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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, on behalf of clients with an interest in the provision of Inmate Calling Services ("ICS"), for filing in the above-referenced docket. The undersigned submits this ex parte in response to the FCC's proposed ICS reform measure,[1] which repeats its previous mistake by failing to rein in excessive site commissions. Parties in this proceeding have argued that the Commission lacks statutory authority to regulate site commissions and that an ICS Order attempting such regulation would be unlikely to survive judicial review.[2] But the opposite is true; the FCC squarely possesses the requisite authority and its failure to comprehensively regulate carrier payment of site commissions dooms its latest attempt at ICS reform to rebuke from the courts and failure in the marketplace.

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

Contrary to the arguments of the correctional facilities the FCC has unmistakable direct legal authority to regulate both intrastate and interstate site commissions, under Sections 276, 201(b)

[1] Federal Communications Commission, FACT SHEET: Ensuring Just, Reasonable, and Fair Rates for Inmate Calling Services, (rel. Sept. 30, 2015) ("Fact Sheet").

[2] *See* Georgia Dep't. of Corrections Comments at 4*;* NARUC Comments at 8; Inmate Calling Solutions, LLC Comments at 4; Praeses LLC Comments at 21-22.

and 4(i) of the Communications Act. This authority also includes the ability to preempt application of inconsistent state regulation.

A. Section 276

The correctional institutions have argued that Section 276(b)(1)(A) does not apply to inmate calling and is limited to eliminating Bell Operating Company ("BOC") discrimination in favor of their own payphones, and that the FCC's regulations therefore must be restricted to accomplishing that purpose.[3] But Section 276(b) contains a broad 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 section 276(b), which includes the FCC's authority to determine fair compensation for all payphone calls, must be construed in harmony with this express statement of Congressional intent.

The correctional institutions and their allies misread the statute and the holding in *Illinois Public Telecommunications*. Although subsection (a) of Section 276 includes provisions specifically prohibiting discrimination by Bell Operating Companies, it is clear that Congress did not intend that subsection to limit the scope of the remaining provisions. Subsection (b)(1) expressly requires the FCC to adopt regulations addressing five specific subjects relating to payphone services, only two of which—clauses (C) and (D)—relate to preventing BOC discrimination. This makes it clear that Congress intended subsections (a) and (b) to address overlapping but not identical subject areas; subsection (a) therefore cannot be interpreted as expressing the sole purpose of the entire section.

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 further unambiguously defines the term "payphone service" to include the provision of "inmate telephone service in correctional institutions."[5] It is hard to fathom how the FCC can conclude 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]

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[3] *See* Letter from Phil Marchesiello, Counsel to Praeses, LLC to Marlene H. Dortch, FCC at 3 (Sept. 9, 2015) ("Praeses Sept. 9 *Ex Parte*"); NARUC Comments at 8; Comments of Inmate Calling Solutions, LLC at 4; Comments of Praeses LLC at 21-22 (filed Jan. 12, 2015) ("Praeses Comments").

[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).

Several parties try to distinguish *Illinois Public Telecommunications Ass'n* because the case related to local rates, not interexchange services;[7] or because it related to charges paid by coins, not billed to an end user.[8] There is nothing supporting such distinctions. The court specifically relied upon the language of Section 276(b)(1)(A), which empowers the FCC to establish fair compensation for "each and every completed intrastate and interstate call[.]" The FCC should reject the verbal gymnastics of those who try to make the statute say something other than what its plain words indicate. "Each and every" means every call of every type, regardless of whether the destination is local or toll, and regardless of whether the charges are paid by coins or by credit card or in some other manner. If, as the court held in *Illinois Public Telecommunications Ass'n*, the FCC has authority to prescribe maximum rates for some payphone calls, the statutory language commands that it have the same authority as to all other calls within the scope of Section 276.

The FCC has already determined that site commission payments by ICS providers, and the excessive rates ICS providers must then charge end users to recover their costs, frustrate the FCC's ability to achieve the statutory objective of "fair" compensation.[9] 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 commissions or limiting the amount of site commission payments ICS providers can pay correctional facilities allows the FCC to achieve its objective — fair ICS rates—to inmate users, ICS providers and correctional facilities with legitimate ICS-related costs alike.

