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

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

PAY TEL COMMUNICATIONS, INC.'S REPLY COMMENTS TO OPPOSITION OF GLOBAL TEL*LINK CORPORATION TO PETITION FOR EXTENSION OF WAIVER OF INTERIM INTERSTATE ICS RATES

Pay Tel Communications, Inc. ("Pay Tel"), through its attorneys, respectfully submits these reply comments in response to the Oppositions of Global Tel*Link, Corp. ("GTL"),[1] to Pay Tel's Petition for Extension of Waiver ("Extension Petition"),[2] and to Pay Tel's supplement to its Extension Petition,[3] which Pay Tel submitted on October 31, 2014 and November 11, 2014, respectively.[4] Pay Tel's Extension Petition seeks extension of the waiver granted by the Bureau on February 11, 2014 ("Waiver Order").[5]

In the Waiver Order, the Bureau granted Pay Tel a waiver ("Waiver") providing limited, narrow relief from the interim rate cap on interstate calls adopted in the Commission's *ICS*

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[1] Opposition of Global Tel*Link Corp. to Pay Tel Communications, Inc.'s Petition for Extension of Waiver, WC Docket No. 12-375 (Nov. 5, 2014) ("GTL Opposition"); Opposition of Global Tel*Link Corp. to Pay Tel Communications, Inc.'s Supplement to Its Petition for Extension of Waiver, WC Docket No. 12-375 (Nov. 17, 2014) ("GTL Second Opposition") (collectively, ("GTL Opposition")).

[2] Pay Tel Communications, Inc., Petition for Extension of Waiver, WC Docket No. 12-375 (Oct. 31, 2014) ("Extension Petition").

[3] *See* Letter from Marcus W. Trathen, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, Notice of Ex Parte Presentation—Supplemental Information, WC Docket No. 12-375 (Nov. 11, 2014) ("Extension Petition Supplement").

[4] Pay Tel has also submitted in furtherance of its Extension Petition and in response to the Bureau's request its updated audited financial statements. *See* Letter from Marcus W. Trathen, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, Notice of Ex Parte Presentation—Supplemental Information, WC Docket No. 12-375 (Nov. 13, 2014).

[5] *Rates for Interstate Inmate Calling Services*, Pay Tel Communications Inc.'s Petition for Waiver of Interim Interstate ICS Rates, WC Docket No. 12-375, Order, 29 FCC Rcd 1302 (WC Bureau 2014) ("Waiver Order").

Order released September 26, 2013 in this docket.[6] As explained in its original Waiver Petition[7] and as reiterated in the Extension Petition, Pay Tel sought the Waiver and seeks extension thereof because it cannot recover its costs on a holding company level if it is required to charge the *ICS Order*'s interim interstate rates.[8] Because the *ICS Order*'s rate cap framework does not adequately address Pay Tel's demonstrated costs of providing ICS, Pay Tel meets the waiver standard the Commission set forth in the *ICS Order*; waiver of the interim interstate rate caps was appropriate earlier this year when the Waiver was granted and remains so today.

Reply To GTL's Opposition

In its *ICS Order*, the Commission established the relevant test for determining when a waiver of the interim interstate rate caps would be warranted:

> An ICS provider that believes that it has *cost-based rates for ICS that exceed our interim rate caps* may file a petition for a waiver. Such a waiver petition would need to demonstrate good cause to waive the interim rate cap. As with all waiver requests, the petitioner bears the burden of proof to show that good cause exists to support the request. The following factors may be considered in a request to waive the interim rate caps: costs directly related to the provision of interstate ICS and ancillary services; demand levels and trends; a reasonable allocation of common costs shared with the provider's non-inmate calling services; and general and administrative cost data. . . . We will evaluate waivers at the holding company level. . . . [W]e believe it is appropriate to evaluate waivers at a holding company level to obtain an accurate evaluation of the need for a waiver.[9]

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[6] Report and Order and Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC 13-113 (rel. Sept. 26, 2013) ("*ICS Order*").

[7] Pay Tel Communications, Inc., Petition for Waiver of Interim Interstate ICS Rates, WC Docket No. 12-375 (Jan. 8, 2014) ("Pay Tel Waiver Petition" or "Waiver Petition").

[8] *See, e.g., id.* at 12–19; Extension Petition at 17.

