

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

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

**REPLY COMMENTS OF PAY TEL COMMUNICATIONS, INC.
ON THIRD FURTHER NOTICE OF PROPOSED RULEMAKING**

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SUMMARY

Pay Tel Communications, Inc. (“Pay Tel”) respectfully submits these reply comments in response to the Third Further Notice of Proposed Rulemaking (“Third Further Notice”), released November 5, 2015 in this docket. In summary, Pay Tel replies to the comments submitted in response to the Third Further Notice as follows:

- The Commission should continue to promote competition in the ICS industry, but it should do so through adoption of a limited per-minute admin-support cost recovery fee additive to the rate caps to compensate correctional facilities for their costs in lieu of site commission payments. Such a regulatory framework would exert downward pressure on ICS rates and would facilitate a properly-functioning ICS marketplace. Mandating intra-facility competition is an impractical solution that would compromise safety and security. The Wright Petitioners’ “wholesale-retail” proposal suffers from similar flaws—and is unworkable and implausible in the ICS environment.
- The Commission should gather necessary cost and related data and information regarding video calling, video visitation and other advanced ICS services. Such services should not be used to circumvent the reforms that otherwise apply to traditional ICS. As with traditional ICS, an appropriate, limited cost-recovery fee additive should be implemented along with the rate caps on these services. HRDC’s proposal that video visitation should be free is contrary to the law and must be rejected.
- In its next data collection, the Commission should learn from the deficiencies of the August 2014 Mandatory Data Collection in order to collect more useful and meaningful data—including the deficiencies identified by Custom Teleconnect and Correct Solutions Group in their recent filings which apparently led the Commission to misinterpret their data. In addition, as suggested by the Wright Petitioners, the Commission should consider accelerating the timing of its contemplated future Data Collection in order to understand as soon as possible the practices of ICS providers in the wake of the Second Inmate Rate Order with respect to commission payments and the like, which practices might merit further regulation.
- The Commission should reject calls from inmate advocates for ICS providers to file their contracts. The public information in those contracts is already and will continue to be made available by other means, and requiring ICS providers to file all of their agreements would create significant burdens for ICS providers and correctional facilities with little to no offsetting benefit to the public.
- The Commission does not need to regulate international ICS, but if it chooses to do so, rate caps on those calls should be higher than the Second Inmate Rate Order’s rates to account for the higher costs associated with international calling.

- Pay Tel agrees with various inmate advocates that the Commission must further regulate third-party financial transaction fees, as well as revenue-sharing agreements and other creative arrangements that ICS providers set up, so that providers are unable to circumvent the Second Inmate Rate Order's rules.

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COMMENTS

Pay Tel Communications, Inc. (“Pay Tel”), by its attorneys, respectfully submits these reply comments in response to the Third Further Notice of Proposed Rulemaking, WC Docket No. 12-375, released November 5, 2015 in the above-captioned proceeding (“Third Further Notice”).¹

The Commission correctly recognized in the Second Inmate Rate Order that its “work is not complete.”² In the Third Further Notice, the Commission asks many of the right questions regarding how to complete its work, including how to promote competition in order to further reduce rates; what further reform is necessary to prevent ICS providers and facilities from exploiting regulatory loopholes to undermine reform efforts; and what reporting requirements are necessary in order to build upon the work of the Second Inmate Rate Order.

With respect to promoting competition, numerous parties representing inmates that filed comments in response to the Third Further Notice provide the wrong answers. Intra-facility competition is not the solution. Cost-recovery is. The Commission should revisit the proposal to replace site commission payments, which have been widely understood to lead to abuses in the ICS ecosystem, with a per-minute cost-recovery fee that will better align the interests of consumers with the needs of correctional institutions. A modest cost-recovery mechanism would push facilities (and therefore providers) to stimulate minutes of use, creating an environment in which providers would compete to offer the lowest rates in response to requests for proposals. A vehicle

¹ Second Report and Order and Third Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC 15-136 (rel. Nov. 5, 2015) (“Second Inmate Rate Order” and “Third Further Notice”). Reply comments were originally due February 1, 2016, but the Bureau extended the reply comment deadline to February 8, 2016. WC Bureau, Order, WC Docket No. 12-375, DA 16-107 (Jan. 29, 2016).

² Second Inmate Rate Order, at ¶ 11.

for accomplishing this reform is presently before the Commission³ and should be seized upon as an opportunity to ameliorate the continuing harms that are already being documented by the Wright Petitioners.⁴

Coincident with creating a pro-competitive ICS marketplace through a cost-recovery mechanism, and in order to ensure consumers receive the true benefits of that competition, the Commission should extend its regulatory reach to video visitation and other advanced ICS technologies so that per-minute rates and charges for such products and services are just and reasonable. Pay Tel agrees with many inmate advocates who push in their Third Further Notice comments for such action, but would note that such additional regulation would only be appropriate after cost and data collection and analysis thereof.

