

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)
)
)
Rates For Interstate Inmate) **WC Docket No. 12-375**
Calling Services)

OPPOSITION TO PETITION FOR STAY

The Wright Petitioners (the “Petitioners”) hereby submit this Opposition to the Petition Of Global Tel*Link For Stay Pending Judicial Review, filed by Global Tel*Link (the “Petition”).¹ The Petition requests that the FCC stay the effectiveness of the Inmate Calling Service (ICS) rate caps adopted in the Second Report and Order, adopted on October 22, 2015, and released on November 5, 2015, in the above-captioned proceeding.² The Petition requests that the FCC delay implementing the rate caps adopted in the Second R&O “pending GTL’s petition for judicial review.”³

As set forth below, GTL incorrectly asserts that (i) it will likely prevail in a future judicial review; (ii) it will suffer irreparable harm; (iii) other interested parties will not be substantially harmed if the stay is granted; and (iv) the public interest favors granting a stay.⁴ Not only does the Petition ignore the enormous impact caused by a further delay in providing real relief to ICS consumers, GTL also fails to satisfy the *Virginia Jobbers* test for granting a stay. Therefore, the Petition must be dismissed.

¹ The Petition was filed on December 22, 2015. Pursuant to Section 1.45(d) of the FCC’s rules, this Opposition is filed within 7 days of the submission. *See* 47 C.F.R. § 1.45(d) (2015).

² *Rates for Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking, FCC 15-136, rel. Nov. 5, 2015 (the “*Second R&O*”). The Second R&O was published in the Federal Register on December 18, 2015. *See* 80 FED. REG. 79135 (Dec. 18, 2015).

³ *Petition*, pg. 1.

⁴ *Petition*, pg. 9 (citing *Virginia Petroleum Jobbers Association*, 259 F.2d 921 (D.C. Cir. 1958)).

First, the Petition is incorrect that an appeal is likely to be successful.⁵ GTL claims that the FCC was required to reduce or ban site commissions in the *Second R&O* because site commissions “are a necessary cost of providing service.”⁶ As shown below, this is simply incorrect.

The record in this proceeding demonstrates that several states and a number of local jurisdictions do not require site commissions, and ICS providers still are able to provide ICS service to those facilities. Thus, rather than being in the same category as “telephone equipment or the lease of local telephone lines,”⁷ site commissions operate outside the costs that are necessary to initiate, connect and complete an ICS call.

Instead, GTL has (perhaps intentionally) forgotten that site commissions are a relatively recent development in the ICS industry. Up until the mid-1990s, ICS was provided without the demand and payment of site commissions. However, with the development of specialized ICS providers, site commissions became a vehicle for these new ICS providers to win contracts to provide ICS to correctional facilities.

Thus, the perverse race to share the largest portion of the site’s ICS revenue with the correctional facility, which has resulted in ICS providers falling over themselves and willingly offering to share a large percentage of their revenue to win a contract, began because ICS providers knew they could pass these costs onto inmates and their families. When demands for the sharing of ICS call revenue rose high enough to affect their bottom line, ICS providers created new ancillary fees to pass on to ICS customers, the revenue from which was not shared with the correctional facilities.

⁵ *Petition*, at 6.

⁶ *Petition*, at 10.

⁷ *Id.*

However, the FCC determined long ago that these voluntary “location rental payments” complained upon by GTL were not “costs,” but rather, are “negotiable by contract with the facility owners and represent an apportionment of profits between the facility owners and the providers of the inmate payphone service.”⁸ While the ICS providers undoubtedly now regret introducing the payment of these “negotiable” site commissions into the ICS marketplace, GTL’s attempt to paint this practice as a mandatory aspect of providing ICS ignores substantial evidence to the contrary, and ignores the fact that the FCC determined that site commissions were not “costs” to be considered under Section 276 of the Communications Act thirteen (13) years ago.

Thus, the Second R&O did not break new ground in this respect, and GTL’s request for a stay regarding the FCC’s decision not to treat site commissions as “costs” must be dismissed. While ICS providers like GTL would have preferred that the FCC save ICS providers from the folly of their own making, the FCC’s adoption of caps on ICS rates and fees fits squarely within its statutory authority and its past long-standing precedent.

Moreover, GTL questions whether the FCC had the authority to take the action it claims as the basis for its judicial appeal – stating “if the Commission (assuming it has the authority) had barred the payment of commissions and rendered existing contracts unenforceable, it could then disregard such costs in setting rate caps.”⁹ If GTL is serious in its query as to whether the FCC has the authority to regulate or ban site commissions, one must seriously question why it is the main focus for its stay request and judicial appeal.

