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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.

It has been suggested that the Commission cannot prohibit site commissions paid by carriers because such action might affect state sovereignty. The undersigned is aware of no case law supporting such a position. Although the Tenth Amendment to the U.S. Constitution provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are served to the States, respectively, or to the people,”¹ this does not, however, necessarily constrain congressional authority to subject state instrumentalities to “generally applicable” law.² In other words, “[i]f the regulation would be valid if applied to a private party, it is also valid as to the state.”³

As discussed in previous filings, the FCC has plenary authority to regulate site commissions.⁴ Section 201(b) of the Act affords the FCC broad power to reject anticompetitive practices that

¹ U.S. Const. Amend. X.

² See *Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528, 537 (1985) (listing four conditions that must be satisfied before a state activity may be deemed immune from a particular federal regulation enacted under commerce power including that the federal law regulates “the ‘States as States.’”).

³ See Steven Emanuel and Lazar Emanuel, *Constitutional Law 9* (Aspen Publishers 2008).

⁴ See, e.g., Letter from A. Lipman to M. Dortch, FCC, at 9 (July 21, 2015).

are contrary to the public interest,⁵ and the FCC has regularly exercised its authority under Section 201(b) to declare carrier practices unreasonable.⁶ Under Section 201(b), the FCC has 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.⁷

In the *Commercial MTE Exclusivity Order*, for example, the FCC decided not to carve out contracts involving government offices from its prohibition on exclusive contracts.⁸ The FCC specifically prohibited carriers from entering into or enforcing exclusivity clauses in contracts with building owners for the provision of telecommunications services to commercial customers and residential customers in multiple tenant environments (“MTE”) because such exclusivity arrangements were an unreasonable practice that harmed competition in the telecommunications market.⁹ Such exclusive MTE arrangements included the provision of interstate, international and intrastate telecommunications services. Like those exclusive MTE contracts, correctional facilities generally enter into an exclusive contract that “necessarily and inseparably includes” the provision of interstate and intrastate services, and the FCC therefore has authority to prohibit ICS providers from entering into or renewing contracts that provide for site commissions or regulate the level of such payments.

Section 276 also provides the FCC with broad authority to regulate ICS.¹⁰ Specifically, Section 276(b)(1)(A) requires the FCC to ensure that all payphone service providers (“PSPs”), including ICS providers, are “fairly” compensated for both interstate and intrastate calls.¹¹ Site commissions frustrate the FCC’s ability to achieve this statutory objective of “fair” compensation

⁵ 47 U.S.C. § 201.

⁶ 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).

⁷ See *Promotion of Competitive Networks in Local Telecommunications Markets*, Opinion, 23 FCC Rcd 5385, 5391 ¶ 15 (2008) (citations omitted) (hereinafter referred to as “*Residential MTE Exclusivity Order*”).

⁸ 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, ¶38 (2000) (hereinafter referred to as *Commercial MTE Exclusivity Order*).

⁹ *Id.* at ¶¶ 160-64 (applicable to commercial customers); *Residential MTE Exclusivity Order* 23 FCC Rcd at 5386, 5391 ¶¶ 5, 14-15 (applicable to residential customers).

¹⁰ 47 U.S.C. § 276(d).

¹¹ 47 U.S.C. § 276(b)(1)(A).

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because a correctional facility lacks the incentive to choose the lowest-cost provider and drive ICS rates lower. Existing market forces instead motivate the facility to award its exclusive contract to the ICS provider willing to pay the highest commission, and it is the ICS users and their families and friends that bear the burden of these excessive costs. The record in this proceeding overwhelmingly demonstrates that the payment of site commissions unreasonably distorts the ICS marketplace and causes unfair compensation.

Accordingly, it is within the Commission's authority to adopt a regulation prohibiting ICS providers from paying site commissions.

Sincerely,

/s/ Andrew D. Lipman

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