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**ELECTRONICALLY FILED**

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

Re: **WC Docket No. 12-375: Rates for Interstate Inmate Calling Services**

Dear Ms. Dortch:

Pursuant to 47 C.F.R. § 1.1206(b)(1), the undersigned submits this written *ex parte* presentation in the above-referenced docket.

**1. The Commission Has Legal Authority to Limit or Prohibit Site Commissions**

Multiple provisions of the Communications Act of 1934, as amended (“Act”), provide the Commission with legal authority to limit or prohibit site commissions between inmate calling service (“ICS”) providers and correctional facilities.

It is well settled that the Act’s prohibition on unjust and unreasonable terms, conditions, prices and practices under Section 201(b) affords the Commission broad power to reject anticompetitive practices that are contrary to the public interest.<sup>1</sup> The Commission regularly exercised its authority under Section 201(b) to declare carrier practices unreasonable.<sup>2</sup> An unjust or unreason-

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<sup>1</sup> *Applications for Renewal of License Filed by United Telephone Co., of Ohio For Radio Common Carrier Stations KQA459 and KQA651 in the Domestic, Public Land Mobile Radio Service at Lima, Ohio, and Bellefontaine, Ohio*, 26 F.C.C.2d 417, ¶ 6 (citing *NBC v. U.S.*, 319 U.S. 190 at 222-223 (1943)).

<sup>2</sup> See e.g., *Cable & Wireless*, 166 F3d 1224 (D.C. Cir. 1999) (failing to follow mandatory international settlement benchmarks); *NOS Communications, Inc. and Affinity Network Incorporated*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 8133, ¶ 6 (2001) (deceptive marketing); *Exclusive Service*

able practice can “encompass a broad range of activities provided and rates charged...”<sup>3</sup> In general, a “practice is deemed anti-competitive to the extent that it harms the competitive process, thereby obstructing “competition's basic goals -- lower prices, better products, and more efficient methods.”<sup>4</sup> Because ICS site commissions are a significant factor driving excessive ICS rates,<sup>5</sup> they should be prohibited as an unreasonable practice.

The Commission’s authority under Section 201(b) to regulate site commissions is not constrained by the Commission’s characterization of site commissions as an apportionment of profits instead of a compensable cost for the provision of ICS.<sup>6</sup> The purpose of that decision was to prevent ICS providers from including site commissions in their interstate rates. Consistent with that goal, the Commission may decide that a site commission is not a compensable cost for setting rates because it has “no reasonable and direct relation to the provision of ICS”<sup>7</sup> and decide that it is an unreasonable practice that occurs “in connection” with ICS to obstruct lower rates.

Under Section 201(b), the Commission has clear authority to regulate contractual or other arrangements between common carriers and other entities, even those entities that are generally not subject to Commission regulation.<sup>8</sup> It may “modify ... provisions of private contracts when necessary to serve the public interest” and has done so when private contracts violate sections 201 through 205 of the Act.<sup>9</sup> It also has the authority to regulate contracts that “necessarily and

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*Contracts for Provision of Video Services in Multiple Dwelling Unites and Other Real Estate Developments*, 22 FCC Rcd 20235 (2007) (exclusive clauses in contracts between providers and MDU owners for the provision of video services).

<sup>3</sup> *Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.*, 423 F.3d 1056, 1068 (9th Cir. 2005).

<sup>4</sup> *Infonxx, Inc. v. New York Telephone Co.*, Memorandum Opinion and Order, 13 FCC Rcd 3589, ¶ 21 (1997) (citations omitted).

<sup>5</sup> *Rates for Interstate Inmate Calling Services*, Report and Order, 28 FCC Rcd 14107, ¶ 3 (2013), subsequent history omitted (hereinafter referred to as “*Interstate Rates Order*”).

<sup>6</sup> *Interstate Rates Order* at ¶ 54.

<sup>7</sup> *Id.*

<sup>8</sup> *See Promotion of Competitive Networks in Local Telecommunications Markets*, Opinion, 23 FCC Rcd 5385, ¶ 15 (2008) (citations omitted) (hereinafter referred to as “*Residential MTE Exclusivity Order*”).

<sup>9</sup> *Id.* at ¶ 17 (citing *Western Union Tel. Co. v. FCC*, 815 F2d 1495, 1501 (D.C. Cir. 1987)). *See also*, *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Memorandum Opinion and Order, 9 FCC Rcd 5154, 5207-10, paras. 197-208 (1994), *remanded on other grounds*, *Pacific Bell v. FCC*, 81 F3d 1147 (D.C. Cir. 1996); and *Competition in the Interstate Interexchange*

inseparably include[]” interstate service as well as intrastate service.<sup>10</sup> The Commission, for example, prohibited carriers from entering into or enforcing exclusivity clauses in contracts with building owners for the provision of telecommunications services to commercial and residential customers in multiple tenant environments (“MTE”) because such exclusivity arrangements were an unreasonable practice that harmed competition in the telecommunications market.<sup>11</sup> Such exclusive MTE arrangements included the provision of interstate, international and intrastate telecommunications services. Like those exclusive MTE contracts, correctional facilities generally enter into an exclusive contract that “necessarily and inseparably includes” the provision of interstate and intrastate services, and the Commission therefore has authority to prohibit ICS providers from entering into or renewing contracts that provide for site commissions.

