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May 1, 2015

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 to supplement previous filings dated Feb. 20, 2015, and April 8, 2015.

Several recent submissions in this docket have focused on the question of whether the Commission should prohibit all site commissions, and if not, what types and amounts of payments to site owners should be permitted by the rules. The undersigned's April 8 letter discusses the Commission's authority to prohibit ICS providers from entering into agreements with site owners that contain provisions for payment of site commissions, whether determined as a percentage of revenue or on some other basis. Nonetheless, several parties, representing interests as diverse as inmates and their family members (Martha Wright, *et al.*, Petitioners) and ICS providers (Global Tel-Link¹), as well as many sheriffs' offices, have urged the Commission as a matter of policy to permit some level of payment to correctional facilities. As Petitioners put it in their most recent *ex parte* letter, "while the FCC has the authority to eliminate kickbacks, it should decide to not eliminate kickbacks so that correctional authorities and ICS providers can allocate excess revenue to cover any ICS costs incurred by the correctional facilities[.]"² And numerous sheriff's

¹ Letter from Chérie R. Kiser, Counsel for Global Tel*Link Corporation ("GTL"), to Marlene H. Dortch, filed April 3, 2015 ("GTL April 3 *ex parte*").

² Letter from Lee G. Petro, Counsel for Petitioners, to Marlene H. Dortch at p.1, filed April 20, 2015.

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offices have submitted form letters to the Commission asserting that continued receipt of payments from ICS providers are essential to ensuring the continued offering of this “discretionary” service to inmates.

It is certainly true that, while the Commission has authority to eliminate all site commission payments, it is not required to do so and may decide for policy reasons to adopt a more flexible approach. It is also likely true that correctional facilities do incur *some* costs as a direct result of making ICS available to inmates in their custody, although (as discussed in the undersigned’s February 20 and April 8 letters) the amount of such costs has not been documented in the record with anything near the level of specificity required for the Commission to make cost findings.

The absence of reliable cost data for correctional facilities need not prevent the Commission from acting to place reasonable limits on site payments. The Communications Act only requires that the compensation system for ICS be “fair” to consumers and to ICS providers, not to site owners. 47 U.S.C. § 276(b)(1)(A). Moreover, if the Commission determines that permitting ICS providers to make some level of payments to site owners will promote the public interest, those payments need not necessarily be based on the site owners’ costs. The site owners, after all, are government agencies performing a public safety function, not operating a business. Correctional facilities generally do not generate net income for their operators, and have no reasonable expectation of earning revenues that will cover their costs. Nor are they managed for the purpose of returning a profit to their investors (*i.e.*, the taxpayers). It would therefore be absurd to apply a traditional “cost-plus-reasonable-return” utility regulation approach to the payment of site commissions.³

In any event, the Commission’s authority extends to regulating the rates and practices of ICS providers, but not the practices of correctional facilities. As explained in the undersigned’s April 8 letter, the Commission can regulate the terms on which ICS providers may contract with correctional facilities under its express and ancillary statutory authority, but this is not the same thing as directly regulating correctional facilities. The correctional facilities would remain free to decide whether they wish to enter into new contracts with ICS providers on terms consistent with

³ In *FPC v. Hope Natural Gas*, 320 U.S. 591, 603 (1944), the Supreme Court explained that agencies exercising ratemaking authority must balance consumer and investor interests. “From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.” *Id.* (citation omitted). But there are no “other enterprises having corresponding risks” to a correctional facility, since correctional facilities are not enterprises at all, nor do they seek to attract capital in the competitive market.

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the Commission's requirements.⁴ The Commission should not (and cannot) mandate what, if any, level of services a particular correctional facility chooses to permit, nor should it compel correctional authorities to devote any portion of their facilities to ICS purposes.⁵ Accordingly, a regulation that solely restricts the ability of ICS providers to enter into particular types of contracts with site owners should not be vulnerable to legal challenges.

