WILTSHIRE & GRANNIS LLP

REDACTED

August 19, 2013

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 Further Notice of Proposed Rulemaking released by the Consumer and Governmental Affairs Bureau in the dockets captioned above on June 10, 2013.

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) two copies of the presentation containing Highly Confidential Information and Confidential

---

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).

REDACTED

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,

Mark D. Davis
Counsel to Sorenson Communications, Inc.

Enclosures

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

In the Matter of	
Structure and Practices of the Video Relay Service Program	CG Docket No. 10-51 CG Docket No. 03-123
Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities	

COMMENTS OF SORENSON COMMUNICATIONS, INC., AND CAPTIONCALL, LLC

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
Timothy J. Simeone
Steven A. Fredley
Mark D. Davis
Walter E. Anderson
Peter J. McElligott

WILTSHIRE & GRANNIS LLP
1200 18th St., NW, Suite 1200
Washington, D.C. 20036
(202) 730-1336
jnakahata@wiltshiregrannis.com

August 19, 2013

Counsel for Sorenson Communications, Inc., and CaptionCall, LLC

TABLE OF CONTENTS

I. Introduction and Summary 1

II. Argument 8

A. The Commission Should Rapidly Adopt and Implement a Market-Based Compensation Methodology. 8

1. The Commission Should Conduct an Auction to Establish a Market-Based Rate for VRS in 2014. 11
2. The Commission's Rate-Setting Proposals Must be Revised to Avoid Degrading Service. 15

B. TRS Providers Are Entitled to Recover for the Significant Costs of Complying with the Commission's New Rules. 24

C. The Commission's Nebulous Proposal to Fund TRS Research and Development Through the NSF Will Waste Millions of TRS Fund Dollars. 28

1. It Is Impossible to Comment on the Proper Budget Without Knowing the Scope of the NSF's Work. 28
2. Replacing Private Innovation with Government-Mandated Research and Development Will Lead to Inferior Technology. 29

D. The Commission Should Require RLSA to Propose Contribution Factors Quarterly. 31

E. The Commission Should Permit Hearing Individuals to Obtain Ten-Digit Numbers, But VRS Providers Should Not Bear the Costs of this Change. 33

F. The Commission Should Not Expand the Role of the TRS Fund Advisory Council. 34

G. Because of the Important Differences Between VRS and IP CTS, the Commission Should Not Blindly Apply VRS Rules to All Forms of TRS. 37

H. The Commission Should Not Disaggregate VRS Emergency Call Handling. 40

1. The Current System for Handling 911 Calls Works Well for VRS Users. 41
2. Disaggregating Emergency VRS Calls Would be Either Entirely Unworkable **or** Prohibitively Expensive**.** 43
3. Disaggregating Emergency VRS Calls Would Make it Even More Difficult to Meet Speed-of-Answer Requirements for Non-Emergency Calls, and Would Raise the Costs of Providing Non-Emergency VRS. 46

I. The Commission Should Reject the Impossible-to-Meet 10-Second Speed-of-Answer Requirement, But Should Fix Problems with the Current System. 47

1. The Existing 30-Second Daily Requirement Will Be Difficult or Impossible to Meet. 48
2. The Proposed 10-Second Threshold Is Impossible to Meet. 51
3. Rather Than Create More Problems by Adopting a 10-Second Standard, the Commission Should Fix the Existing Standard. 53
4. The Commission Should Adopt Its First Proposed Speed-of-Answer Formula, With Clarifications. 56
5. The Commission Should Collect the Information Necessary to Audit Providers' Speed-of-Answer Reports. 57

J. Rather than Fine-Tuning Administrative and Oversight Rules Designed for a Rate-of-Return Approach to Regulation, the Commission Should Set Market-Based Rates Via Auction and Ensure a Level Playing Field for Competition Among VRS and Stand-Alone Interpreting Service Providers. 58

1. The Commission Should Reject Rate-of-Return Regulation and Eliminate Related Data Collection Requirements. 58
2. The Commission Should Ensure a Level Playing Field Between Stand-Alone Interpreting Service Providers and Existing VRS Providers. 60

K. The Commission Should Restructure Part 64.604 of Its Regulations. 62

L. Prohibiting TRS Providers from Using CPNI for the Purpose of Contacting TRS Users for Political and Regulatory Advocacy Purposes Would Plainly Violate the First Amendment. 62

M. The Commission Should Adopt Rules Clearly Delineating Prohibited Practices, Not a Vague "Unjust and Unreasonable" Standard. 66

N. The Commission Should Eliminate the "Guest-User" Period. 70

O. The Commission Should Not Mandate That VRS Providers Make "Enhanced Features" Available to Customers of Competitors. 71

1. Sorenson Does Not "Block" Non-Sorenson Customers From Leaving Video-Mail Messages and Should Not Be Required to Conform its Video Mail System to the Inferior Design Used By Other Providers. 72
2. The Commission Should Maintain Its Current Policy of Allowing Competition Through "Enhanced Features." 74

P. The Commission Should Not Ban "Non-Compete" Clauses in VIs' Employment Agreements Because Doing So Would Reduce the Supply of Qualified Interpreters. 76

Q. The Commission Should Not Permit VIs to Work From Home Overnight. 78

III. Conclusion 79

I. INTRODUCTION AND SUMMARY

In its June 2013 Order, the Commission put Video Relay Service ("VRS") on a path to a bleak future for deaf consumers. Ignoring all record evidence that its rate-of-return methodology is economically unsustainable when applied to VRS, the Commission doubled down on its rate-of-return rate-setting approach. The Commission is scheduled to push VRS rates below levels that any provider even speculated that it could reach. The Commission never addressed how it could reasonably expect economically sustainable VRS when the compensation it will pay fails to cover even some FCC-mandated costs, such as ten-digit-number assignment and E911 capability, let alone the equipment (whether hardware or software) necessary for consumers to access and use VRS. This is especially true because the FCC noted that if costs fall further, such as if providers cut "allowable costs" in order to adapt the FCC's scheduled rate reduction, it could lower rates still further. Moreover, unlike other labor-intensive firms—such as a temp agency—VRS providers are not allowed to earn any mark-up (*i.e.*, profit) on expenses, including labor; rather, the Commission allows profit only on booked capital investment, which is proportionately small for VRS as compared with the telephone companies for which the FCC developed its rate-of-return approach. If companies cannot earn a profit, they will not invest in providing and improving VRS, including basic service and added features, and access equipment. Without such investment, VRS will continue to fall behind services for fully-hearing Americans—if the service even exists at all—making a lie out of the Americans with Disabilities Act's promise of functionally equivalent telephone service embodied in Section 225.

The problem with the FCC's focus on dramatic rate-cutting in Telecommunications Relay Services ("TRS") is that it lacks regulatory humility. If the FCC is wrong about the rates that are needed to sustain high-quality TRS services, then the too-low rates will cut quality and

jeopardize the existence of the service itself. We have already seen this in IP Relay. Even before the most recent order setting IP Relay compensation rates, two of five competitors concluded that the FCC's escalating regulatory demands made their provision of IP Relay service uneconomic. When the FCC then announced a 20 percent reduction in IP Relay rates, along with a promise of future 6 percent annual real (*i.e.*, with no allowance for inflation) rate reductions, Sorenson discontinued its IP Relay service. It is not even clear that the two remaining providers will both continue to provide IP Relay service. It is ironic that the FCC's actions may lead to IP Relay being provided solely through offshore call centers (an alternative not even available for VRS). And having wrecked a service through its lack of humility in rate setting, the FCC will find it difficult ever to attract private investment back to TRS. Yet that is where we are with respect to IP Relay, and it is the path on which the FCC has set VRS.

The other path the FCC is clearly on, as reflected in its June 2013 Order but about which the FCC is less than candid, is that deaf and hard-of-hearing Americans are expected to pay a lot more to be able to access and use VRS—even though it is the best accommodation for ASL-speaking deaf, hard-of-hearing, and speech-disabled individuals. The FCC has once again declared that the end-user equipment (whether hardware or software) necessary to access and utilize VRS is not an allowable cost, and thus it aims to set VRS rates at levels that do not cover those costs. The same is true for many of the vertical features that make VRS a more functionally equivalent service. Yet if the FCC's object is to set rates at levels that do not include these costs, including research and development to create these features and equipment, then the FCC's object has to be to make deaf, hard-of-hearing, and speech-disabled individuals pay for them. But forcing a deaf, hard-of-hearing, or speech-disabled consumer to spend hundreds of dollars for access equipment and software when a fully hearing person can buy a

phone at Walmart for less than $6 does not even plausibly approach functional equivalence. Similarly, heaping additional monthly service charges on deaf consumers—who are disproportionately low-income—when they already have to buy Internet access to use VRS (which a fully hearing person does not have to purchase to place and receive telephone calls) does not fulfill functional equivalence. What these added charges to deaf consumers would do is stifle adoption of VRS, denying the Section 225 accommodation to individuals who need it.

Nor will nationalizing VRS endpoint technology (whether hardware or software) or the communications platform necessary to support VRS facilitate functional equivalence, innovation, and investment in improved VRS and technologies. As bare-bones options for providers to use, these do limited damage, although they do place the government in competition with private-sector solutions. However, if these are used to set the compensation for private-sector providers, they will effectively drive the entire market to the same bare-bones levels for service and features. This is especially true if consumers do not accept these platforms or endpoints. It would be as if the Commission used the VRS equivalent of the Yugo (a cheap car that subsequently went out of business for lack of consumer interest) to set compensation rates for the VRS communications-platform service. Economically, no provider could provide better service unless they could charge deaf consumers.

So what should the Commission do? It is imperative that the Commission implement market-based VRS rates in 2014, before its interim rate schedule sinks to ruinous levels that will destroy VRS. This can be done through a descending-clock auction to set a unified (*i.e.*, no tiers) rate for VRS. The FCC should not set a reserve price—doing that fundamentally defeats the ability of a market-based mechanism such as an auction to reveal that the FCC set its interim rates too low (or that its "allowable costs"-based rate of return regulation yields rates that are

unsustainably low). The Commission must recognize that its unsubstantiated economic suppositions may, in fact, be incorrect—as all record evidence suggests.

Such an auction would require some additional safeguards. An auction should avoid, or at least limit, interference with consumer choice. This can be done by using auctions for a relatively small volume of minutes to set overall VRS compensation for the portions of the service being auctioned and by allowing consumers to opt out of using the auction winner (such as through dial-around). The volumes auctioned must mirror the composition of traffic as a whole, in both duration and time of day. To prevent speculative, low-ball bids from establishing unsustainable rates, the Commission should qualify bidders by limiting them to bidding on no more than the total number of VRS conversation minutes provided in the year prior to the auction and require them to have satisfactorily complied with the applicable minimum standards. *See infra* Section A & J.

Nor should the Commission use the contract price it establishes for the neutral communications platform to set compensation levels for the communications-platform portion of VRS. Certainly, it should not use that contract price if the neutral communications platform fails to achieve substantial consumer acceptance. But even if it achieves substantial consumer acceptance, setting the price based on a no-features, bare-bones communications service creates no plausible economic incentive to innovate and improve the features and functions provided through the platform.

In response to other questions raised in the FNPRM:

- The Commission should allow providers to recover the costs directly related to implementation and compliance with the new VRS rules. In particular, providers will incur substantial costs in complying with the Commission's mandate concerning implementation of the TRS User Registration Database ("TRS-URD"), which

involves significant data collection from all VRS users, and the new speed-of-answer rules, which will require increased Video Interpreter staffing. *See infra* at II.B.

- The Commission should reject the unrealistic 10-second speed-of-answer requirement. The Commission's planned rate reductions have already put providers in an untenable position as the rates will be below the actual cost of providing service. Yet, at the same time, the Commission changed the measurement window from monthly to daily, dramatically cut the speed-of-answer requirement to 30 seconds (fully effective July 1, 2014), and *increased* the percentage of calls that must meet the threshold. It will not be possible for providers to meet these new requirements without hiring more interpreters and reducing productivity—which, if it is even possible, will increase the costs of service at a time when the FCC has also mandated declining rates. Reducing the speed-of-answer requirement further, from a 30-second daily average to 10 seconds, will only exaggerate the problem the Commission's rules have created—further increasing the costs of providing service in the face of declining rates. The Commission should also adopt its first proposed speed-of-answer formula and make clear that providers may not game the system by using busy signals or similar recorded messages when their systems become overloaded. *See infra* at II.I.

- The Commission should reject demands by providers that are unable or unwilling to develop innovative features to compel Sorenson to adopt these providers' inferior video-mail-system design. The Commission has previously addressed the issue of "enhanced features," such as video mail, and has concluded that these features can be offered "on a competitive basis, which will encourage innovation and competition." There is no justification for the Commission to abandon its prior position when doing so will ultimately harm consumers. *See infra* at II.O.

- The Commission should continue to permit the use of "non-compete" clauses in the employment agreements of Video Interpreters ("VIs") within the limits of employment and antitrust laws. Sorenson spends substantial resources identifying and training new interpreters. Its "non-compete" clauses provide it minimal assurance that after expending significant resources on training, a Sorenson interpreter will remain with Sorenson for a reasonable time. If Sorenson is not allowed to implement reasonable "non-compete" employment agreements, it will not be able to afford to invest as substantially in training, and this will lead to a reduction in the number of qualified interpreters. *See infra* at II.P.

- The Commission should not blindly transfer rule and process changes from VRS to IP Captioned Telephone Service ("IP CTS") simply because they are both relay services. VRS and IP CTS are very different services. They have very different customer bases and rely on very different means of providing service—VRS relies heavily on well-trained video interpreters, and IP CTS is more reliant on cutting edge-technology. VRS providers also sit in the middle of the call flow, while IP CTS providers that do not require dial-back sit to the side, monitoring and captioning the

audio of a call between telephone companies. The Commission, therefore, needs to carefully consider any reforms to IP CTS that take into account its relative infancy as a service, the technological differences between how VRS and IP CTS are provided, and the particulars of the market. And given these considerations, CaptionCall objects to extending a number of VRS reforms to IP CTS, including aggregating sensitive customer data in the TRS-URD, creating a national outreach coordinator, and adopting a vague prohibition against waste, fraud, and abuse that lacks the specificity required by fundamental principles of due process. *See infra* at II.G.

- The Commission should adopt concrete rules specifically tailored to combat practices that lead to waste, fraud, and abuse in VRS, rather than the amorphous "unjust or unreasonable practices" standard proposed by the Commission. The Commission's proposed standard lacks the specificity required by due process and poses the serious risk of discriminatory or selective enforcement. *See infra* at II.M.

- The Commission should maintain the current system for handling VRS emergency calls, which has worked and continues to work well and provides VRS users with functionally equivalent service. The Commission's proposal to disaggregate VRS emergency-call handling is a solution in search of a problem. Indeed, the Commission is required to identify the real-world problem that it is trying to solve before undertaking a project as expensive and disruptive as that proposed in the FNPRM, and it has yet to do so. Any substantial changes to the way in which VRS emergency calls are currently handled, including the creation of a dedicated entity to handle 911 calls from VRS users, would be either entirely unworkable or prohibitively expensive. *See infra* at II.H.

- The Commission should reject the Consumer Groups' proposal that the Commission prohibit a relay provider from using CPNI for the purpose of contacting TRS users for political and regulatory purposes. Such a rule would clearly violate the First Amendment, as would imposing such restrictions in connection with services for hearing users. *See infra* at II.L.

- The Commission should allow providers to assign ten-digit VRS numbers to hearing users and include those numbers in the iTRS database. This proposal would increase functional equivalence by ensuring that hearing users who are fluent in ASL can place point-to-point calls, and it would reduce TRS Fund costs by allowing hearing individuals fluent in ASL to communicate with deaf users without using VRS. Sorenson, however, supports this request only so long as any new rules do not impose uncompensated costs on VRS providers. *See infra* at II.E.

