nos. 10-51 and 03-123 (filed Nov. 14, 2012) ("Sorenson PN Comments").

[32] ZVRS PN Comments at 13-14.

that would be obliged to "leave the industry" if RLSA's proposed rates are adopted: "The overall weighted average calculated cost by RLSA of $3.396 is significantly lower than ZVRS' cost."[33] Purple, too, cannot operate at the proposed rates: "[T]he TRS Fund Administrator's rate proposal will have the effect of decreasing rates for non-dominant VRS providers to such an extent that they will be forced out of business, and, as a result, undermine the Commission's goal of increasing competition in the VRS industry to facilitate consumer choice and promote functional equivalence."[34] Convo Communications, LLC ("Convo") observes that "[n]o business can withstand sudden and repeated double-digit percentage decreases in their operating revenue," and notes it would be impossible "to reduce costs in an orderly manner quickly enough to offset the type of revenue reductions that would result from RLSA's proposed rates."[35]

Even interpreter organizations recognize that the rate cuts would undermine providers: "There wouldn't be many or any VRS provider[s] that could sustain [their] organization with rate cuts, reduction of consumers, and/or services...[if] the FCC's current proposals go into effect."[36] And interpreter organizations acknowledge that their members will in turn be harmed by those proposals. The Registry of Interpreters for the Deaf, Inc. ("RID"), for example, explains that it knows from experience what happens as a result of dramatic rate reductions: "The 2010 rate reductions resulted in interpreter cutbacks and job losses, the closure of VRS centers across the country, and the implementation of new hiring practices"; even more draconian cuts, RID fears,

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[33] *Id.* at 3.

[34] Purple PN Comments at 12.

[35] Comments of Convo Communications, LLC at 6, CG Docket Nos. 10-51 and 03-123 (filed Nov. 14, 2012) ("Convo PN Comments").

[36] Comments of the National Alliance of Black Interpreters, Inc. at 2, CG Docket Nos. 10-51 and 03-123 (filed Nov. 14, 2012) ("NAOBI PN Comments").

will "threaten the health of the professional interpreters working as CAs, [and] will certainly impact the overall quality of service provided through VRS."[37] The Communications Workers of America argue that unreasonable demands on video interpreters have already been imposed as a result of this proceeding:

> [I]n response to the Commission's ongoing actions and discussion of possible reduction in VRS compensation rates in this instant proceeding, VRS providers have already begun to increase the previously demanding workload of video interpreters who take calls in Spanish and English to such a degree that it impairs the ability of video interpreters to provide quality interpretation services to consumers.[38]

While Sorenson has taken great care to maintain reasonable workloads for its interpreters, there is no question that, as a practical matter, the kind of rate cuts proposed by RLSA would "impact the work of the sign language interpreter directly" and thereby "affect[] the quality of service."[39] One direct impact would be less funding for technological advances that assist video interpreters in their work. Many of the technological advances made by Sorenson and other providers—including improved endpoints and advanced workplace settings—have enabled interpreters to work more comfortably and efficiently. But those advances are of course dependent on available resources, and the rate cut RLSA has proposed would eliminate funding for efforts of this kind. Without further advances, interpreters will eventually turn away from VRS work as it becomes more challenging, difficult, and demanding relative to other pursuits.

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[37] Comments of the Registry of Interpreters for the Deaf, Inc. at 3, CG Docket Nos. 10-51 and 03-123 (filed Nov. 14, 2012) ("RID PN Comments"). ZVRS's comments similarly argue that RLSA's proposed rates would require providers to make impossible demands on VIs in order to make the service economical—the work "schedule [that the rates would require from VIs]...would injure interpreters mentally, emotionally and physically." ZVRS PN Comments at 8.

[38] Comments of Communications Workers of America in partnership with Video Interpreters at 2, CG Docket Nos. 10-51 and 03-123 (filed Nov. 14, 2012).

[39] NAOBI PN Comments at 2.

Moreover, inadequate resources will ultimately lead to inadequate technological systems which will lead to consumers requesting clarification due to poor picture quality or complaining about other facets of the service. This will predictably result in frustration for interpreters, who will likely find the work less satisfying under such conditions, which will give them additional incentives to consider leaving VRS and focus on community work instead.

b. Bankrupting providers providing substantial portions of VRS would exacerbate the harm to consumers and video interpreters.

As noted in Sorenson's comments, the rate proposals would so obviously place all VRS providers on a path to insolvency that it is difficult to avoid the conclusion that those proposals were *designed* to result in bankruptcies—perhaps in the hope that bankruptcies could simply and neatly eliminate VRS providers' debt, thereby reducing their costs going forward with little or no disruption or harm to consumers.[40] Although Sorenson briefly explained in its opening comments on the PN that hopes for disruption-free insolvency represent pure "fantasy,"[41] the reasons why that is so bear further explanation here.

