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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.

The undersigned has already expressed concerns regarding the FCC's apparent approach to ICS reform that does not bar or limit carrier payment of site commissions.¹ The undersigned has additional concerns that the FCC has not fully considered the instability that will result if it leaves the existing site commission regime in place while adopting its proposed rate caps. The FCC appears to assume that even if the FCC's order does not bar or limit site commissions, because site commission contracts frequently contain change of law provisions, ICS providers and correctional facilities will use such clauses and quickly renegotiate site commission payments to function under the rate caps.

Of course the alternative scenario undermines the FCC's laudable goals at reforming the ICS regime. Correctional facilities with long term contracts guaranteeing revenue streams from site

¹ Letter from A. Lipman, Morgan Lewis & Bockius, LLP to M. Dortch, FCC, at 2-5 (July 6, 2015); Letter from A. Lipman, Morgan Lewis & Bockius, LLP to M. Dortch, FCC (Oct. 9, 2015) (the "*Oct. 9 Ex Parte*"). 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).

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commissions will not willingly negotiate away those revenues unless compelled to do so. And ICS providers will be unwilling to pay site commissions that exceed the revenues they can collect under the FCC's reduced rate caps as such a practice would be the end of their business.

Plainly ICS providers and correctional facilities will disagree whether the FCC's proposed rules, as represented in the September 30, 2015 Fact Sheet, should be construed as a change of law with respect to enforcing change of law provisions in contracts requiring payment of site commissions. These disputes and resulting litigation will consume significant resources and cause instability in the system for years.

Courts will carefully examine and narrowly construe change of law provisions, particularly those that are ambiguous. Courts adjudicating contract disputes of course will read the instrument as a whole.² And, the ordinary meaning will be given to a contract provision unless circumstances show that a special meaning should be attached to them.³ In particular, the courts will consider whether the Order, "by its own force" alters or preempts terms in the agreement.⁴

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,⁵ 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 without years of costly and destabilizing litigation.

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

Sincerely,

/s/ Andrew D. Lipman

Andrew D. Lipman

² Restatement Second Contracts § 202(2).

³ Restatement Second Contracts § 202(3); Williston on Contracts 4th ed. §32.3.

⁴ See e.g. *P.R. Tel. Co. v Sprintcom, Inc.*, 662 F.3d 74, 92 (2011).

⁵ 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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