[9] *ICS Order* at ¶¶ 82–83 (emphasis added); *see also* Extension Petition at 4 (quoting same). The Commission delegated to the Bureau "the authority to request additional information [from ICS providers] necessary for its evaluation of waiver requests and to approve or deny all or part of requests for waiver of the interim rate caps . . . ." *ICS Order* at ¶ 84. The Commission noted that "evaluation of these waiver requests will require rate setting expertise, and that the Bureau is well suited to timely consider any waiver requests in that are filed." *Id.*

The Commission further explained that "ICS providers are *entitled to collect cost-based rates* and will have opportunities to seek waivers to the extent the framework adopted in this *Order* does not adequately address their legitimate costs of providing ICS."[10]

GTL's Opposition offers no new facts or analysis relevant to the test set out in the *ICS Order*. Most importantly, GTL does not challenge or rebut:

- Pay Tel's showing that it faces a net intrastate shortfall of approximately $1.7 million (annualized) if forced to lower its interstate rates to the Commission's interim rate caps due to the below-average-cost rate caps and restrictions in place in the states that Pay Tel predominantly operates.[11]

- Pay Tel's documentation of the intrastate rate caps and restrictions currently in effect which prohibit Pay Tel from recovering its average costs for the call type (local calls) that constitute approximately 80% of Pay Tel's total calls.[12]

- Pay Tel's facility-by-facility demonstration of its current calling demand for all call types that result in the intrastate revenue shortfall.[13]

- Pay Tel extensive documentation of its costs of providing ICS, including a fully-developed cost study submitted in July 2013 and a detailed facility-by-facility cost showing in response to the Commission's Mandatory Data Request.[14]

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[10] *ICS Order* at ¶ 105 (emphasis added); *see also* Extension Petition at 5 (quoting same).

[11] *See generally* Extension Petition Supplement; *id.* at Exhibit A (updated intrastate shortfall analysis); *id.* at Exhibit B (updated state-by-state revenue shortfall); *id.* at Exhibit C (declaration of Don Wood); Waiver Petition at 12–19; *id.* at Exhibit B (intrastate shortfall analysis); *id.* at Exhibit C (state-by-state revenue shortfall); *id.* at Exhibit H (declaration of Don Wood); *see also* Letter from Marcus W. Trathen, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2–3 and Attachments (filed Jan. 16, 2014) (revised shortfall analysis) ("Waiver Petition First Supplemental Filing").

[12] *See, e.g.*, Extension Petition, at Exhibit A (declaration of Vincent Townsend); Waiver Petition at Exhibit D (summary of intrastate rate restrictions); Waiver Petition First Supplemental Filing at 2 (discussing contractual "change in law" provisions).

[13] *See generally* Extension Petition Supplement; *id.* at Exhibit A (updated intrastate shortfall analysis); Waiver Petition at Exhibit B (intrastate shortfall analysis); Waiver Petition First Supplemental Filing at Attachment (revised shortfall analysis).

[14] *See generally, e.g.*, Letter from Marcus W. Trathen, Counsel for Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at Attachment (July 23, 2013) (Pay Tel Cost Study); *see generally* Letter from Marcus W. Trathen, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Pay Tel's Response to Mandatory Data Collection, at Attachment 3 (Aug. 18,

(continued . . .)

- Pay Tel's audited financial statements demonstrating Pay Tel's company-level financial condition.[15]

- Pay Tel's showing that it is unable to recover its total company costs if forced to lower interstate rates to the Commission's interim interstate rate caps.[16]

Rather than confront the facts Pay Tel put in the record in support of its Extension Petition, GTL instead chooses to "pound the table" by contending that the Waiver somehow vests Pay Tel with an unfair competitive advantage and that Pay Tel did not do "enough" to obtain relief from the state commissions and/or responsible facilities to warrant grant of relief from the harm that would be caused by application of the *ICS Order's* interim rates.[17] In other words, GTL apparently would have the Bureau deny relief—despite Pay Tel's demonstration that it has satisfied the prerequisite for grant of waiver set forth by the Commission in the *ICS Order*—because (a) ensuring that Pay Tel is able to recover its costs constitutes an unfair competitive advantage to Pay Tel, and (b) Pay Tel was unable, by itself, to solve the problem that the Commission created in its *ICS Order* by causing third parties that it does not control (state

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2014) ("Cost Analysis of Inmate Calling Services Provided by Pay Tel Communications, Inc., Prepared to Support the FCC's 2014 Data Collection"); *see also, e.g.*, Waiver Petition at Exhibit A (Cost Study).

[15] *See* Letter from Marcus. W. Trathen, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (Nov. 13, 2014) (providing 2012-13 audited financial statements); Letter from Marcus W. Trathen, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (Jan. 16, 2014) (providing 2011-12 audited financial statements).

[16] *See generally* Extension Petition Supplement; *id*. at Exhibit A (updated intrastate shortfall analysis); *id.* at Exhibit B (updated state-by-state revenue shortfall); *id.* at Exhibit C (declaration of Don Wood) Waiver Petition at 12–19; *id.* at Exhibit B (intrastate shortfall analysis); *id.* at Exhibit C (state-by-state revenue shortfall); *id.* at Exhibit H (declaration of Don Wood); Waiver Petition First Supplemental Filing at Attachment (revised shortfall analysis).

