



1612 Homestead Road
Chapel Hill, NC 27516

Michael S. Hamden
Attorney and Counselor at Law

28 July 2016

M2007Hamden@cs.com
(919) 605-2622

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

*Re: Rebuttal Ex Parte Comments (via ECFS)
WC Docket No. 12-375, Rates for Interstate Inmate Calling Services*

Dear Ms. Dortch:

These *ex parte* comments are offered in rebuttal to recent filings in this docket by two ICS providers.

In its Notice of *Ex Parte* filings of 27 July 2016, Century Link refers to the FCC 14 July 2016 Fact Sheet's proposed action on rate caps as "legally deficient in light of the demonstrated costs of providing service at some institutions, even without applying commissions that may be required by state law or contract." But no reliable data regarding facility costs in providing ICS have been submitted publicly in this docket. Further, there is no question that the FCC may regulate contracts for ICS, and 47 U.S.C. § 276(c) specifically confers authority which allows the FCC to preempt "any State requirements [that] are inconsistent with the Commission's regulations . . ."

NCIC's filing of 27 July 2016 is more expansive. The company first contends that I "mistakenly identifie[d] site commissions as the "underlying cause of dysfunction" in the ICS market when they are actually the *product* of an unregulated environment that permitted high rates and fees." NCIC Reply at p. 1, WC Docket No. 12-375 (27 July 2016). While it was the ICS industry that created "site commissions" as a competitive tool to gain monopoly contracts with correctional facilities and even entire correctional systems, it is true that the practice grew and festered in an "unregulated environment that permitted high rates and fees." But that observation reinforces the idea that site commissions are indeed the underlying cause of a dysfunctional market, as the FCC has itself repeatedly concluded.¹

¹ See, e.g., Second Report and Order and Third Further Notice of Proposed Rulemaking, Rates for Interstate Inmate Calling Services, 30 FCC Rcd 12763, at ¶ 122 (2015)(concluding that site commission payments "distort the ICS marketplace"); Second Further Notice of Proposed Rulemaking, Rates for Interstate Inmate Calling Services, 29 FCC Rcd 13170, at ¶¶ 21, 24 (2014)(explaining that "site commissions are the primary reason ICS rates are unreasonable and ICS compensation is unfair" and that site commission payments are "the main cause of the dysfunction of the ICS marketplace").

NCIC suggests that I have been less than clear in explaining how excessive site commission payments will continue once the D.C. Circuit lifts its stay of the Second Report and Order and Third Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC 15-136 (rel. 5 November 2015). NCIC Reply at p. 2, WC Docket No. 12-375 (27 July 2016). Of course, that concern presumes that the Order will not be modified or overturned. But even so, the clarity that NCIC apparently desires can be gleaned from the record in this docket, in which the ways ICS providers can be expected to “game” the system to pay excessive site commissions have been extensively described. *See, e.g.*, Michael S. Hamden, *Ex Parte* Presentation, “Integrated Services,” WC Docket No. 12-375 (8 July 2015)(arguing that unregulated products and services offer ICS providers with new platforms thorough which to exploit inmates and their families); and Petition for Partial Reconsideration, WC Docket No. 12-375 (Michael S. Hamden, 19 January 2016)(“the pressurized dynamic created by the rate caps, coupled with the continuing availability of site commission payments, will drive ICS providers to subsidize ever escalating commissions with new and increasing fees imposed on unregulated services”). Indeed, the machinations of ICS providers to circumvent the rules have even been anticipated by the FCC. Second Report and Order and Third Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC 15-136 (rel. 5 November 2015). *See, e.g., id.*, at ¶ 128 n.437 (“These comprehensive reforms leave less room for entities to seek to ‘game’ the rules by, for example, attempting to recover site commission payments through intrastate rates that were not subject to our interim rate caps”).

NCIC next contends that a cost-recovery mechanism for correctional facilities is impracticable because “the differences in facility cost structures and the changing nature of communications will make it virtually impossible to conduct a ‘meaningful data collection process to determine the actual expense of providing ICS services.’” NCIC Reply at p. 2, WC Docket No. 12-375 (27 July 2016). Poppycok. Despite the myriad differences among correctional facilities in all their divergent manifestations and constant technological developments, ICS providers are somehow able to negotiate contracts that provide a profitable return across the spectrum, despite the almost infinite technical and logistical considerations entailed in the provision of services. It would be far more simple to identify and quantify facility costs in administering ICS.

NCIC acknowledges that “where NCIC has lowered rates, it has seen call volumes and minutes increase up to 50 percent.” NCIC Reply at p. 2, WC Docket No. 12-375 (27 July 2016). But it claims that “[t]hese higher call volumes also increase the cost to jails to manage inmate calling (by as much as 50 percent).” *Id.* at p. 3. However, it should be obvious that an adequate cost-recovery mechanism will, by design, offset the legitimate costs of providing ICS for facilities, even if those costs increase.



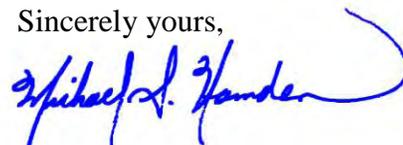
The prohibition or regulation of site commissions would be pointless, according to NCIC. “In lieu of site commissions, ICS providers will find ways to offer other incentives to facilities,” both “official” [e.g., computer hardware and software] and “unofficial” [e.g., various kinds of perks, including entertainment, travel, and the like]. NCIC Reply at p. 3, WC Docket No. 12-375 (27 July 2016). Of course, that concern only reinforces the wisdom of the Commission’s broad definition of “site commissions” to include in-kind payments, “any form of monetary payment,” and all other kinds of compensation. *See* 47 C.F.R. § 64.6000, Definitions, at ¶ (t).

And finally, NCIC contends that “the Commission does not have authority to regulate site commissions.” NCIC Reply at p. 3, WC Docket No. 12-375 (27 July 2016). But that is not correct. The legal authority of the Federal Communications Commission to regulate site commission payments is clear.²

Because the ICS industry practice of paying site commissions is central to the exploitation of prisoners and their families and the underlying cause of dysfunction in the market, site commissions must be altogether prohibited or strictly regulated. In its 14 July 2016 Fact Sheet, the Commission has signaled an intention to increase interstate and intrastate call rates to specifically account for correctional authorities’ costs in administering ICS. If the Commission decides to proceed in this manner, it should prohibit all payments to correctional authorities except a designated, interim, per-minute additive (say \$0.01 to \$0.04 per-minute, depending on facility size) to the intrastate and interstate rates. Such an approach should be followed by a data collection process to determine the actual costs facilities incur in providing ICS.

Thank you for considering these ideas. With all best wishes, I am,

Sincerely yours,



Michael S. Hamden

² *See, e.g.*, Comments of Michael S. Hamden, WC Docket No. 12-375 at pp. 3 – 9 (12 January 2015). *See also*, Letter from Andrew D. Lipman to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2-4 (21 September 2015) (“the FCC has unmistakable direct legal authority to regulate both intrastate ICS rates and site commissions, under Sections 201, 276 and 4(i) of the Communications Act”). The concept of fair compensation, as used in 47 U.S.C. § 276(b)(1)(A), “encompasses both the compensation received by providers and the rates paid by end users.” *Id.*, at p. 2 [citing 2013 Inmate Calling Order, 28 FCC Rcd at 14115 ¶ 14; and Illinois Public Telecommunications Ass’n v. FCC, 117 F.3d 555, 562 (D.C. Cir. 1997)].

