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
	)	
Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities	)	CG Docket No. 03-123

To: The Commission

REPLY COMMENTS OF PURPLE COMMUNICATIONS, INC.

PURPLE COMMUNICATIONS, INC.

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EXECUTIVE SUMMARY

Purple Communications, Inc. ("Purple") supports the Commission's goals of achieving market-based pricing for Video Relay Service ("VRS") and fostering a competitive VRS marketplace through which multiple providers will continue delivering high-quality, innovative services to consumers. The rate schedule adopted by the Commission in its June 10, 2013 Report and Order, however, will not accomplish these goals. To the contrary, the rate schedule adopted by the Commission creates significant risk for all VRS providers, regardless of size, and creates significant programmatic risk for the delivery of VRS with respect to sustainability, quality, competition, and innovation. The Commission is, in essence, "playing chicken" with VRS – which is irresponsible, especially considering the critical nature of this service. Unless the Commission adopts an alternative approach, the current rate schedule will eliminate any competitive dynamic in the VRS industry, if not the entire service itself. This outcome would harm the public interest and have disastrous effects on the very consumers the VRS program was designed to serve.

To ensure that the Commission is able to achieve its goals and guarantee the long-term viability of the VRS program, Purple presents a better path forward. Specifically, Purple urges the Commission to establish rates through a multi-winner auction process with share caps. By implementing a reasonable auction process with share caps, similar to other FCC auctions, the Commission can guarantee to its stakeholders that there will be a pre-determined number of winners, each representing a portion of industry minutes, thereby sustaining consumer choice and facilitating marketplace competition. Further, Purple's proposal will enable the Commission to hold VRS providers accountable for high performance in quality and innovation through enforceable obligations, and ensure that the Commission is paying a market-based rate. In so doing, the Commission can achieve its goals of ensuring that the VRS program remains effective, efficient and sustainable for the benefit of all consumers now and in the future.

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REPLY COMMENTS OF PURPLE COMMUNICATIONS, INC.

Purple Communications, Inc. ("Purple") hereby further responds to the FCC's Report and Order and Further Notice of Proposed Rulemaking released on June 10, 2013.[1] Purple has submitted comments on various options and proposals to ensure functional equivalence of the video relay service ("VRS") program and to insulate it as much as possible against waste, fraud, and abuse.[2] The central topic which will have the greatest impact on the future of VRS is the process for establishing a market-based competitive rate for VRS. Accordingly, that topic is the focus of Purple's Reply Comments.

Three months ago, the Commission set forth a steeply declining rate schedule which, by January 1, 2017, would pay providers that generate less than one million minutes per month a

[1] *See Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 10-51 and 03-123, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 8618 (rel. June 10, 2013) (hereinafter cited as "Report and Order" or "FNPRM" depending upon which section of the document is being referenced).

[2] *See* Comments of Purple Communications, Inc., CG Docket Nos. 10-51 and 03-123 (filed Aug. 19, 2013) ("Purple Comments").

total of $4.07 per minute, and $3.49 per minute for any minutes generated by providers in excess of one million minutes per month.[3] This dramatic and steep reduction – representing a reduction from current rates of 32% and 28% per minute for each volume tier – creates significant risk for any provider, regardless of size. It also creates significant programmatic risk for the delivery of VRS as it relates to sustainability, quality, competition, and innovation. Based on the Commission's pre-determined VRS rate trajectory, and the lack of a clear alternative in the comments to the FNPRM, Purple details a practical and achievable alternative.

Purple's proposal represents a better path forward, and it must be explored as an alternative to the drastic and unsustainable rate reductions already implemented in the Commission's June 2013 Order, which Purple fears will eliminate any competitive dynamic in the VRS industry, if not the service itself. The current rate trajectory merely serves to weaken the industry and put consumers at risk while the FCC tries to implement, in 2-3 years, a completely novel approach to the TRS program structure. The FCC should not be "playing chicken" with such a critical and necessary service.

I. PROPERLY STRUCTURED VRS AUCTIONS MUST INCLUDE SHARE CAPS FOR ALL MARKET MINUTES TO ENSURE QUALITY, INNOVATION, AND CHOICE AT A MARKET-BASED PRICE.