Instead, it is likely that GTL and other ICS providers, along with their correctional partners, would have sought a stay from the FCC and filed a judicial appeal even if the FCC had

⁸ See *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand, 17 FCC Rcd 3248, 3262 (2002).

⁹ *Id.*, at 13 (emphasis added).

banned site commissions by perhaps claiming that the FCC lacked the authority to intercede in contracts between private corporations and state/local governments. The FCC established just, reasonable and fair interstate and intrastate ICS telephone rates based on its clear authority under Sections 201, 205 and 276 of the Communications Act, and declined to rescue ICS providers from their voluntary agreements to pay site commissions. The FCC focused on the fact that ICS providers were charging unjust, unreasonable and unfair ICS rates and fees, and used its statutory authority to correct the problem. Throwing a life-preserver to ICS providers was not required to satisfy the FCC's statutory obligations and would have only led to the same parties filing a stay request and judicial appeal.

Second, the rate caps adopted by the FCC will continue to permit ICS providers to receive fair compensation. The FCC correctly noted that ICS providers' cost studies substantially overstated their actual costs to provide service, and GTL ignores the verifiable fact that lower ICS rates have led to substantial increases in ICS call volume.¹⁰ The combination of documented increased call volume resulting from lowered interstate ICS rates, along with ICS providers' actual costs which are substantially lower than reported in their cost studies, support the ICS rate caps adopted by the FCC in the Second R&O.¹¹

¹⁰ See *Petitioners Comments*, filed Dec. 20, 2013, Exhibit F (Florida DOC advocating for the adoption of a "pricing structure that increases the department's commission rate by approximately 27% while lowering the cost of a 15 minute collect phone call to inmate family and friends by approximately 25%. The lower cost per call should lead to increased communication between inmates and their family and friends which will ultimately help support the Department's Re-Entry Initiatives."). See also *Telmate Comments*, filed March 22, 2013, pg. 13 (call volume in its institutions had increase more than 200% when it instituted a postalized rate in one Great Plains state).

¹¹ In fact, GTL just reduced the rates charged to Virginia state inmates to 4 cents per minute. In doing so, the CEO of GTL stated "[t]his is an excellent example of how partners who share common goals can work together to reduce the cost of phone calls to friends and family members and still provide the necessary security and safety features to protect the public." See <http://augustafreepress.com/governor-mcauliffe-announces-further-reduction-on-inmate-phone-call-rates/>.

Lastly, GTL is unlikely to prevail on the merits by arguing that the FCC failed to provide adequate notice that it would not ban site commissions. Stating that the FCC engaged in a “bait-and-switch,” GTL states that the FCC failed to provide adequate notice under the Administrative Procedure Act by ultimately deciding not to ban the ICS providers’ voluntary site commission payments. However, the APA does not require the FCC to adopt every proposal contained in a notice of proposed rulemaking. Instead, the FCC has the discretion as the expert agency to review the relative merits of their proposals in light of public comment, and adopt final rules.

Ironically, GTL argues that the FCC “consciously chose to duck the issue” of site commissions, despite the fact that GTL has argued for the perpetuation on site commissions in some form or another for the past eight years. For example, in response to the 2007 Alternative Proposal, GTL stated “[w]hile there may be some merit to lower commission structures, there are trade-offs as well. This complex issue is simply not amenable to a uniform national solution.”¹² In its 2013 comments, GTL argued that “[t]he amount of commissions, how they are calculated, and the determination of which programs the funds support are all decisions within the discretion of state and local policymakers, and the FCC must continue to defer to state and local authorities with regard to such determinations.”¹³

In response to the Further Notice of Proposed Rulemaking, GTL argued against banning site commissions, stating that “[s]uch a drastic reduction in ICS rates effectively will eliminate all commissions in the ICS industry. The loss or reduction in commissions will have a direct, adverse effect on the ability of correctional facilities to provide services and programs to inmates.”¹⁴

¹² See *GTL Comments*, CC Dkt. 96-128, pg. 7 (filed May 7, 2007).

¹³ See *GTL Comments*, WC Dkt. 12-375, pg. 3 (filed March 25, 2013).

¹⁴ See *GTL Comments*, WC Dkt. 12-375, pg. 5 (filed Dec. 20, 2013).