Section 276 provides the Commission with broad authority to regulate ICS.<sup>12</sup> Specifically, Section 276(b)(1)(A) requires the Commission to ensure that all payphone service providers (“PSPs”), including ICS providers, are “fairly” compensated for both interstate and intrastate calls.<sup>13</sup> Fairness encompasses both the compensation received by providers and the rates paid by end users.<sup>14</sup> Site commissions frustrate the Commission’s ability to achieve this statutory objective of “fair” compensation because a correctional facility lacks the incentive to choose the lowest-cost provider and drive ICS rates lower. Existing market forces instead motivate the facility to award its exclusive contract to the ICS provider willing to pay the highest commission, and it is the ICS users and their families and friends that bear the burden of these excessive costs.

The Commission may determine that the existing negotiation process between ICS providers and correctional facilities is anti-competitive. ICS users and their families and friends do not have the option to choose an alternative provider because correctional facilities almost always grant exclusive contracts to a single firm due to security concerns. In contrast, a premise owner in the public payphone market does not have the same need to have a single ICS provider for security measures. Also, unlike correctional facilities, a premise owner wants to increase business at its

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*Marketplace*, CC Docket No. 90-132, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 2677, 2681-82, paras. 23-28 (1992)).

<sup>10</sup> See *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd 22983, ¶ 35 (2000).

<sup>11</sup> *Id.* at ¶¶ 160-64 (applicable to commercial customers); *Residential MTE Exclusivity Order* at ¶¶ 5, 14-15 (applicable to residential customers).

<sup>12</sup> 47 U.S.C. § 276(d).

<sup>13</sup> 47 U.S.C. §276(b)(1)(A).

<sup>14</sup> *Interstate Rates Order* at ¶ 14.

location and may pay a provider to install a public payphone on the premises to generate value.<sup>15</sup> Given these differences between the ICS market and the public payphone market, diverse treatment of site commissions under Section 276 is warranted.

The Commission also has authority under section 276(b)(1)(E) to regulate the negotiations between correctional facilities and ICS providers.<sup>16</sup> The statute provides that all PSPs have the right “to negotiate” with the site owner. Clearly, limiting the terms to which regulated carriers can agree in such negotiations falls within the ambit of the Commission’s duty to adopt regulations permitting payphone service providers to negotiate with property owners.<sup>17</sup> The Commission has adopted a similar position in the context of retransmission consent, where it found that the statute authorizing the agency to regulate “retransmission consent negotiations” permitted the agency to prohibit joint retransmission consent negotiations between one or more of the top four television stations in the same geographic market.<sup>18</sup> The Commission took such action because evidence showed that joint negotiations between top four stations increased retransmission consent fees and put pressure on the retail rates charge by distributors.<sup>19</sup> The site commissions at issue here likewise place upward pressure on the rates ICS providers charge.

Nor is there any merit to the argument that the Commission cannot regulate site commissions for intrastate calling.<sup>20</sup> Congress clearly instructed the Commission to establish a compensation regime for PSPs so that they are “fairly compensated for each and every completed *intrastate and interstate call*.”<sup>21</sup> Section 276(b)(1) directs the agency to “take all actions necessary ... to proscribe regulations” implementing the compensation plan. The correctional institutions and some providers like CenturyLink claim that this command does not mean what it says. CenturyLink, for example argues that this provision was only meant to address concerns regarding “dial-around” calls, despite the fact that “dial-around” appears nowhere in the statutory text.<sup>22</sup>

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<sup>15</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545, ¶ 156 (1999).

<sup>16</sup> 47 U.S.C. §276(b)(1)(E).

<sup>17</sup> One party has argued that this statutory provision actually prohibits the Commission from adopting regulations that limit the potential outcomes of negotiation. This argument was addressed and rebutted in the undersigned’s Reply Comments filed in the above-referenced docket on Jan. 26, 2015, at pp. 3-5.

<sup>18</sup> *Amendment of the Commission’s Rules Related to Retransmission Consent*, 29 FCC Rcd 3351, 3357 ¶ 10 (2014).

<sup>19</sup> *Id.* at 3363 ¶ 17.

<sup>20</sup> See CenturyLink Reply Comments at 9-14 (dated 1/27/15).

<sup>21</sup> 47 U.S.C. § 276(b)(1)(A).

<sup>22</sup> CenturyLink Reply Comments at 5.

CenturyLink further argues that section 276(b)(1)(A) “has no bearing on rates charged to end users”<sup>23</sup> even though the D.C. Circuit rejected that same argument in 1997.<sup>24</sup>

CenturyLink<sup>25</sup> also misconstrues the relevant precedent, such as *Ill. Pub. Telecom Assoc.*, that plainly affirmed the Commission’s authority over intrastate payphone services.<sup>26</sup> CenturyLink seems to rely on the D.C. Circuit’s decision in *New England Pub Comm’ns. v. FCC*, 334 F.3d 69, 78 (D.C. Cir. 2003), for the proposition that the agency’s role with respect to intrastate payphone regulation is limited.<sup>27</sup> But that case did not address the scope of the Commission’s authority under Section 276(b)(1)(A); instead, it rejected the argument advanced by PSPs (that was not adopted by the Commission in the order on review) that the Commission should impose the same nondiscrimination and nonstructural safeguards that the agency imposed on the Bell companies to all incumbent local exchange carriers (“ILECs”) generally.<sup>28</sup> While the D.C. Circuit found that the Commission lacked authority under sections 276(a) (nondiscrimination) and 276(b)(C) (nonstructural safeguards) to impose similar regulations on non-Bell Operating Company ILECs, the case did not call into question the general command in Section 276(b)(1)(a) requiring the agency to adopt a compensation plan providing for fair compensation for intrastate as well as interstate calls.

