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September 21, 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, on behalf of clients with an interest in the provision of Inmate Calling Services (ICS), for filing in the above-referenced docket.

In previous filings in this docket,¹ the undersigned has advocated, among other things: i) that the Commission has the statutory authority to bar or limit interstate and intrastate site commission payments ICS providers make to correctional institutions; ii) in recognition of the consensus that correctional institutions incur some costs to maintain ICS programs, the FCC should adopt a per-minute cap, separate from the ICS rate caps, on ICS provider payment of site commissions; and iii) ancillary fees for non-communications services, while a problem that needs to be addressed in the industry, is a problem the Commission lacks statutory authority to solve.

Recent filings by other interested parties warrant further discussion of these issues below. In addition, this letter will also address the transitional regime the Commission should adopt. Any such transition period should be brief, for example 60-90 days, and should include provisions to prevent gamesmanship before the Commission's rules take effect.

¹ Letters from Andrew D. Lipman to Marlene H. Dortch, WC Docket No. 12-375, filed July 21, July 6, 2015; June 1, 2015, May 1, 2015; and April 8, 2015.

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1. The Act Gives the FCC Jurisdiction to Prohibit or Regulate Payment of Site Commissions

Contrary to the arguments of the correctional facilities and their agents (including Praeses, LLC), the FCC has unmistakable direct legal authority to regulate both intrastate ICS rates and site commissions, under Sections 201, 276 and 4(i) of the Communications Act. This authority also includes the ability to preempt application of inconsistent state regulation.

Praeses argues, without providing citation, that Section 276(b)(1)(A) does not apply to inmate calling and only serves to protect independent payphone operators.² But Section 276(b) *does* contain an unambiguous statement of purpose: “to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public” The provisions of subsection (b), which includes the FCC’s authority to determine fair compensation, must be construed in harmony with this express statement of Congressional intent, not with Praeses’ imagined implied intent.

Praeses points to no statutory text supporting its cramped reading of Section 276.³ Section 276(b)(1)(A) unambiguously requires the FCC to ensure that “all payphone service providers are fairly compensated for each and every completed intrastate and interstate call.”⁴ Section 276 unambiguously defines the term “payphone service” to include the provision of inmate telephone service in correctional institutions.⁵ It is hard to fathom how Praeses can argue that the terms “each and every call” and “inmate telephone service” somehow exempt ICS rates from the Congressional mandate to ensure “fair compensation.” Further, the FCC, and the courts have already made clear that the term “fairly compensated” encompasses both the compensation received by providers and the rates paid by end users.⁶

Site commission payments by ICS providers, and the excessive rates ICS providers charge to recover the cost of paying site commissions, frustrate the FCC’s ability to achieve the statutory objective of “fair” compensation. The FCC’s authority to ensure fair compensation necessarily implies that it can act to rein in practices that result in excessive compensation; if it could not, the statutory provision would be meaningless. Prohibiting ICS providers from paying site

² Letter from Phil Marchesiello, Counsel to Praeses, LLC to Marlene H. Dortch, FCC at 3 (Sep. 9, 2015) (“Praeses Sep. 9 *Ex parte*”).

³ In addition to its authority under § 276(b)(1)(A), the FCC also has authority under § 276(b)(1)(E) to regulate the negotiations between correctional facilities and ICS providers.

⁴ 47 U.S.C. § 276(b)(1)(A)

⁵ 47 U.S.C. § 276(d).

⁶ 2013 *Inmate Calling Order*, 28 FCC Rcd at 14115 ¶ 14; See *Illinois Public Telecommunications Ass’n v. FCC*, 117 F.3d 555, 562 (D.C. Cir. 1997).

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commissions or limiting the amount of site commission payments ICS providers can pay correctional facilities allows the FCC to ensure that ICS rates are fair — to inmate users, ICS providers and correctional facilities with legitimate ICS-related costs alike.