[17] GTL also argues that Pay Tel's need for a waiver is belied by its Ethical Proposal, which proposes jail rate caps be set at $0.26 and $0.22. Either GTL does not understand Pay Tel's proposal or it is willingly obfuscating the record. *See* Opposition at 7. Pay Tel, of course, proposed that rate caps in the amount of $0.26 and $0.22 be established <u>for all call types, including local calls</u>. *See* Ethical Proposal for Reform of Inmate Calling Rates and Fees Submitted by Pay Tel Communications, Inc., WC Docket No. 12-375, at 1 (Oct. 3, 2014). If Pay Tel's proposal were adopted, the intrastate shortfall would not exist, since Pay Tel would be recovering its costs for local calls.

commissions and its contract partners) to take action they are not inclined to take. Acceptance of these arguments has no basis in the waiver standard articulated by the Commission and would subvert the very purpose of the waiver process in the first place. Indeed, GTL does not explain what the purpose of the Commission's waiver process is in the first place if grant of a waiver is dependent on obtaining relief in another forum entirely.

First, the notion that Pay Tel is a competitive threat to GTL is preposterous.[18] Pay Tel only provides service to jails, and it has annual gross revenues of $26 million. GTL provides ICS in all 50 states, serving over 2,100 facilities, 1.1 million inmates, 27 state DOCs (including 12 of the largest 20), and over 800 counties (including 29 of the 50 largest), in addition to the Federal Bureau of Prisons;[19] it has annual gross revenues of some $500 million; and it has captured somewhere between 45-50% of the market. More fundamentally, as Pay Tel has shown in this proceeding,[20] the cost of serving prisons—GTL's predominant market—is considerably less than the cost of providing service in jails, so in those few instances where Pay Tel and GTL might compete for a jail client, GTL has the inherent ability to cross-subsidize from prisons to jails should it desire to do so to win a contract—a situation that creates continuous market peril

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[18] GTL's real motive for its Opposition in unveiled on the last page of it filing, where it chides Pay Tel for its Ethical Proposal, which proposes higher rate caps in jails than in prisons. *See* Opposition at 7. GTL is not concerned with the preposterous notion of competitive "balance" as against a company that it dwarfs; rather its objective is to silence a voice of reason (and ethics) in this proceeding.

[19] *See* GTL website, "Company Profile," *http://www.gtl.net/about-us/company-profile* (last visited Nov. 19, 2014).

[20] *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); Letter from Marcus Trathen, Counsel for Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 3–5 (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 Ex Parte Presentation, "Inmate Calling Service (ICS) Market Distinctions: Prisons vs. Jails", WC Docket No. 12-375 (July 3, 2013); 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).

for companies like Pay Tel. In point of fact, as shown in the Extension Petition, under the Waiver Pay Tel has not been winning contracts, it has been losing them (including losing one of its largest facilities to GTL!), which is hardly indicative of an unfair competitive advantage.

Second, GTL's complaints about Pay Tel's inability to pull itself up by its own bootstraps are misplaced. Pay Tel, recognizes, of course that the Bureau encouraged Pay Tel to "address below-average-cost rates mandates at their source—at the state level and with the individual facilities that it serves"[21] and further instructed in the Waiver Order that any subsequent waiver requests from Pay Tel would "require, at a minimum, a showing of its efforts to obtain relief from state-imposed regulatory mandates."[22] And Pay Tel did exactly this, as demonstrated in its Extension Petition. Pay Tel met with the relevant state commission members in the states primarily responsible for causing the intrastate shortfall; it educated them on the *ICS Order* and Pay Tel's Waiver; it pointed to the Commission's instruction that state commissions conform their efforts to those undertaken at the federal level; and it demonstrated that existing state rate caps are below Pay Tel's average costs.[23] Moreover, Pay Tel has met with its contract partners that impose below-average-cost rate restrictions in an attempt to persuade them to permit Pay Tel to deviate from the contractually required rates.[24] These are hardly "lackluster" efforts as portrayed by GTL,[25] particularly for a company like Pay Tel that does not have anywhere near the resources of GTL, and especially when one considers the current environment in which Pay

[21] Waiver Order at ¶ 19.

[22] *Id.* at ¶ 19 n.107.

[23] *See* Extension Petition at 10 n.46; *id.* at Exhibits A–C (declarations describing such efforts).

[24] *Id.* at Exhibit A (declaration of Vincent Townsend, describing such efforts).

[25] GTL Opposition at 5.

