

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

In the Matter of)	
)	
Rates for Interstate Inmate Calling)	WC Docket No. 12-375
Services)	

**PAY TEL COMMUNICATIONS, INC.
RESPONSE TO GLOBAL TEL*LINK CORPORATION’S OBJECTION
TO DISCLOSURE OF CONFIDENTIAL INFORMATION**

Pay Tel Communications, Inc., (“Pay Tel”), by its attorneys, respectfully submits this response to the Objection to Disclosure of Confidential Information filed by Global Tel*Link, Corp. (“GTL”) in this docket on September 12, 2014. GTL, in its Objection, appears to fundamentally misunderstand the purpose and terms of the Protective Order¹ entered in this docket. GTL objects to disclosure of the confidential version of its response to the Commission’s one-time mandatory data collection in the above-referenced docket² (hereinafter “Data Response” or “GTL’s Data Response”)³ to Pay Tel’s Outside Counsel on the grounds that the Commission routinely protects from disclosure the kind of information sought, and GTL further argues that Pay Tel’s Outside Counsel has failed to demonstrate a need to access GTL’s Data Response. In addition, GTL argues that disclosure of the Data Response to those involved in competitive decision-making would be improper.

¹ WC Docket No. 12-375, Protective Order, DA 13-2434, at ¶ 1 (rel. Dec. 19, 2013) (“Protective Order”).

² See Rates for Interstate Inmate Calling Services, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107, ¶¶ 124–26 (2013) (“*Inmate Rate Order*”).

³ GTL refers in its Objection to the documents requested by Pay Tel as its “Data Response,” and Pay Tel will use the same nomenclature herein. Global Tel*Link Corporation, Objection to Disclosure of Confidential Information, WC Docket No. 12-375, at 1 (Sept. 12, 2014) (“GTL Objection” or “Objection”).

All three arguments miss the mark. First, the Protective Order expressly permits Pay Tel’s Outside Counsel to gain limited access to the Data Response, notwithstanding the fact that it is, per the Protective Order, “confidential information” that is usually protected from disclosure.⁴ Second, contrary to GTL’s assertions, the Protective Order does not impose upon Pay Tel’s Outside Counsel the burden to show why access to the Data Response is needed and, in any event, the need for the data is plain—so that Pay Tel’s counsel may adequately represent Pay Tel in this proceeding, the outcome of which is critical to Pay Tel’s business survival going forward. Finally, whether disclosure of the Data Response to those involved in competitive decision-making is proper is irrelevant, as none of the persons requesting access to GTL’s Data Response is involved in same.

In a tactic that can only be described as bad-faith gamesmanship, at the same time that GTL is refusing to adhere to the plain language of the Commission’s Protective Order that is designed to permit Pay Tel’s counsel to review confidential information submitted in this proceeding, GTL has now submitted (along with two other ICS providers) a joint proposal (“Joint Proposal”) to the Commission proposing a so-called “consensus” resolution the matters pending before the Commission.⁵ Without access to GTL’s Data Response (together with the other data collected by the FCC), Pay Tel’s counsel is unable to evaluate the Joint Proposal against the cost data submitted to the Commission and is unable to advocate for Pay Tel’s interests with respect to the same. The Joint Proposal put forward by these parties, of course, would, if adopted, directly impact Pay Tel’s rights and its competitive position in the

⁴ Protective Order at ¶ 2 (defining “Confidential Information”).

⁵ See Letter to FCC Commissioners from Brian D. Oliver, CEO, GTL; Richard A. Smith, CEO, Securus Technologies, Inc.; Kevin O’Neil, President, Telmate, LLC, WC Docket No. 12-375 (Sept. 15, 2014) (“Joint Proposal”).

marketplace dominated by these three companies. It offends due process that a party could, on the one hand, put forward a proposal to compromise another party's rights and then, on the other hand, refuse to permit that party's counsel to have access to the data underlying the proposal. More to the point, GTL is willfully and purposefully failing to comply with the Commission's Protective Order so that it may secure a tactical advocacy advantage in this proceeding with the hope that it may secure an outcome in this proceeding favorable to its economic interests and contrary to Pay Tel's.

