

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
+1.202.373.6033
andrew.lipman@morganlewis.com

October 15, 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, the undersigned has advocated that the Commission should either bar carriers from paying site commissions or it should adopt a Facility Administrative Support payment that functions as a separate rate ICS providers can charge and remit to facilities for payment of site commissions in states where such payments are lawful.¹ The undersigned's proposal sets the rates for such facility payments between 1-3 cents/minute depending on the average Daily Population of the facility, without distinguishing between jails and prisons.² As explained below, the FCC can set the level of the proposed facility support charges using proxies and even "reasoned guesswork" without direct reference to costs established in the record. Further, the FCC can allow for such payments even if it continues to treat commissions as an allocation of profit rather than a direct cost of providing ICS.

Other parties have offered similar proposals, including correctional institutions. The National Sheriffs Association, proposed a similar structure with higher compensation to jails ranging from 3 cents/minute to 8 cents per minute for jails with Average Daily Populations below 349 in-

¹ See, e.g., Letter from A. Lipman to M. Dortch, FCC (July 6, 2015).

² *Id.* at 5.

mates.³ Darrell Baker, Director of Utility Services for the Alabama Public Service Commission also offered a similar proposal with the a facility charge of 4 cents/minute for jails and a 1-2 cent/minute recovery fee for prisons depending on the Average Daily Population.⁴

As discussed in the undersigned's July 6, ex parte letter, however, the FCC may set the level of allowable facility support charges on proxies and even "reasoned guesswork," as long as its decision is informed by its "historical experience and expertise," in the absence of specific, reliable data.⁵ The *NARUC* case upheld the FCC's assessment of a \$25 surcharge on private lines, due to the leaky PBX problem, as the contribution to the costs of the interstate telephone network because the FCC was unable to obtain reliable data concerning the volume of leaked traffic. The D.C. Circuit rejected arguments that the FCC was obligated to provide a precise cost justification, explaining that "It is not the [FCC's] chore to convince us that what it has done is the best that could be done, but that what it has done is reasonable under difficult circumstances."⁶

Besides the private line surcharge, the FCC has used surrogates, proxies and formulae in lieu of actual cost data in other contexts. In administering the Universal Service program, for example, the FCC used a reimbursement formula relying on surrogate data to estimate level of need, rather than performing site-specific analyses that would have been administratively infeasible.⁷ Also, the FCC based high-cost reimbursement for larger ILECs on forward-looking cost models that estimate costs for specific locations based on mathematical formulae, recognizing that conducting a separate cost study for each particular location would be entirely impracticable.⁸

Here, the FCC faces a problem similar in some respects to that confronted in the *NARUC* decision. The record shows clearly that correctional facilities incur some costs to make ICS available

³ Letter from Mary J. Sisak, Counsel for the National Sheriffs Association, to M. Dortch, FCC at 3 (July 14, 2015).

⁴ Redacted Letter from Darrell A. Baker, Director of Utility Services for the Alabama Public Service Commission to Marlene Dortch, FCC at 4-5 (July 12, 2015).

⁵ *National Ass'n of Reg. Util. Com'rs v. FCC*, 737 F.2d 1095, 1140-41 (D.C. Cir. 1984) ("*NARUC*").

⁶ *Id.* at 1141.

⁷ See *Letter to Mel Blackwell, Vice President Schools and Libraries Division, USAC, from Trent B. Harkrader, Chief, Telecommunications Access Policy Division, Wireline Competition Bureau*, 27 FCC Rcd 8860 (Wireline Comp. Bur. 2012).