The record in this proceeding overwhelmingly demonstrates that the payment of site commissions unreasonably distorts the ICS marketplace and causes unfair compensation. Individual contracts for site commission continue to increase and are as high as 96% of gross revenues.<sup>29</sup> ICS users and their families and friends spent over \$460 million in 2013 to pay for site commis-

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<sup>23</sup> *Id.* at 6.

<sup>24</sup> *Ill. Pub. Telecom Assoc. v. FCC*, 117 F.3d 555, 562 (D.C. Cir. 1997) (finding that “Congress has in fact used the term ‘compensation’ elsewhere in the [Communications] Act in such a way so as to encompass rates paid by callers.”)

<sup>25</sup> CenturyLink Reply Comments at 7-10.

<sup>26</sup> *Ill. Pub. Telecom Assoc.*, 117 F.3d at 562 (holding that Section 276 grants FCC authority to regulate rates for “local” payphone calls). CenturyLink’s Reply Comments (at 9) place weight on the fact that the Commission, until now, has yet to assert authority under section 276 to regulate site commissions. That is simply irrelevant. The Commission is not obligated to announce its views on the scope of its authority under the Act related to problems that have yet to materialize.

<sup>27</sup> CenturyLink Reply Comments at 9.

<sup>28</sup> *See New England Pub Comm’ns.*, 334 F.3d at 78.

<sup>29</sup> *Rates for Interstate Inmate Calling Services*, Second Further Notice of Proposed Rulemaking, WC Docket No. 12-375, FCC 14-158, ¶ 26 (rel. Oct. 22, 2014) (hereinafter referred to as “*Second FNPRM*”).

sions<sup>30</sup> and do not have a seat at the bargaining table regarding the amount or the use of site commissions, which fund a wide range of programs and activities that are not directly related to the provision of ICS. Given the ample evidence in the record, the Commission has the authority to find the paying of site commissions by ICS providers an unreasonable practice and prohibit ICS providers from entering into site commission arrangements with correctional facilities for the provision of ICS. It also has the authority to find site commissions result in payment of unfair compensation by ICS customers.

Finally, as a backstop source of authority in addition to the express statutory jurisdiction conferred by the provisions discussed above, Section 4(i) of the Act provides that the Commission may “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”<sup>31</sup> This allows the Commission to take those actions necessary to fulfill the mandate of the Act, even if such actions are not expressly prescribed by the Act. The Commission is therefore not barred from prohibiting site commissions merely because Congress did not explicitly direct the Commission to do so. As the Seventh Circuit explained, “Section 4(i) empowers the Commission to deal with the unforeseen – even if that means straying a little way beyond the apparent boundaries of the Act – to the extent necessary to regulate effectively those matters already within its boundaries.”<sup>32</sup>

Federal courts have long established that the Commission may exercise ancillary jurisdiction when: (1) its general jurisdictional grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.<sup>33</sup> Courts have come to call the Commission’s section 4(i) power its “ancillary” authority.<sup>34</sup> These principles certainly apply here. ICS is “communication by wire or radio” within the general jurisdictional grant of section 2 of the Act. And the prohibition of site commissions is reasonably ancillary to the Commission’s responsibilities under Sections 201 and 276 and serves the public interest. Applying such a prohibition will ban an anticompetitive practice that distorts competition, and leads to excessive rates for ICS.

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<sup>30</sup> *Second FNPRM* at ¶ 23.

<sup>31</sup> 47 U.S.C. § 154(i).

<sup>32</sup> *North American Telecommunications Association v. FCC*, 722 F.2d 1282, 1292 (7th Cir. 1985).

<sup>33</sup> *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010). *See also*, *American Library Ass’n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005).

<sup>34</sup> *Id.* (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest Video I*), and *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Midwest Video II*)).

Under these multiple sources of authority, the Commission may prohibit ICS providers from paying site commissions entirely, or alternatively might prohibit them from paying site provisions that exceed a reasonable recovery of legitimate costs incurred by the host facilities caused directly by the provision of ICS on their premises.<sup>35</sup> As discussed in the following section, however, the record currently is devoid of any evidence sufficient to support a finding of any demonstrable costs incurred by correctional facilities as a direct result of the provision of ICS to their inmates. Therefore, it would be arbitrary and capricious, on the existing record, for the Commission to adopt any specific allowance or safe-harbor level of commission payments.

## **2. Correctional Facilities Have Not Provided Legally Cognizable Evidence of Their Alleged ICS Costs**

More than 65 filings have been submitted by correctional facilities and associations claiming inmate calling service (“ICS”) revenues from site commissions are needed. Of those, fewer than ten produced any cost data to support their claims. As described below, none of the few entities that provided cost data sufficiently explained and documented their data inputs and cost allocation methodologies or produced work papers to evaluate their analysis. All of the submissions lack the kind of detail that would be required in a rate proceeding to justify their accuracy and are deficient as compared with ICS providers’ detailed cost analysis supported by expert economist reports.