To understand why forcing Sorenson into reorganization—or, indeed, any action by the Commission engendering substantial uncertainty among Sorenson's interpreters—would have far-reaching negative impacts on consumers, it is necessary to understand the unique relationship between VRS providers and the interpreters at the heart of the services provided. Virtually all of Sorenson's interpreters—and, for that matter, other VRS providers' interpreters—are part-time employees. Sorenson's part-time interpreters, for example, typically work *** **BEGIN CONFIDENTIAL** *** [redacted] *** **END CONFIDENTIAL** *** hours per week, and most are

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[40] *See* Sorenson PN Comments at 14-15.

[41] *Id.* at 15.

unwilling to work substantially more. VRS interpreters work part-time both because of the unique demands of VRS interpreting and because all ASL interpreters typically have deep, often personal, ties to deaf and hard-of-hearing individuals in their local communities. Those ties require most interpreters to work part-time at a number of interpreting jobs within their communities, eschewing full-time employment with a single employer. As employers, VRS providers thus compete with numerous other part-time interpreting opportunities available to interpreters in their communities.

Any perception of job insecurity among VRS interpreters would lead to large and disruptive outflows of critical human capital—in short, interpreters will simply leave for other, non-VRS jobs which they perceive to be more secure. This fact was dramatically underscored after the Commission slashed the Tier III compensation rate by 18 percent in June 2010. For example, while Sorenson naturally took steps to minimize the disruption caused by that change, it was nonetheless obliged to close five call centers, thereby directly eliminating hundreds of interpreter positions. That action had the unintended consequence of dramatically increasing Sorenson's interpreter turnover.[42] Sorenson believes that many, if not most, of those who left did so because 1) they perceived VRS interpreting jobs to be less secure than alternatives within their communities as a result of the 2010 lay-offs; and/or 2) they were unwilling to take on the burdens of increased workloads imposed on them by the closure of five call centers. Sorenson believes that the vast majority of these interpreters did *not* go to work for other VRS providers—having had a negative experience with one provider due to industry-wide rates established by the regulator, most interpreters simply left the VRS industry altogether.

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[42] Sorenson currently employs more than *** **BEGIN HIGHLY CONFIDENTIAL** *** *** **END HIGHLY CONFIDENTIAL** *** fewer interpreters than it did in July 2010.

Furthermore, because interpreter reductions were necessitated by rate cuts, raising wages to increase retention was not (and will not be in the future) a realistic option for any VRS provider. Moreover, when Sorenson closes a call center in a location where no other provider operates a call center, its experience is that interpreters generally do not move to another community to continue interpreting for VRS—they simply take on other part-time jobs within their community. And, of course, it is doubtful that any provider will be able to open any *new* call centers anywhere if the rates are anything like those proposed by RLSA, as that formula provides little to no profit margin for any provider and thus the provider is unlikely to be able to obtain the financing necessary to construct new call centers.

The net result of these factors is that threats—such as the specter of a Sorenson bankruptcy—to the job security of video interpreters will simply cause them to leave the industry, usually for good. Of course, the threat of a Sorenson bankruptcy—or any flash-cut in rates—would have dramatic effects far beyond the relationship between VRS providers and video interpreters. Technical support staff would need to be slashed or at least reduced—and as Sorenson learned in the aftermath of the 2010 rate cuts, it simply is not possible to do that without substantial increases in wait times.[43] And increased wait times, of course, force VRS further from the functional equivalence demanded by statute. Any threat of insolvency would also dramatically reduce or eliminate additional expenditures on research and development, including investment to improve interoperability or the functionality of hardware and software. Field staff—an area in which VRS providers employ hundreds of deaf individuals for outreach,

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[43] *See* Letter from John Nakahata, Counsel, Sorenson Communications, Inc., to Marlene Dortch, Secretary, Federal Communications Commission, Attachment 2 at 7-8, CG Docket Nos. 10-51 and 03-123 (filed July 11, 2012) ("Sorenson July 11 Letter").

installation, customer service, and training—would also need to be cut to improve cash flow, just as occurred in 2010.[44] Once again, the result would be VRS that is further from functional equivalence, with longer wait times for service when problems arise, fewer installations for currently unserved individuals, and so on.

It bears emphasis that the Commission's 2010 rate cut had important effects on video interpreters beyond reductions in force—terminations and other cost reductions simply were not adequate to offset the entire revenue reduction. In Sorenson's case, for example, terminations and cost reductions addressed about one-third of the impact of the rate cuts. Included in those cost reductions were steps to limit interpreter down time and increase its interpreter "efficiency rate" to almost *** **BEGIN HIGHLY CONFIDENTIAL** *** *** **END HIGHLY CONFIDENTIAL** *** percent—a rate which previously had been considered nearly impossible and, Sorenson believes, is substantially higher than its competitors' efficiency rates. Because 1) interpreters must take breaks for physical reasons (at least 10 minutes per hour), 2) time spent setting calls up and terminating them is not compensable, and 3) interpreters spend time in training and on vacation (for which they are paid but are not interpreting any VRS calls), Sorenson's current efficiency level is almost certainly the practical limit and, unlike 2010, Sorenson cannot respond to a further rate cut by making interpreters work even harder. Once again, additional demands on video interpreters would simply cause vast numbers of them to leave the VRS industry