- The Commission should direct the Fund Administrator to propose contribution factors quarterly. A quarterly system would allow the Commission to be more responsive to changes in demand that require an increase in the contribution factor, and it would permit providers to make more reliable projections. The Commission should also

require the Fund Administrator to base the TRS contribution-factor proposals on contributors' projected, rather than historical, revenues. This method, which is the Commission's practice for USF, would ensure a fairer system. *See infra* at II.D.

- The Commission should maintain the current prohibition against at-home interpreting by rejecting the proposal to allow VIs to work from home during overnight hours. Permitting at-home interpreting, even during overnight hours, presents significant risks to the quality, privacy, and reliability of VRS. *See infra* at II.Q.

- The Commission should refrain from funding the National Science Foundation's research and development of TRS technology. Funding such research through an untested program with unspecified goals will not save costs; rather, it will add costs to the VRS fund with little corresponding benefit. If the Commission is sincere in wanting to increase functional equivalence, it should incentivize providers, which have a long track record of innovation, to continue advancing their state-of-the-art offerings by compensating them for their research and development. *See infra* at II.C.

- The Commission should eliminate the guest-user period, which was originally implemented during the transition to ten-digit numbers. Now that the transition is over, there is no longer any reason to continue the guest-user period. *See infra* at II.N.

- The Commission should refrain from expanding the TRS Fund Advisory Council beyond its current role. The Council is supposed to advise the Fund Administrator, and none of the proposed areas have anything to do with administration of the Fund. Nor is there any need for a committee to address issues such as technology, efficiency, outreach, and user experience, which are better addressed through market forces. What is more, if the Commission decides to expand the role of the Council, the reconstituted Council will be subject to the Federal Advisory Committee Act, including its open-meeting provisions. *See infra* at II.F.

- The Commission should restructure Part 64.604 of its regulations. Restructuring the Commission's rules will make it simpler for providers to determine what rules apply to them and eliminate the uncertainties and efficiencies caused by the present code. *See infra* at II.K.

II. ARGUMENT

A. The Commission Should Rapidly Adopt and Implement a Market-Based Compensation Methodology.

The Commission correctly recognizes "the need to replace cost-of-service ratemaking with more market-based approaches."[1] Along with the Commission's recognition that it should eliminate tiers and adopt a "unitary" rate,[2] the use of a market-based approach to setting the rate is the best step the Commission could take to improve the regulation of VRS. Indeed, as discussed below, the most important flaw in the Commission's proposal, other than setting its interim rates on a trajectory that ends below sustainable levels for any VRS provider, is its intention to move too slowly to a unitary rate based on the results of auctions.

In Sorenson's view, the Commission should conduct an auction as soon as possible, and in any event by the summer of 2014, to set a unitary and sustainable rate for the provision of VRS. The FNPRM's proposal to wait until a neutral communications video provider has been created—then to pursue a bifurcated ratemaking approach in which part of the rate is set by means of a benchmark based on the contract rate for that "platform" provider and the remainder is set by an auction to establish a rate for video interpreter ("VI") service—will not work. *Every* provider has told the Commission that the descending rates established in Table 2 of the Order reach unreasonably low levels, and if the Commission actually implements them—or even allows the prospect of them to linger in the marketplace—the effect on consumers and providers

[1] *Structure and Practices of the Video Relay Service Program,* Report and Order and Further Notice of Proposed Rulemaking, FCC 13-82, 28 FCC Rcd. 8618, 8707 ¶ 217 (2013) ("VRS Reform Order").

[2] *See id.* at 8703-8704 ¶ 212.

will be disastrous.[3] The Commission's unreasonably low IP Relay rates recently caused a majority of providers to leave that market, leaving a duopoly, and, after the Commission's 2010 VRS rate cut, AT&T and Sprint stopped providing VRS, leaving only three VRS providers with more than a *de minimis* market share. The further rate cuts threatened in Table 2 of the Order will cripple the remaining providers and lead to degraded service and fewer options for consumers.

With respect to the conduct of an auction, whether it is an auction to establish a market rate for VRS or, as the Commission has proposed, an auction for interpreting service only, the following principles are most important. First, there should not be a reserve price based on the Commission's artificially low cost-of-service calculations. We recognize that the Commission sometimes calls those calculations the "actual" costs of providing service rather than the costs it deems "allowable," but that is a fiction. The Commission has conducted audits confirming that Sorenson's actual costs of providing service—the lowest in the industry—***** BEGIN HIGHLY CONFIDENTIAL *****

***** END HIGHLY CONFIDENTIAL *****. Other providers report higher actual costs, which the Commission has not disputed. Accordingly, if there is a reserve price at all (which there should not be) it should be at least $5.07, which is the lowest rate under which any

[3] *See* Comments of Convo Communications, LLC, CG Docket Nos. 10-51 & 03-134, at 5-13 (filed Nov. 14, 2012); Comments of ASL Service Holdings, LLC, CG Docket Nos. 10-51 & 03-134, at 12 (filed Nov. 14, 2012); Comments of CSDVRS, LLC, CG Docket Nos. 10-51 & 03-134, at 4-9 (filed Nov. 14, 2012); Comments of Hancock, Jahn, Lee & Puckett, LLC d/b/a Communication Access Ability Group, CG Docket Nos. 10-51 & 03-134, at 5-6 (filed Nov. 14, 2012); Comments of Purple Communications, Inc., CG Docket Nos. 10-51 & 03-134, at 12-13 (filed Nov. 14, 2012).

company has sustainably provided high-quality VRS. And if the Commission wants to preserve at least three VRS competitors, economic theory would suggest the use of the fourth-lowest average total (not merely "allowable") costs among viable providers plus a reasonable return on capital—an approach that would yield a rate far greater than $5.07.[4]

Second, steps must be taken to ensure minimal interference with consumer choice. The Commission could do this by auctioning a limited number of licenses that allow a VRS provider to be a default provider and to seek as many minutes as customers will permit them in the market. Alternatively, if the Commission follows its proposal to auction off increments of VRS traffic bound for specific destinations (essentially inbound VRS service not unlike 8YY service), then these steps should include (a) auctioning a relatively small percentage of minutes of service, so that relatively few calls are directed to a provider other than the provider chosen by the user as his or her default provider, and (b) permitting consumers to opt out of the auction result and use their preferred provider if they choose.

Third, only qualified providers should be permitted to bid. There is a real danger that a bidder with few minutes of use (or customers)—or none at all—could make an unreasonably low bid on the gamble that substantially increasing its number of compensable minutes by winning an auction would allow it to provide service profitably. That gamble would be similar to that made in the notorious C Block wireless auction, where bidders paid more than they could afford with the expectation that the value of their licenses would increase and larger carriers would buy

[4] *See* Michael L. Katz, *An Economic Analysis of VRS Policy Reform* at ¶¶ 68-70 (Mar. 9, 2012) (attached as Appendix A to Comments of Sorenson Communications, Inc., CG Docket Nos. 03-123, 10-51 (Mar. 9, 2012)) ("Katz FNPRM Declaration").

them out; of course, many of those bidders ended up in bankruptcy proceedings and consumers lost out when service was delayed for many years. Therefore, bidders should not be permitted to bid for more minutes than they have shown the capability to provide at the level of service required by the Commission. Specifically, no bidder should be allowed to bid in the auction for a number of minutes of service greater than the number they provided in the last year to all VRS users. In addition, bidders should be required to show that they complied with the minimum standards established by the Commission to ensure that users are not harmed by low-quality bidders winning the auction and not meeting the minimum standards—especially when the Commission is considering auctioning calls to the Social Security Administration ("SSA") and the Internal Revenue Service ("IRS"), calls that are likely to be of critical importance. Such a bidding rule is not unfair to small providers and new entrants—they will be able to compete to provide all the service that is not auctioned, which should be well above 90 percent if the Commission auctions a relatively small percentage of minutes. If they are successful in the marketplace, they would be able to bid for more minutes in future auctions. And if the Commission establishes auctions with multiple winners, even small providers will be able to bid.

1. The Commission Should Conduct an Auction to Establish a Market-Based Rate for VRS in 2014.

The Commission should embrace a market-based rate methodology sooner rather than later, because VRS providers will be devastated sooner rather than later by the rates established in Table 2 of the Order. Sorenson recognizes that the Commission will not accept this view on August 19, 2013, the date of these comments. But as the unrealistic assumptions underlying the rates in Table 2 become more apparent, and the harm to VRS users mounts, the Commission should have an alternative available. That alternative should be an auction to provide VRS (rather than interpreting service) that: (a) has no reserve price, or at least none lower than $5.07;

(b) preserves consumer choice by auctioning a relatively small number of minutes and allowing consumers to opt out of service by the auction winner; (c) is open only to companies that have provided at least the number of minutes on which they are bidding within the last year in compliance with the applicable minimum standards; and (d) results in a unitary rate rather than a tiered rate. Later, when and if the neutral platform has been developed—assuming it proves to be a viable alternative for a significant number of VRS users—and problems discussed below concerning the use of the platform as a benchmark have been resolved, the Commission might conduct an auction limited to interpreting service.

Such an approach embodies appropriate regulatory humility. Because setting rates is one of the hardest tasks any regulator faces, it is critical for the Commission to approach its task with humility and to ask, "What happens if I am wrong?". If market rates are at or below the levels the FCC established in its scheduled rates, the auction will confirm that. But if, as Sorenson believes and consistent with the statements of all larger VRS providers, the scheduled rates will drive below sustainable levels, the auction must also be allowed to reveal that truth. If the FCC sets a reserve price based on the scheduled rates or its "allowable costs"-based rate-of-return calculations, it denies even the possibility that its current calculations could be wrong. The FCC is not infallible, and it should not act as though it believes it is.

Such an approach is not unfair to smaller VRS providers. As noted above, bids by new entrants and very small providers are inherently unreliable. The Commission has expressed fear that a "one-firm industry" could result from an auction,[5] but that fear is based on the concern that there may be "significant economies of scale" in VRS. *Id*. As Sorenson has repeatedly shown,

[5] *VRS Reform Order* at 8701¶ 204.

supported by declarations from multiple renowned economists, any economies of scale are small and exhausted at relatively low minutes of service.[6] Even the Commission's expanded tiers suggest that there could be at least four VRS providers operating at Tier III levels.[7] In addition, the Commission appears to think that it should wait to hold an auction until all interoperability issues have been resolved. But there is no justification for that approach. As an initial matter, the other two major providers have a substantial number of customers, so any remaining interoperability issues are not significantly impeding them from providing service and taking customers from one another. More importantly, an auction is an opportunity for those providers to acquire more minutes of service. To the extent that any consumers do not use the other two major providers because of interoperability concerns, the flip side of the limited interference with consumer choice resulting from an auction is that the winner has the opportunity to provide service to consumers who have chosen another provider as their default provider—and perhaps persuade those consumers to switch providers.

Furthermore, for that reason, there is no basis for the Commission's concern that bidders will not bid aggressively.[8] Rather, as the Commission appeared to recognize, bidders with smaller market shares will have strong incentives to bid aggressively to provide service to users

[6] *Katz FNPRM Declaration* at ¶¶ 28, 35.

[7] Of course, if there were to be four equally sized VRS providers, the Commission would be paying much more for VRS than under current market shares. In its June 2013 Order, the Commission expanded Tier 2 such that, were there to be four equally sized providers, only a small number of minutes would be in Tier 3, the lowest compensated tier, as compared to today, when most minutes are compensated at Tier 3 rates. This shows the irrationality and pro-competitor—rather than pro-competition—nature of its tiered approach and why the FCC should be moving even faster to end compensation tiers for VRS.

[8] *VRS Reform Order* at 8710 ¶ 235.

they have not served.[9] And Sorenson intends to bid aggressively to retain as much service as possible while not bidding so low that it cannot afford to provide high-quality service.

Nor is using an auction to set rates unfair to the companies that contribute to the TRS Fund. First, it should be noted that section 225 clearly envisions that most of them will provide VRS: section 225(c) states that "[e]ach common carrier providing telephone voice transmission services" shall be in compliance with the Commission's regulations ensuring that functionally equivalent communications services are available to deaf and hard-of-hearing individuals. And section 225 was adopted because Congress concluded that the public switched telephone network discriminated against deaf and hard-of-hearing individuals.[10] However, as the Commission's regulations have become more burdensome and the rates less realistic, the Commission has allowed the telephone companies to leave the market. They nevertheless are well-positioned to enter if they think the rates are high enough for them to make a profit. In addition, the contributors have almost universally supported the Commission's moves away from cost-of-service regulation in their lines of business and therefore are hardly in a position to complain about the demise of cost-of-service regulation for VRS. And, finally, they are simply not entitled to make contributions based on the artificially low rate that results from the Commission's list of allowable costs. For the same reasons, consumers are not treated unfairly to the extent that carriers pass their contributions through to consumers.[11]

[9] *Id*.

[10] 47 U.S.C. §225 (c).

[11] It bears note that carriers are prohibited from having a "TRS fee" line item on their bills, although they may recover the costs in other ways. In 1993, the Commission stated that, "In order to provide universal telephone service to TRS users as mandated by the ADA, carriers are required to recover interstate TRS costs as part of the cost of interstate telephone services and not as a specifically identified charge on end user's lines." *Telecommunications Services*

In addition, many of the caveats discussed in the next section—addressing the detailed questions the Commission asked in the FNPRM— would also apply to an auction of VRS rather than interpreting service. For example, it would be important to ensure that the telephone numbers auctioned are representative of telephone numbers in general rather than numbers that are particularly inexpensive or costly to serve.

2. The Commission's Rate-Setting Proposals Must be Revised to Avoid Degrading Service.

The overall structure of the rate-setting process proposed by the Commission consists of the use of a benchmark based on the contract rate for the platform provider plus an amount for providing interpreting service based on the results of an auction. As an initial matter, it bears note that there is no allowance for the cost of providing videophones or other end-user equipment (whether hardware or software) even though these are necessary to use VRS. This failure is inconsistent with the functional equivalence mandate of § 225. Videophones—or off-the-shelf devices such as tablet computers that would be necessary to run a software videophone—are far more expensive than voice telephones, costing hundreds of dollars as compared with a voice telephone that can be purchased for less than $6 at Walmart.[12] The prior FNPRM recognized that fact and proposed to provide a subsidy of approximately $600 every two years for equipment.[13] The Commission apparently has decided not to pursue that approach,

for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, 8 FCC Rcd. 1802, 1806 ¶ 22 (1993). In 2005, the Commission noted, in the course of adopting Truth-In-Billing rules, that those rules do "not alter the role of any other specific prohibition or restriction on use of line items. For example, this Commission has prohibited line items for interstate Telephone Relay Service (TRS) costs." *Truth-In-Billing and Billing Format*, 20 FCC Rcd. 6448, 6459 n. 64 (2005).

[12] *See* www.WalMart.com/ip/Uniden-1100-slimline-corded-phone-white/20927768.

[13] *See Structure and Practices of the Video Relay Service Program, Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech*

but has provided no explanation for its failure to do so; to the extent it is simply relying on deaf consumers to pay these costs, it fails to explain how that is consistent with functional equivalence. Nor has it explained its failure to recognize that VRS providers must invest in the hardware and/or software necessary for users to access VRS services—and thus must be compensated from somewhere for these costs. Of course, basic principles of administrative law require agencies to consider important aspects of the problem they address.[14] Accordingly, unless the Commission changes course and takes the cost of VRS end-user equipment into account, it must explain why it believes its failure to subsidize equipment purchases is consistent with the functional equivalence standard—which, in our view, is not possible.

The Commission's failure to provide an equipment subsidy will have important real-world consequences. In the past, Sorenson and other providers have been able to provide videophones without charge. But that was because, although the Commission obtained data relating to its list of allowable costs, it never set rates based solely on that data. Indeed, starting in 2007 the Commission adopted a price-cap system, which had the effect of setting rates without regard to rate-of-return-based cost-of-service principles.[15] In June 2010, the Commission set rates by averaging the price-cap rates then in effect with the rates that would have resulted from the rate-of-return-based rates derived using only "allowable costs"—which established rates lower than those in effect in the first half of 2010, but still higher than the rates based solely on

Disabilities, Further Notice of Proposed Rulemaking, FCC 11-184, 26 FCC Rcd. 17,367, Appendix C ¶15 (2011).