The FCC also has authority under section 276(b)(1)(E) to regulate the negotiations between correctional facilities and ICS providers.[10] 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 FCC's duty to adopt regulations permitting payphone service providers to negotiate with property owners.[11] The FCC 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

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[7] NARUC Comments at 11-12; ACC Comments at 6; Georgia DOC Comments at 4.

[8] *Id*.

[9] *See Rates for Interstate Inmate Calling Services*, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 13170, 13184-86 ¶¶ 30-31, 34 (2014) ("Second FNPRM").

[10] 47 U.S.C. §276(b)(1)(E).

[11] One party has argued that this statutory provision actually prohibits the FCC from adopting regulations that limit the potential outcomes of negotiation. This argument was addressed and rebutted in the Reply Comments of Andrew D. Lipman at 3-5 (filed Jan. 26, 2015).

same geographic market.[12] The FCC took such action because evidence showed that joint negotiations between the top four stations increased retransmission consent fees and put pressure on retail rates charge by distributors.[13] The site commissions at issue here likewise place upward pressure on the rates ICS providers charge.

Section 276 also covers intrastate site commission payments since 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 …."[14] The FCC need not credit the correctional institutions misplaced reliance on Section 2(b).[15] The Supreme Court established that amendments to the Act like Section 276(b)(1) expressly extending FCC authority to services traditionally the domain of states – such as intrastate ICS services, prevail over the more general terms of Section 2(b).[16]

B. Section 201(b)

The argument that the FCC cannot use section 201(b) to prohibit correctional facilities from demanding excessive "pay to play" site commissions is equally devoid of merit.[17] It is well settled that the Act's prohibition on unjust and unreasonable terms, conditions, prices and practices under Section 201(b) affords the FCC broad power to reject anticompetitive practices that are contrary to the public interest.[18] The FCC regularly exercised its authority under Section 201(b) to declare carrier practices unreasonable.[19] An unjust or unreasonable practice can

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[12] *Amendment of the FCC's Rules Related to Retransmission Consent*, 29 FCC Rcd 3351, 3357 ¶19 (2014).

[13] *Id*. at 3362 ¶16.

[14] *Id*. at §276(b)(1)(A) (emphasis supplied.)

[15] Praeses Sept. 9 *Ex parte* at 3.

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

[17] Praeses Sept. 9 *Ex parte* at 3.

[18] *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, 419 ¶ 6 (*citing NBC v. U.S.*, 319 U.S. 190 at 222-223 (1943)).

[19] *See e.g., 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).

"encompass a broad range of activities provided and rates charged…"[20] 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.'"[21] Because ICS site commissions are a significant factor driving excessive ICS rates,[22] they should be prohibited as an unreasonable practice.

Section 201(b) provides the FCC 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.[23] The FCC thus 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.[24] The FCC also may regulate contracts that "necessarily and inseparably include[]" interstate service as well as intrastate service.[25] Using this authority, the FCC prohibited carriers from entering into or enforcing exclusivity clauses in contracts with building owners for the provision of interstate and intrastate telecommunications services to commercial and residential customers in multiple tenant environments ("MTE").[26] There is little distinction between the exclusive contracts prohibited in the *Competitive Networks* decisions and the contracts that provide for site commissions.

C. Section 4(i) Ancillary Authority

The FCC also has ancillary authority, as set forth in Section 4(i) of the Act as a backstop source of authority in addition to the express statutory jurisdiction conferred by the provisions discussed above, authorizing it to "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

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[20] *Metrophones Telecomm., Inc. v. Global Crossing Telecomm., Inc.*, 423 F.3d 1056, 1068 (9th Cir. 2005).

[21] *Infonxx, Inc. v. New York Tel. Co.*, Memorandum Opinion and Order, 13 FCC Rcd 3589, 3600 ¶ 21 (1997) (citations omitted).

[22] *2013 Inmate Calling Order*, 28 FCC Rcd at 14110 ¶ 3.

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

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

[25] *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).

[26] *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).