Relatedly, Pay Tel supports the views of commenters like Prison Policy Initiative and the Wright Petitioners that the Commission must either refine or rework the Second Inmate Rate Order's treatment of third-party financial transaction and payment processing fees in order to prevent them from being used to circumvent the Order's rules. Finally, Pay Tel agrees that continued oversight of ICS providers' costs, rates and other data is proper. Such oversight should occur via a much improved, reformatted data collection that actually provides consistent, meaningful reporting (the template of which should be created based on input from relevant parties' subject matter experts). It should not occur through requiring ICS providers to file their contracts with the Commission.

³ See Michael S. Hamden, Petition for Partial Reconsideration, at 4-15, WC Docket No. 12-375 (Jan. 19, 2016) ("Hamden Petition for Partial Reconsideration").

⁴ See generally, e.g., Wright Petitioners, Ex Parte Submission, WC Docket No. 12-375 (Feb. 3, 2016) ("Wright Petitioners Feb. 3 Ex Parte") (citing apparent efforts to circumvent rules through encouragement of adoption of new government-mandated fees and citing to recent Requests for Proposals soliciting commissions).

I. THE COMMISSION SHOULD PROMOTE COMPETITION BY REPLACING SITE COMMISSION PAYMENTS WITH A COST-RECOVERY MECHANISM.

The Wright Petitioners state that “in order for the FCC to meet its goal in promoting competition in the ICS market, the FCC must focus on developing rules to re-structure the ICS market so that it delivers just, reasonable and fair rates and ancillary fees for consumers.”⁵ Pay Tel agrees with the Wright Petitioners that additional rules restructuring the ICS marketplace are necessary to promote competition, but it disagrees with the Wright Petitioners and other inmate advocates on what those rules should be and what shape such a restructured ICS marketplace should take.

Pay Tel believes that the Commission can help promote competition that drives down ICS rates and increases service quality by replacing site commission payments with an explicit, per-minute admin-cost recovery fee as an additive to the rate caps.⁶ Such a proposal was embraced by Pay Tel, several other ICS providers, the National Sheriffs’ Association and other correctional facilities, a key regulator who helped shape ICS reform in Alabama, and inmate advocate Michael Hamden.⁷ Indeed, Attorney Hamden has filed a Petition for Partial Reconsideration of the Second Inmate Rate Order urging the Commission to ban site commissions⁸ and institute “some

⁵ Wright Petitioners, Comments, at 4, WC Docket No. 12-375 (Jan. 19, 2016) (“Wright Petitioners’ Third Further Notice Comments”).

⁶ See, e.g., Pay Tel, Comments, at 2-4, WC Docket No. 12-375 (Jan. 19, 2016) (“Pay Tel Third Further Notice Comments”); Letter from Brian D. Oliver, CEO, GTL; Richard A. Smith, CEO, Securus; Curt Clifton, Vice President of Government Affairs and Strategic Planning, Telmate; and Vincent Townsend, President, Pay Tel, to Marlene H. Dortch, Secretary, FCC, at 1-2, WC Docket No. 12-375 (Oct. 15, 2015) (“Joint Proposal Letter”).

⁷ See, e.g., Joint Proposal Letter, at 1-2; National Sheriffs’ Association, Ex Parte Presentation, at 4-5, WC Docket No. 12-375 (June 12, 2015); Darrell Baker, Director, Utility Services Division, Alabama Public Service Commission, Ex Parte Presentation, at 3-6, WC Docket No. 12-375 (July 12, 2015); Michael S. Hamden, Ex Parte Presentation, at 6-8, WC Docket No. 12-375 (Sept. 23, 2015).

⁸ Hamden Petition for Partial Reconsideration, at 5-11.

mechanism that will permit an offset to the cost of providing ICS” for facilities.⁹ Pay Tel supports that Petition and notes that it presents the Commission with the opportunity to revisit a critical aspect of ICS reform, particularly in light of evidence presented by the Wright Petitioners of ongoing abuses related to the continuation of the flawed system of site commission payments that remains in place.¹⁰ The recent filing of the Wright Petitioners shows exactly the sort of gamesmanship promoted and encouraged by the Commission’s current “hands-off” approach to site commissions, conduct that Pay Tel forecast in previous filings.¹¹

Pay Tel remains convinced that the joint proposal submitted by it, Global Tel*Link Corp. (“GTL”), Securus Technologies, Inc. (“Securus”), and Telmate, LLC (“Telmate”) is the only proposal that achieves the Commission’s goal of a market-based approach to ICS that will create pro-competitive incentives for facilities to select providers based on lower costs to consumers and create competition between providers based on maximizing consumer welfare.¹² Adopting a cost-recovery fee in lieu of site commission payments would remove the upward pressure on ICS rates¹³ that still exists in the industry because of the Second Inmate Rate Order’s inexplicable decision not to regulate site commission payments¹⁴—in spite of the Commission’s repeated findings that

⁹ *Id.* at 13.