Tel is barely covering its costs to begin with[26] and is struggling to respond to the Commission's various requests for comments and data and otherwise provide helpful and meaningful participation in the ongoing proceeding. More to the point, GTL is in no position to sit in judgment of the magnitude of Pay Tel's efforts, and grant or denial of the Extension Petition certainly can't rise or fall on the question whether Pay Tel's efforts were sufficiently "lustered." The Waiver Order directed Pay Tel to make efforts to redress the problem that it identified and to report back, and Pay Tel did exactly that.[27]

GTL apparently would require Pay Tel to scale a virtually insurmountable hurdle in order to obtain extension of the Waiver Order —achieving intrastate rate reform on its own by making parties that it does not control take actions they do not want to take.[28] Moreover, GTL would apparently have Pay Tel spend money that it does not have on this fruitless undertaking. Pay Tel simply does not control the decisions of the relevant state commissions nor does it control the decisions of the contract partners that its serves. Pay Tel has carefully documented the various reasons why these third parties do not wish to relieve Pay Tel of the problem created by the

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[26] *See infra* n. 15.

[27] These efforts were discussed with Commission staff during the waiver period. *See* Extension Petition at 10 n.46 (citing Pay Tel, Notice of Ex Parte Presentation, WC Docket No. 12-375 (July 10, 2014)).

[28] The *interim* reforms implemented in the *Inmate Rate Order*, it must be remembered, came about *ten years* after the Wright Petitioners filed their initial rulemaking petition seeking relief. *See* Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Petition of Martha Wright et al. for Rulemaking or, in the Alterative, Petition to Address Referral Issues in Pending Rulemaking, CC Docket No. 96-128 (filed Nov. 3, 2003). Permanent reform has not yet been realized. Moreover, as Commissioner Clyburn lamented recently, states have been slow to follow the Commission's lead in reforming the ICS industry—even when urged and challenged by the Commission to take action. *See, e.g.*, *Second Further Notice*, at 72–73, Statement of Commissioner Mignon Clyburn, WC Docket No. 12-375 (rel. Oct. 17, 2014), http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1017/DOC-330005A3.pdf ("While I sincerely hoped that the states which have yet to reform their intrastate calling rate structures would have followed the FCC's lead, only a few have elected to do so."); *see also, e.g.*, *Inmate Rate Order*, at ¶ 130 ("[W]e encourage more states to eliminate site commissions, adopt rate caps, disallow or reduce per-call charges, or take other steps to reform ICS rates.").

Commission through its interim interstate rate caps; these reasons, while misguided from a regulatory point of view, are not without basis.[29] And, to this point, it should be noted that the existence of the Commission's ongoing reform efforts make it even more difficult to obtain rate relief, as regulators and contracting parties are reluctant to expend energy on matters which are under review at the federal level and upon which the Commission has tentatively concluded it intends to exercise its preemptive authority.

Moreover, the imposition of the additional hurdles suggested by GTL would conflict with Section 276. That provision imposes a statutory requirement that the Commission ensure that ICS providers are fairly compensated for each and every completed intrastate and interstate call.[30] Pay Tel's submissions demonstrate that application of the interim ICS rates to it will mean, as a matter of mathematical certainty, that Pay Tel will not be "fairly compensated" for local calls, which is a problem that Congress directed to this Commission's attention.

In short, Pay Tel did exactly what it was instructed to do in the Waiver Order and it cannot be faulted for the inaction of parties over which it has no control. GTL's protestations about the nature and extent of Pay Tel's "efforts" are simply misplaced.

Finally, GTL further states that the "waiver was not meant to grant Pay Tel a carte blanche exception to the Commission's adopted rates."[31] Pay Tel agrees. A waiver is required where an ICS provider shows that it cannot recover its costs on a holding company level. It is ironic that GTL, in its Second Opposition, tries to use Pay Tel's updated intrastate shortfall, which is slightly larger than a year ago,[32] as evidence that the Extension Petition should not be

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[29] *See, e.g.*, Extension Petition at 10 n.46 and Exhibits A–C.

[30] § 276(b)(1)(A).

[31] GTL Opposition at 2.

[32] Extension Petition Supplement at 2.

granted.[33] The reverse, of course is true. Pay Tel's revised shortfall demonstrates that the basis relied upon by the Bureau in granting the original waiver is unchanged and, in fact, the case for waiver is even more compelling than previously shown.

Conclusion

As shown above and in Pay Tel's filings in support of its Extension Petition, Pay Tel has demonstrated that it is unable to recover its total company costs if forced to lower interstate rates to the Commission's interim interstate rate caps. Moreover, grant of the Extension Petition will serve the public interest in that it will permit Pay Tel to continue as a going concern, allowing Pay Tel to continue providing highly-secure, high-quality ICS to the inmates and families in the facilities which it serves and to continue to be a voice for ethical ICS reform in this proceeding. For these reasons, Pay Tel's request for extension of its existing Waiver is warranted and should be granted.

[33] GTL Second Opposition at 2–3.

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Respectfully submitted,

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