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. The FCC's Failure to Exercise its Jurisdiction over Site Commissions Arbitrarily Repeats the Mistakes of the 2013 ICS Order

The FCC's second attempt to rein in unreasonable rates for ICS will fail unless it addresses "site commissions [—] the primary reason ICS rates are unjust and unreasonable."[27] As discussed below, rules that cap rates — without factoring in the costs of paying site commissions — while allowing correctional facilities to demand such commissions, would almost certainly be reversed by the Court of Appeals.

First, failing to address site commissions, which the record demonstrates and the FCC declares to be the predominant factor resulting in unreasonably high ICS rates, would be arbitrary and capricious. 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."[28] Site commissions, as those on both sides of the issue readily acknowledge, are an "important aspect" of the ICS problem.[29]

Second, imposing rate caps on ICS providers that do not permit recovery of the costs of site commissions while at the same time doing nothing to end the practice of site commissions would necessarily result in rates that are confiscatory in violation of the Fifth Amendment. The FCC cannot set rates at levels so low that they make it impossible for service providers to recover their costs *and* provide a reasonable return on capital to their investors. Excluding site commissions from costs, without any offsetting opportunity for recovery, guarantees this prohibited result.

A. It Would Be Arbitrary and Capricious to Adopt ICS Rate Rules that Fail to Reduce or Eliminate Site Commissions — the Primary Cause of Unreasonably High Rates

In 2013, the FCC decided to ignore an entire category of expenditures by ICS providers — site commissions — by concluding that they are profits, not a cost of service.[30] The FCC's analysis

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[27] *See Second FNPRM*, 29 FCC Rcd at 13180 ¶ 21.

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

[29] *See Second FNPRM*, 29 FCC Rcd at 13180 ¶ 20. *See, e.g.*, Reply Comments of Lattice, Inc. at 9 (filed Jan. 27, 2015) (noting how "site commissions affect access to ICS").

[30] *2013 Inmate Calling Order*, 28 FCC Rcd at 14135 ¶ 54.

of whether site commissions are direct costs of providing ICS, however, focused exclusively on whether they recover communications-related costs incurred by correctional facilities (correctly concluding that they do not). But it ignored the fact that paying site commissions is an unfortunate cost of doing business for ICS providers,[31] despite recognizing that these commissions make up an extraordinary high percentage of the expenses ICS providers incur.[32] It is therefore puzzling that the FCC would consider adopting rate caps based on a cost study that does not consider at all the impact of site commissions on ICS provider expenditures. To ignore such a significant component of ICS provider expenses in setting rates is plainly arbitrary.

The FCC is well aware how curbing site commissions will benefit the ICS marketplace. It found that "[e]liminating the competition-distorting role site commissions play in the marketplace should enable correctional institutions to prioritize lower rates and higher service quality as decisional criteria in their RFPs, thereby giving ICS providers an incentive to offer the lowest end-user rates."[33] But the FCC has not yet taken any action that would rein in site commissions. Instead its plan seems to be to wait until state governments decide to prohibit the use of site commissions. Given that many states have used ICS rates to raise funds for their general treasuries,[34] it seems unlikely that many states will be rushing to enact ICS rate reforms that the FCC itself refuses to adopt.

Further, it is arbitrary for the FCC to establish a compensation regime where regulated carriers are effectively guaranteed an economic loss due to site commission payments[35]. As Securus has explained, "under the Rate Caps, it is economically impossible to continue paying commissions while covering the cost of service and without passing through commissions to end users in the calling rates."[36] In *AT&T*, the D.C. Circuit rejected the FCC's rate of return refund rule, which required carriers to refund any actual returns in excess of the threshold established by the agency.[37] It did so because the FCC's refund rule did not allow carriers to offset gains against periods where their actual rate of return was lower than the threshold, and therefore was inconsistent with the rest of the regulatory scheme.[38] The rule seemed to "guarantee the regulated company

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[31] *Id.* at 14125 ¶ 34 n.132, at 14110 ¶ 3 n.13.

[32] *Id*.

[33] *Second FNPRM*, 29 FCC Rcd at 13183 ¶ 27.

[34] *2013 Inmate Calling Order*, 28 FCC Rcd at 14110 ¶ 3 n.13.

[35] *See AT&T*, 836 F.2d at 1391-92.

[36] Letter from S. Joyce, counsel for Securus Technologies, Inc. to Marlene H. Dortch, FCC, at 2 (filed May 4, 2015) ("Securus May 4 E*x Parte"*).