None of GTL's arguments objecting to disclosure has merit; to the contrary, GTL's conduct is a blatant disregard of the Commission's Protective Order in this docket. Moreover, Pay Tel's Outside Counsel believe that having access to the requested Data Response will facilitate the development of "a more complete record"⁶ in this proceeding, upon which the Commission will ultimately be able to base its decision. Such is the stated purpose of the Protective Order.⁷

BACKGROUND

Pursuant to Paragraph 5 of the Protective Order issued in this docket,⁸ Pay Tel's Outside Counsel (two attorneys, Marcus W. Trathen and Timothy G. Nelson) and the company's Outside Consultant (Don J. Wood) on September 9, 2014 served on GTL's counsel a request for certain Stamped Confidential Documents and Confidential Information filed by GTL in this proceeding. GTL accurately describes in its Objection the documents—the Data Response—to which Pay Tel's representatives seek access.

⁶ Protective Order at ¶ 1.

⁷ *Id.*

⁸ *Id.* at ¶ 5.

Each of the persons seeking access to the Data Response executed the Protective Order's Acknowledgment of Confidentiality, and copies thereof were served upon GTL along with the request. GTL has stated that it is willing to provide access to Pay Tel's Outside Consultant, Don J. Wood,⁹ but GTL objects to disclosure of the Data Response to Pay Tel's Outside Counsel.¹⁰

DISCUSSION

GTL accurately cites to and quotes both the FOIA exemption regarding trade secrets and commercial or financial information as well certain Commission Rules regarding such information.¹¹ But they are not pertinent here. The very purpose of the Protective Order is to “make . . . available to participants in this proceeding,”¹²—to limited persons and for limited purposes—the “proprietary or confidential information”¹³ that would, absent the Protective Order, otherwise be “subject to protection under the Freedom of Information Act, 5 U.S.C. § 552, and the Commission's implementing rules.”¹⁴ As stated in the Protective Order, “[b]y designating documents and information as Confidential under [the] Protective Order, a Submitting Party will be deemed to have submitted a request that the material not be made routinely available for public inspection under the Commission's rules.”¹⁵ Moreover, the Commission specifically anticipated and advised ICS providers like GTL and Pay Tel that

⁹ GTL Objection, at 2. It should be noted that although GTL did not object to producing the requested information to Mr. Wood, GTL did not provide the requested date to Mr. Wood until September 23, seven days after the date the information was due under the Protective Order. *See* Protective Order, at para. 5 (requiring delivery of requested information within 5 business days).

¹⁰ *Id.* at 2.

¹¹ 5 U.S.C. § 552(b)(4); 47 C.F.R. §§ 0.457(d); 0.459(b)(3); 0.459(b)(5); GTL Objection at 2.

¹² Protective Order at ¶ 1.

¹³ *Id.*

¹⁴ *Id.* at ¶ 2.

¹⁵ *Id.* at ¶ 3.

information they submitted in response to the *Inmate Rate Order*'s "mandatory data collection"¹⁶ could be filed pursuant to the Protective Order.¹⁷ Of course, in advising ICS providers that it could file responses to the mandatory data collection pursuant to the Protective Order, the Commission knew full well the kinds of data—including the costs of providing ICS, revenue-producing minutes of use, and costs associated with ancillary services and fees, the disclosure of which GTL objects to¹⁸—that it would receive.¹⁹

Thus, GTL's first argument—that the "Commission routinely protects the type of data GTL has designated as Confidential Information"²⁰—even if taken as true, is inapposite. The Protective Order *does* in fact protect GTL's Data Response; as the Commission explains at the outset of the Protective Order:

While the Bureau is mindful of the sensitive nature of . . . filings [containing proprietary or confidential information], we are also mindful of the right of the public to participate in this proceeding in a meaningful way. The Bureau therefore will make such information available to participants in this proceeding, but only pursuant to a protective order. The Bureau concludes that the procedures adopted in this Protective Order give appropriate access to the public *while protecting proprietary and confidential information from improper disclosure*, and that the procedures thereby serve the public interest.²¹

¹⁶ See *Inmate Rate Order* at ¶¶ 124–26.