A. Competition in the VRS Market is Critical for Consumers. The Current Framework Will Not Guarantee Competition.

The Consumer Groups have appropriately raised concerns about the state of competition in the VRS industry.[4] Consumers Groups rightly worry that "a single provider – or even two providers – that obtains the right to serve a group of telephone numbers via an auction will not face enough competitive pressure to maintain robust service and to provide customers with the

[3] *See* Report and Order, ¶ 215.

[4] *See* Comments of Telecommunications for the Deaf and Hard of Hearing, *et al.*, CG Docket No. 10-51 and 03-123 (filed Aug. 19, 2013) ("Consumer Groups Comments").

level of service they need."[5] Purple agrees that there is insufficient competition in VRS. Absent competition, or in the face of an FCC rate framework that is designed to stifle competition, the quality, advancement and continuation of a functional VRS industry is unlikely, if not impossible.

Purple is worried, however, that the Consumer Groups are falsely confident that the FCC's *already adopted* tiered rate structure system will allow multiple providers to continue offering VRS and continue innovating on behalf of consumers.[6] In fact, Purple believes that under the current tiered rate trajectory, by January 1, 2017 – the effective date of the FCC's lowest adopted per minute rate – the Consumer Groups' worst fears will be realized. On the current path and resulting rate progression already adopted, Purple believes the following will result well in advance of January 1, 2017: a) the provider marketplace will significantly contract, resulting in one or two surviving providers; b) providers will have no choice but to continue to reduce the largest single expense in the delivery of service, which is interpreter labor; and c) investment in innovation will all but evaporate. An already destabilized VRS program could become a clunky relic (like the stuck-in-time TTY service) if the FCC blindly prioritizes its quest to lower the costs of the program above all else. Implicit in this trend is the continued misperception that VRS providers generate excessive profitability when, in fact, the record, including the audit reports prepared by the FCC's Office of Inspector General, supports a conclusion that only one VRS provider is overcompensated.[7]

The comments of the Registry of Interpreters for the Deaf, Inc. ("RID") and Sorenson Communications, Inc. ("Sorenson") reflect the consequences to consumers that will result from

[5] Consumer Groups Comments at 7.

[6] *See* Consumer Groups Comments at 5, 8.

[7] *See* Comments of Purple Communications, Inc., CG Docket Nos. 10-51 and 03-123, at 2, n. 1 (filed April 16, 2013).

the Commission's narrow focus on costs above all else. As RID explains, by focusing solely on costs, the Commission "effectively ignores the impact [the Commission's proposed] changes have on interpreters and thus on the fulfillment of a functionally equivalent video relay service" for consumers.[8] As Sorenson points out, "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 will be disastrous."[9] Indeed, Purple agrees it is a fundamental and simple reality that "[i]f 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."[10]

The Commission, and all stakeholders, have the responsibility to ensure that VRS and other forms of TRS not only remain available for us, but continue advancing toward functional equivalency – just as consumers who do not require TRS enjoy the benefits of advancements in telecommunications technologies. This is important for public safety reasons, as well as for meeting the requirements of the Americans with Disabilities Act. Any approach that eliminates consumer choice, stifles innovation, and destabilizes providers, should be rejected as contrary to the Commission's goals and the public interest.

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[8] Comments of the Registry of Interpreters for the Dead, Inc., CG Docket Nos. 10-51 and 03-123, at 9 (filed Aug. 19, 2013).

[9] Comments of Sorenson Communications, Inc., CG Docket Nos. 10-51 and 03-123, at 1 (filed Aug. 19, 2013) ("Sorenson Comments").

[10] Sorenson Comments at 8.

B. Share Cap Auctions for All Market Minutes Will Be Better for Consumers and is the Best Way to Meet the FCC's Objectives for the TRS Program.

So how can the FCC guarantee for its stakeholders – Congress, contributors to the fund, consumers (which include those that are fully hearing in addition to those with hearing disabilities), interpreters and providers – that the VRS program will remain "effective, efficient and sustainable for the future?"[11] As detailed in Purple's comments and other filings, Purple believes this can be accomplished through a multi-winner auction process with share caps.[12] Share caps will allow the Commission to guarantee to its stakeholders that there will be a pre-determined number of winners, each representing a portion of industry minutes, thereby sustaining consumer choice.

