

Morgan, Lewis & Bockius LLP  
2020 K Street NW  
Washington, DC 20006-1806  
Tel. +1.202.373.6000  
Fax: +1.202.373.6001  
www.morganlewis.com

**Andrew D. Lipman**  
Partner  
+1.202.373.6033  
andrew.lipman@morganlewis.com

October 9, 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.

The undersigned has already expressed concerns regarding the FCC's apparent approach to ICS reform as outlined in the FCC's September 30, 2015 'Fact Sheet.'<sup>1</sup> This letter addresses two intertwined problems with the FCC's proposed approach — the confiscatory rates that will result from adoption of rate caps excluding site commission costs while failing to bar or regulate such payments; and the FCC's expectation that ICS providers will be able to transition to such confiscatory rates within 90 days of the effective date of the FCC's rules. To address this problem the FCC either needs to prohibit or regulate site commissions, for example by adopting the proposal to prohibit all site commissions except for a small per-minute additive above the proposed rate caps,<sup>2</sup> or its needs to grandfather all existing contracts that require payment of site commissions.

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<sup>1</sup> Federal Communications Commission, FACT SHEET: Ensuring Just, Reasonable, and Fair Rates for Inmate Calling Services, (rel. Sept. 30, 2015).

<sup>2</sup> Letter from A. Lipman, Morgan Lewis & Bockius, LLP to M. Dortch, FCC, at 2-5 (July 6, 2015). *See also* Letter from Marcus W. Trathen, Counsel to Pay Tel Communications, Inc., to Marlene H. Dortch, WC Docket No. 12-375 (July 13, 2015) ("*Pay Tel July 13 Ex Parte*"); Ex Parte Submission of Securus Technologies, Inc., WC Docket No. 12-375 (July 27, 2015).

As explained in the undersigned's September 21 letter,<sup>3</sup> the FCC can define the scope of "existing" agreement to be grandfathered in a way to deter gamesmanship.

Providers have already explained how the proposed rate caps are confiscatory.<sup>4</sup> In addition to the general problem with the FCC's adoption of rates that are below providers' costs,<sup>5</sup> the proposed order fails to address the problem faced by providers in multi-year contracts.

The record is clear that multi-year contracts are the standard vehicle where the correctional facility requires payment of site commissions. Global Tel\*Link, for example, explained that it "enters into multi-year contracts with its correctional facility customers through a competitive bidding process operated by the customer."<sup>6</sup> Most of these "contracts run for a term of three to ten years."<sup>7</sup> Under such long term contracts it is not unusual that the ICS provider does not reach the break-even point "until towards the end of the contract term."<sup>8</sup>

Because the FCC apparently is not modifying the site commission regime, it is likely that the vast majority of ICS contracts requiring site commissions will not be modified, leaving providers in the unenviable position of being required to charge much lower rates in compliance with the rate caps, while still being obligated under contract to pay site commissions.

Expert reports filed in this proceeding, for example, have explained that "the impact of site commissions ... would be devastating if [the provider] could no longer offset these costs in telephone rates."<sup>9</sup> As Mr. Siwek concludes, without "recovery of site commission costs, the gross margins earned from each facility group turn sharply negative."<sup>10</sup> ICS providers are already feeling the impact of the FCC's proposal. Securus has noted that "if adopted, the rates and rules in the Fact Sheet could be a 'business-ending event' for the company."<sup>11</sup> Global Tel\*Link is

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<sup>3</sup> Letter from A. Lipman, Morgan Lewis & Bockius, LLP to M. Dortch, FCC, at 9 (Sept. 21, 2015) ("*Lipman Sept. 21 Ex Parte*").

<sup>4</sup> See Letter from S. Joyce, Counsel for Securus Technologies, Inc., to M. Dortch, FCC, at 1-2 (Oct. 8, 2015); Letter from M. Trathen, Counsel for Pay Tel, to M. Dortch, FCC at 1 (Oct. 8, 2015); Letter from C. Kiser, Counsel for Global Tel\*Link, to M. Dortch, FCC, at 2 (Oct. 8, 2015).

<sup>5</sup> *Id.* at 2.

<sup>6</sup> Global Tel\*Link Comments at 4, (filed Mar. 25, 2014).

<sup>7</sup> *Id.* at 10.

<sup>8</sup> Petition of CenturyLink for Stay Pending Judicial Review, Decl. of P. Cooper ¶ 11. (Nov. 25 2013).

<sup>9</sup> Expert Report of Stephen E. Siwek, On Behalf of Securus Technologies, Inc. at ¶ 4.8, attached to Securus Comments (Mar. 25, 2013).

