

Law Offices

September 8, 2015

1500 K Street N. W.
Suite 1100
Washington, D.C.
20005-1209

(202) 842-8800
(202) 842-8465 fax
www.drinkerbiddle.com

CALIFORNIA
DELAWARE
ILLINOIS
NEW JERSEY
NEW YORK
PENNSYLVANIA
WASHINGTON D.C.
WISCONSIN

By ECFS

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

RE: *Ex Parte Written Presentation*
Rates for Interstate Inmate Calling Services
WC Docket No. 12-375

Dear Ms. Dortch:

Pursuant to Section 1.1206(b) of the FCC's rules, Martha Wright, *et al.* (the "Petitioners"), hereby submit the following comments in the above-referenced proceeding.

The FCC is faced with a stark choice in addressing the rates and ancillary fees charged by Inmate Calling Service (ICS) providers, whether to –

1. Exercise its authority granted by the Communications Act to fulfill its statutory obligation to protect consumers from unjust, unreasonable and unfair ICS charges, practices, classifications, and regulations and to proscribe ICS rates, charges and practices that are just, reasonable and fair; or
2. Arbitrate the conflicting goals of two parties with respect to their completely optional revenue-sharing negotiations, which have failed to deliver just, reasonable and fair ICS rates and fees for consumers for more than 15 years.

Since 2003, the Petitioners have urged the FCC to adopt regulations that would protect consumers from the unjust, unreasonable and unfair ICS rates and fees charged by ICS providers. The Petitioners have demonstrated that the unjust, unreasonable and unfair rates and fees charged during this period did not reflect the cost of providing these services and were the direct result of private negotiations between ICS providers and correctional authorities in which the main focus is to maximize revenue earned from inmates' families and their loved ones. The imposition of these unjust, unreasonable and unfair ICS rates and fees ignored the importance of ongoing communication between inmates and their families and its relation to recidivism rates and ignored the impact of limiting communications between the 2.7 million children with at least one incarcerated parent.

It is encouraging to the Petitioners, then, to see that the parties directly responsible for this history of unjust, unreasonable and unfair rates and fees – namely, the sheriffs, departments of corrections and the ICS providers – are finally willing to address these issues. It should be noted, however, that this recent interest is not borne from some altruistic interest in providing relief to inmates and their families who have paid unjust, unreasonable and unfair ICS rates and fees for more than a decade. If the sheriffs, departments of corrections and the ICS providers were truly concerned about the impact of their business practices on the families of incarcerated individuals, they would have reduced or eliminated the unjust, unreasonable and unfair rates and fees years ago.

Instead, their recent, accelerated interest in crafting rules are based on their need to expand (or at least freeze) their respective bottom lines in the final FCC rules. Through the leadership of then-Chairwoman Clyburn and Commissioner Rosenworcel, the FCC adopted interim rules that have resulted in relief for millions of families and have increased contact with their incarcerated loved ones. Under Chairman Wheeler, the FCC proposed rules in September 2014 that would expand the ICS rate caps to all ICS calls and regulations that would eliminate or at least restrict the unreasonable ancillary fees.

The proposed reforms will have an immediate and significant impact on the lives of those with incarcerated family members and loved ones. The proposed reforms also will impact the bottom lines for correctional authorities and ICS providers alike, and that is why we now see both groups urging the FCC to “lock in” excessive rates and fees that would protect their historical unjust, unreasonable and unfair practices.

For example, the ICS providers have requested that the FCC limit or eliminate the practice of sharing revenue between the companies and the correctional authorities. The ICS providers have argued that they have no power to “just say no” and therefore the FCC must adopt rules to regulate their contractual relationships with correctional authorities.

The ICS providers have also requested “backstop” ICS rates and ancillary fees that far exceed their cost of providing the services. The Petitioners demonstrated that the cost studies provided by the ICS providers were fundamentally flawed in significantly overstating the cost of provided the services. By basing its final rules on these overstated cost studies, the FCC would be creating a “race to the top” of a ceiling for unjust, unreasonable and unfair ICS rates and ancillary fees that far exceed the costs of providing ICS to the public.