As previously described, this share cap auction result can be achieved by dividing <u>all</u> VRS CA calls (not just a portion of frequently called minutes) into units on which certified providers could compete to serve based on their capacity to support the particular volume in that unit over a given period of time. For optimal efficiency, no single bidder would be permitted to "win" more than 50% of the calls allocated to the auction process. This will preserve a competitive marketplace in which consumers have options and are not tied to a single provider.[13]

The allocated units subject to bidding would be established to ensure that there could be participation/competition from certified bidders with varying capacities so that the bidding

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[11] *See* Report and Order, ¶ 1.

[12] *See* Purple Comments at 5; *see also* Purple's Reply Comments to FNPRM on Structure and Practices of the Video Relay Services Program, CG Docket Nos. 10-51 and 03-123, at 5 (filed March 30, 2012); Comments to FNPRM on Structure and Practices of the Video Relay Services Program, CG Docket Nos. 10-51 and 03-123, at 25 (filed March 8, 2012).

[13] The FNPRM asks how to ensure "sufficient bidders for a competitive auction." FNPRM, ¶ 235. Allowing for multiple winners could certainly help do so.

process would not in effect be limited only to the largest capacity provider(s) of VRS.[14]

Purple's suggested bidding model would require input of stakeholders, new technical standards and centralized call routing algorithms to distribute calls to providers in accordance with the units for which they were the winning bidder. Nevertheless, this is achievable from a technical perspective with VRS, as a similar program has successfully operated in California for many years.

Purple disagrees with ZVRS, which asks the Commission to wait, some unspecified period, before imposing any competitive bidding mechanism – in part because it believes competitive bidding will not ensure the statutorily required "functional equivalency."[15] It does so at the same time as conceding that the current marketplace is dominated by one VRS provider with an 80% market share.[16] Much of the ZVRS analysis rests on criticism of the "winner-take-all" bidding processes for state TRS funding – which ZVRS asserts will only further entrench the dominant provider. However, the Commission is not required to implement, and should not implement, such a "one winner" mechanism. Indeed, Purple agrees with ZVRS that the "*only* way an auction or bidding process could be successful is if there were a guaranteed allotment of market share to the winning bidders."[17] This is the essence of Purple's proposal, with a cap on any one bidder receiving more than 50% of the market share. This approach would free up almost a third of the current market to competitive providers of VRS.

ZVRS criticizes the California TRS system cited by Purple in its comments, which does

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[14] Such a share mechanism is analogous to varying spectrum blocks established by the Commission in the context of spectrum auctions.

[15] *See* Comments of CSDVRS, LLC, CG Docket Nos. 10-51 and 03-123, at 6-24 (filed Aug. 19, 2013) ("CSDVRS Comments").

[16] *Id.* at 14 (80% market share), 15 (retain monopoly), 16 (attained a monopoly).

[17] *Id.* at 16 (emphasis in original).

involve multiple service vendors, as subject to consumer complaints about the "inadequacy of choices and the erratic level of services."[18] The Commission is cognizant of the need for any competitive bidding system to ensure "quality of service" and asks whether existing rules on quality of service are sufficient; further, it seeks comment on the consequences for failure to meet those requirements.[19] As Purple addresses in greater detail below, as part of the development of specific auction and related service rules, the Commission can learn from service issues implicated by the California experience and adjust the FCC's process accordingly.

As for adequacy of choice, a multiple winner auction in which no single bidder can attain more than a specified portion of the calls allocated would help foster a greater number of choices.[20] The detailed auction rules could include incentives for smaller providers to participate, particularly if they bring technological innovations to the table.

CWA also urges outright rejection of any auction proposal because there would be "no way to control for quality." CWA terms an auction proposal a "race to the bottom."[21] But the Commission, for a variety of reasons, has affirmatively decided to restructure the VRS compensation structure and move away from the tiered system.[22] The FCC is correctly not trying to maintain the status quo, but instead is attempting to implement a methodology for best facilitating an "effective, efficient and sustainable" VRS program. The quality issues raised by CWA are, as Purple discusses in further detail below, properly addressed through service and

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[18] *Id.* at 13.

[19] NPRM, ¶ 234.

[20] If there continue to be anti-competitive issues or market practices in the current market structure that could stifle competitive interest, as ZVRS suggested there may be, the Commission should address them in the appropriate proceeding or in the context of setting auction rules.

[21] *See* Comments of Communications Workers of America and National Interpreter Action Network, CG Docket No. 10-51, at 7 (filed Aug. 19, 2013) ("CWA Comments").