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

[15] Although the Commission has argued that its 2007 Order did not establish a price cap, the 10th Circuit rejected that argument. *See Sorenson Commc'ns, Inc. v. Fed. Commc'ns Comm'n,* 567 F.3d 1215, 1221-22 (10th Cir. 2009).

allowable-cost calculations. Those higher rates permitted VRS providers to subsidize equipment costs.

But a rate-setting system consisting of a benchmark based on the contract rate of the neutral-platform provider plus a rate based on an auction of interpreting service will not permit equipment subsidization—because the costs of equipment are entirely ignored. Indeed, by funding the creation of the end-point reference model, the Commission is actually subsidizing one type of equipment—the reference platform—but not competing equipment; the Commission never addresses why it should not maintain a level playing field between providers that use the reference platform and those that innovate and develop their own equipment. Similarly, bidders in an auction to provide only the interpreting component of VRS (standalone VI providers) will not base their bids on calculations that include equipment subsidy costs.

As noted above, it appears that the Commission intends to require users to pay for their videophones and other equipment since it has proposed a system that does not include a subsidy for equipment or otherwise allow providers to cover their costs. If that is correct, administrative-law principles of reasoned decision-making require the Commission to acknowledge that it is changing course from the proposal in the prior FNPRM and provide a reasonable explanation for its decision.[16] Moreover, because videophones are far more expensive than voice telephones (and deaf Americans are, on average, relatively poor), the Commission must also explain how such a system could be consistent with Section 225's touchstone of functional equivalence:

[16] *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 42; *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973).

plainly it is not functionally equivalent for deaf Americans to have to pay hundreds of dollars to purchase a special-purpose videophone or a tablet computer that can run specialized software in order to obtain the same functionality that a hearing person can obtain using a less-than-$6 phone from Walmart.

a. Using the Neutral-Platform Provider Contract as a Benchmark.

As noted previously, in ¶ 222 the Commission proposes using the contract with the neutral-platform provider it will create as a benchmark for setting the rate for the communications-platform component of compensation for integrated providers that do not use the neutral platform. The primary problems with this proposal are that the neutral platform the Commission intends to fund may be a stripped-down version of the platform used by the three major integrated VRS providers, and the neutral-platform provider may not have the ability to innovate in the future. Among other things, VRS providers' platforms offer a range of value-added vertical features that enhance the functional equivalence of VRS. In its Order, however, the Commission contemplates that the neutral platform will provide only a bare minimum of "compensable" features. If so, the benchmark would provide support for only a frozen-in-time version of a substandard 2013 platform. That is not functionally equivalent to the options available to hearing persons, who benefit from competition among wireless and wireline providers in both service and additional features.

One key test of the neutral platform will be market acceptance. Unless and until a substantial number of minutes of service are provided using the neutral platform, its costs should not be used as a benchmark. Moreover, its costs should not be used as a benchmark until it achieves sufficient scale, reliability, and functionality to be comparable to the platforms of fully

integrated VRS providers, which will likely be a minimum of several years after the neutral platform is running. Until the neutral platform is fully functioning, reliable, and well-accepted, rates should be set based on an auction to provide integrated VRS.[17] Any stand-alone VI service operators should be compensated based on the integrated VRS rate, but required to pay the neutral-platform operator a reasonable price for its services.

b. Using Auctions to Establish a Per-Minute Rate for VI Service.

As stated above, whether the Commission holds an auction for integrated VRS or for stand-alone VI service, the most important principles are: (a) to establish an actual market-based rate, there should not be a reserve price based on cost-of-service calculations; (b) to maintain consumer choice as much as possible, a relatively small number of minutes should be auctioned; (c) to ensure quality service, only established VRS providers in compliance with Commission rules should be permitted to bid; and (d) to set a competitive rate applied uniformly to all providers, the auction should result in a unitary rate rather than a tiered rate.

Sorenson agrees that an auction to provide service to an appropriately selected set of telephone numbers can be a good method of establishing compensation rates for VI service (or for integrated VRS), as proposed in ¶¶ 223-35. Sorenson also agrees that the form of bids in an auction should be an offer to provide service at a price per minute, as proposed in ¶ 230. But finding an appropriate selection of numbers will be a difficult task. The examples suggested in ¶ 223 are probably not appropriate because most of the entities listed are likely to have long wait

[17] The exact number of minutes that should be required before the Commission uses the neutral platform as a benchmark is an issue that deserves further study. But it would certainly be unreasonable to use the neutral platform if the providers using it were providing less than 10 percent of the minutes of service. Such low usage would indicate consumer rejection of the neutral platform.

times. For example, callers to the SSA are likely to be put on hold for a lengthy but unpredictable period of time. A VI service bidding to serve calls to the SSA might therefore bid low on the theory that its interpreters would spend a lot of time on very light work—they would essentially get their necessary break time while the calls are on hold. It might be preferable to auction a certain number of minutes of calls to a randomly selected set of phone numbers.

For similar reasons, auctioning the right to provide calls at various times of the day, as suggested in ¶ 236, seems unnecessarily complicated. And it is not clear how a bid to provide service for only one period of time is useful for establishing a rate for providing service at other times—because call volume, interpreter availability, and other aspects of providing VRS vary depending on time of day, costs likewise vary, and rates for different times of day would need to be different to take those cost variances into account. Moreover, it is not clear why the Commission would want to create incentives for providers to specialize in particular times of day.

In any event, care should be taken to ensure that the telephone numbers that are auctioned are not atypical in the length or temporal (*i.e.*, time of day) distribution of calls they receive. It is important to ensure that the cost of providing the minutes to be auctioned accurately reflects the cost of providing other minutes of service. Because the auction price will be the basis of reimbursement for other minutes of service, the minutes to be auctioned must be typical, or it would be like using the price of apples to set the price of oranges.

Among the options discussed in the FNPRM, Sorenson is inclined to think a descending-clock auction with multiple winners would be the best option, on the understanding that the Commission intends to establish a unitary rate rather than tiered rates. As we understand the proposal in ¶ 228, the Commission would start at a rate and ask what percentage of the minutes

of service subject to auction providers would serve at that rate. So, for example, if the starting rate were $6 per minute, it is likely that many bidders would offer to provide 100 percent of the minutes to the selected numbers, so that the Commission might receive bids totaling 300 percent or more of the minutes being auctioned. The Commission would gradually reduce the rate until the bids totaled 100 percent. That might happen at a point where only one bidder was willing to provide service at that rate and that bidder was willing and qualified to serve 100 percent of the minutes, or it might happen if, for example, one bidder was qualified and willing to provide 50 percent of the minutes, another 30 percent, and another 20 percent. At that point, the bidding would end with a single rate for 100 percent of the minutes.

Having multiple winners would help to avoid interference with consumer choice. For example, if one bidder won 100 percent of the minutes auctioned, it would be highly likely that that provider is the consumer-selected default provider only for some, but not all, consumers placing calls to the auctioned destination. Thus, if strictly implemented, the auction would mandate that some consumers use a provider other than the one they have pre-selected as their default provider in order to reach the auctioned destination, which would clearly interfere with customer choice. But that interference with consumer choice could be minimized if the Commission allowed consumers to opt out of the auction—by taking an affirmative step such as returning a postcard—so that their calls would not be affected by the auction results. Under that approach, a particular provider might end up without enough minutes to fill its auction share, but that result would be neither unfair to the provider nor problematic in terms of the purpose of the auction. It is not unfair because if so many users want service from their default provider rather than an auction winner, it is hard to justify forcing users to take service from a provider they do not want to use, and the provider will still obtain compensation at the rate it bid for the minutes

of service it provides. It is not problematic because the purpose of the auction is to establish a rate rather than to allocate minutes of service; indeed, allocating some minutes of service to a provider other than a user's default provider is an unfortunate and undesirable byproduct of an auction.

A further refinement might be to auction only some percentage of calls to a particular number or set of numbers. That would make it more likely that consumer choice could be respected while the winning bidders were able to provide the amount of minutes of service for which they bid.

With respect to frequency of auctions, about which the Commission inquires in ¶ 232, Sorenson believes the Commission should wait to address that issue and might conclude that it does not need to conduct further auctions. For example, the Commission might establish a unitary rate by means of an auction and then adjust it using price-cap principles to provide an incentive for providers to become more efficient. A properly functioning price cap not tied to insufficient "allowable costs" would provide the stability that the VRS industry has long needed. In any event, the Commission should make clear before the auction what options it is considering.

With respect to bidder qualifications and quality-of-service issues, raised in ¶¶ 231 and 234, as stated above the Commission should limit bidders to bidding on no more than the number of minutes provided in the year before the auction.[18] That is because bids by companies that

[18] Bidders would have a strong incentive to bid aggressively, despite this limitation, because they could increase their total number of minutes substantially. For example, if a bidder with a 10 percent market share won 100 percent of an auction for 3 percent of the total minutes of service, that provider would have increased its market share substantially by holding onto its

have never provided service or seek to dramatically increase their minutes of service despite their failure to obtain customers in the market would be inherently unreliable. For example, an inexperienced or confused bidder could make unreasonably low bids and later exit the market—causing havoc not only with respect to the numbers it bid to serve but to all providers and users as well, since the unreasonably low winning bid would have provided the basis for the rates for all providers. And again, such a limitation is not unfair to new entrants and small providers because they would be able to enter or increase their minutes of service by winning customers in the marketplace by providing quality service at the rate set by the auction. In addition, if an auction design permitting multiple winners is used, even the smallest provider may bid.

Further, bidders should be required to have satisfactorily complied with the Commission's minimum-service standards in the past. It will require care to develop appropriate rules, since an overly strict standard such as disqualifying a bidder on account of any violation of any rule whatsoever might eliminate all bidders, but it should be possible to distinguish major violations that ought to disqualify a bidder from technical violations that ought not disqualify a bidder. In addition, of course, winning bidders would remain subject to the Commission's standards and should not be eligible for compensation for minutes provided in violation of those standards, which should help to ensure quality service.

In short, a well-structured auction embracing market-based principles would be a useful method of setting a rate for VRS or its VI-service component. And, in response to the question posed in ¶ 238, there is no apparent reason why auctions could not be useful in setting rates for

current users and obtaining additional minutes of service through the auction. This is essentially the point the Commission made in *VRS Reform Order* at 8710 ¶ 235.

other forms of iTRS. But the Commission should move forward quickly to use auctions to set rates for VRS rather than wait until it considers revisions to the rules relating to IP CTS and IP Relay.

B. TRS Providers Are Entitled to Recover for the Significant Costs of Complying with the Commission's New Rules.

The Commission notes in the FNPRM that it "do[es] not believe that the providers' additional costs necessary to implement the requirements adopted [in the *VRS Reform Order*] will be substantial," but requests comment on whether it should adopt a "mechanism" to allow additional cost recovery in connection with the Order.[19] Contrary to the Commission's belief, the compliance costs of these new rules will be significant. As just one example, as discussed in Section II.I below, the new speed-of-answer requirements will require dramatic increases in interpreter staffing and thus will increase costs (and decrease efficiency). And even if the new costs were smaller, that is no basis on which to deny providers the right to recover "allowable costs." Consistent with its prior decision in the *First Internet-Based TRS Numbering Order* and the methodology adopted therein, the Commission should adopt a similar process here by allowing providers to recover the costs directly related to implementation of and compliance with the new VRS rules.

Section 225 provides that TRS providers are to be compensated for their costs of providing service in compliance with the TRS regulations.[20] Under its (deeply flawed) "allowable-costs"-based rate-of-return methodology, compensable costs are those that "'relate to the provision of service in compliance with the applicable non-waived [TRS] mandatory

[19] *VRS Reform Order* at 8665 ¶120.

[20] 47 U.S.C. § 225(d)(3).

minimum standards.'"[21] In the *First Internet-Based TRS Numbering Order*, the Commission allowed VRS providers to recover costs directly related to implementation of the numbering database, stating that providers are "permitted to 'seek exogenous cost adjustments if new costs are imposed that are beyond the providers' control.'"[22] In that case, compensability of the additional costs did not turn on whether they were substantial. The Commission observed that "although [it] did not believe that the providers' additional costs necessary to implement the numbering and Registered Location requirements adopted herein will be substantial, they are costs for which the providers generally may be reimbursed."[23] Accordingly, it adopted a mechanism by which providers could recover these costs.

The Commission should follow that precedent here and, of course, must offer a reasonable explanation for its change of course if it does not. The *VRS Reform Order* adopted significant and substantial structural reforms to the VRS market. Providers will incur additional costs in complying with these rules and should be permitted to recover these costs. Sorenson highlights here two rules in particular that will involve significant compliance costs—namely, the creation and implementation of the TRS User Registration Database ("TRS-URD") (including reverifying all new users through the central verification system) and the reduction of permissible wait times (*i.e.*, the speed-of-answer requirements).

The TRS-URD is a user-registration database that is to be built, operated, and maintained by a neutral third party. When operational, it will have the capability to allow the TRS Fund

[21] *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 23 FCC Rcd. 11591, 11626 ¶ 96 (2008) ("*First Internet-Based TRS Numbering Order*").

[22] *Id*. at 11626, ¶ 97 (internal quotation omitted).

[23] *Id.* at 11626, ¶ 98 (internal quotation omitted).

Administrator and the Commission to: (1) receive and process subscriber information provided by VRS providers; (2) assign each VRS user a unique identifier; (3) allow VRS providers to query the database to determine if a prospective user already has a default provider; and (4) allow VRS providers to indicate that a VRS user has used the service.[24] But as the Commission recognized, "[t]he TRS-URD cannot serve its intended purpose unless VRS providers populate the database with the necessary information and query the database to ensure a user's eligibility for each call."[25] The Commission, therefore, adopted rules "requiring each VRS provider to submit to the TRS-URD administrator" certain information for each user, including the last four digits of the Social Security Number, date of birth, and eligibility certification, and to obtain each user's consent before providing this information.[26] These are not costless activities, especially as they relate to the providers' existing customers. To comply with the new rule, providers will be forced to expend substantial resources to contact all existing VRS users, collect and process their information and certifications, and submit this information to the TRS-URD. Moreover, VRS providers will need to make sure they have implemented secure systems to protect sensitive consumer data that they would not have collected and maintained in a centralized form in the absence of the FCC's new mandates. These activities are similar to those mandated in the *First Internet-Based TRS Numbering Order* for which the Commission permitted cost recovery.[27] Here, the Commission should allow VRS providers to recover the costs of collecting, maintaining, and safeguarding the required data and of implementing the TRS-URD.

[24] *VRS Reform Order* at 8650 ¶ 69.

[25] *Id.*at 8650, ¶ 70.

[26] *Id.*

[27] *First Internet-Based TRS Numbering Order* at 11627 ¶ 100 (permitting cost recovery related to "ensuring that database information is properly and timely updated and maintained").

Similarly, the Commission should permit cost recovery (*i.e.*, it should increase its scheduled rates) related to compliance with the new speed-of-answer rules. The Commission's new VRS speed-of-answer rule changed the standard from requiring VRS providers to answer 80 percent of all VRS calls within 120 seconds, measured on a *monthly* basis, to requiring providers to answer 85 percent of calls within 30 seconds, measured on a *daily* basis. As discussed further in Section I, complying with this new standard will require higher VI staffing levels, because a "miss" on one day can no longer be offset by better performance on the next; and, consequently, VRS providers will face significant new labor costs at the same time the Commission is reducing rates.