In fact, the consensus proposal filed with the FCC by GTL in September 2014 perpetuated the ICS industry's wishy-washy treatment of site commissions:

The parties, however, have not reached agreement as to what amount or what percentage (if any) should be required, or how such admin-support payments can accurately be measured. Accordingly, the industry looks to the FCC to determine the appropriate amount or percentage that should be included in ICS rates for such payments to correctional facilities based on the record presented.¹⁵

GTL continued to support the consensus proposal in its final submissions to the FCC.¹⁶ In sum, GTL filed numerous submissions addressing its argument that the FCC should not eliminate commissions, and the consensus proposal filed by three of the largest ICS providers did not provide any concrete advocacy on whether the industry supported the elimination of site commissions.

GTL's wishy-washiness was explained by GTL's CEO after the record had closed in the proceeding. Specifically, Mr. Oliver stated that the company did not come out for the elimination of site commissions previously "because it would have been business suicide."¹⁷ It is black-letter law that a party seeking particular relief may not sit back, wait for relief, and then seek an appeal when such relief is not forthcoming.¹⁸

But now, because the FCC did not bail out GTL and the other ICS providers from their own willingness to pay site commissions, it seeks a stay of the Second R&O, and is filing an

¹⁵ *Consensus Proposals by Global Tel*Link Corporation, Securus Technologies, Inc. and Telmate, LLC*, WC Dkt. 12-375, pg. 3 (filed Sept. 15, 2014).

¹⁶ *See GTL Ex Parte Submission*, WC Dkt. 12-375 (pg. 2) (filed Oct. 13, 2015).

¹⁷ *See Overnight Tech: Inmate phone industry says it's not the 'bad guy'*, The Hill (Oct. 19, 2015)(<http://thehill.com/policy/technology/overnights/257370-overnight-tech-the-bad-guy-in-the-inmate-phone-industry-fights>). Ironically, Mr. Oliver blames states that "local counties, states and sheriffs are ultimately to blame for the high phone rates charged to inmates and family", presumably for being willing to accept the site commissions offered by GTL and the other ICS providers.

¹⁸ *See Colorado Radio Corp. v. FCC*, 118 F2d 24, 26 (D.C. Cir. 1941) (parties cannot "sit back and hope that a decision will be in its favor and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.")

appeal to have the judiciary do what it would not do for itself. Clearly, this is not a case of “bait and switch,” but rather a desperate act by the largest ICS company seeking relief from its own disastrous business decision. A stay is not warranted under these circumstances.

Next, GTL failed to provide evidence that GTL will suffer irreparable harm.¹⁹ The Petition lacked sufficient evidence that any existing ICS contracts are in danger of not being reformed to take into consideration the new price caps, or that it will suffer a loss of good will.²⁰ While GTL argues that the FCC did not conduct any analysis on the percentage of agreements that could be modified through change of law provisions, GTL ignores its own significant role in preventing such an examination.

Specifically, GTL has never even provided an inventory of its contracts – let alone the actual contracts – to the FCC. On the other hand, at great time and expense, the Petitioners have provided substantial evidence that ICS agreements between correctional authorities and ICS providers contain these provisions.²¹ GTL had both the burden, and the ability, to attempt to prove otherwise, and chose not to do so. It is telling that, even in its Petition seeking extraordinary relief, GTL did not provide any agreements that could not be reformed through change-in-law or *force majeure* provisions. Again, GTL is the party with the sole ability to provide evidence that its contracts with correctional facilities may not be reformed, and, pursuant to *Colorado Radio Corp*, GTL may not now seek relief in light of its decision to not provide this evidence.

¹⁹ See *Connect America Fund*, 27 FCC Rcd 7158, 7160 (2012) (“To warrant injunctive relief, an injury must be ‘both certain and great; it must be actual and not theoretical. Petitioners must provide ‘proof indicating that the [they allege] is certain to occur in the near future.’”). See also *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (“Bare allegations of what is likely to occur” are not sufficient.”).

²⁰ *Petition*, at 20.

²¹ See, e.g., *Wright Petitioners Submission*, WC Dkt. 12-375 (filed August 2, 2013).

Moreover, while GTL argues that it will not enjoy the same monopoly profits it has earned in the past, that is and was the whole point of the proceeding – to protect ICS customers from unjust, unreasonable and unfair rates, fees and practices that led to windfall, monopoly profits for ICS providers. Simply put, a petition seeking the stay of an order ending monopoly rates, fees and practices cannot point to loss of monopoly rates, fees and practices as its justification for the stay. Requiring GTL to charge just, reasonable and fair rates is the very essence of the FCC’s statutory authority. While it is reasonable to question whether GTL will earn as much under the new ICS rates and fees than it has in the past, the extraordinary relief of staying the Second R&O to save its monopoly profits must be rejected.