[22] NPRM, ¶ 217.

auction rules. All interested and affected parties should be permitted to participate in the formulation of those parameters.

C. Properly Structured Incentives and Penalties Keep Providers Accountable for High Performance in Quality and Innovation. The Current Framework Will Not.

Purple's auction proposal achieves the Commission's market-based rate goal, while protecting competition, choice, quality and innovation through a multi-winner share cap model through which all VRS minutes are auctioned.

Several commenters raised concerns that an auctions approach would not allow the continued delivery of high quality service and continued innovation.[23] This would be true if the Commission chooses to auction only limited portions of the market or chooses a winner-take-all auction approach. However, neither of these scenarios reflect Purple's proposal.

Properly designed with stakeholder input, Purple believes incentives and penalties can and must be included in the auction award in order to keep providers accountable for meeting performance standards and provide consumers and the Commission comfort that the integrity of service quality is maintained at high levels. Moreover, the Commission could even tailor service quality standards (such as answer speed) into the bid instructions, thus enabling providers to factor in the labor cost impacts of the required standard to their bid price. Such an approach is far more commercially rational than forcing an increased service level onto providers in a static or declining rate environment.

To make this more tangible, Purple offers the following scenario as an illustration for one way that such a system might work. The illustration divides activities into Pre-Award and Post-Award categories. In the Pre-Award category, meaning as part of the bidding process that

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[23] *See, e.g.*, Consumer Groups Comments at 7-9; CSDVRS Comments at 11; CWA Comments at 7.

competing providers would undergo, each competing provider would furnish to the FCC a road map setting forth the bidder's detailed plans for critical differentiators, such as product innovation, demonstration of full interoperability compliance, and capacity planning, each covering the full duration of the proposed contract term. For example, if the FCC were to offer a 5-year contract to the winning bidders of the auction, each provider's plans would apply to that 5-year period. This road map would include specific milestones for the first 12-months of the contract and would be required to be updated annually with specific milestones for the next 12-month period. Assuming that provider was chosen to be among the group of winning bidders, it would then begin to execute in the Post-Award period.

In the Post-Award period, any provider materially failing to hit its critical milestones in the 12-month period would be permanently penalized for the balance of the contract term in the form of reduced market share allocation. These milestones must be treated as enforceable obligations. This structure not only guarantees innovation, but prevents any provider from overselling expectations simply to win a bid and then failing to produce the innovations promised in their proposal.

This same structure applies to quality. The TRS Fund Administrator will have monthly quality reports in the form of speed of answer. Not only would failed speed of answer result in payment penalties, but the Post-Award system could be designed in such a way that on-going penalty for speed of answer failures would result in a reduction to market share allocation for the remainder of the contract term. With some exceptions (national emergency, regional crisis, etc.) providers would be operating in an environment of known traffic patterns making the business less volatile and as a result, more predictable. Staffing models could be calibrated to a higher degree of precision and accordingly, providers could build their models to support a predictable traffic flow which should result in high quality service delivery to consumers.

Purple's proposed structure provides the correct incentives to ensure continuing innovation, efficiency and quality. By comparison, under the current trajectory for VRS with rates falling by 32% and 28% respectively in the two primary tiers of the tiered rate plan, the remaining providers will be forced to further slash labor costs (which will already experience compression based on the initial rate reductions in the Order) and virtually ignore innovation simply in order to remain solvent. The auction process with share caps and properly designed incentives avoids these risks and should be considered the best option to achieving a market-based rate.

D. A Reasonable Auction Process, Similar to Other FCC Auctions, Can Ensure the Commission is Paying a Market-Based Rate. The Current Framework Will Not.

The Commission has essentially conceded that the rate setting process for VRS is broken and imperfect.[24] Purple and many other commenters certainly agree with the Commission on this point. The Administrator itself has questioned the applicability of the underlying formula, which the Administrator feels constrained to use in making rate recommendations.[25] And the rate model is being applied to an industry that is dominated by a monopolist provider who has exploited the TRS fund with limited repercussions from the Commission, and leveraged its repeated violations of FCC rules to payout hundreds of millions of dollars to its shareholders.

Yet, despite this recognition that a broken and imperfect system exists for rate setting, the Commission has set long-term rates that, unless another direction is taken, will have disastrous effects on the very people the program was designed to serve, as well as the livelihood of professional interpreters, the most qualified of whom will likely seek to make a living outside of

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[24] *See* FNPRM, ¶ 217.