Although the Commission suggests that "VRS providers already are largely achieving this standard at current VI staffing levels" and that this new performance standard will not impose any "additional costs to providers," the Commission is mistaken. Indeed, the "record" on which the Commission relied for this claim was the reply comments submitted by certain consumer groups, but those comments merely referenced the groups' collective "understand[ing] that the majority of VRS calls are already answered within 30 seconds."[28] Even assuming these groups' "understanding" is accurate, it does not follow, as the Commission suggests, that there will be no additional cost to comply with the new rules. With the new speed-of-answer rules, compliance must now be calculated on a *daily* rather than monthly basis. Varying levels of demand, therefore, cannot be averaged over multiple days during the month.[29] This

[28] Comments of Deaf and Hard of Hearing Consumer Advocacy Network, *et al.,* at 4, CG Docket Nos. 10-51, 03-123 (filed Mar. 30, 2012) ("Consumer Groups Reply Comments").

[29] As further discussed in Section I, *infra*, the new standard will also create the potential for VRS services to crash in a cascading manner if a significant provider anticipates that it will miss the speed-of-answer requirement for the day. The Commission should fundamentally revisit how it has configured its speed-of-answer requirement—such as denying

measurement window will require significant additional staffing; therefore, the Commission should permit the recovery of the exogenous-cost adjustments required by this new rule.[30]

C. The Commission's Nebulous Proposal to Fund TRS Research and Development Through the NSF Will Waste Millions of TRS Fund Dollars.

The FNPRM seeks comment on the proper budget for the research and development to be conducted by the National Science Foundation ("NSF"). As a threshold matter, Sorenson believes that the Commission should not waste TRS Fund resources on research and development through an untested program with unspecified goals. The Commission's proposal to fund TRS research and development through the NSF will add costs to the TRS Fund with little corresponding benefit. What is more, the Commission seems to propose replacing provider-based research and development, for which it has previously denied providers compensation, with an undefined program that provides no specifics regarding the focus of its research and development. The Commission's proposal misallocates scarce resources that would be better spent incentivizing TRS innovation through provider-based research and development.

1. It Is Impossible to Comment on the Proper Budget Without Knowing the Scope of the NSF's Work.

The Commission asks commenters to speculate on the appropriate budget for a program with undefined goals.[31] Without significantly more details regarding the scope and aims of the proposed program, it is impossible to offer reasonable comment. The Commission's proposal of

compensation only for minutes during that day for which the speed-of-answer requirement was missed.

[30] *First Internet-Based TRS Numbering Order* at 11627 ¶ 100 (permitting cost recovery related to "processing and transmitting calls made to ten-digit numbers" and "other implementation related tasks directly related to facilitating ten-digit numbering and emergency call handling").

[31] *VRS Reform Order* at 8711 ¶ 241.

$3 million may or may not be a reasonable amount depending upon what the Commission seeks to accomplish through the program. Importantly, however, no amount of funding is likely to permit a heavily-bureaucratic program to match the results of provider-based innovation. As discussed below, provider-based research and development has a 10-year record of successfully furthering functional equivalence and meeting or exceeding consumer demands. In recognition of this indisputable fact, if the Commission is determined to fund research and development through the NSF it should create specific targets that complement providers' cutting-edge research and development. Moreover, if the Commission really wants to increase functional equivalence for deaf and hard-of-hearing users, it should incentivize providers to continue advancing their state-of-the-art offerings by compensating providers for their research and development. Therefore, rather than comment on funding for unspecified goals and moving targets, Sorenson encourages the Commission to rethink its research-and-development proposal and to seek additional comment on the ways in which the Commission can most efficiently fund and encourage advancements in the functional equivalence of VRS technology. Sorenson is certain that if the Commission examines the facts it will find that provider-based research and development is the most efficient use of the TRS Fund to advance functional equivalence.

2. Replacing Private Innovation with Government-Mandated Research and Development Will Lead to Inferior Technology.

Over the past decade, Sorenson has responded to VRS users' needs by creating a state-of-the art product line with innovative features specifically for deaf and hard-of-hearing users.[32] These advances have greatly advanced the fundamental statutory goal of ensuring that VRS

[32] *See* Comments of Sorenson, Inc. at 56, CG Docket Nos. 10-51, 03-123 (filed Nov. 14, 2012) ("Sorenson Nov. 2012 Comments").

technology is functionally equivalent to the technology available to hearing users. Without regard for this past success, the Commission now proposes to end these steady advances, replacing them with a slow-moving, unproven, nationalized research-and-development process that will offer no incentives to respond to consumer needs and will be incapable of replicating market-based product innovations. As Sorenson understands the Commission's ill-defined NSF research proposal, grant applications will be submitted to a committee, reviewed, compared to other proposals, and approved if certain conditions are met.[33] This bureaucratic process is unlikely to produce any near-term advances, especially given the Commission's lack of research-and-development goals or direction, and will likely only reproduce technology that is already available to consumers today. [34]

Without significant justification, the Commission's undefined research-and-development proposal flagrantly ignores the significant achievements VRS providers have made in advancing functional equivalence.[35] As providers have previously explained, advances in TRS were driven

[33] *See VRS Reform Order* at 8711¶ 241 n. 580.

[34] Further, the Commission's undefined proposal does not sufficiently explain whether the Commission proposes to create consumer end-products. VRS equipment is necessary to access VRS, and, unlike calls placed using the PSTN, equipment cannot merely be purchased for a minimal fee at a local convenience store. Without provider-specific hardware and software there is no VRS. Thus, it is irrational to exclude research and development funding for providers regardless of the amount the Commission may fund to the NSF program.

[35] The Commission argues that providing research-and-development funds to VRS providers is duplicative because it must fund multiple providers' overlapping research and would be inappropriate on a per-minute compensation basis. *See VRS Reform Order* at 8626¶ 21. Sorenson believes the Commission's concern is misplaced; a free market has proven to be much more efficient than central-planning bureaucracies of the sort proposed by the Commission. If central planning worked so well, the Soviet Union would have out-innovated the U.S.; of course, the opposite occurred. Moreover, the Commission's concern is overstated, since market-driven industries all have at least some level of duplication, which drives innovation through competition.

by private investment and a commitment to responding to the demands of the market.[36] Those private investments will continue to lead to greater advances in functionally equivalent technology, while the Commission's proposal would waste millions of dollars on unfocused and centrally planned development. What is more, any government-funded centralized researchers would lack the institutional knowledge that VRS providers obtained during the last 10-plus years and that feeds differentiation and innovation. Ironically, the Commission's proposed nationalized NSF research-and-development program will likely be viewed as a success if it is able to achieve even a fraction of the advances private industry has made over the past decade, despite receiving millions more dollars than providers received for their research and development. The Commission's proposal is therefore misaligned with the goal of advancing functional equivalence and the Commission's duty to responsibly administer the TRS Fund. The Commission should abandon this proposal.

D. The Commission Should Require RLSA to Propose Contribution Factors Quarterly.

The Commission seeks comment on whether to require the Fund Administrator to propose a contribution factor quarterly as is done with the Universal Service Fund.[37] Sorenson supports this proposal, with some modifications.

TRS demand is subject to numerous factors, and it is difficult for providers to project a full year's funding requirements with precision. Thus, under the annual arrangement currently in effect, the Administrator must propose a contribution factor using data that is highly speculative.

[36] *See* Comments of Purple Communications, Inc. at 5, CG Docket Nos. 10-213, 03-123 (filed May 16, 2011); Comments of Snap! Telecommunications, Inc. at 2-3, CG Docket Nos. 10-213, 03-123 (filed May 16, 2011).

[37] *VRS Reform Order* at 8711 ¶ 242.

The recent spike in IP CTS growth—and the Commission's response—highlight the need for more frequent contribution-factor updates. When effective marketing practices caused demand to increase at rates that exceeded provider projections rates, the Commission faced the threat of Fund exhaustion because the demand surge happened early in the year. Facing a delay of several months before it could adjust the contribution factor without waiving its own rules, the Commission hastily issued interim rules without notice and comment.[38] These rules did little more than slow legitimate growth and curb legitimate use. By limiting projections to shorter periods of time, providers will be able to provide more reliable projections, and the Commission should be able to react more quickly—*i.e.*, by approving increased quarterly contribution factors—when demand exceeds projections.

In addition, beyond moving to a quarterly system, the Commission should require the Administrator to base the TRS-contribution-factor proposals on contributors' projected, rather than historical, revenues. Doing so is consistent with the Commission's practice for USF, where the contribution factor has been based on projected revenues since 2002.[39] In addition, in the USF context, the Commission has recognized that "carriers with decreasing revenues must recover their contributions from a revenue base smaller than the one assessed."[40] Thus, this proposal would ensure a fairer system for contributors, as it would protect companies with

[38] *See Misuse of Internet Protocol (IP) Captioned Telephone Service*; *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, FCC 13-13, 28 FCC Rcd. 703 (2013) ("*IP CTS Interim Order*").

[39] *Telecommunications Relay Service, North American Numbering Plan*, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329, 17 FCC Rcd. 24952, 24972 (2002).

[40] *Id.* at 24969 ¶ 30.

declining revenues from paying higher percentages of their current revenues than companies with increasing revenues.

E. The Commission Should Permit Hearing Individuals to Obtain Ten-Digit Numbers, But VRS Providers Should Not Bear the Costs of this Change.

The Commission seeks comment on the Consumer Groups' proposal to allow providers to assign ten-digit VRS numbers to hearing users and to include those numbers in the iTRS database. As it has in the past, Sorenson supports such a change in the rules,[41] which would ensure that hearing users who are able to communicate in ASL can make point-to-point calls to deaf, hard-of-hearing, and speech-disabled users. Under the current rules, which prohibit providers from placing numbers for hearing users in the iTRS database, ASL-fluent hearing users often cannot make video calls and must instead place a compensable TRS call through an interpreter. This makes little sense. Not only do point-to-point calls allow users to communicate more directly without the intervention of an interpreter (thus enhancing functional equivalence), they also do not impose any costs on the iTRS fund. Enhancing the ability of hearing users to place point-to-point calls is therefore a win-win scenario.

Critically, however, Sorenson supports this proposal only if it will not result in VRS providers bearing new costs without compensation—which is an important consideration since providers are not currently compensated for handling point-to-point calls. The Commission should not place the burden on VRS providers to provision numbers to hearing ASL-fluent users who want access to non-compensable point-to-point service; to ensure that those numbers are included in the iTRS Numbering Directory; to support emergency calling functionality for these

[41] Reply Comments of Sorenson, Inc. at 2, CG Docket Nos. 10-51, 03-123 (filed Mar. 30, 2012).

hearing users; to provide other support to them beyond accepting a point-to-point connection to VRS providers' deaf, hard-of-hearing, and speech-disabled customers; or to bear the costs of billing and collecting service fees from hearing end users. Instead, the Commission should explore ways in which these functions can be performed by the hearing ASL users' current numbering providers—that is, the local exchange carriers, interconnected VoIP providers, and wireless providers that already support the hearing users' numbering needs and already have direct billing relationships with them.

The Commission also asks what other factors must be considered if this proposal is implemented.[42] One example is that while the Commission proposes flagging a hearing person's ten-digit number in the system so that it is not eligible for VRS compensation, there may be times when a deaf or hard-of-hearing user visits that hearing user and attempts to place a VRS call through that number. The Commission should allow the deaf user to place a compensable VRS call using the phone of a hearing user—perhaps by providing his or her unique verification identifier.[43] Sorenson expects that other novel questions will also arise if the Commission allows hearing users to obtain ten-digit numbers and that the Commission should be prepared to rapidly respond to requests for clarification and modification from providers and consumers.

F. The Commission Should Not Expand the Role of the TRS Fund Advisory Council.

The Commission proposes to "revise the nature, composition, and functions" of the TRS Fund Advisory Council.[44] Specifically, the Commission proposes to change the composition of

[42] *See VRS Reform Order* at 8712 ¶ 243.

[43] *See id.* at 8651 ¶ 72-73.

[44] *Id.* at 8712 ¶ 244.

the Council, removing TRS providers but including consumers, researchers, and entities paying into the Fund.[45] The Commission also seeks comment on which of the following six areas should be within the Council's focus: (1) technology; (2) efficiency; (3) outreach; (4) user experience; (5) eligibility, registration, and verification; and (6) porting and slamming.[46]

Sorenson does not object to the Commission's proposal to eliminate provider participation on the Council. Provider participation on the current Council has not been successful in that the provider members have not been representative of the industry as a whole. To the extent that the Commission allows providers to continue to participate on the Council, Sorenson believes that all providers should have a seat at the table because otherwise the potential exists for one provider to advance its own interests at the expense of other providers.

The Commission should not, however, expand the TRS Fund Advisory Council beyond its current role. First, it bears emphasis that the TRS Fund Advisory Council is supposed to advise the TRS Fund Administrator—not the Commission.[47] Yet the TRS Fund Administrator has no need for advice on the expanded areas proposed by the Commission, none of which have to do with administration of the interstate TRS Fund. Nor is there any need to create a new council to advise the Commission on these issues. The Commission already has advisory councils—including the Consumer Advisory Committee, the Technological Advisory Council, and the Emergency Access Advisory Committee—to give it advice.

[45] *Id.* at 8714 ¶ 248.

[46] *Id.* at 8713-8714 ¶ 247.

[47] *See, e.g.*, *id.* at 8713-8714 ¶ 247 (proposing to direct the TRS Fund Administrator to establish a new council).

More fundamentally, there is simply no need to address these issues by committee. The majority of the topic areas proposed by the Commission—including technology, efficiency, outreach, and user experience—are best addressed through vigorous competition among TRS providers rather than through a central-planning committee. As the Commission is aware, great products are not the result of government focus groups; rather, great products are developed when private companies invest in consumer intelligence so that their products and services match consumer demands and expectations. It is these same consumer insights that help companies bring completely new technology to market. The Commission should not expect to create innovative technology, to increase efficiency, to improve outreach, or to improve the "user experience" through a committee. To further these goals, the Commission must work to create a system where VRS providers compete for customers on the merits of their products and services. As for issues involving eligibility, registration, verification, porting, and slamming, the Commission has recently adopted new rules addressing these issues, and there is no need for a committee to address these.

If the Commission nevertheless does decide to expand the scope of the TRS Fund Advisory Council, it bears emphasis that any reconstituted council would be subject to the Federal Advisory Committee Act because it appears that the council would effectively be advising the Commission rather than the TRS Fund Administrator. As such, the reconstituted council would be subject to the Act's open-meeting provisions,[48] and would be limited to

[48] 5 U.S.C. App. 2 § 10.

providing "advisory functions" rather than determining "action to be taken and policy to be expressed."[49]

G. Because of the Important Differences Between VRS and IP CTS, the Commission Should Not Blindly Apply VRS Rules to All Forms of TRS.

The Commission seeks comment on whether it should extend "the structural reforms adopted in today's Order to all forms of Internet-based TRS."[50] Specifically, the Commission asks whether the rules relating to TRS-URD, the neutral platform, outreach, provider compliance plans, and slamming prevention, as well as the rules against waste, fraud, and abuse, should be extended to other forms of iTRS. Because Sorenson no longer provides IP Relay services, we comment here only on extension of the VRS reforms to IP CTS, which is offered by Sorenson's wholly owned subsidiary CaptionCall. In general, the Commission must keep in mind that VRS and IP CTS are very different services that serve different populations. VRS is a well-established technology, whereas IP CTS is comparatively new and growing. VRS relies heavily on the skill of well-trained VIs, whereas IP CTS is much more reliant on cutting-edge technology. VRS serves deaf persons of all ages, whereas IP CTS serves primarily elderly consumers who frequently have some additional form of cognitive impairment. VRS providers sit in the middle of the call, whereas IP CTS providers—at least those that do not set up calls by calling back the originating caller—sit to the side of a call between two telephone companies monitoring the audio that they are to caption. Thus, the Commission should not blindly transfer reforms from one service to another simply because they belong to the "relay services" family.

[49] 5 U.S.C. App. 2 § 9.

[50] *VRS Reform Order* at 8714 ¶ 250.

Rather, the Commission should examine each reform in relation to the unique attributes of IP CTS and its customer base.