¹⁷ See, e.g., WC Docket No. 12-375, Public Notice, Commission Announces Inmate Calling Services Data Due Date, DA 14-829 (rel. June 17, 2014).

¹⁸ GTL Objection at 2.

¹⁹ See, e.g., Instructions for Inmate Calling Services Mandatory Data Collection, FCC, OMB No. 3060-1196, available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-327664A1.pdf (requiring, among other data, "direct and common costs incurred in providing inmate services", "revenue and non-revenue producing minutes of use", and "costs of providing ICS that are ancillary to the provision of ICS, including any costs that are passed through to consumers as ancillary charges").

²⁰ GTL Objection at 3.

²¹ Protective Order at ¶ 1 (emphasis added).

To the extent that GTL’s objection is rooted in the argument that the Data Response warrants some degree of confidential treatment, the point is not disputed (at least not at this juncture) by Pay Tel. The Protective Order expressly assumes that documents filed in this proceeding that have been designated as “Confidential” are in fact confidential and are, therefore, not subject to standard, public disclosure.²² Pay Tel has not objected to GTL’s designation of the Data Response as “confidential”; rather, Pay Tel has sought access to the Data Response pursuant to the terms of the Protective Order.

GTL also contends that the Data Response should not be disclosed to Pay Tel’s Outside Counsel on the grounds that “[d]isclosure of GTL’s confidential Data Response to its competitor would cause substantial and irreparable harm to GTL.”²³ This argument, too, is a red herring. As a starting point, Pay Tel’s Outside Counsel are not “competitors” of GTL, nor are they involved in “competitive decision making” on behalf of Pay Tel.²⁴ Instead they are outside regulatory lawyers who have been retained by Pay Tel to render legal advice and advocate for Pay Tel’s interests in this proceeding.

Despite these facts, GTL argues that “it makes no difference that it is Pay Tel’s outside counsel that is seeking access to the confidential information rather than internal Pay Tel personnel”²⁵ because of the undersigned’s purported “long-standing and exclusive representation

²² See, e.g., *id.* at ¶ 3.

²³ GTL Objection at 4; see also *id.* at 5 (“Access to GTL’s confidential cost data, ‘when combined with other public available information, would enable competitors to estimate [GTL’s] revenues for specific product families, particular companies, and geographic areas, giving competitors a substantial competitive advantage.’”).

²⁴ See, e.g., Acknowledgments of Marcus W. Trathen and Timothy G. Nelson, Outside Counsel to Pay Tel, WC Docket 12-375 (filed Jan. 17, 2014) (certifications of Pay Tel’s Outside Counsel that they are “not involved in Competitive Decision-Making”).

²⁵ GTL Objection at 7. Although its unsupported assertion that the Outside Counsel are Pay Tel’s “exclusive” legal representatives is not material to whether the Outside Counsel are entitled to review
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of Pay Tel”²⁶ In support of this suggestion that the undersigned members of the bar²⁷ would purposefully violate the terms of the Protective Order by disclosing confidential information to Pay Tel, GTL cites to a 2009 news article about Pay Tel’s business expansion for the proposition that Pay Tel’s Outside Counsel’s “plays an important role in the company’s Competitive Decision-Making process.”²⁸ Apparently GTL misses the irony that it would engage in intentional obfuscation of the facts while attempting to impugn the integrity of others, as the article cited does nothing to support this reckless assertion; rather the article’s only reference to Pay Tel’s counsel states that counsel “is representing Pay-Tel in FCC proceedings that will decide future rate regulations”²⁹—precisely the narrow scope of representation undertaken here that has nothing to do with competitive decision-making.³⁰ It is evident that GTL has scoured the reaches of LEXIS/NEXIS in search of any evidence that might support its assertions and was able to show nothing more than the obvious fact that Pay Tel’s Outside Counsel represents Pay Tel in FCC matters.