¹⁰ *See, e.g.*, Wright Petitioners Feb. 3 Ex Parte, at 3-4 (citing to recent RFP in Baldwin County, Alabama requesting that providers offer a “cost recovery rate” and stating that the provider that could provide best services while offering highest cost recovery rate would be selected).

¹¹ *See, e.g.*, Letter from Marcus W. Trathen, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, at 2, WC Docket No. 12-375 (Oct. 8, 2015) (“Pay Tel Oct. 8 Ex Parte”).

¹² Letter from Marcus W. Trathen, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, at 2, WC Docket No. 12-375 (Oct. 15, 2015).

¹³ *Id.*

¹⁴ *See, e.g.*, Second Inmate Rate Order, at ¶¶ 118, 128, 130.

commissions are the “main cause of the dysfunction of the ICS marketplace”¹⁵ and the “primary reason ICS rates are unjust and unreasonable and ICS compensation is unfair[.]”¹⁶

Adopting a modest cost-recovery fee would (1) ultimately drive down ICS rates (closer to the inmate advocates’ goal of \$0.05/minute in prisons) because correctional facilities will be incentivized to negotiate with providers for lower rates in order to spur more phone usage,¹⁷ and (2) provide an above-board, legitimate, fair means by which facilities can recover the costs they incur as result of facilitating ICS for their inmates. In other words, the cost-recovery fee additive mechanism would create the proper incentives in the ICS market to force rates down while also allowing facilities to be “made whole” for their ICS-related costs. If the Commission restructures the ICS industry through cost-recovery, while at the same time eliminating other forms of site commissions (and closing down other potential loopholes by regulating advanced ICS technologies and services and revising the rules regarding third-party fees), it will spur real competition that is in the best interest of consumers and will get closer to eradicating the exploitive practices that for too long have plagued the industry.

The Wright Petitioners, in throwing up their hands at the difficult problem of tackling commissions, appear to be engaging in a game of “regulatory gotcha”—hoping that facilities will still request, and providers will still pay, site commissions so they can later argue for further rate reductions, regardless of the actual costs of ICS.¹⁸ Instead, the Wright Petitioners’ in their

¹⁵ Second Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC 14-158, at ¶ 24 (rel. Oct. 22, 2014) (“Second Further Notice”).

¹⁶ *Id.* at ¶ 21. *See also id.* at ¶ 20 (arguing that site commissions are the principal reason for the “disrupt[ion] and even invert[ing of] the competitive dynamics of the industry”).

¹⁷ *Id.*

¹⁸ Wright Petitioners’ Third Further Notice Comments, at 4 (“As we noted, the FCC would not be able to get a firm handle on the many ways that these companies could share their revenue with the

comments launch an out-of-the-blue proposal for a “significant overhaul” of the ICS industry through the establishment of rules creating two classes of ICS: wholesale and resale.¹⁹ This is not a practical or realistic proposal, certainly in jails, and it should get no traction.

First, the wholesale-retail option suffers from the same safety and security problems that Pay Tel and others have raised in response to previous calls for creating intra-facility competition through allowing (or even requiring) multiple providers to serve a facility²⁰—calls which the Commission has properly rejected on several occasions.²¹ These public safety concerns are a fundamental distinguishing factor of ICS from other services and cannot be ignored. In fact, those safety and security concerns may be exacerbated in a wholesaler-retailers setting, where customers

correctional facilities as these services expanded to cover additional services, and the FCC’s determination to not ban site commissions was appropriate.”).

¹⁹ *Id.* at 5-7.

²⁰ *See* Pay Tel Third Further Notice Comments, at 4-7; Pay Tel, Reply Comments, at 50-52, WC Docket No. 12-375 (Jan. 27, 2015) (“Pay Tel Second Further Notice Reply Comments”); Ohio Department of Rehabilitation and Corrections, Comments, at 4, WC Docket No. 12-375 (Jan. 12, 2015). The Human Rights Defense Center yet again argues that intra-facility competition is the “only way to inject competition into the government-created and sustained monopoly ICS market that currently exists.” Human Rights Defense Center, Comments, at 1, WC Docket No. 12-375 (Jan. 19, 2016) (“HRDC Third Further Notice Comments”). Pay Tel has shown herein that the only, viable option—cost-recovery coupled with prohibiting commissions—would inject the competition HRDC seeks, and would do so (1) with the support of ICS providers and correctional facilities and (2) without the security and logistical concerns that would come along with having multiple providers operating in the same facility.