The Commission can reject the broad unsupported claims of the correctional facilities and associations because relying on them would be arbitrary and capricious decision making. The agency cannot rely on data or cost methodologies submitted in the record “without ascertaining the accuracy of the data contained in the study or the methodology used to collect the data.”<sup>36</sup> Such a decision would be “arbitrary agency action, and the findings based on [such a] study are unsupported by substantial evidence.”<sup>37</sup> In other words, it is error for the Commission to rely on cost data that have “no explanation or underlying support.”<sup>38</sup>

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<sup>35</sup> If the Commission elects not to apply such restrictions to *existing* site contracts, at least during their current unexpired terms, then it would have to permit ICS providers to charge rates sufficient to recover those commission payments in addition to their direct costs of offering service.

<sup>36</sup> *City of New Orleans v. SEC*, 969 F.2d 1163, 1167 (D.C. Cir. 1992).

<sup>37</sup> *Home Health Care, Inc. v. Heckler*, 717 F.2d 587, 592 (D.C. Cir. 1983) (footnote omitted); cf. *Ohio Bell Tel. Co. v. Public Utils. Comm’n*, 301 U.S. 292, 303 (1937) (“[H]ow was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?”).

<sup>38</sup> *City of New Orleans v. SEC*, 969 F.2d at 1167.

As a general rule, the Commission requires sufficient detail about the methodology, calculations, assumptions, and other data used to develop submitted costs.<sup>39</sup> Such detail is necessary to provide the capability to examine and modify the critical assumptions and to ensure transparency.<sup>40</sup> That is, the logic and algorithms should be “revealed, understandable, capable of being adjusted by the parties and regulators, and not contain ‘black boxes.’”<sup>41</sup> Submissions that lack sufficient detail to evaluate claimed costs are typically rejected by the Commission.<sup>42</sup> A submission, for example, that summarizes results and does not disclose the inputs used cannot be replicated or confirmed and therefore may be refused.<sup>43</sup>

The Commission can determine the types of costs that are allowable or disallowed as being caused directly by the provision of ICS. The “used and useful” standard provides the foundation of Commission decisions evaluating whether particular investments can be included in a carrier’s revenue requirement. Property, for example, is considered “used and useful” for regulatory ratemaking if it is “necessary to the efficient conduct of a utility’s business, presently or within a

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<sup>39</sup> *Federal-State Joint Board on Universal Service et al.*, Tenth Report and Order, 14 FCC Rcd 20156, ¶ 107 (1999).

<sup>40</sup> *Universal Service First Report and Order*, Report and Order, 12 FCC Rcd 8776, ¶ 250 (1997) (setting forth criteria for forward-looking cost methodologies).

<sup>41</sup> *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 17722, ¶ 48 (2003).

<sup>42</sup> See, e.g., *Broward County, Florida and Sprint Nextel Corporation Mediation No. TAM-50073*, Memorandum Opinion and Order, 26 FCC Rcd 7635, ¶¶ 44-45 (2011) (rejecting requested spectrum relocation costs for failing to provide justification such as what work the costs would cover); *WTVG, Inc., Petition for Waiver of Section 76.92(f) of the Commission’s Rules*, Memorandum Opinion and Order, 25 FCC Rcd 12263, ¶ 19 (2010) (rejecting a cable operator’s costs analysis to stop carrying a duplicate station because it merely introduced a laundry list of costs); *Numbering Resource Optimization et al.*, Second Report and Order, Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200, and Second Further Notice of Proposed Rulemaking in CC Docket No. 99-200, 16 FCC Rcd 306, ¶ 182 (2000) (finding amount and detail of data insufficient to determine shared industry and direct carrier-specific costs of thousands-block number pooling); *Petition of Pacific Bell Telephone Company Under Section 69.4(g)(1)(ii) of the Commission’s Rules for Establishment of New Service Rate Elements*, Memorandum Opinion and Order, 13 FCC Rcd 6545, ¶ 9 (1998) (suspending tariff revisions for failing to provide sufficient cost justification and other support to permit a full assessment of the reasonableness of the proposed charges and rate structures).

<sup>43</sup> See *Access Charge Reform (CALLS II Order)*, Opinion, 17 FCC Rcd 10868, ¶¶ 33-36 (2002) (refusing to use carrier cost studies that summarize results because it is impossible to replicate or confirm the results without disclosing the inputs used).

reasonable future period.”<sup>44</sup> The Commission has investigated and invalidated access rates when the carrier failed to demonstrate an increase in operating expenses and an excessive rate of return.<sup>45</sup> The Commission has also prohibited a business from including goodwill or other intangible costs.<sup>46</sup>

The Commission has identified general principles regarding what constitutes “used and useful” but has recognized “that these guidelines are general and subject to modification, addition or deletion. The particular facts of each case must be ascertained in order to determine what part of a utility’s investment is used or useful.”<sup>47</sup> One is the equitable principle that ratepayers should not be forced to pay a return except on investments that can be shown to benefit them.<sup>48</sup> The Commission considered this equitable principle when it determined a portion of the cost of a video cable, not then being used to provide video service, was partially eligible for inclusion in the rate base.<sup>49</sup> “In balancing the equities between the interests of carriers and rate payers, the Commission found that ‘video service customers have benefitted to some degree from [the] decision to include [polyethylene shielded video] cable in composite sheaths.’”<sup>50</sup>

None of the correctional facilities and associations submitted sufficient detail in this proceeding either to support the amount of their alleged costs, or to demonstrate that these costs meet the used and useful standard. In fact, many correctional facilities misleadingly claim to be entitled to payment for activities that have nothing to do with the provision of a telecommunications service. They improperly identify several activities, such as surveillance and investigation of calls, that are basic law enforcement activities and not costs for providing a telecommunications service. Correctional facilities typically monitor or supervise *all* communications between inmates and outside parties, such as mail and in-person visits, as part of their internal security function. Likewise, if inmates commit crimes or violate prison rules while communicating in

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<sup>44</sup> *Sandwich Isles Communications, Inc. Petition for Declaratory Ruling*, Opinion, 25 FCC Rcd 13647, ¶ 12 (2010) (citing *American Tel. and Tel. Co.*, Phase II Final Decision and Order, 64 FCC 2d1, at 38, para. 111 (1997) (*AT&T Phase II Order*)).