In addition, the National Sheriffs Association (NSA) and many individual correctional authorities have demanded that the FCC set up a dedicated funding mechanism whereby they receive guaranteed revenue directly from ICS consumers. If they don't receive this guaranteed funding stream, the correctional authorities threaten to curtail or eliminate ICS access to inmates and their families.¹

This ultimatum is based on a flawed survey submitted by the NSA in January 2015, which provided wildly inconsistent and unreliable information from a small subsection of sheriffs who were willing to provide their costs.² When confronted with these glaring deficiencies, the NSA simply shrugged and asserted that it's the best the sheriffs can do.³

Rather than adopt rules that:

- i. dictate terms of private agreements between ICS providers and correctional authorities,
- ii. freeze the current unjust, unreasonable and unfair ICS rates and fees, and
- iii. create a new funding mechanism for sheriffs and DOCs,

the FCC has a clear path to satisfy its statutory obligation to protect consumers from unjust and unreasonable charges, practices, classifications, and regulations and to proscribe rates, charges and practices that are just, reasonable and fair. The Petitioners have long advocated for a simple regulatory structure for ICS – cap all ICS rates, eliminate or cap ancillary fees, and create a compliance structure to ensure that future ICS consumers are protected.

¹ See e.g., *Ex Parte Submission of the National Association of Sheriffs*, filed July 14, 2015, pg. 5. In contrast, the American Correctional Association stated that “sheriffs and jail administrators would never pull ICS out of the jails completely, that it was an integral part of correctional business and a necessary service for inmates.” See *Ex Parte Submission of the American Correctional Association*, dated June 24, 2015.

² See *Comments of the National Association of Sheriffs*, filed January 12, 2015.

³ See *Ex Parte Submission of the National Association of Sheriffs*, dated June 12, 2015 (“Sheriffs and jails also do not have staffs that include attorneys, accountants and economists schooled in the art of ratemaking principles and Commission rules and regulations on cost studies.”).

In its 2013 comments, the Petitioners advocated for the cap of ICS rates at \$0.07 and the elimination of all ancillary fees.⁴ In its comments submitted in January 2015 responding to the Second NPRM, the Petitioners relaxed its proposals to take into account the alleged higher costs incurred by small jails by advocating for a two-tiered structure with the alternative of adopting a limited number of acceptable ancillary fees, and the prohibition of all other charges.⁵

This approach provides regulatory certainty for ICS consumers and would be simple to administer. It also places the responsibility for compliance on the two parties that have sole control over the provisioning of ICS service – the correctional authorities and the ICS providers. As the FCC has correctly noted, ICS consumers do not have a choice in selecting an ICS provider, and the lack of competition results in a market failure that, over the past 15 years, has led to unjust, unreasonable and unfair rates be charged by ICS providers.⁶

Because the consumer does not have a choice in selecting an ICS provider, and because the correctional facilities and ICS providers refuse to permit competition for “security” reasons,⁷ the consumer must not bear the anticompetitive burden arising from these historical unjust, unreasonable and unfair market forces.

The Joint Proposal submitted by three of the largest ICS providers will protect the unjust and unreasonable ancillary fees that have increased since the August 2013 Report and Order, and will permit the ICS providers to charge ICS rates that far exceed the cost of providing the service.⁸ The terms of the Joint Proposal are conditioned upon the FCC’s affirmative ruling that would exempt or severely limit ICS providers’ obligation to pay commissions to correctional authorities. Thus, under the Joint Proposal, ICS providers would be authorized to charge “backstop” rates that are substantially higher than the cost of providing service, charge excessive ancillary fees, *and* avoid paying commissions to correctional facilities. In sum, the Joint Proposal would merely freeze in place the unjust, unreasonable and unfair ICS rates and fees that they have been charging over the past 15 years, and get them out of having to share their excessive profits with correctional authorities.

⁴ *Petitioners Comments*, filed March 23, 2013.

⁵ *Petitioners’ Comments*, filed Jan. 12, 2015.

⁶ *See Second Further Notice of Proposed Rulemaking*, 29 FCC Rcd 13,170, 13172

⁷ *Id.*, 29 FCC Rcd at 13,217.

⁸ *Joint Providers Proposal*, filed Sept. 15, 2014.

Seeing the writing on the wall, the NSA proposes that the FCC create a new guaranteed payment structure in which ICS consumers pay an additional fee to jails for the ability to remain in contact with incarcerated family members. This fee would be in addition to the per-minute rate that ICS providers charge consumers, and purportedly would be used solely to reimburse sheriffs for the security and administrative duties that jails perform to provide ICS.

Absent approval of its proposal, the NSA threatens the elimination of ICS, stating that “if Sheriffs do not receive compensation, they would have the incentive to reduce the amount of unrecoverable cost by reducing access to ICS.”⁹

Thus, the contrast between the proposals is clear:

- i. Petitioners advocate that the FCC must use its statutory authority under Section 201, 205 and 276 of the Communications Act to prohibit unjust, unreasonable and unfair ICS rates and charges,
while
- ii. ICS providers and correctional authorities argue that the FCC must (a) freeze the current practices of charging excessive rates and fees and (b) arbitrate between ICS providers and correctional authorities regarding the payment of commissions and (c) create new financial penalties on inmates and their families in order to remain in contact.