<sup>10</sup> *Id.*

<sup>11</sup> Letter from S. Joyce, Counsel for Securus, to M. Dortch, FCC at 1 (Oct. 7, 2015).

already suffering the effects of the FCC's proposal; as Standard & Poors has reduced its credit rating based on a belief that an "FCC order that caps rates without a commensurate reduction or elimination of commissions could materially hurt the company's profitability."<sup>12</sup>

While many of these multi-year contracts include change of law provisions, it is unclear whether the counter parties to these agreements — the correctional facilities — will agree that the FCC's reforms, as set forth in the Sept. 30 Fact Sheet, amount to a change of law with respect to site commission payments. ICS providers have explained that it "is not a given that ICS providers can discontinue paying site commissions under these contracts, or renegotiate or terminate these agreements, until the terms of the contracts expire."<sup>13</sup>

It is easy to understand how correctional facilities will argue that the FCC's rules — which fail to directly address the practice of paying site commissions for ICS — do not constitute a change of law with respect to the site commissions required in the contract. Courts adjudicating disputes regarding change of law provisions will look to the language of the contract but also to the language of the FCC's Order.<sup>14</sup> In particular, the courts will consider whether the Order, "by its own force" alters or preempts terms in the agreement.<sup>15</sup> Unless the FCC directly prohibits or regulates site commissions it is unlikely that ICS providers will be successful at reducing the level of site commissions in their multi-year contracts thereby rendering the rate caps confiscatory.

Accordingly, the FCC should a) either bar or regulate site commissions, such as by adopting the undersigned's proposal to prohibit all site commission payments other than a Facility Administrative Support Payment,<sup>16</sup> as an additive to the rate caps, so that correctional facilities can recoup the legitimate costs associated with permitting ICS; or b) grandfather all existing ICS contracts that require payment of site commissions so that ICS providers and correctional facilities can appropriately transition to the FCC's new rate caps.

If the FCC grandfathers existing contracts, it should make sure its transition rules deny parties the opportunity to game the system by forcing ICS providers into new or amended contracts on the eve of FCC reform. As Pay Tel explained in 2013, there were instances where "facilities

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<sup>12</sup> Letter from C. Kiser, Counsel for Global Tel\*Link, to M. Dortch, FCC, (Oct. 8, 2015) Attachment, Standard & Poor's Rating Services, *Research Update: Global Tel\*Link Corp. Ratings Placed on CreditWatch Negative Following Proposed FCC Regulation* at 2 (Oct. 8, 2015).

<sup>13</sup> CenturyLink Comments at 11 (Dec. 20, 2013).

<sup>14</sup> See e.g., *P.R. Tel. Co. v. Sprintcom, Inc.*, 662 F.3d 74 (2011).

<sup>15</sup> *Id.* at 92.

<sup>16</sup> See e.g., Letter from A. Lipman, Morgan Lewis & Bockius, LLP to M. Dortch, FCC, at Proposed Rules Exhibit A, p. 3-4 (Proposed Rule 64.6060) (Sept. 28, 2015).

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were requesting ‘workarounds’ of pending FCC rules by seeking immediate prepayment of site commissions projected over a multi-year period corresponding to the life of the contract.”<sup>17</sup> It would not be surprising if similar practices occurred again on the eve of FCC action.

While the FCC cannot prevent all gamesmanship by parties that seek to preserve site commissions, it can make sure that the adoption of its rules do not set off a free for all where parties race to force providers into new or amended contracts requiring upfront or accelerated site commission payments during the period between adoption of the FCC’s rules and their formal publication in the Federal Register.

As explained in the undersigned’s September 9 letter, the FCC’s order should define existing contracts as those that were in effect on the day *before* the FCC adopts its order, to prevent any party from rushing to sign or amend a contract in the late hours of the day after learning of the contents of the rules.<sup>18</sup> This is consistent with Pay Tel’s rules proposal,<sup>19</sup> and with FCC precedent.<sup>20</sup>

Please do not hesitate to contact the undersigned should you have any questions about this submission.

Sincerely,

*/s/ Andrew D. Lipman*

Andrew D. Lipman

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<sup>17</sup> Letter from M. Trathern, Counsel for Pay Tel, to M. Dortch, FCC, at 1 (Apr. 3, 2015).

<sup>18</sup> Lipman Sept. 21 Ex Parte at 9.

<sup>19</sup> Pay Tel July 13 Ex Parte, Proposed Rules Attachment at 7.

<sup>20</sup> *Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9189, ¶ 82 n. 154 (2001) (subsequent history omitted).