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October 15, 2015

**VIA ELECTRONIC FILING**

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

Re: Interstate Inmate Calling Services, WC Docket No. 12-375

Dear Ms. Dortch:

Pursuant to 47 C.F.R. § 1.1206(b)(2), this letter is to advise you that the undersigned, and Joshua M. Bobeck of Morgan, Lewis & Bockius LLP, made an oral *ex parte* presentation relating to this proceeding on October 14, 2015, to Travis Litman, Legal Advisor to Commissioner Jessica Rosenworcel.

Our oral presentation covered the topics addressed in my written comments, reply comments, and written *ex parte* submissions in the above-captioned docket and responded to the outline of the proposed order in this proceeding as explained in the Fact Sheet issued on September 30, 2015.<sup>1</sup>

The undersigned's oral presentation covered the following topics:

- The FCC has ample authority under Sections 201, 276 and 4(i) of the Communications Act to either prohibit carriers from paying site commissions or to establish a facility sup-

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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) ("Fact Sheet").

port fee that would set a limit on the level of payments ICS providers could make to correctional facilities.<sup>2</sup>

- The FCC need not set the level of such facility support payments based on correctional facility costs but may use proxies or other surrogates informed by the FCC's vast experience regulating inmate calling and similar services.<sup>3</sup> The FCC has used such surrogates in assessing surcharges on private lines with respect to Leaky PBXs,<sup>4</sup> in administering universal service,<sup>5</sup> and high cost support.<sup>6</sup>
- The FCC's decision to regulate site commissions or to bar all payments other than those complying with a facility support payment rule does not depend on whether the FCC treats site commissions as an allocation of profit or a direct cost of providing ICS.<sup>7</sup>
- The proposed order, as represented in the Fact Sheet issued September 30, 2015, particularly the 90 day transition, would pose serious problems with respect to multi-year contracts and the site commissions called for under such contracts. Renegotiating the site commissions in these agreements is unlikely to occur and would likely lead to years of litigation and uncertainty. Courts adjudicating disputes regarding change of law provisions not only look to the language of the contract but also to the language of the FCC's order.<sup>8</sup> In particular, the courts will consider whether the order, "by its own force" alters

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<sup>2</sup> See, e.g., Letters from A. Lipman, Morgan, Lewis & Bockius, LLP to M. Dortch, FCC (Sept. 21, 2015) at 2-6; (Oct. 7, 2015) at 2-6; (June 1, 2015) at 9-12.

<sup>3</sup> See Letter from A. Lipman, Morgan, Lewis & Bockius, LLP to M. Dortch, FCC at 3-4 (July 6, 2015).

<sup>4</sup> *Id.* at 3 citing *National Ass'n of Reg. Util. Com'rs v. FCC*, 737 F.2d 1095, 1140-41 (D.C. Cir. 1984).

<sup>5</sup> Lipman July 6 *Ex parte* at 3-4 citing 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).

<sup>6</sup> Lipman July 6 *Ex parte* at 4 citing *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).

<sup>7</sup> Lipman July 6 *Ex parte* at 4.

<sup>8</sup> See e.g., *P.R. Tel. Co. v. Sprintcom, Inc.*, 662 F.3d 74 (2011).

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or preempts terms in the agreement.<sup>9</sup> Unless the FCC directly prohibits or regulates site commissions the disputes between ICS providers and facility providers regarding enforcement of change of law provisions will introduce significant instability into the industry, jeopardizing the availability of ICS at some facilities or causing some providers to exit the market rather than pay confiscatory rates under the FCC's caps.<sup>10</sup>

- The undersigned also expressed concern that the FCC's proposal to bar providers from charging for certain ancillary services should be limited to charges that are related to communications service as the FCC lacks jurisdiction to regulate the provision of non-communications services by ICS providers.<sup>11</sup>

Sincerely,

*s/Andrew D. Lipman*

Andrew D. Lipman

cc: T. Litman

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<sup>9</sup> *Id.* at 92.

<sup>10</sup> See Letter from A. Lipman, Morgan, Lewis & Bockius, LLP to M. Dortch, FCC at 3-4 (Oct. 9, 2015).

<sup>11</sup> See Letter from A. Lipman, Morgan, Lewis & Bockius, LLP to M. Dortch, FCC at 6-8 (Sept. 21, 2015).