More specifically, CaptionCall generally objects to the burden and privacy risks inherent in aggregating sensitive consumer data in the TRS-URD. In addition, a central feature of the URD, per-call validation, will present substantial challenges for IP CTS providers, which will ultimately harm functional equivalence. As discussed above, many IP CTS providers, like CaptionCall, play no role in routing the underlying telephone calls. Instead, they operate to the side of the existing telecommunications connection, providing captions to the consumer's phone via a broadband connection. Unlike VRS providers, CaptionCall has no control over when a call connects; it is not in the call stream and receives no carrier-to-carrier or carrier-to-end user signalling other than audio tones such as busy signals, "fast busy." or Special Information Tones. Thus, CaptionCall cannot delay call connection until a call is validated. If CaptionCall nevertheless has to wait until the customer's eligibility is validated before it begins captions, the customer will lose captions at the beginning of each call. This result is directly contrary to functional equivalence, as it would be akin to muting a hearing person's phone for some period of time at the beginning of each call. Finally, consolidating all TRS user data into a single database would create a single point of failure for the entire TRS industry, which is an unacceptable risk that hearing users do not face.

Furthermore, CaptionCall does not believe an IP CTS national outreach coordinator is necessary. Unlike with VRS, there is no need to educate the hearing population regarding how to accept and interact with IP CTS users. Rather, the hearing person hears the hard-of-hearing person's voice, just as they do with any other call. Thus, there is no need for a centralized body to educate the general public about IP CTS.

To be clear, however, outreach to potential IP CTS users is a fundamental aspect of provider marketing and should be a compensable cost of IP CTS service. IP CTS is a relatively new technology that has only begun to penetrate the market of eligible hard-of-hearing consumers. Vigorous competition among providers, including strong efforts to reach new subscribers, will allow more hard-of-hearing individuals to benefit from the service quickly. Denying compensation for customer outreach would severely contract outreach activity, making services less available to hard-of-hearing consumers.

CaptionCall also opposes the adoption of a rule prohibiting "unjust and unreasonable practices for or in connection with TRS services."[51] Although CaptionCall supports the Commission's targeted efforts to eliminate waste, fraud, and abuse, the proposed rule is simply too vague and amorphous to give providers fair notice about what conduct is prohibited. As stated in Section M, this type of prohibition appears to be intended to serve as a catch-all that would allow the Commission to engage in post hoc enforcement activity whenever it identifies a practice of which it disapproves. Thus, this provision would raise significant enforcement concerns under *Fox* and *Trinity Broadcasting*.

In addition, CaptionCall supports the idea of requiring IP CTS providers to submit compliance plans, but only under certain conditions. First, the Commission must implement clear rules as to the practices it will allow and prohibit. Without a clear understanding of the rules, CaptionCall cannot effectively craft compliance strategies. Among other things, the Commission should adopt a short deadline—such as 90 days—for addressing providers' requests for declaratory rulings regarding the permissibility of specific practices, with suspension of any

[51] *VRS Reform Order* at 8721 ¶ 271.

enforcement if the Commission does not meet its deadline. The Commission cannot reasonably expect compliance with vague or uncertain rules without giving providers notice via a declaratory ruling. Second, the Commission must ensure that rules regarding the content of compliance plans are reasonable and that such rules apply equally to all providers.

Finally, regarding extension of the anti-slamming rules to IP CTS, it is difficult to see how slamming could occur presently in IP CTS, as providers today each employ a proprietary platform, which means a user must switch equipment in order to change providers. Notably, however, if anti-slamming rules are needed for some reason in the future, CaptionCall foresees no objection providing they apply equally to all IP CTS providers.

H. The Commission Should Not Disaggregate VRS Emergency Call Handling.

The Commission seeks comment on how "to ensure that VRS users have access to 911 services that [are] functionally equivalent to 911 access available to the general population."[52] In particular, the Commission requests "feedback on whether [to] . . . transfer the VRS emergency call handling obligation to a single VRS contractor through a competitive bidding process."[53] This is a solution in search of a problem. As explained below, the current system for handling 911 works well and provides VRS users with functionally equivalent service. Sorenson opposes substantial changes to the way in which VRS emergency calls are currently handled and, indeed, believes that creating a dedicated entity to handle 911 calls from VRS users would be either entirely unworkable or prohibitively expensive. Furthermore, Sorenson believes it is imperative to consult the interpreting industry—which, to the best of our knowledge, has not been

[52] *VRS Reform Order* at 8716 ¶ 256.

[53] *Id.*at 8716 ¶ 257.

consulted—in contemplating this kind of major change to VRS, because such a change would have a tremendous impact on a VI labor pool that is in short supply.

1. The Current System for Handling 911 Calls Works Well for VRS Users.

The FNPRM does not explain what, if any, problems the Commission perceives with the manner in which VRS providers currently handle emergency calls. Plainly, the Commission has a responsibility to set forth the real-world problem that it is trying to solve before undertaking a project as expensive and disruptive as a fundamental change to the way VRS emergency calls are handled. But Sorenson—which, as the largest VRS provider, handles the overwhelming majority of all emergency 911 VRS calls—is not aware of any significant problems with the current VRS emergency-call regime. To the contrary, Sorenson has gone to great lengths to ensure functionally equivalent 911 service for its VRS users.

Sorenson currently handles 911 calls—like all VRS calls—on a distributed model, whereby the same call centers and VIs that handle routine VRS calls also handle emergency calls. Sorenson therefore provides *all* of its VIs with careful training on how to handle emergency calls. Such training is necessary whether emergency VRS calls are handled by VRS providers on a disaggregated basis or through a centralized call center, and the Commission should therefore allow for additional training costs for handling emergency calls. In Sorenson's experience, regular training of VIs on emergency call handling helps to mitigate problems during such calls for both interpreters and VRS users.

Sorenson also treats emergency calls very differently at the network level from regular VRS calls. For example, as required by FCC rules, 911 calls are immediately routed to the first available VI, rather than being answered in the order received like other VRS calls. In addition,

Sorenson double-staffs 911 calls, so that there are two VIs involved rather than the usual one. This ensures the best possible service to the VRS user at a time when he or she may communicate less clearly than would be the case under less stressful circumstances.

The fact that emergency VRS calls are often the product of stressful circumstances is an obvious point, but one to which the Commission should be particularly attentive in considering whether to make changes to the current VRS emergency-call-handling regime. It is particularly important during times of stress that the call experience for VRS users be familiar and comfortable. The Commission should therefore avoid any emergency-call-handling procedures that place VRS users in an unfamiliar situation at times when users are most in need of reassurance and routine. The current system in which emergency VRS calls function identically to any other VRS call from the perspective of the end user is the best way to ensure the smoothest possible experience for those making calls in times of stress.

This system also functions best in times of regional or national emergencies. In such situations, there can be demand for a great many emergency calls at the same time. By disaggregating emergency call service, the Commission would virtually ensure that a stand-alone 911 provider—which cannot possibly have as many VIs as a large VRS provider—would be understaffed in times of large-scale (and totally unpredictable) emergencies.

The Commission should also be aware that any future transition to Media Communications Line Service ("MCLS")—permitting direct connection to PSAPs "using various devices, which include video, real-time text, voice, and data," via PSAP personnel trained and qualified as "sign language interpreters (SLIs) and Communications Assistants (CAs)

with emergency expertise"[54]—will not eliminate the need for VRS emergency-call services in the foreseeable future. While the ultimate goal of MCLS is for people with disabilities to be able to communicate directly with PSAP personnel, it will be a long time before all PSAPs have made the upgrades necessary to utilize MCLS. Accordingly, VRS will be a necessary back-up to MCLS even once some, but not all, PSAPs have such services up and running—and even if all PSAPS support MCLS, VRS may be needed as a back-up if the MCLS system becomes saturated.

2. Disaggregating Emergency VRS Calls Would be Either Entirely Unworkable or Prohibitively Expensive.

As noted above, the FNPRM asks whether all 911 calls should be handled by a "single VRS contractor" selected "through a competitive bidding process." The Commission appears to assume that "routing VRS 911 calls to pre-identified CAs . . . who would be specially trained to handle the safety and medical issues" of emergency calls would result in "benefits" for VRS users. In Sorenson's experience, this assumption is deeply flawed—as a practical matter, it would be either impossible or extremely expensive to provide 911 call handling through a disaggregated entity.

The reasons for Sorenson's conclusion relate to the special characteristics of the VI labor market. Sign-language interpreting for VRS is a difficult and often stressful occupation, even when interpreters are handling non-emergency calls. On average, an individual VRS interpreter is willing to work for about ***** BEGIN CONFIDENTIAL ***** [redacted] ***** END**

[54] Emergency Access Advisory Committee (EAAC) Working Group 3 Recommendations on Current 9-1-1 and Next Generation 9-1-1: Media Communication Line Services Used to Ensure Effective Communication with Callers with Disabilities at 4, PS Docket Nos. 10-25, 11-134, and 11-153 (filed Mar. 11, 2013).

CONFIDENTIAL *** hours a week for a VRS provider, and no more. That is because sign-language interpreters nearly always have other jobs in their communities that they are unwilling to leave—those jobs often involve close personal and professional relationships and are frequently seen as more appealing than interpreting for VRS, due to lower stress levels, better compensation, and the lack of a regulatory body overseeing interpreting work in the community. Moreover, the *least* appealing aspect of VRS interpreting for most VIs is handling emergency calls, which are of course even more stressful (and longer, on average) than non-emergency VRS calls. Even in the current distributed model, where individual VIs only occasionally handle 911 calls, VIs universally dislike interpreting such calls because of the stressful nature of the work.[55]

As a result, it might well be impossible to staff an entity dedicated to handling only (or even mostly) VRS 911 calls. As a big-picture matter, it is important to keep in mind that the pool of individuals in this country qualified and willing to do any VRS interpreting at all is a very small one—there are only about 10,000 nationally certified sign language interpreters. There may be another 3,500 to 5,000 individuals who are not nationally certified but still capable of VRS interpretation. Of that pool of at most 15,000 individuals, ***** BEGIN CONFIDENTIAL ***** [redacted] ***** END CONFIDENTIAL***** Recruiting and retaining qualified VIs is thus a constant challenge for all VRS providers,

[55] Sorenson believes that in considering any significant changes to the current VRS regime—and to the handling of emergency calls in particular—the Commission must pay particular attention to the views of the interpreting community. In that regard, it is notable that while the Commission seeks comment on the March 13, 2013, report released by the Commission's Emergency Access Advisory Committee ("EAAC"), *see VRS Reform Order* at 8616-17 ¶ 260, the EAAC failed to take the interpreting community's views into account in making its recommendations. As a result, the recommendations of the EAAC are of little value.

including Sorenson. Moreover, as discussed in Section I of these comments, the Commission's new requirement of 30-second speed of answer for 85 percent of calls greatly exacerbates that challenge—simply put, Sorenson believes it will prove impossible to staff at the level necessary to consistently comply with the new rule. *See infra* at Section I. In this tightly constrained labor market, then, finding enough individuals willing to handle *entirely* (or even mostly) emergency calls is probably impracticable—at a minimum, it would require paying VIs a considerable premium over the labor cost for handling only occasional emergency calls.

Labor costs for a VRS 911-only entity would also be increased by the fact that such an entity would need to have a great deal of excess (and therefore largely idle) VI capacity. In the distributed model, emergency calls take priority over regular VRS calls, so in the rare case of either a coincidence or a calamity resulting in a lot of simultaneous emergency calls, many such calls can be handled at once. But, as noted above, a dedicated entity would lack that ability unless it had VIs standing by just waiting for such unusual circumstances. This need for redundancy would add greatly to the expense of a dedicated entity.

The Commission would also face serious practical problems in obtaining competitive bids. Again, one of the primary problems for a dedicated entity handling emergency calls would be ensuring enough redundancy in the case of a major emergency, whether a natural disaster or a man-made threat like a terrorist attack. As a result, the Commission would need to set forth clear capacity and performance criteria in any bid request—but it would be difficult to know or describe how much excess capacity would be enough. The Commission would also need to take care that any entity placing bids actually has enough experience with this highly specialized labor market to know what is and is not possible in terms of staffing, and to evaluate what kind of wage premium VIs would demand to undertake a steady diet of emergency call handling.

If the Commission does disaggregate VRS emergency-call handling, it must also ensure proper messaging to and training of VRS users. As noted above, VRS emergency calls are often made in times of extreme stress, and VRS users need to be completely comfortable with the call procedures for calls to be successful in such circumstances. Plainly, however, VRS providers would not be in a position to train users on new, disaggregated 911 call-handling processes. The Commission would also need to make clear that existing 911 rules no longer apply to VRS providers.

3. Disaggregating Emergency VRS Calls Would Make it Even More Difficult to Meet Speed-of-Answer Requirements for Non-Emergency Calls, and Would Raise the Costs of Providing Non-Emergency VRS.

As noted above and further discussed in Section I, *infra*, the *VRS Restructuring Order*'s new rule that 85 percent of calls must be answered within 30 seconds—measured *daily*—will be difficult or impossible to meet. The reality is that the VI labor pool simply does not exist to consistently staff so as to satisfy this requirement. Significantly, however, creating an additional, dedicated entity to handle emergency VRS calls would exacerbate this problem.

Again, the pool of VIs available to work for VRS providers is already extremely limited. Assuming that it is even possible to provide sufficient financial incentives to entice some VIs to handle large volumes of emergency calls, VI hiring is essentially a zero-sum game. Any VI capacity attracted to a new 911 call-handling entity would necessarily reduce the VI capacity available for interpreting non-emergency VRS calls. And that capacity is already inadequate to meet the new speed-of-answer requirements. So disaggregating VRS 911 calls from other VRS would make the speed-of-answer shortfall worse. This is particularly true because of the need for excess capacity in the disaggregated model—VIs who would be available to handle non-

emergency calls in the current distributed model will sit idle waiting for emergency calls in the disaggregated model.

Finally, the need to pay VIs more to handle a steady stream of emergency calls will likely drive up wages for non-emergency VIs. Again, Sorenson questions whether an emergency-call-only entity could attract enough VIs to function at all—but to the extent that *some* VIs were to be lured to the new entity by higher wages, VRS providers will presumably need to raise their wages to compete for scarce interpreting talent, and the per-minute costs of providing non-emergency VRS will go up.

I. The Commission Should Reject the Impossible-to-Meet 10-Second Speed-of-Answer Requirement, But Should Fix Problems with the Current System.

The Commission seeks comment on whether it should further reduce the speed-of-answer requirement to 10 seconds, measured daily.[56] Sorenson vigorously opposes such an unachievable requirement. The new daily requirement for 85 percent of calls to be answered within 30 seconds will already be difficult, if not impossible, to meet—especially in light of the drastic rate cuts adopted by the *VRS Reform Order*. Adopting a 10-second speed-of-answer requirement would only make matters worse. Indeed, to meet such a requirement, providers would have to hire a vast number of new interpreters, but as explained below, there simply are not enough interpreters to meet the demand that would be created by such a Draconian standard.

Instead of creating more problems by adopting a Draconian speed-of-answer requirement, the Commission should fix the problems with the existing standard. For example, as explained below, the Commission should ensure that providers do not evade the speed-of-

[56] *VRS Reform Order* at 8718 ¶ 265.

answer requirements by using busy signals to reject incoming calls or by throttling their incoming trunks. Moreover, the Commission should not require providers to forfeit an entire day's compensation simply because they failed to meet the speed-of-answer threshold for a relatively small percentage of calls. Not only is such a result unfair because providers often miss the speed-of-answer requirement for reasons beyond their control, but it gives providers an incentive to shut down or reduce staffing once it becomes apparent that they will not meet the speed-of-answer requirement for the day. That creates a domino effect as other providers are flooded with unexpected demand, thereby increasing wait times for callers using these other providers and increasing the risk that these other providers will also miss their speed-of-answer requirements. To avoid these problems, the Commission should—at a minimum—compensate providers for the calls that meet the speed-of-answer requirement even when the provider misses the 85 percent daily threshold.