GTL’s confidential information under the Protective Order, this is another example of GTL’s willingness to bend the truth. Pay Tel has submitted, under oath, a declaration in this proceeding making clear that Pay Tel employs multiple counsel. *See* Pay Tel Communications, Inc., Supplemental Response to Securus Technologies, Inc.’s Objection to Disclosure of Confidential Information, Declaration of Vince Townsend, President of Pay Tel, WC Docket No. 12-375 (Aug. 19, 2014). Mr. Townsend’s Declaration is incorporated herein by reference.

²⁶ GTL Objection at 7.

²⁷ Pay Tel’s lead regulatory counsel, Mr. Trathen, has practiced law for 24 years, has successfully handled confidential materials in varied legal matters, and is a member of a law firm whose credentials and experience are a matter of record before the Commission.

²⁸ GTL Objection at 7.

²⁹ *See, e.g.,* Matt Evans, *Pay-Tel expands, looks for bigger industry footprint*, Triad Business Journal (Jan. 12, 2009), <http://www.bizjournals.com/triad/stories/2009/01/12/story1.html?page=all>.

³⁰ Moreover, GTL has advanced no argument that Pay Tel’s other Outside Counsel, Mr. Nelson, should not be provided with the Data Response—yet GTL has withheld the data from Mr. Nelson nonetheless.

Moreover, the plain requirements of the Protective Order run counter to and should quell GTL's fears that disclosure could cause it substantial and irreparable competitive harm. The Protective Order prevents anyone involved in Pay Tel's "Competitive Decision-Making" from seeing or knowing the information contained in the unredacted Data Response.³¹ Again, the three persons seeking access have all signed the Acknowledgment, by which they have certified they are not involved in Pay Tel's Competitive Decision-Making.³² The terms of the Acknowledgment also mean those three individuals have committed to use any Confidential Information in the Data Response to which they are granted access in accord with the Protective Order's limited, narrow terms—"solely for the preparation and conduct of this proceeding before the Commission and any subsequent judicial proceeding, and . . . *not . . . for any other purpose, including without limitation business, governmental, or commercial purposes, or in other administrative, regulatory or judicial proceedings.*"³³

The request to which GTL objects does not present the situation addressed by the Commission in other proceedings where in-house counsel seeks access to confidential information of a competitor and a party has objected.³⁴ Instead, counsel here are third parties who are bound by the obligations of the Protective Order to keep information in the Data Response confidential. Pay Tel is not aware of any Commission Protective Orders refusing to grant access to confidential information to outside counsel retained by a party actively involved

³¹ Protective Order at ¶¶ 7–8.

³² *Id.* at Acknowledgment.

³³ *Id.* at ¶ 7 (emphasis added).

³⁴ *See, e.g., In re Application of WorldCom, Inc.*, Order Adopting Protective Order, CC Docket No. 97-211 (1998) (permitting access to confidential information by in-house counsel not involved in "competitive decision making"). The Protective Order adopted in this proceeding has anticipated this potential issue and has adopted similar restrictions.

in the proceeding to which the information pertains, and GTL has failed to cite to any such authority.³⁵ To the contrary, it is the Commission’s standard practice and procedure (consistent with that utilized in court proceedings) to permit outside counsel to access confidential materials filed in a proceeding; in fact, the Commission’s longstanding policy regarding confidential information expressly recognizes that provision of such information to outside counsel (as opposed to others) is particularly appropriate in those cases where sensitive business information is involved so as to reduce the possibility of misuse of same.³⁶

Any other result would raise serious due process concerns; if a party’s counsel is not permitted to review the information in question, then disclosure to such party’s outside consultants would be of little practical utility, as it would effectively preclude any use of the data in the proceeding where the data is relevant.³⁷ Consider, for example, the practical implications