Under this approach, the Commission must consider what level of payments to facility operators would be consistent with the public interest, by creating a reasonable incentive for the facilities to continue offering ICS without imposing unjust or unreasonable costs on users of the service. GTL, based on a study performed by Economists Inc., suggests that payments in the range of \$0.005 to \$0.016 per intrastate minute of use would be sufficient to cover facilities' direct costs, although it also notes that its study did not attempt to analyze whether this would provide an incentive for facilities to lower ICS rates or ancillary fees.⁶ CenturyLink has suggested allowing "significant" payments without specifying a particular level, although it has also stated that the costs of call monitoring alone are at least \$0.05 per minute.⁷ Call monitoring, however, is a normal part of a correctional facility's internal security, like monitoring inmate mail and in-person visiting, and the cost of this function should not be recovered from telephone customers.⁸ A number of correctional facilities, unsurprisingly, have suggested that even larger payments are necessary to cover their costs, although as discussed in the undersigned's previous filings, few of them have provided any meaningful documentation of these supposed costs.

One facility operator that did provide some cost analysis, Cook County (Illinois), demonstrates the potential for operators to inflate their cost claims in the absence of any standard form of cost documentation and any third-party scrutiny of cost data.⁹ Cook County states that it operates

⁴ As suggested in the undersigned's April 8 letter, the Commission may reasonably conclude that it should not apply any restrictions to existing contracts, at least for their current, unexpired terms; but, in that case, it would be essential to permit ICS providers to recover all the costs they incur in performing under existing contracts, including site commissions.

⁵ This letter does not address the merits of various sheriffs' contentions that ICS is a "discretionary" service that they have no obligation to offer to inmates; nonetheless, no such obligation is imposed by the Communications Act, and if inmates have a right to access to telephone service, it must arise under some other source of law.

⁶ GTL April 3 *ex parte* at 5.

⁷ CenturyLink Reply Comments at 20-21 & n.84 (filed Jan. 27, 2015).

⁸ Indeed, the ability to monitor ICS calls is a benefit to the facility as it improves the facility's capability to investigate potential criminal activities and other misconduct by inmates. *See* GTL April 3 *ex parte* at 5.

⁹ Comments of Cook County, Illinois (filed Jan. 12, 2015) (hereinafter "Cook County").

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“one of the largest single-site county confinement facilities in the nation,” with an average daily population (ADP) of 9,000 inmates,¹⁰ so it might be expected to realize some economies of scale relative to smaller facilities. Yet its study estimates annual costs of \$2.4 million, or \$0.08 per minute, which is far above the range of GTL’s study. A review of the study suggests several possible reasons for this discrepancy:

- The study includes \$362,000 in call monitoring costs, including among other things responding to subpoenas for call records.¹¹ As discussed above, call monitoring is not properly a cost of providing ICS, but a cost of securing the correctional facility, and responding to subpoenas for call records is an operational cost not unlike responding to subpoenas for any other records relating to an inmate.
- The largest single item, by far, is \$710,000 for “voice biometric resets & re-enrollments.” The study indicates that the re-enrollment process is similar to initial enrollment (for which the reported cost is only \$114,000), but also includes an investigation to determine whether re-enrollment is necessary followed by transporting the detainee to a telephone.¹² The time allotted for initial enrollments is 2 minutes, but the time allotted for re-enrollments ranges from 7.3 minutes to 16.8 minutes, varying by division.¹³ There is no explanation of why the jail counts the time required to transport a detainee to the re-enrollment telephone as a cost of ICS, when it (properly) does not count as a cost the time its officers necessarily spend monitoring detainees when they are going to or from a telephone to make calls. Further, the jail allocates up to five persons (four correctional officers and one sergeant, with the number varying by division) to *each* re-enrollment.¹⁴ The highest personnel total is for Division 9, which is the jail’s “super-maximum” security division.¹⁵ Although undoubtedly this division is more costly to operate than other divisions due to its higher security requirements, these additional costs are not caused by the provision of ICS, but rather are caused by the characteristics of the inmates assigned to

¹⁰ *Id.* at 1.

¹¹ *Id.* at 4.

¹² *Id.* at 4.

¹³ *Id.*, attachment at 2-3.