<sup>45</sup> See *Beehive Telephone Company, Inc., Tariff FCC No. 1*, Memorandum Opinion and Order, 13 FCC Rcd 2736 (1998), *modified on recon.*, 13 FCC Rcd 11795 (1998), *aff’d*, *Beehive Telephone Co., Inc. v. FCC*, 180 F3d 314 (1999).

<sup>46</sup> *Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation*, 11 FCC Rcd 2220, ¶ 42 (1996).

<sup>47</sup> *Sandwich Isles* at ¶ 12.

<sup>48</sup> *Id.*

<sup>49</sup> See *Investigation of Special Access Tariffs of Local Exchange Carriers*, FCC 86-52 (1985), *re-manded on other grounds*, *MCI Telecom. Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988).

<sup>50</sup> *Sandwich Isles* at ¶ 14.

person or by mail, the correctional facility will incur costs to investigate and prosecute these offenses. These functions are part of the general duties of law enforcement, regardless of the medium of communication used, and the cost of these functions is part of the cost of operating a correctional facility, not a cost to be borne by the recipient of a letter, the prison visitor, or the other party to a telephone call.

As another commenter pointed out, the funding of law enforcement activities “is the responsibility of government ... [not] telecommunications costs that should be paid from ICS rate revenue.”<sup>51</sup> The use of an ICS security tool by an investigator to secure a conviction or spot illegal activity that happens to involve the use of a telephone does not transform their time into an ICS cost, and such costs should be paid by governments if they help investigators to perform their job.<sup>52</sup> Correctional facilities must supervise inmate movements at all times, and supervising movements to make a telephone call does not make such expense an ICS cost as opposed to a general operating cost.<sup>53</sup> Costs for free calls that are statutorily required are not an ICS cost but attributable to external legal requirements that should be funded by general revenues.<sup>54</sup> To the extent that correctional facilities handle inquiries from the U.S. Marshals, those costs should be recouped under contracts with the U.S. Marshals and not site commissions.<sup>55</sup> Simply put, all of the aforementioned activities are part of the general duties of law enforcement and are not directly related to the provision of ICS.

Several commenters likewise inappropriately identify educational and welfare costs. These programs may be beneficial to society but they are not telecommunications services and telecommunications consumers should not have the responsibility to pay for them.<sup>56</sup> As the Commission acknowledged, “the Act does not provide a mechanism for funding social welfare programs or other costs unrelated to the provision of ICS, no matter how successful or worthy.”<sup>57</sup> Yet, in 2013, “ICS users and their families, friends and lawyers spent over \$460 million to pay for programs ranging from inmate welfare to roads to correction facilities’ staff salaries to the state or county’s general budget ... [which] appears to be of limited relative importance to the combined budgets of correctional facilities [but] has life-altering impacts on prisoners and their

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<sup>51</sup> See Prison Policy Initiative Reply Comments at p. 7 (dated 1/26/15).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at p. 9.

<sup>54</sup> *Id.* at p. 8.

<sup>55</sup> *Id.*

<sup>56</sup> See Ex Parte Letter from Andrew Lipman to Marlene Dortch (dated 2/20/15).

<sup>57</sup> *Interstate Rates Order* at ¶ 57.

families.”<sup>58</sup> These individuals should not have to disproportionately bear the costs for educational and welfare programs. The costs should be paid for from general revenue sources because reducing recidivism and providing basic care are core responsibilities of the correctional facilities and the governments that imprisoned the offenders.<sup>59</sup> The Commission also should not be swayed by spurious arguments that educational and welfare programs will be eliminated without site commissions. States like New York banned ICS commissions and still managed to obtain funding from other resources to continue beneficial educational and welfare programs.<sup>60</sup>

The undersigned responds below to the cost assertions and data submitted by each of the correctional facilities and associations. In short, the correctional facilities have not documented costs that are actually caused by the provision of ICS and have provided only unverified and undocumented assertions without sufficient detail about the methodology, calculations, assumptions, and other data to evaluate and validate cost information.

The National Sheriffs’ Association (“NSA”) asserts that every jail incurs costs for officers’ time to maintain security and administer the ICS system and provides some information from a survey it conducted of its 3,000 members regarding the amount of time spent on security and administrative duties in connection with ICS.<sup>61</sup> The Commission should reject this survey as inconclusive given that only 5% of NSA’s members (about 152) responded (and there is no analysis of whether these respondents constitute a representative sample of the membership), only “the most recent three months of data” were used, and no calculations were provided of average costs and standard deviation. The submission should also be rejected because it does not provide sufficient details to validate the result. Specifically, NSA does not separately identify the costs for each task and instead separates information into two broad categories (administrative and security) and by employee type (e.g., officer, supervisor and other). NSA does not specifically explain what may be encompassed by “other duties” in the two categories or “other” type of employee. NSA does not explain the methodology for allocating time between various tasks and categories, particularly any shared time and costs. NSA also did not produce a copy of the survey or any work papers.