³⁵ See, e.g., *Pantelis Michalopoulos, Esquire, Christopher Bjornson, Esquire*, 25 FCC Rcd 7479, 2 (2010) (cited in GTL Objection at n.24) (limiting access to materials designated as “Highly Confidential” “to Outside Counsel of Record, their employees, and Outside Consultants and experts whom they retain to assist them in this proceeding,” pursuant to a protective order and finding that “such materials develop a more complete record on which to base the Commission’s decision in this proceeding. We are mindful of the highly sensitive nature of all information, documents, and data described in this letter, but we must also protect the right of the public to participate in this proceeding in a meaningful way.”) (emphasis added); *Randy H. Herschaft, Associated Press on Requests for Inspection of Records*, 22 FCC Rcd 5880, ¶ 24 (2007) (cited in GTL Objection at n.25) (dealing with release of raw data submitted in response to Commission audits to an Associated Press reporter—not to Outside Counsel of another party in the proceeding).

³⁶ See, e.g., *In re Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, Report and Order*, 13 FCC Rcd 24816, ¶¶ 20-26 (1998), amended by 14 FCC Rcd 20128 (1999) (Commission’s Confidential Information Policy, adopting a Model Protective Order and also noting that the Commission, as here, would “in rare instances such as when specific future business plans are involved, consider limiting access to documents to outside counsel and experts so as to minimize the potential for inadvertent misuse of such information”) (emphasis added).

³⁷ This is entirely consistent with the Commission’s Confidential Information Policy. Regarding rulemaking proceedings, the Commission’s Policy regarding confidential information is that “[m]aterial submitted in rulemaking proceedings will . . . be routinely available for public inspection because . . . rulemakings have a broad impact on the public, and wide public participation, with a full opportunity to comment, is contemplated by the APA. An agency’s decision to withhold information in the context of a

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of GTL’s Objection if it is sustained. If Pay Tel’s Outside Consultant, Don Wood, is given access to the information in the Data Response but he cannot discuss it with Pay Tel’s Outside Counsel (since they would not be deemed a “Reviewing Party”),³⁸ how are Pay Tel’s Outside Counsel supposed to utilize such information to advocate for their client “in a meaningful way” in order to “develop a more complete record” in this proceeding?³⁹ Even if Don Wood were to communicate with Pay Tel’s Outside Counsel “relying generally on examination of Stamped Confidential Documents or Confidential Information,” any such filing made by Pay Tel’s Outside Counsel that in any way “used” that general communication to advance Pay Tel’s position would almost certainly be attacked by other ICS providers as violating the Protective Order. Thus, following GTL’s desired outcome to its logical conclusion effectively “handcuffs” Pay Tel’s Outside Counsel from being able to, if necessary, utilize the Data Response to advocate for its client in this proceeding to develop a more complete record—in direct contravention to the Commission’s stated goal as set forth in the Protective Order and in direct contravention of the express terms of the Protective Order itself.

Certainly GTL has a legitimate interest in ensuring that its confidential information is not used against it for competitive purposes; however, that interest is ensured by the Protective Order

rulemaking can have a significant impact on whether commenters have had meaningful notice and opportunity to comment on the bases of an agency’s decision. One purpose of the requirement that agencies disclose the documents it deems relevant to a proceeding, therefore, is to ensure that interested parties have a full opportunity to participate in the proceeding by providing a different perspective on materials that may be relied upon by the agency.” *Id.* at ¶ 44 (also explaining that use of protective orders is appropriate where information is commercially sensitive). While the confidential information in the Data Response was not submitted into the record voluntarily, GTL nonetheless relies upon it in advocating for its “consensus” resolution to the matters involved in this rulemaking proceeding, including its proposal for flat rate caps; accordingly, Pay Tel’s Outside Counsel must be afforded the chance to review and analyze the Data Response in order to ensure a full opportunity to participate in this proceeding and, perhaps, provide a different perspective on the Joint Proposal.

³⁸ Protective Order at ¶ 8.

³⁹ *Id.* at ¶ 1.

issued in this proceeding, and GTL has presented no reason to believe that the protections of the Protective Order are not sufficient. A party should not be permitted to “game” the regulatory process in this manner by preventing other parties in their ability to understand, analyze and rebut confidential information put into the record.