¹⁴ *Id.* For example, for Division 1, Cook County estimates that it performs 23 re-enrollments per week at 15.1 minutes per enrollment; this comes to a total of 18,059 minutes or 300 hours per year. The county allocates a total of 1,728 hours per full-time employee per year (*id.* attachment at 5), so 300 hours is about 0.17 FTE. But Cook County assigns 0.7 FTE to Division 1 for this function, for three correctional officers and one sergeant, implying that all four of these personnel are being assigned to this task for its full duration (including the preliminary investigation to determine whether a re-enrollment is warranted).

¹⁵ http://www.cookcountysheriff.com/doc/doc_DivisionsOfJail.html (visited Apr. 29, 2015).

this division. Correctional facilities should not be permitted to assign the costs of general facility security requirements, no matter how necessary or appropriate these costs may be to the performance of their custodial functions, to customers of ICS.

- Cook County allocates 3.7 FTEs (\$318,000) to telephone inspections, and 4.2 FTEs (\$363,000) to telephone maintenance. Telephone inspection reportedly consumes anywhere from 4 minutes per shift to 86 minutes per shift (2 shifts per day), varying by division.¹⁶ Although, as already noted, Cook County’s jail facility is one of the nation’s largest, it still strains credulity to assert that telephone inspection requires nearly three hours per day, seven days a week, in Division 2, or that this task requires the equivalent of nearly four full-time positions (which, since there are two shifts, would imply that two correctional officers are inspecting telephones somewhere in the jail during every minute of every shift). These totals indicate either a flawed cost study methodology or inflated cost allocations. Similarly, the amounts allocated to telephone maintenance appear excessive, especially considering that the county’s ICS vendor actually performs the maintenance.¹⁷
- The County reports costs of \$441,000 annually, or 5.1 FTEs, for managing its pre-paid telephone debit card system. According to the cost study, four correctional officers spend 16 hours per week *each* “sorting and packaging” debit cards, and *another* 16 hours per week *each* on “delivery.”¹⁸ These two functions consume about three-fourths of the costs assigned to this category. The county states that it processes 1,900 debit cards weekly;¹⁹ thus, it is allowing a full two minutes for “sorting and packaging” each individual card, and another two minutes for delivery. These figures suggest either a highly inefficient method of operating this program, or (again) a flawed cost study methodology.
- The items listed above account for at least 80% of the total cost claimed by the Cook County study. Given the pervasive problems identified in these sections of the study, it is possible that other costs are also overstated, but these have not been examined due to their relatively smaller amounts.

¹⁶ Cook County, attachment at 4.

¹⁷ Cook County at 5 (“the ICS provider’s staff ... repairs the equipment under guard and escort by CCSO staff.”) Escorting the telephone maintenance staff is a general security function of the jail, like escorts for any other contractor or outside personnel who might need to perform tasks inside the facility, and should not be charged to ICS customers.

¹⁸ Cook County, attachment at 3.

¹⁹ Cook County at 4.

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For the reasons outlined earlier in this letter, the Commission should not devote further scarce resources to attempting to develop a more accurate estimate of correctional facility costs. Instead, the Commission should establish a limit on site payments that will provide facilities the ability to cover the reasonable costs of an efficient inmate calling program, and an incentive to continue to offer this valuable service.

The undersigned suggests that payments should be capped on the basis of cents per minute, and that contracts determining payments on the basis of a percentage or share of revenues should be prohibited. Revenue-sharing agreements give correctional facilities and ICS providers a joint interest in increasing the rates paid by consumers, regardless of market forces, and therefore are not in the public interest. A fixed cents-per-minute payment creates no such incentive.

A reasonable level for site owner payments is likely to vary depending on the size of the facility.²⁰ Considering the record evidence, including the studies submitted by GTL and other parties, the undersigned suggests that the Commission should find that agreements to pay site commissions in excess of the following levels is an unreasonable practice by ICS providers:

Average Daily Population (ADP) of Facility	Maximum per minute
1,000 or greater	\$0.01
300 to 999	\$0.02
Below 300	\$0.03

Sincerely,

/s/ Andrew D. Lipman

Andrew D. Lipman

²⁰ For reasons explained in Reply Comments of Petitioners at 15-16 (filed Jan. 13, 2014), the distinction between prisons and jails is not sufficiently related to costs to serve as a basis for differentiating in site payment levels.