1. The Existing 30-Second Daily Requirement Will Be Difficult or Impossible to Meet.

To understand just how disastrous the proposed 10-second requirement would be, it is important to appreciate that the existing 30-second daily requirement—which will become fully effective in July 2014—will already be difficult or impossible to meet. The Commission adopted this new requirement in June, reasoning that providers can easily meet the requirement because they already answer *the majority* of calls within 30 seconds. But this logic is faulty. While it may be true that providers answer *a majority* of calls within 30 seconds over long periods such as a month, it does not follow that they answer the majority of calls within 30 seconds over shorter periods of time, such as a day. Moreover, it also is fallacious to assume that because providers answer more than 50 percent of calls per month in 30 seconds, they can therefore answer *85 percent* of calls *per day* in 30 seconds.

In reality, providers are not already meeting the 30-second daily requirement imposed by the Commission, and meeting the new requirement will be extremely expensive—if not impossible. Under the 30-second daily standard, Sorenson would have missed the speed-of-answer requirements on ***** BEGIN CONFIDENTIAL ***** [redacted] ***** END CONFIDENTIAL ***** last year. To comply with the new 30-second standard, based on its current daily call volumes and standard Erlang C call distribution calculations, Sorenson estimates that it would need ***** BEGIN CONFIDENTIAL ***** [redacted] ***** END CONFIDENTIAL ***** more VIs scheduled during any time. In the face of the current VI labor pool limitations, this would likely be impossible. Moreover, even if it could be done, it would increase the average cost for a minute of interpreting time by the same ***** BEGIN CONFIDENTIAL ***** [redacted] ***** END CONFIDENTIAL *****, which would be impracticable given the compensation regime imposed by the Order.

The primary difficulty with the new standard is that, unlike the monthly standard that providers must meet today, compliance with the new standard is assessed *daily*. Complying with a stringent speed-of-answer requirement on a *daily* basis is much more difficult because calling patterns over long periods are more predictable than over short periods, and with longer measurement windows, it is easier to smooth out unexpected variation in calling patterns in one part of the window by exceeding the standard during other periods. Indeed, unlike calling trends over an entire month, which are more predictable, calling patterns for any given day may be strongly influenced by unanticipated factors that are entirely outside a provider's control. For example, if a large percentage of calls on a particular day are to the IRS, speed of answer will depend on how quickly IRS agents answer calls. If the IRS phone centers happen to be understaffed on a given day, VRS users will tend to wait on hold longer before speaking to an

IRS representative. That means that VIs will spend more time processing each call, reducing the number of VIs available to take new incoming calls.

Other major governmental entities or businesses—such as banks, state agencies, and the SSA—can cause similar problems. For example, a major bank recently shut down its customer-service lines after being swamped with an unanticipated overload of inbound calls. The problem flowed backward to the VRS providers who had to handle many of these calls, increasing the average speed of answer during that period. Moreover, a major disruption like that can spill over to several days, potentially depriving providers of revenue for several days in a row for reasons completely beyond their control.

A similar problem can be caused when other VRS providers experience technical difficulties. When one VRS provider is unable to process phone calls for a period, other providers are likely to see unanticipated—and inherently unpredictable—increases in call volumes during those periods. The problem will be even worse once the Commission begins to measure speed of answer on a daily basis. When that happens, Sorenson is concerned that some providers may send all but a few of their staff home once it becomes apparent that the provider cannot meet the speed-of-answer threshold for the day and will therefore not receive compensation.

The Commission notes that providers "now have more than a decade of experience managing CA staffing levels"[57] and therefore suggests that meeting a daily speed-of-answer requirement will not be costly. The reality, however, is much more complicated. Providers can perform what is known as an "Erlang C" calculation to determine the number of interpreters they

[57] *Id.* at 8672 ¶ 139.

will need—if they know the average number of calls per period, the average call duration, and the average acceptable delay. Over longer periods such as a month, it is possible to estimate the average number of calls and the average call duration with some degree of accuracy; the law of large numbers suggests that these variables will be fairly predictable. But while 10 years of data is certainly better than nothing, those data show that over periods as short as a day, staffing needs are highly variable. Therefore, if providers must meet stringent speed-of-answer requirements on a *daily* basis, providers are left with no choice but to *overstaff*, greatly increasing costs—costs that, as explained above, must be reimbursed under the Commission's exogenous-cost framework.[58]

2. The Proposed 10-Second Threshold Is Impossible to Meet.

Further reducing the speed-of-answer threshold from 30 seconds to 10 seconds would only exacerbate the problem. Under the proposed 10-second daily standard, Sorenson would have missed the threshold *more than* ***** BEGIN CONFIDENTIAL ***** [redacted] ***** END CONFIDENTIAL ***** *percent of the time* from July 1, 2012, to July 1, 2013, and under the new rules, it would therefore be compensated for *fewer than* ***** BEGIN CONFIDENTIAL ***** [redacted] ***** END CONFIDENTIAL ***** of the days it actually provided service. To avoid economic catastrophe, Sorenson would accordingly have to greatly increase the number of VIs on call at a given time.

While the 30-second daily threshold will be extremely expensive, it is at least theoretically achievable if the additional costs are reimbursed. But it is doubtful that Sorenson or any other provider could ever meet a 10-second daily threshold. Moving from a 30-second daily

[58] *First Internet-Based TRS Numbering Order* at 11626-27 ¶¶ 97-101 (2008).

to a 10-second daily threshold would require providers to hire a vast number of new interpreters: Sorenson believes that moving from a 30-second standard to a 10-second standard would require ***** BEGIN CONFIDENTIAL ***** [redacted] *****END CONFIDENTIAL ***** more interpreters—and that is on top of the ***** BEGIN CONFIDENTIAL ***** [redacted] ***** END CONFIDENTIAL ***** increase over current staffing levels that will be required to meet the 30-second requirement. But there likely aren't enough qualified interpreters to meet this vastly increased demand. As discussed already, *supra* Section H.2, the labor pool for both VRS and community interpreters is extremely limited, leaving only a small fraction of the labor pool available to meet the strong surge in demand created by the Commission's new speed-of-answer requirement. Given this limited labor pool, it is extremely unlikely that providers could manage an expansion of the magnitude required to meet the proposed 10-second speed-of-answer threshold. Nor is this problem likely to be solved by new graduates from interpreting schools. Sorenson estimates that interpreting schools graduate between 750 and 1,500 new interpreters per year—about 50 percent of which drop out of the market within their first year. Thus, even if no current interpreters were to leave the labor pool, there would only be between 375 and 750 new interpreters each year. But, of course, interpreters do leave the labor pool for retirement and other reasons, so there is little overall expansion from year to year.[59] Making matters worse, Sorenson has found that interpreters generally need at least 3 to 5 years of interpreting experience before they are qualified to meet the high demands of interpreting in

[59] Nor is it likely to be possible to convince existing VIs to work longer hours. In addition to interpreting for VRS providers, most VIs do community-interpreting work, which precludes them from working full-time for a VRS provider. Moreover, VRS interpreting is a stressful, physically exhausting, and mentally draining job that most VIs find too taxing to perform 40 hours per week.

the VRS environment. That means that new interpreters graduating today will not even be ready until sometime between 2016 and 2018.

In short, a 10-second speed-of-answer requirement would impose dramatic new costs on providers at the same time that the Commission is slashing rates. Even if VRS providers were compensated for these costs—which they apparently will not be—it is highly unlikely that providers could meet a 10-second speed-of-answer requirement due to the limited interpreter labor pool—especially if the speed of answer were measured daily. The Commission should reject the proposal.

3. Rather Than Create More Problems by Adopting a 10-Second Standard, the Commission Should Fix the Existing Standard.

Rather than exacerbate an already difficult situation by adopting an impossible speed-of-answer requirement, the Commission should modify the speed-of-answer requirements to solve the problems that already exist. As explained already, one solution would be to calculate speed-of-answer compliance monthly rather than daily (as providers will continue to do until the new requirements take effect in January). In addition, the Commission should reform the speed-of-answer rules in two additional ways: (1) by compensating providers who miss the speed-of-answer requirements for the fraction of calls that do meet the requirement; and (2) by clarifying that providers may not evade the speed-of-answer requirements by throttling inbound trunks.

a. The Commission Should Not Require Providers to Forfeit the Entire Day's Compensation for Missing the Speed-of-Answer Threshold on Only a Small Percentage of Calls.

As noted above, providers use Erlang C call-distribution calculations to predict the number of interpreters required for a given period. If providers know the number and length of calls they will receive, it is possible to predict fairly accurately the number of interpreters that are

necessary to meet a speed-of-answer requirement over a long period, say a month. Despite providers' best efforts, however, it is not always possible to predict the number or length of calls that will be received—especially over shorter time periods such as a day. Indeed (as also discussed above), over these shorter time periods, call volumes can be wildly unpredictable and often vary for reasons completely outside a provider's control.

For this reason, there will inevitably be times when providers miss the speed-of-answer requirement through no fault of their own. When that happens, the rule adopted in June—and the proposed new 10-second rule—requires providers to forfeit their compensation for an entire day. This result is incredibly unfair—it penalizes providers for events completely beyond their control. Moreover, it also is likely to cause any speed-of-answer issues plaguing one provider to spread to the entire industry, magnifying any problems that inevitably will arise.

The reason is simple: once a provider realizes that it will miss the speed-of-answer requirements for a particular day, it will receive no compensation for that day's service, which makes it uneconomical to continue providing service for the day. Although the Commission's requirements for providers to operate 24 hours a day may prevent providers from shutting down service entirely for the rest of the day, providers who realize that they will miss the requirement are likely to send home a large percentage of their interpreters in order to minimize their losses. When that happens, irate customers will inevitably dial around to other providers, who will be flooded with unexpected demand, and wait times at these other providers will soar.

This is a bad result for both VRS consumers and VRS providers. To address this problem, the Commission should make two simple changes to the speed-of-answer rules. First, the Commission should not require providers to forfeit an entire day's compensation simply because they missed the speed-of-answer threshold early in the day. Rather, even when

providers miss the 85 percent threshold, they should receive compensation for the calls that are answered in the required time. This will eliminate the perverse incentive for providers to reduce staffing when they experience speed-of-answer problems and may actually encourage them to do the right thing—call in more interpreters when call volumes spike unexpectedly. Second, the Commission should make clear that it will not require a provider to forfeit compensation if the provider can show that it staffed its call centers reasonably given the expected call volumes. Such a change would encourage providers to staff their call centers appropriately without unfairly punishing them for events beyond their control as the proposed rule does.[60]

b. The Commission Should Ensure that Providers Cannot Evade Speed-of-Answer Requirements by Throttling Inbound Trunks.

Similarly, although the Commission should not adopt an unreasonable 10-second requirement, it should also ensure that providers are not able to game the system by evading whatever more reasonable requirement it does impose.

First, the Commission should make clear that providers may not game the system by using busy signals or similar recorded messages when their systems become overloaded. Sorenson has learned that some providers use busy signals or similar recordings when they receive more calls than they can handle, a practice that appears to violate the Commission's rules prohibiting providers from refusing calls. Nevertheless, to the extent that providers engage in this practice, the Commission ought to clarify that if a call is answered by a busy signal rather than a VI, that

[60] The Commission should not, however, rely on a system of *ad hoc* waivers to deal with the unfairness of its punitive daily-forfeiture policy. Rather, the Commission should clearly articulate the standard it will apply in determining whether providers may receive compensation despite missing the speed-of-answer requirement.

call must be included in speed-of-answer calculations as a call that failed to meet the speed-of-answer threshold.

Second, to ensure that providers' speed-of-answer reports reflect reality, the Commission should also clarify that providers must purchase bandwidth and telephone capacity that are sufficient to handle all calls even at peak capacity. If providers purchase insufficient bandwidth, then calls during peak-demand periods may never reach their servers simply because there is not enough bandwidth to allow the call. Because these calls never reach the provider's servers, the provider may not even be aware that they exist and will likely not count rejected calls in speed-of-answer calculations. Providers should not be permitted to game the system in this way. The Commission should clarify that VRS providers must comply with the P.01 standard that is currently applicable to other forms of TRS[61] and that ensures that no more than 1 percent of calls are blocked during the busy hour.

4. The Commission Should Adopt Its First Proposed Speed-of-Answer Formula, With Clarifications.

The FNPRM seeks comment on how the Commission should measure compliance with the new speed-of-answer thresholds. Sorenson submits that the Commission should use two important principles in adopting a speed-of-answer formula. First, providers should not be penalized if users hang up before the minimum time for answering has passed. Callers hang up for many reasons—including being interrupted, realizing they are dialing the wrong number, and changing their mind about placing the call. It is unfair to penalize providers when a caller hangs up for one of these reasons. Second, as discussed above, providers should not be able to skirt the

[61] 47 C.F.R. § 64.604(b)(2)(ii)(D).

speed-of-answer requirements by sounding a busy signal during busy periods or by limiting bandwidth available to call centers.

The FNPRM proposes two possible formulas to calculate speed of answer:

(1) $$\frac{calls\ unanswered\ in\ 30\ seconds\ or\ less + calls\ answered\ in\ 30\ seconds}{all\ calls\ (unanswered\ and\ answered)}$$

(2) $$\frac{calls\ answered\ in\ 30\ seconds\ or\ less}{all\ calls\ answered\ by\ a\ CA + calls\ abandoned\ after\ more\ than\ 30\ seconds}$$

Applying the above principles, Sorenson believes that the first formula is preferable. Nevertheless, the formula needs to be clarified in one important way. Specifically, the Commission should replace the phrase "calls unanswered in 30 seconds or less" with the phrase "unanswered calls abandoned in 30 seconds or less." As written, the phrase "calls unanswered in 30 seconds or less" could be understood to mean "calls that are not answered in 30 seconds." Read this way, the formula would require providers to add calls that were not answered in 30 seconds to those that were answered in 30 seconds, then divide by all calls. This always yields 100 percent and cannot have been what the Commission intended. To avoid this misinterpretation, the Commission should instead use the phrase "unanswered calls abandoned in 30 seconds or less."

5. The Commission Should Collect the Information Necessary to Audit Providers' Speed-of-Answer Reports.

The Commission also proposes to require that certain call detail record information be submitted to the TRS Fund Administrator—including the date and time that each call arrives at the provider's network, the time when it is answered by a VI, and the time the call ends.

Sorenson supports these requirements, which will allow the Administrator and the Commission to ensure that providers are reporting speed of answer correctly.

J. Rather than Fine-Tuning Administrative and Oversight Rules Designed for a Rate-of-Return Approach to Regulation, the Commission Should Set Market-Based Rates Via Auction and Ensure a Level Playing Field for Competition Among VRS and Stand-Alone Interpreting Service Providers.

1. The Commission Should Reject Rate-of-Return Regulation and Eliminate Related Data Collection Requirements.

Section J of the FNPRM poses a wide range of questions regarding administrative, oversight, and certification rules. These questions, however, appear primarily focused on fine-tuning the Commission's existing rate-of-return approach based on "allowable costs"; for example, the Commission seeks comment on whether to modify rules regarding data that must be submitted to or may be collected by the TRS Fund Administrator, and rules concerning whether the Administrator currently has sufficient authority to collect information.[62] Rather than considering minor rule changes that will make little difference to VRS as a whole, however, the Commission should embrace the one substantial reform set forth in the first section of these comments—the Commission should reject outdated and ineffective rate-of-return ratemaking based only on "allowable costs" and instead set prices by using an auction to set market-based rates. This will enable the Commission to abandon much of the current inefficient data collection relating to "allowable costs."

[62] *VRS Reform Order* at 8719 ¶¶ 266-67.

a. Rate-of-Return Rate Regulation Makes No Sense in the Context of VRS.