Section 276 further provides the FCC with authority to regulate both interstate and intrastate site commission payments. Section 276(d) includes ICS in the definition of “payphone service,” and subsection (b)(1) directs the FCC to establish a compensation plan for “all payphone service providers” applying to “each and every completed *intrastate and* interstate call”⁷ Moreover, subsection (c) expressly preempts any State requirements that are inconsistent with the FCC’s regulations.

The FCC correctly outlined the basis for its authority over intrastate rates in the Further Notice of Proposed Rulemaking accompanying the *2013 Inmate Calling Order*.⁸ In addition to citing the statutory provisions noted above, the FCC observed that, in *Illinois Public Telecommunications Ass’n*, the D.C. Circuit held that the “fairly compensated” provision of section 276(b)(1) empowered the FCC to prescribe end-user rates for local payphone calls. Because the FCC’s authority under that provision includes authority over local rates, it likewise includes rates for all other intrastate calls.⁹ Nor is Praeses correct regarding Section 2(b).¹⁰ The Supreme Court established that amendments to the Act expressly extending FCC authority to intrastate services, like Section 276(b)(1), prevail over the more general terms of Section 2(b) preserving State authority over intrastate services.¹¹

Praeses’ argument that the FCC cannot use section 201(b) to prohibit Praeses’ clients from gouging ICS users by demanding excessive “pay to play” site commissions is equally devoid of merit.¹² 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.¹³ 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 The FCC also may regulate contracts that “necessarily and inseparably

⁷ *Id.* at §276(b)(1)(A) (emphasis supplied.)

⁸ 28 FCC Rcd at 14175-78 ¶¶ 135-140, (subsequent history omitted.).

⁹ *See Illinois Public Telecommunications*, 117 F.3d at 562.

¹⁰ Praeses Sep. 9 *Ex parte* at 3.

¹¹ *See AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 380-81 (1999).

¹² Praeses Sep. 9 *Ex parte* at 3.

¹³ *Residential MTE Exclusivity Order*, 23 FCC Rcd at 5391 ¶ 15.

¹⁴ *Id.* at 5392 ¶ 17 (citing *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987)).

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include[]” interstate service as well as intrastate service.¹⁵ Using this authority, the FCC 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”).¹⁶ Such exclusive MTE arrangements included the provision of intrastate telecommunications services. Like those exclusive MTE contracts, correctional facilities generally enter into an exclusive contracts that “necessarily and inseparably include” the provision of interstate and intrastate services, and the FCC therefore has authority to regulate ICS providers entry into such contracts that provide for site commissions.

Praeses also ignores the FCC’s ancillary authority, which could apply to preserve the FCC’s ability to end or regulate the excessive site commissions built into ICS rates. This “ancillary” authority, as set forth in Section 4(i) of the Act, provides that the FCC “may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.” Under this provision, the FCC may assert authority under section 4(i) when its regulations plainly cover interstate “communication by wire or radio” and are “reasonably ancillary” to its substantive responsibilities under the Act. These principles certainly apply to regulating site commissions as such regulations would be ancillary to the FCC’s substantive jurisdiction under either section 201(b) or section 276.

2. If the FCC Allows Limited Site Commissions, It Should Establish a Separate Cap Rather than Trusting the ICS Rate Cap to Reduce Site Commission Payments

In prior letters, the undersigned has proposed that if the FCC is unwilling to prohibit site commission payments altogether, it should declare that a carrier’s agreement to pay site commissions in excess of the following maximum per-minute rate levels is an unreasonable practice: Average Daily Population (ADP) of Facility of 1,000 or more - \$0.01; ADP between 300-999 - \$0.02; and ADP below 300 - \$0.03. Any commission payment within these limits would be allowed as an additive to the ICS provider’s rates for calls at that particular facility.

By separating this cost recovery from the overall ICS rate caps, the FCC would allow ICS providers to compensate correctional facilities for the legitimate and reasonable costs they incur to allow inmates access to ICS. At the same time, the discrete and separate cost recovery would

¹⁵ 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, 23000 ¶ 35 (2000).

¹⁶ *Id.* at 23052-53 ¶¶ 160-64 (applicable to commercial customers); *Residential MTE Exclusivity Order* 23 FCC Rcd at 5386, 5391 ¶¶ 5, 14-15 (applicable to residential customers).