The concerns here are not hypothetical in nature. In the Joint Proposal dated September 15, 2014, GTL advocated, apparently based on the data submitted, that the Commission should adopt one uniform price cap applicable to all facilities and all providers.⁴⁰ This advocacy contrasts with Pay Tel’s consistent advocacy in this proceeding that there are meaningful and substantial cost differences between the provision of ICS in jails and prisons and that any rate rules adopted by the Commission must account for these differences.⁴¹ Adoption of GTL’s “one rate” approach would obviously greatly advantage any particular competitor that served predominately below-average-cost facilities—such as would be the case for GTL itself if Pay Tel is correct that the cost of providing service in prisons is materially lower than the cost of providing service in jails. GTL cannot be permitted, on the one hand, to use its cost data to advance its advocacy in this proceeding and then, on the other hand, deny other parties the opportunity to review and evaluate the basis upon which these arguments are advanced. The

⁴⁰ See Joint Proposal at 2 (proposing flat rate caps of \$.20/minute for all debit and prepaid interstate and intrastate calls and \$.24/minute for all interstate and intrastate collect calls).

⁴¹ See, e.g., Pay Tel Comments in Response to FNPRM, at 17–24, WC Docket No. 12-375 (Dec. 19, 2013); Letter from Marcus Trathen, Counsel for Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (Aug. 2, 2013) (“Pay Tel Aug. 2 Ex Parte”); Pay Tel Aug. 1 Ex Parte Presentation at 3–5; Letter from Marcus Trathen, Counsel for Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (Aug. 1., 2013); Letter from Marcus Trathen, Counsel for Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (July 31, 2013) (“Pay Tel July 31 Ex Parte”); Pay Tel Ex Parte Presentation, “Inmate Calling Service (ICS) Market Distinctions: Prisons vs. Jails”, WC Docket No. 12-375 (July 3, 2013) (“Pay Tel Prisons vs. Jails Report”); Pay Tel May 31 Notice of Ex Parte; Pay Tel Reply Comments at 2, 4–12, WC Docket No. 12-375 (Apr. 22, 2013); Pay Tel Comments at 9–11, WC Docket No. 12-375 (Mar. 25, 2013).

very purpose of the mandatory data submission in the first place was so that the Commission would have data before it in order to complete its rulemaking on ICS rates and practices.

To this point, GTL's argument that Pay Tel has not demonstrated a need for the information⁴² misstates the applicable test. Pay Tel's representatives are entitled to review the information because Pay Tel is an active party to the proceeding, and they have satisfied the requirements set forth in the Protective Order. GTL has no right under the Protective Order to interrogate Pay Tel's representatives about the reasons why they "need" the data. They "need" the data in order to represent Pay Tel in this proceeding and advocate for Pay Tel's interests. Nothing more is required under the Protective Order. Regardless, Pay Tel's counsel's "need" for the data is made obvious by GTL's latest filing in this docket which advances a proposal which is transparently intended to advance its own economic interests on the backs of its competitors, including Pay Tel, and the public. Without access to GTL's data, Pay Tel is unable to adequately and sufficiently advocate for its own interests which are at stake in this proceeding.

The Protective Order gives certain Participants in this proceeding limited access to others' confidential and proprietary information while at the same time "protecting proprietary and confidential information from improper disclosure" ⁴³ Pay Tel's instant request is fully compliant with the terms of the Protective Order, and GTL has presented no explanation of why the Protective Order does not apply in this circumstance or why it should not be subject to its terms.

⁴² GTL Objection at 6–7.

⁴³ Protective Order at ¶ 1.

CONCLUSION

For the foregoing reasons, the Commission should require GTL to provide to Pay Tel's Outside Counsel the unredacted Data Response that has been requested under the terms of the Protective Order adopted in this proceeding.

Dated: September 24, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 24th day of September, 2014, the foregoing Response to Global Tel*Link Corporation's Objection to Disclosure of Confidential Information was served via First Class* or electronic** mail on the following persons:

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