In previous filings, Sorenson has presented detailed reasons why the Commission should abandon rate-of-return regulation based on "allowable costs."[63] There is little point in repeating the arguments against rate-of-return regulation in detail here, but it bears emphasis that such regulation is antiquated, provides little incentive or reward for improving efficiency,[64] and is fundamentally ill-suited to determining rates in a labor-intensive industry like VRS.[65] Moreover, as discussed in Sorenson's previous comments,[66] the Commission 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 November 2011.[67] Against this background, there can be no reasoned basis for perpetuating the use of this discredited system for VRS. In any case, the Commission's current approach to rate-of-return regulation ignores reasonable and necessary costs like actual taxes, working capital, and

[63] *See, e.g,* Comments of Sorenson, Inc. at 37-45, CG Docket Nos. 10-51, 03-123 (filed Mar. 9. 2012).

[64] *Id.* at 37-39.

[65] *Id.* at 39-40.

[66] *See, e.g.*, Sorenson Nov. 2012 Comments at 7.

[67] 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.

financing. Accordingly, as discussed in Part II.A, *supra*, the Commission should set market-based rates for VRS by employing an auction.

b. Eliminating Rate-of-Return Regulation Would Allow the Commission to Eliminate the Inefficient and Burdensome Data Collection Needed to Support It.

Against the backdrop that the Commission should abandon rate-of-return regulation, many of the questions posed by the FNPRM are simply the wrong ones. For example, the "rules on data that must [be] submitted to or that may be collected by the TRS Fund administrator" should not merely be "modif[ied]"—all rules relating to data collection regarding "allowable costs" should simply be *eliminated*. Such rules impose substantial burdens on the Commission and the Administrator, as well as on VRS providers, and for no benefit. Similarly, the question whether the Commission should "explicitly require providers to submit additional detailed information, such as information regarding their financial status (*e.g.*, a cash flow to debt ratio) is misguided.[68] In a VRS industry reflecting market-based rates, such as Sorenson has proposed, regulatory micro-managing of VRS provider finances would plainly be unnecessary. Again, both VRS providers and the Commission itself would benefit from a market-based approach to VRS that would eliminate the need for the burdensome and excessive data collection that currently takes place.

2. The Commission Should Ensure a Level Playing Field Between Stand-Alone Interpreting Service Providers and Existing VRS Providers.

The Commission also seeks comment on whether to implement rule changes in light of the "order['s] creat[ion] of a new category of VRS providers—standalone VRS CA service

[68] *VRS Reform Order* at 8719 ¶ 267.

providers."[69] For example, the Commission proposes to "modify [its] VRS rules to eliminate" submissions relating to "technology and equipment" that standalone providers of interpreting services "will not be required to own."[70]

It is critical for the Commission to ensure that new VI service providers are required to compete with existing VRS providers on a level playing field, not one skewed by regulatory favoritism. In general, that means that the many FCC regulations applicable to existing VRS providers that *can* reasonably be applied to standalone providers of VI services must apply. Most fundamentally, as the Commission moves to the new 30-second speed-of-answer requirement for 85% of calls standard—which, as discussed *supra* at Section I, Sorenson believes will prove impossible to attain in light of staffing challenges posed by the limited VI labor pool—it must impose the unrealistic new standard on standalone VI service providers as well as VRS providers, even if the hold server is operated by the neutral communications platform. As also discussed above, in a tightly constrained labor market, increasing burdens on VIs obviously means paying them more, so providers not subject to the new ASA rules would be at a considerable competitive advantage. Moreover, applying different ASA standards to different kinds of providers would clearly lead to a degradation in service for users not employing traditional full-service VRS providers.

The Commission also seeks comment on whether to adopt specific requirements to ensure the financial stability of new players.[71] As noted above, the Commission acknowledges that VRS providers face the burden of "provid[ing] both a description of the equipment used to

[69] *Id.* at 8719 ¶ 268.

[70] *Id.*

[71] *Id.*

provide" VRS and related "proofs of purchase, leases or license agreements."[72] The point of such requirements is, of course, to ensure that VRS providers have the wherewithal to provide quality services on a long-term basis. New standalone VI service providers should similarly be required to provide information sufficient to ensure their viability, including demonstrating the financial wherewithal to cover payroll, training costs for VIs, the provision of 911 service, taxes, and all other aspects of the costs of providing standalone services.

K. The Commission Should Restructure Part 64.604 of Its Regulations.

The Commission also seeks comment on whether it should reorganize the structure of 47 C.F.R. § 64.604 so that the regulations are service- and transmission-specific.[73] Sorenson supports this proposal. Enhancing the organization of the rules will increase efficiency as providers seek to ensure compliance. In addition, it is currently difficult for Sorenson and CaptionCall to determine which VRS rules apply to IP CTS, and vice versa. Drawing more explicit lines within the rules themselves will eliminate uncertainty, enhance efficiency, and promote more effective compliance practices.

L. Prohibiting TRS Providers from Using CPNI for the Purpose of Contacting TRS Users for Political and Regulatory Advocacy Purposes Would Plainly Violate the First Amendment.

The Commission seeks comment on the Consumer Groups' proposal that the Commission "rules should prohibit a relay provider from using CPNI for the purpose of contacting a relay user for political and regulatory advocacy purposes, unless the user

[72] *Id.*

[73] *Id.* at 8720 ¶ 269.

affirmatively agrees to such contacts" through a proposed opt-in procedure."[74] The Commission also inquires whether such a restriction would advance "functional equivalency."[75] The answer to both questions is a resounding no—prohibiting TRS providers from using CPNI to contact their customers and encourage them to participate in the political process would clearly violate the First Amendment, just as it would violate the First Amendment to impose such a restriction in connection with services for hearing users.

The Tenth Circuit's decision in *U.S. West, Inc. v. FCC*,[76] makes clear that the proposed CPNI rule would violate the First Amendment. *U.S. West* involved regulations promulgated by the Commission to implement 47 U.S.C. § 222, adopted as part of the Telecommunications Act of 1996. According to the court, "the essence of the statutory scheme [was to] require[] a telecommunications carrier to obtain customer approval when it wish[ed] to use, disclose, or permit access to CPNI in a manner not specifically allowed under § 222."[77] Specifically allowed uses included billing for telecommunications services, safeguarding the rights or property of carriers and protecting users of telecommunications services from fraud, and providing certain service-related information during customer-initiated calls.[78] The regulations adopted by the Commission implemented § 222 by essentially "permit[ting] a telecommunications carrier to use . . . CPNI for the purpose of marketing products within a category of service to customers,

[74] *Id.* at 8720 ¶ 270 (citing Comments to Further Notice of Proposed Rulemaking of Deaf and Hard of Hearing Consumer Advocacy Network, *et al.,* at 23-24, CG Docket Nos. 10-51, 03-123 (filed Mar. 9, 2012).

[75] *Id*.

[76] *U.S. West, Inc. v. Fed. Commc'ns Comm'n,*182 F.3d 1224, 1229 (10th Cir. 1999) ("U.S. West").

[77] *Id.*.

[78] *Id.*

provided the customer already subscribes to that category of service," but *prohibiting* the use of CPNI "for the purpose of marketing categories of service to which the customer does not already subscribe."[79]

The *U.S. West* court began its First Amendment analysis by rejecting the Commission's argument that the CPNI regulations did not restrict speech because they "only prohibit[ed] [a carrier] . . . from using CPNI to target customers and do not prevent it from communicating with its customers or limit anything that it might say."[80] The court described this argument as "fundamentally flawed" because it ignores the fact that restrictions on *targeting* speech to a particular audience constitute restrictions on speech. [81]

The *U.S. West* court next turned to the question what *kind* of speech is affected, which of course affects the level of First Amendment scrutiny to which regulations must be subjected. The court found that because the speech at issue in that case was "for the purpose of soliciting . . . customers to purchase more or different telecommunications services, it 'd[id] no more than propose a commercial transaction.'"[82] The court noted that "[w]e analyze whether a government restriction on commercial speech violates the First Amendment under the four-part framework set forth in *Central Hudson*,'"[83] which permits the government to restrict speech only if it proves:

[79] *Id.* at 1230.

[80] *Id.* at 1232.

[81] *Id.; see also Verizon Northwest, Inc. v. Showalter*, 282 F. Supp.2d 1187, 1191 (W.D.Wash. 2003).

[82] *U.S. West*, 182 F.3d at 1233, quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 760 (1976).

[83] *U.S. West* at 1233.

> (1) it has a substantial state interest in regulating the speech; (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest.[84]

The *U.S. West* court found that the CPNI regulation there did not "directly and materially advance[]" the state's asserted interest in customers' privacy, because the "sharing of CPNI within one integrated firm does not raise significant privacy concerns."[85] In addition, the regulations were not narrowly tailored because the Commission "fail[ed] to adequately consider an obvious and substantially less restrictive alternative, an opt-out strategy."[86]

The CPNI regulation on which the FNPRM seeks comment presents a far clearer case of invalidity under the First Amendment than the *U.S. West* rules. Unlike the regulations in *U.S. West*, the regulation proposed here does *not* regulate only speech that "'does no more than propose a commercial transaction.'"[87] To the contrary, contacting TRS users to encourage them to participate in the "political and regulatory" process by engaging in "advocacy"' is obviously "core political speech" for which the First Amendment's protection is "at its zenith."[88] Indeed, the right of all participants in these processes "to speak freely and to promote diversity of ideas and programs" is what keeps "government . . . responsive to the will of the people" and how "peaceful change is effected."[89] As a result, restrictions on such speech are subject not to the

[84] *Id.* (citing *Revo v. Disciplinary Bd. of the Sup. Ct. for the Stateof N.M.,* 106 F.3d 929, 932 (10th Cir. 1997)).

[85] *U.S. West* at 1237-38.

[86] *Id.* at 1238.

[87] *Id.* at 1232-33 (citing *Va. State Bd. of Pharm.,*425 U.S. 748, 760 (1976)).

[88] *See Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 186-87 (1999) (citing *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988)).

[89] *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

"intermediate" scrutiny of *Central Hudson*, but rather to "strict scrutiny."[90] Under strict scrutiny, restrictions on political speech and political association are permitted only when they are justified by a compelling state interest, and only where the restrictions are narrowly tailored to serve that interest.[91]

In *U.S. West*, the court had "doubts about whether" the government's interest in safeguarding consumers from "privacy" harm rises to the level of "substantial" as required by the *Central Hudson* test.[92] Plainly, then, such an interest would not qualify as "compelling," as required by the stricter scrutiny that is applicable here. And, of course, to the extent that the *U.S. West* regulations failed intermediate scrutiny on the ground that an opt-out regime would be more narrowly tailored than an opt-in regime, the proposed regulations would fail strict scrutiny here for the same reason. In short, *U.S. West*—coupled with the fact that a higher level of scrutiny applies here—makes clear that the CPNI regulations on which the FNPRM seeks comment would clearly violate the First Amendment.

M. The Commission Should Adopt Rules Clearly Delineating Prohibited Practices, Not a Vague "Unjust and Unreasonable" Standard.

The Commission proposes adopting a rule that would prohibit "unjust and unreasonable practices for or in connection with TRS services."[93] Sorenson does not oppose the Commission's targeted efforts to eliminate practices that cause waste, fraud, and abuse. It does,

[90] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010).

[91] *See, e.g., Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 207 (1999).

[92] *U.S. West* at 1225.

[93] *VRS Reform Order* at 8721 ¶ 271.

however, oppose the Commission's proposal to ameliorate these problems through the adoption of a vague and amorphous standard.

Sorenson fully supports the Commission's efforts to combat waste, fraud, and abuse. In order for TRS to be a viable accommodation for deaf and hard-of-hearing individuals, it is critical that TRS funds be expended only for legitimate purposes. The Commission's existing rules and regulations have been successfully used in identifying and punishing wrongdoing—whether intentional or unintentional—that jeopardizes the TRS Fund.[94] Sorenson recognizes, however, as has the Commission, that it is difficult to foresee every specific form that waste, fraud, or abuse may take in the future.

Yet the difficulty of the task does not justify abandoning any attempt to address these problems through specific rules and instead adopting a vague standard that may be molded to address any and all practices the Commission may find objectionable after the fact. If the Commission seeks to curb particular practices, it cannot do so by simply labeling those practices "unjust and unreasonable." Rather, it is incumbent on the Commission to consider concrete rules that are specifically tailored to address any offending practices and take into consideration the unique nature of the TRS market. As part of that process, the Commission must identify practices it considers improper or potentially problematic, weigh and analyze the harms and benefits caused by those practices, and then propose and adopt specific rules that are targeted to address those practices. Anything less would be arbitrary and capricious.

[94] *See, e.g.*, *Hands On Video Relay Services, Inc., Go America, Inc. and Purple Communications, Inc.*, Order and Consent Decree, DA 10-1734, 25 FCC Rcd. 13,090 (2010) (approving settlement in excess of $22 million for alleged rule violations involving abuse of the TRS Fund).

What is more, "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[95] If the Commission seeks to prohibit certain practices and punish providers for engaging in those practices, it must define these prohibited practices so providers can behave accordingly, especially when the consequences of any perceived noncompliance are as severe as they are in the TRS context, *i.e.*, forfeiture of all payment from the TRS Fund. Indeed, the Supreme Court has held that "[a] conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'"[96] Thus, the Commission's proposal risks violating due process.

Furthermore, the Commission proposes that its interpretation of the "unjust and unreasonable" standard could be informed by its common-carrier precedents under § 201(b). Any attempt to analogize common carriers to TRS providers will necessarily face at the outset issues concerning whether the analogy fits. Common carriers are subject to market considerations that do not exist in the TRS market, and TRS providers are subject to market forces that do not exist for common carriers. This reality presents at least two problems with the Commission's reliance on common carrier precedents. First, TRS providers will lack adequate notice concerning which precedents even apply. Does the Commission intend to apply all

[95] *FCC v. Fox Tel. Stations*, 132 S. Ct. 2307, 2317 (2012).

[96] *Id.; see also Trinity Broad. Of Fla., Inc. v. Fed. Commc'ns Comm'n*, 211 F.3d 618, 631 (D.C. Cir. 2000) ("Before an agency can sanction a company for its failure to comply with regulatory requirements, the agency must have either put this language into [the regulation] itself, or at least referenced this language in [the regulation]. . . . General references to a regulation's policy will not do." (citing *U.S. v. Chrysler Corp.,* 158 F.3d 1650, 1356 (D.C. Cir. 1998)).

precedents from § 201(b)? If not, what principle(s) will the Commission use in deciding which precedents apply? Until the Commission makes that determination, TRS providers will be in the dark and left to simply guess at what the law might prohibit. Only once the light of the Commission's reasoning is exposed will providers know the rules with which they are expected to comply, but for those providers that are singled out for scrutiny by the Commission, it will be too late for them to structure their practices in a way that are not considered "unjust or unreasonable." Second, given the significant differences between markets, it will be inevitable that the Commission will need to modify its common-carrier precedents to make them applicable to TRS providers. In those circumstances, in what ways will the Commission alter these rules? This uncertainty is contrary to due process, subject to discriminatory enforcement and abuse, and ultimately harmful to consumers as it will invariably cause TRS providers to be less innovative and efficient in the products and services they offer.

Moreover, the Commission lacks the authority to adopt its proposed standard. Section 201(b)'s "unjust and unreasonable practices" standard was adopted by Congress. In enacting § 201(b), Congress specifically delegated to the Commission the authority to promulgate specific rules and regulations to enforce this broad statutory language.[97] No similar authority was granted by Congress to the Commission in § 225. Indeed, when Congress enacted § 225, it was certainly aware of § 201(b) and therefore quite capable of delegating this type of authority if it

[97] *See* 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."); *see also Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, 53 (2007) (noting that "the FCC has long implemented § 201(b) through the issuance of rules and regulations").

wanted. Congress chose not to.[98] The Commission cannot grant to itself broad authority to prescribe "unjust and unreasonable practices" when Congress did not see fit to do so.