NSA also claims that ICS revenues are needed for trained officers to “daily monitor and review information to protect the public from abuse and prevent criminal activity.” However, as explained above, these are basic law enforcement activities that have nothing to do provision of

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<sup>58</sup> *Second FNPRM* at ¶ 23.

<sup>59</sup> *See* Prison Policy Initiative Reply Comments at p. 3.

<sup>60</sup> *See*, Human Rights Defense Center Reply Comments at p. 3 (dated 1/27/15).

<sup>61</sup> National Sheriffs’ Association Comments (dated 1/12/15).

ICS. Thus, the Commission should decline to include any basic law enforcement activity as a cost for providing ICS.

Praeses LLC claims that a survey of its Correctional Clients demonstrates an average cost per minute of \$0.18 (and \$1.88 per call and \$34.46 per inmate) with a standard deviation of \$0.12.<sup>62</sup> However, Praeses admits the raw data demonstrated “dramatic disparity” because different parties may include different types of costs and/or measure and prorate costs in different ways, resulting in non-standardized cost information.<sup>63</sup> The Commission should therefore reject this survey. Praeses did not disclose how many correctional facilities responded or what period of time was used by the various respondents. Also, although Praeses provided a sample copy of the survey, it did not provide any work papers and did not explain or document its methodology for using the raw data to calculate the average costs and standard deviations.

Cook County, Illinois indicates that it receives \$2.4 million annually (which is approximately equivalent to \$0.08 per minute) to perform a wide variety of tasks related to ICS operation, which are comprised of managing the contract and monitoring provider performance (\$138,000); enrolling new detainees into the ICS system (\$114,000); resetting or re-enrolling detainees in its voice biometric system (\$710,000); monitoring calls and retrieving/copying call recordings (\$362,000);<sup>64</sup> administrating a debit card program (\$441,000); and inspecting phones, responding to telephone-related grievances, and facilitating phone maintenance (\$318,000).<sup>65</sup> While this report provides some details about staffing salaries, benefits, and hours spent on each task, its cost information is far less comprehensive than the studies filed by ICS providers. For example, the ICS provider cost studies separately identify types of costs (e.g., direct costs, shared costs) and describe the step-by-step process to categorize and allocate costs, including a break-down of site commissions between local, intra-LATA, inter-LATA, interstate, and international services. The ICS provider cost studies determine standard deviations and address items that can affect cost averages like unpredictable call volume. They also identify who conducted the analysis and his or her qualifications do so. Cook County did not provide this level of detail.

Approximately 12 California sheriffs describe a California law that requires all commission proceeds to be deposited into inmate welfare funds (IWFs) and list numerous educational and welfare programs paid for by the IWFs such as substance abuse education and treatment programs, re-entry services, vocational programs, life skills, counseling, legal research, religious services and ministry, enhanced medical services, hygiene items, books, newspapers, board

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<sup>62</sup> Praeses LLC Comments at p. 35 (dated 1/12/15).

<sup>63</sup> *Id.* pp. 35-36.

<sup>64</sup> As noted above, monitoring and recording calls is properly a general law enforcement function, since the facility is required to monitor all inmate communications regardless of the medium.

<sup>65</sup> Cook County, IL Comments (dated 1/12/15).

games, playing cards, exercise equipment, televisions and television service.<sup>66</sup> However, the California law merely requires any such proceeds to be deposited into welfare funds *if* collected, and does not require the collection of site commissions. These California sheriffs make no attempt to explain how these educational and welfare programs are connected to the provision of ICS or why they should be paid for by telecommunications consumers rather than as part of the general prison budget.

The California sheriffs also do not provide justification for their IWF or other costs. Several simply declare an overall budget or expected impact. For example, the Orange County Sheriff states the FCC proposal would reduce its IWF by 70% or \$4.3 million. The Kern County Sheriff states almost 50% of its IWF budget of \$3.9 million is generated from ICS commissions of \$1.8 million annually. The Alameda County Sheriff states \$8.5 million is spent to support IWF and removal of commissions and in-kind payments would reduce and/or eliminate the programs and services. Shasta County Sheriff states phone commissions fund nearly \$240,000 of inmate programs and services.

Similarly, San Francisco claims it spent about \$1.1 million of IWF amounts for staffing (\$572,606); recidivism reduction programming (\$381,453); and inmate services and supplies (\$180,599), but does not describe how these costs relate to ICS or provide any justification for the costs. The Los Angeles County Sheriff estimates a \$6 million annual cost to service and maintain the ICS system, including investigatory actions, but provides no specifics about the tasks that comprise that estimate. Another commenter submitted a copy of the Los Angeles County IWF expense account, which includes a variety of costs including clothing and personal supplies; food; household expenses; and medical, dental and lab supplies,<sup>67</sup> and highlighted inconsistencies between the use of IWF funds by Los Angeles County and information submitted by San Francisco stating that IWF amounts cannot be used for meals, clothing, housing or medical services.<sup>68</sup>

Imperial County Sheriff estimates that its operational expenses for ICS are \$215,000 a year or \$0.34 per minute. It produced certain employee salary and hour information used to calculate the

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<sup>66</sup> Alameda County, CA Sheriff's Office Comments (dated 1/16/15); Imperial County, CA Sheriff Comments (dated 12/30/14); Kern County, CA Sheriff's Office Comments (dated 1/5/15); Los Angeles County, CA Comments (dated 1/9/15) Orange County, CA Sheriff Comments (dated 12/30/14); Riverside County, CA Sheriff Comments (dated 12/30/14); San Bernardino County, CA Sheriff's Department Comments (dated 11/6/14); San Diego County, CA Sheriff's Department Comments (posted 1/26/15); San Francisco City and County, CA Sheriff's Department Comments (filed 12/15/14); Santa Barbara County, CA Sheriff Comments (dated 1/12/15); Shasta County, CA Sheriff Comments (dated 1/8/15); Ventura County, CA Sheriff Comments (dated 12/16/14).