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be transparent and prevent carriers from entering into agreements to pay excessive site commissions. Other parties support such this structure, although with different rates and tiers.¹⁷

A separate cap on ICS provider payment of site commission costs would be far more effective at restraining excessive site commissions than the alternative of simply setting a maximum rate and allowing providers to pay any level of commissions. An explicit cap would prevent gamesmanship and promote transparency. It would also deter large integrated companies from cross-subsidizing ICS with profits obtained in other markets.

Some parties, such as the Wright Petitioners, argue that capping ICS rates will limit the site commissions ICS providers can pay without creating a separate cap for recovery of site commission costs.¹⁸ But the Wright Petitioners ignore the fundamental fact that this approach has already been tried, and didn't work. The FCC implemented ICS rate caps for interstate services in the *2013 Inmate Calling Order*,¹⁹ and has acknowledged that "failures in the ICS market continue[d]."²⁰ The FCC recognizes that site commissions are the primary source of market failure in the ICS industry.²¹ Although the FCC's rate caps have been effective only for a short period, the FCC has already concluded that they "did not ... address the problems in the ICS marketplace."²² Indeed, the "record is clear that site commission ... payments have continued to increase."²³

Experience shows that setting a maximum rate without separate limits on site commissions would lead to a "race to the top." Correctional facilities would continue to award contracts to whichever provider offered them the highest commissions, and the ICS providers would therefore be certain to charge the maximum authorized rate. Any provider who charged less would have less revenue available from which to pay site commissions, and therefore would be extremely unlikely to win any contracts. Further, if any ICS provider were able to reduce its costs through innovation and efficiency, the benefits of that cost reduction would undoubtedly flow to

¹⁷ See Letter from M. Trathen, Counsel for PayTel to M. Dortch, FCC at 7 (July 13, 2015) ("PayTel July 13 *Ex Parte*"); *Ex Parte* Submission of Securus Technologies, Inc. at 13 (July 27, 2015); Letter from Mary J. Sisak, Counsel for National Sheriffs Association to M. Dortch, FCC at 3 (July 14, 2015).

¹⁸ Letter from L. Petro, Counsel for Wright Petitioners, to M. Dortch, FCC, at 2-3 (Aug. 27, 2015). ("Wright Pet. Aug. 27 *Ex Parte*"); Letter from L. Petro to M. Dortch, at 4-6 (Sept. 8, 2015) ("Wright Pet. Sept. 8 *Ex Parte*").

¹⁹ *2013 Inmate Calling Order*, at 14135-38 ¶¶ 54-58.

²⁰ *Second FNPRM*, 29 FCC Rcd at 13180 ¶ 20.

²¹ *Id.*

²² *Id.*

²³ *Id.*

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the correctional facilities, which would demand higher commission payments from that provider, rather than to the consumers represented by the Wright Petitioners.

Conversely, with a separate site commission element, a correctional facility would have no economic incentive to select a provider on criteria other than the quality, features, and prices of its services. If one ICS provider were able to provide the same range of features and the same quality of service as another at a lower price to consumers, the correctional facility could select the lower-priced provider to benefit the public, without reducing its own revenues by doing so. Further, the transparency afforded by a separate rate additive for commissions would increase the ability of consumers and their representatives, such as the Wright Petitioners, to use the instruments of democratic governance to advocate for public agencies to seek lower calling rates as an explicit goal in awarding contracts.

It would be arbitrary and capricious for the FCC to adopt ICS rules that do not address site commissions, which the record demonstrates and the FCC declares to be the predominant factor resulting in unreasonably high ICS rates.²⁴ A regulatory agency cannot “entirely fail[] to consider an important aspect of the problem, offer[] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”²⁵ Allowing the current regime — where the FCC expects a rate cap to reduce site commission payments when to date its caps have proven incapable of having such an effect — would certainly be arbitrary and capricious.