[37] *AT&T*, 836 F.3d at 1391.

[38] *Id*. at 1390-91.

an economic loss."[39] Absent a prohibition on site commission payments, the same principle would apply to ICS providers.

B. Rate Caps that Ignore Site Commissions Without Restraining the Amount of Site Commissions Will Result in Confiscatory Rates Barred by the Fifth Amendment

The Fifth Amendment to the Constitution protects regulated entities from regulations that are "so unjust as to be confiscatory."[40] *Duquesne* established that to prevail on a claim of a confiscatory regulation, the regulated company must show that the regulation will "jeopardize the financial integrity of the company[y], either by leaving [it] insufficient operating capital or by impeding [its] ability to raise future capital," or that the regulation results in rates that "are inadequate to compensate current equity holders for the risk associated with their investments under a modified prudent investment scheme."[41]

Here, the FCC has established rate caps based on ICS provider cost studies that specifically exclude the cost of paying site commissions, even though those commission payments are the primary reason for excessive rates.[42] Thus the rate caps limit the ability of ICS providers to obtain revenues that exceed their cost. Accordingly, ICS providers will not be able to remain in business if they must comply with the FCC's rate caps, while using the revenues from those regulated rates to pay site commissions to the correctional facility.[43]

The standard for reviewing whether agency ratemaking is confiscatory is well-settled. "Price control is 'unconstitutional … if arbitrary [or] discriminatory.'"[44] The Court's focus in reviewing agency ratemaking decisions is whether the regulated rates permit the entity to obtain a return on its investment "sufficient to assure confidence in the financial integrity of the enterprise, so as to

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[39] *Id*. at 1391.

[40] *Duquesne*, 488 U.S. 299, 307 (1989), *citing Covington & Lexington Turnpike Road Co*., 164 U.S. 578, 597 (1896).

[41] *Duquesne*, 488 U.S. at 312.

[42] *Second FNPRM*, 29 FCC Rcd at 13180 ¶ 21.

[43] *See, e.g.*, Securus May 4 *ex parte* at 2 (explaining that for Securus "under the Rate Caps, it is economically impossible to continue paying commissions while covering the cost of service and without passing through commissions to end users in the calling rates."); GTL April 3 ex parte") ("To achieve both just and reasonable rates for consumers and fair compensation to ICS providers, the FCC must ensure that reductions in ICS rates and ICS provider proposed changes to ancillary fees are implemented over the same timeframe as site commission reform").

[44] *Permian Basin Area Rate Cases*, 390 U.S. 747, 769-770 (1968), *quoting Nebbia v. People of State of New York*, 291 U.S. 502, 539 (1934).

maintain its credit and to attract capital."[45] Adopting regulations that force companies to exit the business are unconstitutional; it is axiomatic that the "power to regulate is not a power to destroy."[46]

ICS rate caps that do not permit recovery of site commissions would specifically deprive ICS providers of the ability to recover their expenses, including a reasonable return on capital, through the rates they charge for service. The expenses excluded from the FCC's cost analysis are not insignificant. In some cases they amount to 96% of the revenue ICS providers obtain from serving a particular correctional facility.[47] It is impossible to imagine rational investors willingly lending capital to an enterprise that is subject to rates that prohibit the recovery of such significant costs and is guaranteed to lose money in the process. This is the essence of confiscatory ratemaking.

The FCC's treatment of site commissions as an "allocation of profit" rather than "costs" in an economic sense will not save its decision. The Supreme Court has made it clear that the review of whether a regulation is confiscatory considers whether the "rate order 'viewed in its entirety' … produce[s] a just and reasonable 'total effect' on the regulated business."[48] "It is not the theory but the impact of the rate order which counts."[49] Therefore, a maximum rate that prevents an ICS provider from charging enough to cover its economic costs plus site commission payments, and still pay some reasonable return to its investors, would be unconstitutional. The FCC cannot rationally separate out the direct costs ICS providers incur to provide service and the expenditures they make on site commissions.[50] Like the FCC's rate of return refund rule overturned in *AT&T*, the FCC's proposed rate caps are impermissible because they "guarantee the regulated compan[ies] an economic loss."[51]

Even if the FCC maintains that site commissions are profit sharing, it must adjust its rate of return prescription to account for the ICS providers' obligation to make these payments. The D.C. Circuit explained the FCC's process for setting the rate of return in *AT&T*:

> Under the Communications Act … the [FCC] regulates the rates a carrier may charge for interstate telecommunications service. 47 U.S.C. §§ 201-

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[45] *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 602 (1944).