It’s that simple.

The FCC must reject the ICS providers’ pleas to regulate their contractual negotiations with correctional authorities. While the ICS providers claim that the FCC must dictate the terms of any future revenue-sharing regime with correctional authorities, they offer no explanation as to why the FCC needs to “play the heavy.”

If ICS providers are unable to submit a proposal that makes financial sense, then the FCC should not be in the business of giving them an easy out. The record is rich in examples of how ICS providers have bent over backwards to sign contracts promising high commissions and other in-kind contributions. The willingness of ICS providers to offer these terms is built squarely on fear that another competitor will offer an even higher commission. However, the costs of these agreements have been paid for by ICS consumers through high ICS rates and ancillary fees.

⁹ NSA Ex Parte Submission, filed June 12, 2015.

Stated another way, if the ICS providers can't say "no" to the payment of high commissions, why should the FCC do so when instead the FCC can use its clear statutory authority to set rates and ancillary fees that will protect consumers and will also effectively eliminate the ability of ICS providers to pay high commissions?

Moreover, if correctional facilities can't be bothered to accurately account for their expenses related to the provisioning of ICS in jails and prisons, why should the FCC establish a guaranteed, per-minute payment plan for which a woefully inadequate basis has been established in the record of this proceeding?

The Petitioners have shown that the hundreds of millions of dollars that are shared by correctional authorities and ICS providers are generally not used for inmate welfare purposes and that these funds do not reflect the nominal expenses that are associated with making ICS available in jails and prisons.¹⁰

The Petitioners have also demonstrated that the FCC has the requisite statutory authority to regulate interstate and intrastate ICS rates, and there is overwhelming support on behalf of the ICS providers and consumer advocates that that the FCC adopt rules establishing uniform rate caps to cover all ICS calls. The only party to make an argument against regulating intrastate ICS calls is the National Association of Regulatory Utility Commissioners, and its arguments are based solely on its interest to maintain a monopoly on regulating intrastate telephone calls. However, the Petitioners have shown that ICS is different in that every call is routed to centralized calling centers before reaching the recipient. Therefore, the artificial construct of whether the call is interstate or intrastate is meaningless in this context.¹¹

¹⁰ See *Second FNPRM*, 29 FCC Rcd at 13,172, n. 13 ("in Orange County, California, the Inmate Welfare Fund had a budget of \$5,016,429 in 2010, and of that amount, 74% of the funds were used for staff salaries, 0.8% was used for the actual services, supplies, and training for inmate educational programs, and 0.06% was used for services, supplies, and training for inmate re-entry programs...commissions paid to county facilities in Massachusetts are placed in a fund available for use by the Sheriff, while commissions paid to the Department of Correction are transferred to the General Fund of the Commonwealth.").

¹¹ *Petitioners Reply Comments*, filed Dec. 30, 2013, pg. 7.

Regarding ancillary fees, Mr. Lipman's recent analysis on behalf of his undisclosed ICS clients also applies to the FCC's statutory authority to regulate ancillary fees charged by ICS providers in connection with ICS calls.¹²

In particular, Mr. Lipman relies on Section 201, Section 276 and Section 4(i) of the Communications Act to argue that the FCC has the requisite authority to regulate site commissions but then curiously fails to apply this same legal reasoning to address ancillary fees.

As noted by Mr. Lipman, "an unjust or unreasonable practice can "encompass a broad range of activities provided and rates charged...".¹³ Moreover, Mr. Lipman stated that:

Under Section 201(b), the FCC has clear authority to regulate contractual or other arrangements between common carriers and other entities, even those entities that are generally not subject to FCC regulation. 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.¹⁴

In addition, Mr. Lipman's argument that Section 276 gives the FCC the authority to regulate site commissions must also apply to ancillary fees. The record establishes that the ancillary fees charged by ICS providers substantially impact consumers' costs to receive ICS calls, and serves as a main source of revenue to pay site commissions.

¹² See *Ex Parte Submission of Mr. Andrew D. Lipman*, filed July 21, 2015 (Mr. Lipman states that his interest in this proceeding is based on his legal representation of "certain clients with an interest in the regulation of inmate calling services."). Mr. Lipman thus far has refused to provide the identities of his clients in his numerous submissions in this proceeding, so we refer to them as the "*Unnamed Parties*."