<sup>67</sup> Human Rights Defense Center Comments, Exhibit A (dated 1/13/15).

<sup>68</sup> Human Rights Defense Center Reply Comments (dated 1/27/15).

estimate but does not explain the tasks connected to provision of ICS, how costs might be prorated or shared, or the methodology for assigning hours. It also claimed that “monitoring, detecting and following-up account for 25% of the workload” for one full-time officer.<sup>69</sup> It did not explain how the percentage was calculated or how these basic law enforcement activities should be charged to the provision of ICS.

San Bernardino County Sheriff claims the FCC proposal would reduce its IWF by 52% or \$2.45 million and asserts its annual expenditures are approximately \$456,000 per year for safety and security, \$271,700 per year for investigative and analytic tools, and \$345,600 per year for free calls mandated by statute. It did not produce any information to support its calculations such as employee salaries and hours, specific activities and tasks covered under each category, and methodology for allocating, prorating and splitting shared costs. It also overstates the ICS-related costs by including basic law enforcement activities such as investigations.

Ventura County Sheriff claims it spent \$511,538 a year or \$0.142 per minute for ICS costs and about \$2 million on IWF staff and programs. It produced certain information used to calculate its expenses including employee salaries and benefits, individual employee’s percentage of time related to ICS, and bi-weekly and annual phone support costs per employee. It broadly describes responsibilities, including several investigative tasks, but does not detail how costs might be prorated or shared and the methodology for determining the percentage. Like San Bernardino County, it overstates ICS-related costs by including basic law enforcement activities such as investigative tasks.

The nine State Department of Corrections (“DOCs”)<sup>70</sup> claim ICS revenues are needed to support programs unrelated to the provision of ICS, such as education programs; legal research and services; treatment programs for substance abuse and sex offenses; re-entry programs like transitional housing and bus tickets; and materials for inmates like newspapers, books, recreational and fitness equipment, furniture, and television service. If these programs and materials better serve inmates and communities, state policy makers should be willing to allocate funds for these purposes, even absent ICS commission revenue.<sup>71</sup> Several DOCs also claim ICS revenues are needed for monitoring and investigations, but these are basic law enforcement activities and not part of the provision of ICS.

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<sup>69</sup> Imperial County, CA Sheriff Comments at p. 2.

<sup>70</sup> Arizona Department of Corrections Comments (dated 12/31/15); Georgia Department of Corrections Comments (dated 1/12/15); Idaho Department of Corrections Comments (dated 11/20/14); Kansas Department of Corrections Comments (dated 12/16/14); Montana Department of Corrections Comments (dated 12/29/14); Ohio Department of Corrections Comments (dated 1/12/15); Oklahoma Department of Corrections Comments (dated 1/6/15); Oregon Department of Corrections Comments (dated 12/9/14); Tennessee Department of Correction Comments (dated 1/12/15).

<sup>71</sup> See Human Rights Defense Center Reply Comments (dated 1/27/15).

None of the DOCs attempt to quantify specific ICS costs, other than the Georgia DOC which admits that ICS costs are not clearly defined in its budget “in a way that accurately reflects its overall monetary and non-monetary operational and capital expenditures associated with ICS.”<sup>72</sup> Nonetheless, the Georgia DOC estimates its monthly costs as approximately \$167,000 by conducting a survey to identify day-to-day tasks under six categories, hours spent on each task, and salaries of employees with any involvement or interaction with ICS. This submission lacks details to validate the result because it does not describe the number of participants in survey, the identified day-to-day tasks, the method for categorizing tasks, or the method for allocating any shared costs. The Georgia DOC also did not produce a copy of the survey or any work papers.

Seven associations and groups<sup>73</sup> submitted comments that ICS revenues are needed to support programs unrelated to the provision of ICS such as education and welfare programs. As noted above, these programs are not telecommunications services and it is not the responsibility of telecommunications consumers to pay for them.<sup>74</sup> These commenters also assert ICS revenues are needed for crime interdiction and prosecution; monitoring; recording and providing copies of calls to law enforcement and courts; and investigative functions – all of which are basic law enforcement activities and should not be funded by ICS revenues. Furthermore, contrary to the Virginia Jail Association’s claim, maintenance and repair of equipment is handled by the provider and not the correctional facility.

A few items listed by the Oregon State Sheriff’s Association are unlikely to result in regular and/or material costs, such as writing requests for proposals and negotiating a contract, conducting background checks on provider employees with access to the facility; and training staff. Nonetheless, commenter did not provide any documentation of such costs.

Approximately 27 form letters<sup>75</sup> submitted by local government officials state that site commissions are necessary to their budgets and list several activities that they claim create costs. How-

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<sup>72</sup> See Georgia DOC Comments at p. 17-18.