Sorenson anticipates that the kinds of dramatic rate cuts contemplated by the PN—either in the first year or at the end of a longer transition—would have an impact on VRS video

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44 *See id.*

interpreters more dramatic by orders of magnitude than the 2010 rate cut. Even rumors of a Sorenson bankruptcy would be extremely destabilizing to the interpreter workforce, and a great many would leave. At a minimum, costs of recruitment, training, and retention would go up substantially. But the effects would likely be far worse. As a general matter, bankruptcy has more limited consequences in industries—like airlines—where most of the value is in hard assets: even if a lot of employees leave an airline, the airline still has a basic infrastructure of planes, gate lease agreements, and terminal arrangements with which it can continue to operate. On the other hand, in businesses where most of the value is in human capital—like law firms, for example—that value can disappear quickly once a critical mass of employees leaves. Accordingly, if a critical mass of interpreters were to leave Sorenson—as would be likely in the case of bankruptcy or reorganization—the business could very quickly get to the point where it simply could not operate. And, of course, problems of interpreter recruitment and retention would then beset other VRS providers assuming that any remained—a doubtful assumption given that any FCC action resulting in a Sorenson bankruptcy would likely bankrupt *all* providers, since Sorenson is the low-cost provider.

The bankruptcy issues unique to the VRS industry discussed above—including losing VRS interpreters and undermining functional equivalence—would also be accompanied by all the more usual problems of bankruptcy. Vendors—of VRS network elements, for example—would, at a minimum, demand pre-payment for future orders, which would raise the costs of dealing with them. Some would refuse to do business at all, making it difficult for VRS providers to continue to deliver services. Governance issues would arise for VRS providers, as it would be difficult or impossible to retain senior management. Labor costs would go up, and productivity would go down. Credit would become essentially unavailable. And, of course, the costs of the professional services necessary for the bankruptcy itself would be very high.

Finally, the Commission should not indulge the fantasy that, if Sorenson were to be driven into bankruptcy, the adverse impact on consumers detailed above could be avoided because other VRS providers would take up the slack. There is simply no basis for such a belief. All of the other providers are substantially smaller than Sorenson; Purple, one of the largest providers other than Sorenson, claims to be one seventh of Sorenson's size, and ZVRS is likely not any larger. Neither of these entities—nor the other even smaller VRS providers—has the capacity to quickly serve a significant percentage of the VRS demand that Sorenson serves. To be able to do so they would have to build new call centers and attract interpreters, all within the financial constraints of rates calculated to provide only a one to two percent margin on the subset of costs labeled "allowable." Under such constraints, they are unlikely to be able to obtain the financing to expand, and even if they did, expansion takes time. Moreover, it is important to bear in mind that ZVRS and Purple have been providing VRS for more than twelve years at this point, and yet they have not succeeded in growing their customer bases beyond levels that they contend remain sub-scale. As Sorenson and Professor Katz have explained, however, their size and costs reflect inefficient management and operations. In light of these providers' track record over the last twelve years, it would be folly for the Commission to embark on a course that would effectively require them to pick up Sorenson's VRS volumes. Although a solvent Sorenson may be able to cushion the consumer disruption that could otherwise flow from other providers' bankruptcies, the other providers will not be able to do so if the Commission drives Sorenson into insolvency.

Accordingly, the net result of driving Sorenson and others into reorganization could well be the collapse of the business, driven primarily by an exodus of interpreters, but amplified by the traditional problems of bankruptcy. The effects of such a collapse would be extremely far-reaching. In the short run, of course, bankrupt providers' customers would suffer greatly from the suspension of services. And that problem would be exacerbated by the fact that it would be difficult, if not impossible, to lure VRS interpreters victimized by bankruptcy back to the industry at all.

In the longer term, the effects would likely be permanent. For the foreseeable future, it would be extremely difficult for VRS providers to attract the capital necessary to scale their services up to meet VRS demand—investors will naturally be leery of investing in an industry in which the FCC has chosen to push even the lowest-cost provider into bankruptcy. VRS users might therefore encounter a VRS industry unable to meet demand for a considerable time to come. Of course, in an efficient market, new capital and new firms would enter the market to meet demand. Unfortunately, however, in a market characterized by regulators willing to force providers into bankruptcy and unwilling to permit providers to earn more than a two percent profit, new entry may well be limited or non-existent.

In short, to the extent that the PN's proposals are intended to result in bankruptcy for the industry's lowest-cost provider in an effort to reduce costs, the Commission should make no mistake that the effects on VRS consumers and video interpreters will be far-reaching and long-lasting. And such an approach would clearly amount to a complete surrender of the Commission's statutory obligation to achieve functional equivalence.