N. The Commission Should Eliminate the "Guest-User" Period.

The Commission seeks comment on whether it should eliminate the "guest user" period for VRS users under which providers "must allow newly registered users to place calls immediately."[99] The temporary-registration period was aimed at ensuring continuity of service during the transition to ten-digit numbers, and Sorenson agrees that now that the transition is over, there is no longer any reason to continue the guest-user period.

Indeed, the temporary-registration period is flatly inconsistent with the new VRS rules, which prohibit providers from including any user in the TRS-URD until that user has been verified[100] and require providers to verify a user's eligibility in the TRS-URD *on a per call basis*.[101] Sorenson does not believe that it is possible to offer guests a temporary-registration period and comply with these two new rules. If the Commission nonetheless decides to retain the guest-user period, it should clarify how guest users are to be listed in the TRS-URD and how providers can comply with the per-call eligibility requirements. Moreover, the Commission should clarify how long the guest-user period can last, an issue that has never been resolved.

Finally, in eliminating the guest-user period, the Commission should clarify that providers have no obligation to handle emergency calls from unregistered devices. As Sorenson

[98] When Congress enacts a new statute, it is presumed to be aware of previous statutes relating to the same subject matter and the basic rules of statutory construction. *See Hall v. U.S.*, 132 S. Ct. 1882, 1889 (2012).

[99] *VRS Reform Order* at 8721 ¶ 272.

[100] *Id.* at 8656 ¶ 86.

[101] *Id.* at 8651 ¶ 72.

has previously discussed with Commission staff, Sorenson has experienced a recent upsurge in the number of illegitimate calls to 911 calls made from unregistered devices. Many of these calls are examples of an illegal practice known as "swatting" in which callers falsely claim to have an emergency and provide false addresses in order to send emergency responders to a particular address. In other cases, callers dial 911 in order to harass the interpreter.

These practices are consuming substantial resources of both VRS providers and emergency responders. On the other hand, there is little downside to allowing providers to refuse emergency calls from unregistered devices. The vast majority of VRS users receive a videophone only after they register for service. In the few cases where users obtain a device or software prior to registering, they are prompted to register immediately upon attempting to place a call. There is simply no reason for a user to have an unregistered videophone for more than a few minutes, and the likelihood of a particular user needing to place an emergency call during those few minutes is extremely low. For these reasons, the Commission should clarify that providers have no duty to complete emergency calls from unregistered devices.

O. The Commission Should Not Mandate That VRS Providers Make "Enhanced Features" Available to Customers of Competitors.

The Commission seeks comment on whether it should require VRS providers that offer video mail to their customers to ensure that video-mail messages can be left by point-to-point callers who are customers of other VRS providers and use equipment furnished by those providers.[102] The Commission's request for comments on this issue appears to have been prompted by complaints from other providers, including Purple Communications, that Sorenson is "blocking" non-Sorenson customers from leaving video-mail messages for Sorenson

[102] *Id*. at 8722-23 ¶¶ 275-77.

customers.[103] Contrary to the assertions of other VRS providers, Sorenson does not "block" non-Sorenson consumers from leaving video-mail messages for its customers. To the extent that users are unable to leave video-mail messages for Sorenson customers, this is because of design differences between providers' video-mail systems. Sorenson has designed an innovative system that ensures the highest possible quality of the video message; other providers have made different decisions. The Commission has previously recognized, however, that "enhanced" features, such as video mail, can be offered "on a competitive basis, which will encourage innovation and competition."[104] There is no justification for the Commission abandoning its prior position. To do so would benefit those providers who are unable or unwilling to develop innovative features at the expense of the consumers the Commission is tasked with protecting.

1. Sorenson Does Not "Block" Non-Sorenson Customers From Leaving Video-Mail Messages and Should Not Be Required to Conform its Video Mail System to the Inferior Design Used By Other Providers.

In October 2011, Sorenson introduced Deaf SignMail®—an eagerly awaited "enhanced feature" for point-to-point calls. When a caller places a point-to-point call and the other party does not answer, Deaf SignMail allows the caller to leave a video message for the other party. The message is first recorded on the calling party's videophone and then uploaded—as bandwidth is available—to Sorenson's server, from which the called party can retrieve it.

[103] Purple Communications, Inc., Request for Immediate Public Notice: VRS Providers May Not Discriminate Against Customers Using Competing Service Providers In Their Ability to Leave a Video Mail Message, CG Docket Nos. 03-123 (filed Apr. 11, 2013) and 10-51 (filed Apr. 15, 2013).

[104] *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Second Report and Order and Order on Reconsideration, 24 FCC Rcd. 791, 820 ¶ 63 (2008) ("*2008 Second Report and Order*").

Sorenson designed Deaf SignMail in this fashion to address a common technical limitation confronting many VRS customers—low bandwidth. Low bandwidth is problematic because it can negatively impact the picture quality of video, which makes it difficult to discern intricate finger movements and facial expressions. Because the Deaf SignMail messages are recorded locally on the *calling party's* videophone and then uploaded to Sorenson's server as bandwidth becomes available, rather than in real time, they can be uploaded without degradation. This design requires phones to be able to record messages and store them locally, features Sorenson introduced with its ntouch line of endpoints. Videophones that do not offer these store and forward features for sign mail—for example, Sorenson's VP-200—are not capable of leaving Deaf SignMail.[105]

Other providers have implemented their video-mail systems in different ways, apparently not concerned about the problems caused by video degradation or incapable of offering videophones with a recording features. It does not follow, however, that because other providers chose not to address these problems or offer these endpoint features that Sorenson "blocks" customers of other providers from leaving video-mail messages for Sorenson's customers. Again, to the extent customers using videophones provided by other providers are unable to leave video-mail messages for Sorenson's customers, that is because Sorenson has solved the technical of low bandwidth—which other providers have elected not to address—in a way that benefits its customers.

[105] *See SignMail*, ntouch VP FAQ, http://www.sorensonvrs.com/ntouchvp_faq (last visited Aug. 9, 2013) ("The new Deaf SignMail feature requires the new Sorenson HD™ technology. The VP-200 does not support Sorenson HD.").

Moreover, the Commission has never required providers to ensure interoperability of their enhanced features for point-to-point calls. On the contrary, for point-to-point calls, the Commission requires *only* that providers support the basic ability to connect with other videophones—*i.e.*, "the ability of VRS users to make point-to-point calls without the intervention of an interpreter."[106]

In addition, interoperability is a two-way street. Sorenson cannot and should not be expected to unilaterally ensure that other providers' customers are able to leave video-mail messages. Absent an interoperability standard, it is fundamentally unfair to place the burden of video mail interoperability solely on the called party's provider.

In sum, the key requirement of Deaf SignMail is a videophone with the ability to record messages locally and then upload those messages to Sorenson's server as broadband capacity is available. Other providers do not distribute videophones with these capabilities, and Sorenson cannot require them to do so. Sorenson should also not be required to redesign its system, which allows for higher video quality over low bandwidth than would otherwise be possible, to accommodate its competitors' inferior designs.

2. The Commission Should Maintain Its Current Policy of Allowing Competition Through "Enhanced Features."

The VRS market is unique in that, unlike most markets, providers do not compete on the basis of price. Consumers, therefore, differentiate between providers on other grounds, such as customer service and technical support, quality of interpreting services, and importantly, "enhanced features." Sorenson has been a pioneer in the market and has devoted significant

[106] *2008 Second Report and Order* at 820 ¶ 65.

resources to developing equipment and enhanced features, like SignMail, that have made it the default provider of choice for a majority of VRS consumers. The Commission has encouraged this competition.

In the context of discussing VRS interoperability, the Commission squarely rejected the idea that "a default provider that furnishes CPE to a customer must ensure that the CPE's enhanced features (*e.g.*, missed call list, speed dial list) can be used by the consumer if the consumer ports his or her number to a new default provider."[107] The Commission emphasized that providers may "offer such features on a competitive basis," which "encourage[s] innovation."[108] The fruits of this competition and innovation are evident from the varied services and features different providers have developed over the years.

Despite the benefits consumers have reaped from this competition and innovation, the Commission now proposes to require that all providers implement video mail in the same way. This proposal will stifle innovation and ultimately harm consumers. Innovation of enhanced features will similarly be harmed if the Commission, in the name of interoperability, compels providers to share their innovations as providers will be hesitant to invest resources into their development. In the context of rates, the Commission has clearly expressed its intent to move to market-based rates. The Commission should similarly allow market forces to continue to work with respect to enhanced features and the Commission should refrain from interfering with those forces by compelling providers to implement video mail in the same manner, particularly if that manner is inferior to the system developed by Sorenson.

[107] *Id. at* 820 ¶ 63.

[108] *Id.*

P. The Commission Should Not Ban "Non-Compete" Clauses in VIs' Employment Agreements Because Doing So Would Reduce the Supply of Qualified Interpreters.

As noted above, the labor pool for Video Interpreters is limited. Particularly in light of the Commission's ever-more-stringent speed-of-answer requirements, it is critical to ensure an adequate supply of competent interpreters. As explained below, however, Purple's proposal to eliminate "non-compete" clauses in employment contracts of Video Interpreters[109] would do just the opposite: it would reduce the number of qualified interpreters available to provide VRS interpreting because it would prevent VRS providers from spending substantial resources to train interpreters who might otherwise be unqualified. For this reason, Sorenson opposes any proposal to ban it six-month "non-compete" agreements in VI contracts.[110]

As Sorenson has repeatedly explained, banning "non-compete" employment agreements would have a detrimental effect on the total number of qualified interpreters and ultimately decrease the quality of VRS.[111] Sorenson expends considerable resources to find and train the best interpreters. Rather than expend resources on identifying and training new interpreters, Sorenson's competitors would seemingly prefer to recruit Sorenson-trained interpreters.[112] But "non-compete" agreements force competing providers to develop training programs, which

[109] *VRS Reform Order* at 8723-24 ¶ 279.

[110] *Id*.

[111] *See* Letter from John Nakahata, Counsel, Sorenson Communications, Inc., to Marlene Dortch, Secretary, FCC, CG Docket Nos. 03-123 and 10-51 (filed Apr. 17, 2013); Letter from Ruth Milkman, Counsel, Sorenson Communications, Inc., to Marlene Dortch, Secretary, FCC, CG Docket No. 03-123 (filed July 14, 2008); Comments of Sorenson Communication, Inc. at 26-27, CG Docket No. 03-123 (filed Sept. 4, 2007) ("Sorenson Sept. 4 2007 Comments").

[112] *See* Letter from John Goodman, Chief Legal Officer, Purple Communications, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 03-123, 10-51 (filed Mar. 1, 2013).

ultimately benefits VRS users because providers must compete on the effectiveness of their interpreter training when consumers decide which provider to use to make a call.

Sorenson's advanced training helps turn unqualified or under-qualified individuals who would not otherwise have the skills to handle VRS calls into highly effective interpreters. Sorenson's "non-compete" employment agreement, which requires interpreters to agree not to work for a competitor within six months of leaving Sorenson, provides Sorenson with a minimal assurance that after expending significant resources on training, a Sorenson interpreter will remain with Sorenson for a reasonable amount of time and not transfer Sorenson's proprietary processes, practices, and technology immediately to a competing provider.[113] By locating, recruiting, and training new interpreters, Sorenson increases the size of the interpreter pool and thereby moderates the upward pressure on the costs of hiring. However, if Sorenson were not allowed to implement reasonable "non-compete" employment agreements, it would likely experience more rapid turnover of hired interpreters, thereby raising the associated costs. Such a result would make hiring and training new interpreters a more risky endeavor and therefore limit the pool of qualified interpreters.

Quite apart from the practical benefits of permitting "non-compete" employment agreements in VRS, the Commission simply lacks the authority to ban or nullify these clauses, as Sorenson has explained in more detail in prior filings.[114] "Non-compete" employment clauses are governed by, and lawful under, state law, and laws of general applicability such as, in limited cases, the antitrust laws. "Non-compete" employment agreements are reasonable and do not

[113] *See* Sorenson Sept. 4 2007 Comments at Attachment A, 11-13 ¶¶ 28-33.
[114] *See* Sorenson Sept. 4 2007 Comments at 18-22.

violate any provision of the Communications Act or the Commission's rules. The Commission therefore lacks authority to preempt private parties' freedom to enter into employment agreements that are consistent with the laws of various states, and other laws of general applicability. Rather than needlessly create unprecedented rules against "non-compete" clauses in VRS employment agreements, the Commission should rely on state and other courts of competent jurisdiction to review (and, if necessary in isolated cases, abrogate) individual clauses at the request of parties with standing.

In short, "non-compete" provisions in VI employment contracts indispensably protect provider investments in identifying and training interpreters. Any proposal to circumvent that protection would be counter to law and would have a detrimental effect on the overall quality and pool of available interpreters. Sorenson therefore encourages the Commission to reject any proposal that would alter private parties' ability to freely enter into employment agreements that are consistent with the laws of various states.

Q. The Commission Should Not Permit VIs to Work From Home Overnight.

The Commission seeks comment on whether it should allow VIs to work from home during overnight hours.[115] As Sorenson has stated before, at-home interpreting presents significant risks to the quality, privacy, and reliability of VRS.[116] A call-center environment allows for better quality control, confidentiality protection, systems redundancy, network quality of service via a known and well managed infrastructure, emergency-call handling, VI coaching

[115] *VRS Reform Order* at 8724 ¶ 280.

[116] *See, e.g.*, Opposition of Sorenson Communications, Inc. to Petition for Temporary Waiver of CSDVRS, LLC, CG Docket No. 10-51 (filed Aug. 16, 2011).

and counseling, training, and access to support and management. Nothing has changed that would suddenly render at-home interpreting a viable option.

Moreover, there is no credible reason to relax this rule and allow VIs to work from home during overnight hours. Overnight staffing generally is generally the *easiest* for VRS providers: call volumes are lowest overnight, and because most VIs work other jobs, more are available to work at night. Thus, Sorenson typically has more requests from VIs that want to work overnight than it can fulfill.

Sorenson makes substantial investments to establish call centers in secure facilities that allow its workforce to be safe, no matter what time of day they work. Any provider limiting a work-from-home request to overnight hours is simply unwilling to make the investment needed to provide secure call-center locations. The Commission should not allow providers to shirk this responsibility to their employees by creating an environment that impedes the data-security, user-privacy, and integrity of VRS calls.

III. CONCLUSION

For these reasons, the Commission should adopt a market-based compensation mechanism as soon as possible and by the summer of 2004. It should also:

- allow providers to recover the costs of complying with the new rules;
- abandon its plans to replace market-based research and development with centralized planning funded through the NSF;
- require RLSA to propose contribution factors quarterly; permit hearing individuals to obtain ten-digit numbers while ensuring that providers do not bear the costs of this change;
- reject the proposal to expand the role of the TRS Fund Advisory Council;
- reject the proposal to blindly apply VRS rules to IP CTS;

- reject the proposal to disaggregate emergency-call handling;
- reject the unrealistic ten-second speed-of-answer requirement;
- abandon rate-of-return regulation and ensure a level playing field among VRS providers;
- restructure Part 64.604 of its regulations;
- reject the proposal to prohibit TRS providers from using CPNI to contact TRS users for political purposes;
- adopt clear rules rather than an ill-defined "unjust and unreasonable" standard;
- eliminate the guest-user period;
- reject the proposal to dampen competition by requiring providers to share enhanced features;
- reject the proposal to eliminate non-competition agreements in VIs' employment agreements;
- and reject the proposal to allow VIs to work at home overnight.

Respectfully submitted,

/s/ John T. Nakahata

John T. Nakahata
Christopher J. Wright
Timothy J. Simeone
Steven A. Fredley
Mark D. Davis
Walter E. Anderson
Peter J. McElligott

WILTSHIRE & GRANNIS LLP
1200 18th St., NW, Suite 1200
Washington, D.C. 20036
(202) 730-1336
jnakahata@wiltshiregrannis.com

Counsel for Sorenson Communications, Inc., and CaptionCall, LLC

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

August 19, 2013