[46] *Permian Basin*, 390 U.S. at 769, *citing Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 331 (1886).

[47] *Second FNPRM*, 29 FCC Rcd at 13172 ¶ 3.

[48] *Hope Nat. Gas*, 320 U.S. at 602. (internal citations omitted)

[49] *Id*.

[50] *See AT&T*, 836 F.2d at 1392 ("[i]nvestors in a carrier, after all, must invest in the carrier as a whole ….").

[51] *Id*. at 1390-91.

> 205 (1982). As part of that task, the [FCC] sets the rate of return on capital that the carrier may use in setting its rates. *See, e.g., Nader v. FCC*, 520 F.2d 182, 191-92 (D.C. Cir. 1975) … The carrier then calculates its rates so that projected revenues will cover projected operating expenses plus the authorized return on capital.[52]

Fixing a rate of return requires the FCC to balance investor and consumer interests.[53] The "investor …has a legitimate concern with the financial integrity of the company whose rates are being regulated … including that "there be enough revenue … for operating expenses …[and] the capital costs of the business.'"[54] Under this standard, the return should be "commensurate with returns on investments in other enterprises having corresponding risks."[55] Further such return "should be sufficient to assure confidence in the financial integrity of the enterprise so as to maintain …credit and attract capital."[56]

The "commensurate" rate of return for ICS must thus take into account the reduced return available to ICS providers where the correctional facilities are not prohibited from imposing site commissions as a cost of doing business. While the FCC can state that site commission "costs" are not direct costs of providing ICS, it cannot exclude them from its calculation of a reasonable rate of return that is "commensurate" with the risks in other similarly situated enterprises.

The FCC made no such analysis of the rate of return in formulating its 2013 rate caps, and instead relied on the 11.25 percent return assumed in the submitted cost studies, which expressly excluded all site commissions.[57] The FCC must do more than "accept[] the figures in the cost study."[58] It must determine whether the rate of return used in the cost study is sufficient to ensure investor confidence in the business once the rate rules are applied. In determining the appropriate level of ICS rate caps, the FCC must make an independent judgment on whether the cost study developed by parties strikes the appropriate balance between consumers and investors.[59] And

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[52] *Id.* at 1388.

[53] *See Hope Nat. Gas*, 320 U.S. at 603.

[54] *Id*.

[55] *Id*.

[56] *Id*.

[57] *2013 Inmate Calling Order*, 28 FCC Rcd at 14136, n.203.

[58] *Id*.

[59] *See Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 328 (5th Cir. 2001) (rejecting FCC decision to set universal service fund level at $650 million based solely on consensus of parties below since "agency abdicates its role as a rational decision-maker if it does not exercise its own judgment, and instead cedes near-total deference to private parties' estimates-even if the parties agree unanimously as to the estimated amount"); *Laclede Gas Co. v. FERC*, 997 F.2d 936, 947 (D.C. Cir. 1993) (FERC was

unless the rate of return expressly considers the commission payments ICS providers must make to obtain contracts to provide ICS, the rate of return will fail to strike the appropriate balance and lead to confiscatory rates.

Conclusion

To ensure that its rules will withstand judicial review, the FCC must adopt a consistent approach that harmonizes its rate caps and site commissions. The FCC's proposed rules, as represented in the Fact Sheet fail to achieve this balance. Instead of regulating or precluding carriers from paying site commissions, such payments are merely discouraged — meaning they will continue unabated. Because ICS providers must pay site commissions in order to provide service, they must be equally entitled to charge rates that cover those costs. If the FCC ignores this essential relationship, as it appears it has, its laudable efforts to rein in ICS rates will be doomed to fail.

Sincerely,

/s/ Andrew D. Lipman

Andrew D. Lipman

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required to exercise independent judgment in approving a settlement even though the figure was within the range pleaded by comments in the agency proceeding below).