3. The FCC Lacks Statutory Authority to Regulate Ancillary Services that are not Communications Services

Parties in this proceeding have also complained about excessive ancillary fees.²⁶ While there is no dispute that these fees are a problem, no party has adequately addressed the scope of the

²⁴ Further, if the FCC were to adopt rules based on the assumption that ICS providers would pay site commissions out of general revenue, it would also have to set rates that would be sufficient to allow recovery of those payments, as discussed in the undersigned’s prior filings. To do that, it would have to have a record basis for determining what amount of payments to build in to the rate. As the FCC itself acknowledged in its statement in support of the mandatory data collection in this docket, “knowing ICS providers’ costs will help the commission ensure that future ICS regulation uses sufficiently sound data so that it does not result in a taking.” *Inmate Calling Services (ICS) One-Time Data Collection*, WC Docket No. 12-375, FCC 13-113, Supporting Statement at 5 (April 2014). But since the data collection did not include information on site commissions, the FCC lacks the necessary “sound data” to set a rate ceiling that would allow for recovery of commission payments.

²⁵ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citations omitted).

²⁶ Letter from P. Wright, Exec. Dir. Human Rights Defense Center, to Tom Wheeler, Chairman, FCC at 2 (Sep. 8, 2015) (“HRDC Sep. 8 *Ex Parte*”).

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FCC’s jurisdiction. Those parties urging FCC action simply assume the FCC has jurisdiction while failing to explain the legal basis for such action.

Section 276(d) includes “any ancillary services” in the definition of “payphone service.” Thus, the FCC can assert jurisdiction over some class of “ancillary services,” but the limits of that jurisdiction are not found in Section 276. Instead, the limits are found in the overall structure of the Act. The FCC, cannot regulate unless authorized to do so by Congress because it “literally has no power to act, ... unless and until Congress confers power upon it.”²⁷ A statutory interpretation must be based upon “the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”²⁸

Indeed the limits on the FCC’s power over ICS ancillary fees reside in the overall structure of the Act. Sections 1 and 2 of the Act provide the general context within which section 276 must be considered by granting the agency authority over “communication service,”²⁹ and more precisely “communication by wire or radio”³⁰ Nowhere does the Act confer upon the FCC authority to regulate financial transactions or sales of other goods or services.

The Wright Petitioners recently have argued that the FCC can engage in expansive regulation of ancillary service charges, based on the undersigned’s arguments regarding site commissions.³¹ Specifically, they argue that if site commissions may be considered “unjust or unreasonable practices” under Section 201, may affect “fair compensation” under Section 276, and may be subject to the FCC’s ancillary jurisdiction under Section 4(i). But their attempted analogy overlooks the critical distinction that site commissions are an element of cost that has been incorporated into the prices of *communications services*, while ancillary fees may include charges for *non-communications services*. By the Wright Petitioners’ logic, if a food truck offered prepaid calling cards (a communications service) for sale alongside tacos and juice smoothies, the FCC would have jurisdiction to regulate the price of tacos.

The Wright Petitioners themselves highlight the critical issue, perhaps inadvertently, when they write –

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*

²⁷ *La. Pub. Serv. Comm’n v. FCC*, 476 US 355, 374 (1986).

²⁸ *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

²⁹ 47 U.S.C. § 151 (emphasis added).

³⁰ 47 U.S.C. § 152(a).

³¹ Wright Pet. Sept. 8 *Ex Parte*, at 7-8.

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completing that very same ICS call is somehow outside the reach of Section 276.³²

In fact, the undersigned has been clear in previous filings that the FCC does have authority to regulate *communications* services that are ancillary to the completion of interstate and intrastate ICS *calls*. This could include, for example, charges for operator services or directory assistance that are in addition to the basic per-minute charge for a call. But that does not provide the agency unlimited authority to regulate any and every service of any type that an ICS customer may purchase.