<sup>73</sup> Chief Probation Officers of California Comments (dated 1/1/15); California State Sheriffs’ Association Comments (dated 12/19/15); Florida Sheriffs’ Association Comments (dated 1/5/15); Oregon State Sheriffs’ Association Comments (dated 1/5/15); Virginia Jail Association Comments (dated 12/14); King George County, VA and Rappahannock Regional Jail Authority Comments (dated 12/17/14); American Jail Association Comments (dated 1/12/15).

<sup>74</sup> See *infra*, fn. 4.

<sup>75</sup> Graham County, AZ Sheriff (dated 12/1/15); Mohave County, AZ Sheriff (dated 12/12/14); Pinal County, AZ Sheriff (dated 12/10/14); Yell County, AR Sheriff (dated 11/25/14); Colorado Jail Association (dated 1/2/15); Columbia County, GA Detention Center (dated 1/12/15); Plymouth County, IA Sheriff (dated 11/26/14); Hampden County, MA Sheriff (dated 12/31/14); Charlevoix County, MI Sheriff (dated 12/1/14); Greene County, MO Sheriff (dated 12/1/14); Gage County, NE Jail Administrator (dated 12/12/14); Cayuga County, NY Sheriff (dated 12/3/15); Niagara County, NY Sheriff (dated 12/1/14);

ever, many of those purported costs have nothing to do with the provision of ICS and are basic law enforcement activities. Such activities include surveillance, monitoring, and/or listening to calls; transporting inmates; handling US Marshal inquiries; storing calls used for court; live alert transmission costs to call investigator; prosecuting or disciplining inmates for crimes committed while using the phones; prison rape elimination act (PREA) mandated voicemail systems, handing calls and reporting; cell phone detection and interception systems; providing call recordings to court; free calls to public defenders, consulates, embassies and private counsel, ombudsmen; free calls to bail bond; free calls to facility commissary providers; and free booking calls.<sup>76</sup>

Other items in the laundry list are associated with features and functions delivered by providers, including bandwidth costs for offering and administering platform; three-way call detection verification; and customer service. In particular, installation and maintenance of phones is handled by the provider and not the correctional facility.

A few other items are unlikely to result in regular and/or material costs, such as writing requests for proposals and handling a bidding process, litigation resulting from inmates or public about use of system, and training staff to use the system and security features. And even if any of these activities are attributable to correctional facilities for the provision of ICS, commenters did not provide any documentation of their costs.

Eight others<sup>77</sup> submitted comments claiming various ICS costs including: monitoring calls; investigation; maintenance of equipment; cell phone detection; educational and welfare programs; drug treatment programs; re-entry programs for housing and jobs; inmate transportation; training; installing a new ICS platform. As previously explained, many of these costs have nothing to do with the provision of ICS because they are related to basic law enforcement

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Denton County, TX Sheriff (dated 12/8/14); Denton County, TX County Judge (dated 12/5/14); Dewitt County, TX County Judge (dated 12/1/15); Fannin County, TX County Judge (dated 12/1/15); Garza County, TX County Judge (dated 12/1/15); Hutchinson County, TX County Judge (dated 12/2/14); Panola County, TX County Judge (dated 12/1/15); San Augustine County, TX County Judge (dated 12/1/14); San Patricio County, TX County Judge and Commissioners (dated 12/14/14); Terry County, TX County Judge (dated 12/8/14); Tuolumne County, TX Sheriff (dated 12/2/14); Waller County, TX County Judge (dated 12/10/14); Washington County, TX County Judge (dated 12/1/14); Wheeler County, TX County Judge (dated 12/1/14).

<sup>76</sup> See also, Prison Policy Initiative (dated 1/26/15) (stating that funding of these programs “is the responsibility of government ... [not] telecommunications costs that should be paid from ICS rate revenue”).

<sup>77</sup> Johnson County, IA Sheriff (dated 12/18/14); Marion County, IN Sheriff (dated 12/8/14); Barnstable County, MA Sheriff (dated 12/24/14); Butler County, PA Prison Board (dated 12/18/14); Delaware County, PA (dated 1/20/15); Hemphill County, TX County Judge (12/1/14); Taylor County, TX County Judge (dated 12/30/14); Williamson County, TX Sheriff (dated 12/22/14).

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activities (e.g., monitoring, investigation, cell phone detection) or are beneficial to society (e.g., educational and welfare programs). Others, like installation and maintenance of phones, are handled by the provider and not the correctional facility. These commenters also did not provide justification for the alleged costs. The Barnstable County Sheriff merely stated that a Massachusetts statute mandates the sheriff to make a return if its property and lines are used. The Taylor County Judge mentioned that its ICS contract generated \$109,000 in 2014 but did not specify how such revenues were spent. Delaware County declared that about \$1.2 million is generated from calling fees and commission to help offset expenses from inmate programs and services without providing any documentation about such spending.

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Accordingly, as set forth herein, the Commission has legal authority under Section 201(b), Section 276, and its Title I ancillary authority, if necessary, to prohibit ICS providers from entering into agreements that require payment of site commissions. The correctional facilities have not documented costs that are actually caused by the provision of ICS, and they improperly seek to recover costs of activities that have nothing to do with the provision of a telecommunications service or are handled by providers. The correctional facilities also have not provided sufficient detail about their methodology, calculations, assumptions, and other data to evaluate and validate the scanty cost information that was submitted. The Commission should therefore reject the unsubstantiated cost information submitted by correctional facilities.

Sincerely,

*/s/ Andrew D. Lipman*

Andrew D. Lipman