Finally, GTL is simply wrong in concluding that third parties will not be harmed by the grant of the Petition.²² Indeed, the record in this proceeding overwhelmingly demonstrates the significant and adverse effects caused the unjust, unreasonable and unfair ICS rates and fees. Even under the current interim rate caps for interstate ICS calls, third parties (i.e., the customers) continue to pay up excessive intrastate ICS rates and ancillary fees. As such, the illogical argument that third parties will not be harmed by the grant of the Petition must be disregarded.

Instead, this proceeding demonstrated the overwhelmingly positive public interest benefits from the adoption of the First R&O, and that any delay in the effectiveness of the Second R&O would be, in fact, be counter to the public interest. As discussed above, a delay in the effectiveness of the Second R&O would delay immediate relief to millions of intrastate ICS customers and all ICS customers currently being charged usurious ancillary fees. The Petitioners have shown that increased contact between inmates and their families and loved ones will reduce recidivism rates, which will decrease the cost of incarceration. In fact, it was shown that just a

²² *Petition*, at 25.

1% decrease in the recidivism rate would result in savings of more than 250 million dollars for state, county and local jurisdictions.²³

The Petitioners have provided previous statements from GTL, CenturyLink, and Securus in response to a Request for Proposal asserting that the reduction in rates would lead to increased call volume, increased revenues for ICS providers, and, in turn, increased commissions paid to the correctional facilities that receive commissions.²⁴ Having advocated to correctional authorities that low ICS rates would drive up revenue and commissions paid to the correctional authorities, GTL contradicts itself now in insisting that that low ICS rates will cause them irreparable damage and not serve the public interest. In the absence of any support for these arguments, the FCC must find that the Petition failed to establish a public interest benefit for delaying the effectiveness of the ICS rate caps adopted in the Second R&O.

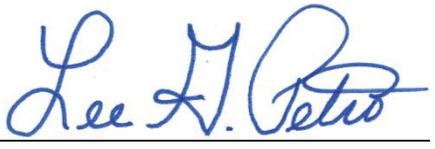
Thus, the Petition has (i) failed to establish that an appeal of the Second R&O would be successful on the merits; (ii) failed to provide any solid evidence that ICS providers will suffer irreparable harm; (iii) failed to show the lack of harm to third parties (in fact, great harm be caused from a delay in the effectiveness of the lower ICS rates); and (iv) failed to show any public interest benefit from granting a stay.

Thus, Petitioners oppose the Petition for Stay, and respectfully request that the FCC adopt an order denying the request as legally unsustainable.

²³ *Petitioners Comments*, pg. 36 (citing Declaration of Coleman Bazelon, Ph.D).

²⁴ *Petitioners' Ex Parte Submission*, dated July 18, 2013 (“the recent statements of CenturyLink, GTL and Securus demonstrate that a lower ICS rate will lead to higher call volumes, and a commission of 50% or more can still be paid to the correctional authority. Each tout their low rate/high commission rate proposals as delivering higher call volumes and higher revenues for the Florida DOC. Their blended 15-minute rate was less than \$0.10 per minute, and each proposed to pay an annual commission in excess of 46%.”).

Respectfully submitted,

By: 

Lee G. Petro

DRINKER BIDDLE & REATH LLP

1500 K Street N.W.

Suite 1100

Washington, DC 20005-1209

(202) 230-5857

December 29, 2015

CERTIFICATE OF SERVICE

I hereby certify that, on December 29, 2015, the forgoing Opposition was served via electronic mail on the following persons:

Marlene H. Dortch, Secretary
Federal Communications Commission
Marlene.Dortch@fcc.gov

Chairman Tom Wheeler
Federal Communications Commission
Tom.Wheeler@fcc.gov

Commissioner Mignon Clyburn
Federal Communications Commission
Mignon.Clyburn@fcc.gov

Commissioner Jessica Rosenworcel
Federal Communications Commission
Jessica.Rosenworcel@fcc.gov

Commissioner Ajit Pai
Federal Communications Commission
Ajit.Pai@fcc.gov

Commissioner Michael O’Rielly
Federal Communications Commission
Michael.ORielly@fcc.gov

Jonathan Sallet
General Counsel
Federal Communications Commission
Jonathan.Sallet@fcc.gov

Matthew DelNero, Chief
Wireline Competition Bureau
Federal Communications Commission
Matthew.Delnero@fcc.gov

Michael K. Kellogg
Kellogg, Huber, Hanson, Todd, Evans et. al.
MKellogg@KHHTE.com
*Counsel for Global Tel*Link*

By: 

Lee G. Petro