¹³ *Unnamed Parties Submission*, pg. 9 (citing *Metrophones Telecomm., Inc. v. Global Crossing Telecomm., Inc.*, 423 F.3d 1056, 1068 (9th Cir. 2005)).

¹⁴ *Unnamed Parties Submission*, pg. 10 (citing *Residential MTE Exclusivity Order*, 23 FCC Rcd 5386, 5391 (2008); *Cable & Wireless*, 166 F.3d 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, 8136 ¶ 6 (2001) (deceptive marketing); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units 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)).

Because Mr. Lipman agrees with the FCC that “[f]airness encompasses both the compensation received by providers and the rates paid by end users,” he cannot then claim that the ancillary fees imposed on ICS customers in connection with completing that very same ICS call is somehow outside the reach of Section 276.¹⁵

Finally, Mr. Lipman cites Section 4(i) of the Communications Act to argue that the FCC has the authority to regulate site commissions. In particular, Mr. Lipman argues that FCC may:

take those actions necessary to fulfill the mandate of the Act, even if such actions are not expressly prescribed by the Act. The FCC is therefore not barred from prohibiting site commissions merely because Congress did not explicitly direct the FCC to do so. As the Seventh Circuit explained, “Section 4(i) empowers the FCC 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.”¹⁶

Mr. Lipman continues, arguing that:

Because site commissions are “imposed on ICS providers as a condition of offering ICS, they become part of the cost structure of ICS” and “are among the ‘charges, practices, classifications, and regulations for and in connection with’ communications services.” Thus site commissions easily come under the FCC’s jurisdiction over the “fair compensation” of ICS providers that offer such service using wire or radio communication.¹⁷

While Mr. Lipman is discussing site commissions, there is no reasonable distinction between site commissions and ancillary fees in this context. Ancillary fees are imposed on ICS consumers without any other alternative, and ancillary fees are a main source of revenue used by ICS providers to pay site commissions. Clearly, if commissions are part of the ICS “cost structure,” certainly the ancillary fees charged by ICS providers to ICS customers - which are then used to fund commission payments to correctional authorities - are also part of the ICS “cost structure.”

¹⁵ *Unnamed Parties Submission*, pg. 11 (citing *2013 Order*, 28 FCC Rcd at 14115 ¶ 14).

¹⁶ *Unnamed Parties Submission*, pg. 12 (citing *North Am. Telecomm. Ass’ v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985)).

¹⁷ *Unnamed Parties Submission*, pg. 13.

Therefore, using Mr. Lipman's analysis as a model, the FCC has the requisite statutory authority to regulate ancillary fees. While the FCC may have chosen not to regulate financial transactions in other industries, consumers in those other industries have the choice to change providers if the charges are excessive, and there is actual competition in the marketplace that disciplines excessive rates.

Here, the record is replete with evidence that any existing competition in the ICS marketplace actually drive rates and ancillary fees higher and competition does not serve to discipline the rates and fees that consumers are being forced to pay to remain in contact with each other. In the absence of competitive choices, the ICS consumers have no ability to avoid paying a major component of the ICS "cost structure."

In sum, no reasonable argument has been presented to undermine the FCC's proposed regulation of interstate and intrastate ICS rates. The ICS providers presented cost studies which have been shown to be inflated, and the Petitioners have put forth a reasonable solution to account for higher-cost facilities. With respect to ancillary fees, the Petitioners originally proposed the elimination of all ancillary fees but have also put forth a compromise solution; the FCC has the requisite statutory authority to adopt either solution.

Finally, rather than have the FCC serve as the arbitrator between ICS providers and correctional authorities with respect to their completely optional revenue-sharing agreements, the FCC should leave these private negotiations to be resolved between the parties, and focus instead on protecting ICS consumers from unjust, unreasonable and unfair charges, practices, classifications, and regulations.

Should there be any questions regarding this submission, please contact undersigned counsel.

Respectfully submitted,

A handwritten signature in blue ink that reads "Lee G. Petro". The signature is written in a cursive style with a horizontal line underneath the name.

Lee G. Petro

Counsel for Martha Wright, et al.

Marlene H. Dortch, Secretary

September 8, 2015

Page 10

cc (via email):

Chairman Tom Wheeler
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Commissioner Michael O'Rielly
Matthew DelNero, Bureau Chief
Daniel Alvarez
Rebekah Goodheart
Travis Litman
Matthew Berry
Amy Bender
Madeleine Findley
Pamela Arluk
Lynne Engledow
Rhonda Lien