[25] *See* Rolka Loube Saltzer Associates LLC, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, CG Docket Nos. 03-123 and 10-51, at 23 (filed May 1, 2013).

VRS, resulting in significant decreases in quality and negative effects on consumers. In fact, the current trajectory of rates, described by the FCC as a "glide path" toward cost-based rates,[26] does not reflect "market competition" and instead is designed based on a set of flawed assumptions. Namely, the FCC's rate "glide path" is flawed because its starting point is based on the weighted average cost of provider data in a market that is highly imbalanced.[27] While the Commission has set a fixed date by which all providers will be impacted by the significantly lower rates, it has not committed to a timetable for implementing any of the pro-competition rules adopted to correct the imbalance in the VRS market – nor has it made any commitment to enforce those pro-competition rules. The FCC's implementation of the current rate change without coinciding market reform to correct the market imbalance will result in a rate structure that supports neither competition nor innovation in the VRS market. This is exactly the opposite of the FCC's goals of achieving market-based pricing and a market with multiple providers offering choice to VRS consumers.

Purple completely agrees with the FCC that a market-based rate derived from a competitive process among evenly situated competitors will result in an outcome that is both fair and efficient. This should be the goal for all stakeholders, and Purple's proposal presents a path to achieve it. Moreover, the solution proposed by Purple is not novel. The FCC has used a similar approach to auctions, as cited in Purple's prior filing, to achieve this effective balance. Purple proposes that the FCC consider a way forward that blends the FCC's experience with auctions, with the unique permutations of the VRS industry, and design a process that includes

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[26] Order, ¶ 212.

[27] *See* Order, ¶ 211 ("We also approve RLSA's use of weighted averages in calculating actual and projected costs. To the extent that one provider commands a substantial share of the VRS market, we find that RLSA's use of weighted averages is appropriate, and properly balances, on one side, the greater relative costs incurred by smaller providers with, on the other hand, not penalizing providers operating at lower costs for their greater efficiency.").

share caps to guarantee that the Commission achieves its goals of market-based pricing and a VRS market in which multiple providers will continue to exist to deliver high-quality, innovative services to consumers.

II. CONCLUSION.

Purple has long agreed that the VRS market in its current form is inefficient, under-competitive and, in some ways, broken. The primary reason for this is the presence of a monopolist provider which has been allowed to maintain its dominant position through well-documented, anticompetitive practices, and run roughshod over the rights of consumers – all to the detriment of consumers, competitors, the Commission, the Fund and its contributors. The June 10 Order does much to advance the state of completion and break up the near-monopoly of the dominant provider by banning still more of its anti-competitive practices and requiring compliance with industry standard technologies. And, while given time to compete on a level playing field, smaller, innovative, quality-based providers like Purple can expect to gain market share from the monopolist, the widely-shared goal of market parity and multiple providers of efficient scale is not imminent even under an enhanced competition regime. Furthermore, while elements of the restructured program certainly appear to encourage such providers to grow through investment – the timeline required for organic growth would exceed the period during which the current rate trajectory supports a viable industry. For these reasons, Purple's proposal for a share cap auction is not only a more operationally viable alternative – it also is the most expedient path for all stakeholders (save one) to achieve the shared goal of parity and industry efficiency.

Purple supports the Commission's goals of achieving market-based pricing and a competitive VRS market in which multiple providers will be able to continue delivering high-quality, innovative services to consumers. The rate schedule adopted by the Commission in its

June 10 Order, however, will not accomplish these goals. To the contrary, the current rate schedule creates significant risk for any VRS provider, regardless of size, and creates significant programmatic risk for the delivery of VRS with respect to sustainability, quality, competition, and innovation. Unless the Commission adopts an alternative approach, the current rate schedule will have disastrous effects on the very people the VRS program was designed to serve.

Purple's auction proposal presents a better way forward. By implementing a reasonable auction process with share caps, similar to other FCC auctions, the Commission can guarantee marketplace competition, hold providers accountable for high performance in quality and innovation through enforceable obligations, and ensure that the Commission is paying a market-based rate. In so doing, the Commission can achieve its goals of guaranteeing that the VRS program remains effective, efficient and sustainable for the benefit of all consumers now and in the future.

Respectfully submitted,

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