⁸ See *Connect America Fund; High-Cost Universal Service Support*, Report and Order, 28 FCC Rcd 5301 ¶ 1 (Wireline Comp. Bur. 2013); *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17734 ¶ 184 (2011) *aff'd* 753 F.3d 1015 (10th Cir. 2014), *cert denied. United States Cellular Corp. v. FCC*, Case 14-610 et al. (May 4, 2015).

to their inmates, but the evidence is far less clear as to the amount of those costs. Furthermore, the entities incurring the costs (typically sheriffs and prison systems) are not themselves offering regulated communications services, are not subject to the direct jurisdiction of the FCC, and have no uniform system of accounting for ICS-related costs. It will therefore be difficult and resource-intensive for the FCC to obtain reliable cost information, if it is possible at all. This is precisely the type of situation in which the use of reasonable surrogates is permissible.

Moreover, the fact that the FCC treats site commission payments as an allocation of profit, rather than as a cost of service, has no bearing on its ability to adopt a sliding-scale formula to limit such payments. The Commission has ample statutory discretion to determine the level of “profit” that can be included in a just and reasonable rate. As already noted, it has effectively allowed for a wide range of potential earnings in adopting incentive regulation for large ILECs. It can similarly allow for a range of earnings, albeit with more constraints, by permitting a range of site commission payments based on the size of the facility.⁹

Similarly, for purposes of determining whether maximum rates are confiscatory, in violation of the Fifth Amendment, it does not matter whether the FCC considers site commissions as “costs” or as “profits.” 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.”¹⁰ “It is not the theory but the impact of the rate order which counts.”¹¹ 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.¹²

Accordingly, it would be both reasonable and proper for the Commission to adopt a formula approach to determining the maximum reasonable site commission payment for ICS providers, instead of going down the burdensome and potentially endless path of trying to analyze costs on a site-by-site basis. This provides an administratively feasible and flexible method of capping site commissions, and if experience proves that the cap results in a reduction in the availability of telephones to inmates (or, conversely, results in unreasonably high rates for ICS calls), the Commission would be able to adjust the formula.

⁹ State regulatory agencies operating under similar statutory authority have, for example, sometimes allowed some regulated companies to earn higher rates of return than others as a reward for good management or for undertaking particular investments that served the public interest. *See, e.g., Pennsylvania Public Util. Comm’n v. PPL Electric Utils. Corp.*, R-2012-2290597, Order at 93-98 (Pa. Pub. Util. Comm’n 2012).

¹⁰ *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (internal citations omitted).

¹¹ *Id.*

¹² *See also Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989).

Marlene H. Dortch
October 15, 2015
Page 4

The undersigned continues to believe that adopting a facility support compensation payment rate, in addition to its rate caps is the best solution to bring lower rates to ICS users and stability to the ICS industry for all parties. There are no practical alternatives to this approach in the record. No party has seriously suggested that the FCC should, or even could, attempt to make site-by-site cost determinations, either through rulemaking or through individualized waiver proceedings. Either of these approaches would be unreasonably wasteful of both parties' and the Commission's limited resources. The only other possibilities would be to prohibit site commission payments entirely, or else to leave them completely unrestricted (as they were before the first Report and Order in this docket). The former, although within the scope of the Commission's authority,¹³ appears likely to lead to results contrary to the public interest, as it could lead some correctional facilities to reduce or eliminate inmate access to phones. The latter would simply reinstate the principal cause of the unreasonable ICS rates that led the Commission to act in the first place.¹⁴

Sincerely,

/s/ Andrew D. Lipman

Andrew D. Lipman

cc R. Goodheart
S. Weiner
T. Litman
N. Degani
A. Bender
M. Findley
S. Tetreault
D. Gossett
P. Arluk
L. Engledow
G. Strobel
T. Parisi
B. Middleton
R. Mallen

¹³ Letter from A. Lipman, Morgan Lewis & Bockius, LLP to M. Dortch, FCC, at 9-12 (June 1, 2015) (discussing Commission authority under sections 276 and 4(i) among others); Letter from A. Lipman, Morgan Lewis & Bockius, LLP to M. Dortch, FCC, at 1-7 (April 8, 2015) (discussing Commission authority under sections 201, 276, and 4(i) of the Act).

¹⁴ Lipman June 1 *ex parte* at 3, 5; Lipman April 8 *ex parte* at 2-3.