The FCC has no authority over charges that are not charges for completion of a call, or even charges for a communications service at all, such as “account establishment by check or bank account debit; account maintenance; payment by cash, check, or money order; monthly electronic account statements; account closure; and refund of remaining balances[,]”³³ and money transfer service fees.³⁴

The undersigned does not mean to downplay the potential that some non-communications services that may be offered by or through ICS providers could harm consumers. But, to survive on judicial review, the FCC’s rules must be based on some rational delineation of its jurisdiction that provides a meaningful line between ancillary communications services subject to regulation, and non-communications services that are beyond its authority. If there is a need to address services in the latter category, the only viable solution would be for the industry, perhaps with the assistance of the FCC, to voluntarily eliminate or cap certain charges (such as was suggested in the Joint ICS Industry Proposal, dated September 15, 2014, filed with the FCC). But such a solution cannot be imposed by FCC regulation.

4. The FCC Should Adopt a Limited and Brief Transition that Denies Parties the Ability to Evade the New Rules

Parties have urged the FCC to adopt a transition plan to bring existing arrangements between ICS providers and correctional institutions under a revised regulatory framework.³⁵ It is reasonable, as the Wright Petitioners have argued, to “substantially limit the transition period for the adoption of new ICS rates.”³⁶ The PayTel proposal with a 90 day transition is the *longest* transi-

³² *Id.* at 8 (emphasis added).

³³ 29 FCC Rcd at 13206 ¶ 89.

³⁴ *Id.* at 13213 ¶ 104.

³⁵ Martha Wright Pet. Aug. 27 *Ex Parte* at 2-3; PayTel July 13 *Ex Parte*, Proposed Rules Attachment at 7.

³⁶ Martha Wright Pet. Aug. 27 *Ex Parte* at 2.

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tion period that would be reasonable. If correctional facilities and providers anticipate that the transition might be longer than that, they would have a strong incentive to enter into new long-term contracts in advance of a Commission vote on adoption of new rules, seeking to lock in unreasonably high rates and/or site commission levels.

Further, any transition period must address the possibility of gamesmanship in the period in between the FCC's adoption of new rules and their effective date. PayTel's proposal reasonably attempts to accomplish this by defining existing contracts as those in effect on the date the FCC adopts its order (which is not the same as the date of publication of the order).³⁷ Out of an abundance of caution, however, the undersigned suggests that existing contracts should be defined as those that were in effect on the day *before* the FCC adopts its order, to prevent any party from rushing to sign a contract in the late hours of the day after learning of the contents of the decision.

The Commission can, on good cause, limit parties from taking advantage of the window between adoption of rules and the effective date of those rules, to foreclose actions that would undermine the effectiveness of the FCC's new regime. The FCC has taken such steps before, such as in the *ISP Remand Order*, where the FCC limited the ability of certain competitive carriers to adopt interconnection agreements that did not comply with the FCC's new rules for compensation of ISP-bound traffic.³⁸ To avoid gamesmanship between the date of publication and the effective date, the FCC specified that carriers would not be allowed to adopt older agreements upon publication of the Order in the Federal Register.³⁹

A similar limitation is warranted here to avoid parties seeking to game the system by entering into new contracts that would be prohibited under the FCC's new rules if entered into after the effective date.

Conclusion

The FCC must establish reasonable rates for ICS that are fair to customers, providers, and facility operators alike. To accomplish this goal, the FCC should establish maximum rates for both interstate and intrastate ICS calls that permit providers both to recover their costs, including a reasonable rate of return on investment; and to pay a discrete, modest and reasonable, but limited, site commission to facility owners in those jurisdictions that permit such payments, to provide an incentive for continued availability of ICS in those facilities. These regulations should be effective as soon as possible, with any transition period limited to a brief period thus denying

³⁷ PayTel July 13 Ex Parte, Proposed Rules Attachment at 7.

³⁸ *Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9189, para. 82 (2001) (subsequent history omitted).

³⁹ *Id.* n.154.

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parties the ability to take advantage of any delay in the effective date of the agency's rules. Lastly, the FCC should likewise refrain from attempting to regulate ancillary services that are not communications services and thus not covered by the agency's delegation of authority from Congress.

Sincerely,

/s/ Andrew D. Lipman

Andrew D. Lipman