²¹ Pay Tel hereby incorporates by reference the previous, exhaustive and persuasive comments and findings on this issue. *See, e.g.*, Order on Remand & Notice of Proposed Rulemaking, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 3248, 3276, ¶ 72 (2002) (“[L]egitimate security considerations preclude reliance on competitive choices, and the resulting market forces, to constrain rates for inmate calling.”); Second Report and Order and Order on Reconsideration, *Billed Party Preference for IntraLATA 0+ Calls*, CC Docket No. 92-77, 13 FCC Rcd 6122, 6156, ¶ 57 (1998) (“We are persuaded by comments of the United States Attorney General, other federal officials, and nearly all who have commented on this issue that implementation of BPP for outgoing calls by prison inmates should not be adopted. With regard to such calls, it has generally been the practice of prison authorities at both the federal and state levels, including state political subdivisions, to grant an outbound calling monopoly to a single IXC serving the particular prison. This approach appears to recognize the special security requirements applicable to inmate calls.”).

in the same facility would likely bounce from one retailer to another, making calls difficult to track and also increasing the likelihood calls would be “paid for” with fraudulent credit cards or other means. Compounding these problems is the fact that it is unlikely the various retailer providers would share one another’s customer data and information, so a customer could defraud one retailer and then move onto defrauding the other retailers in the facility, without the subsequent retailers ever knowing it; there would be virtually no visibility as to total call traffic in a given facility. It would be impossible to provide adequate security in such an environment.

Beyond safety and security concerns, a wholesale-retail model suffers from other practical flaws, including one of dubious legal authority. Pay Tel is not aware of any provision of the Communications Act that would permit the Commission to adopt rules mandating the provision of ICS in a bifurcated manner such that one provider was required to share its infrastructure with another. In this regard, ICS is readily distinguishable from the legacy telecommunications market where Congress imposed explicit requirements, including resale, on incumbent local carriers.²² From a real-world perspective, Pay Tel questions whether any ICS provider would even be willing to be the wholesaler in the first place—particularly in jails where the calling volume is limited and barely is capable of supporting one provider, much less introducing other providers into the mix. In a wholesale model, the wholesaler would have to be willing to gamble whether there would be enough ICS traffic, split up among multiple retailers, in order for it to recoup the upfront costs associated with providing the equipment, infrastructure and operating system in a facility. It would also have to be willing to accept the risk that it might not be able to collect monies owed to it from retailers that do not control their bad debt (possibly because of consumers’ use of fraudulent credit cards, discussed above) and go out of business. Perhaps, although Pay Tel doubts it, there would

²² 47 U.S.C. § 251(c)(4).

be sufficient minutes of use in a large prison (where there is significant calling volume) in order to allow the wholesaling provider to earn a positive return, but that would almost certainly not be the case in jails where call volume is much lower. Adding more providers into a facility, and adding an additional layer of service providers that also must receive a return on their investment, would only increase the cost of providing ICS—in an environment where the Commission has adopted rate caps that are already barely compensatory, if that, in higher cost facilities (and are not compensatory in any case if site commissions are paid).²³ The Commission has ample experience with the wholesale model of competition in the competitive telecommunications context, experience which demonstrates that the model is inapt in the ICS setting.

II. THE COMMISSION SHOULD STUDY VIDEO VISITATION AND OTHER ADVANCED ICS SERVICES AS A PRECURSOR TO REGULATION.

Pay Tel shares HRDC's concerns that history is repeating itself and that providers will look to unregulated services, including video visitation and other advanced ICS, as a means of offsetting revenue losses that will result from implementation of the Second Inmate Rate Order.²⁴ This risk is particularly great in an environment, such as presently exists, where the Commission has not addressed the underlying systemic problem of site commissions by replacing such payments with explicit cost recovery. In the present environment, as Pay Tel has previously warned, providers and facilities will be mutually incited to siphon off revenues from consumers through unregulated

²³ The Second Inmate Rate Order's rate caps are below Pay Tel's cost for certain jail tiers. Moreover, due to the collapsing of the 0-99 tier into a 0-349 tier, the rate cap applicable to the smallest jails is not compensatory.

²⁴ HRDC Third Further Notice Comments, at 10. *Id.* at 4 (quoting regional jail spokesperson in West Virginia as stating that facilities will turn to installation of video kiosks that offer fee-based services as an option for offsetting effects of the Second Inmate Rate Order; also citing to Securus's prospectus and its discussion of expanding into unregulated areas of service).

fees and services.²⁵ Hope is not a viable regulatory strategy in this regard, as history has shown beyond any doubt.

The Wright Petitioners and Prison Policy Initiative advocate for an extension of the Second Inmate Rate Order’s regulations “to video visitation products including caps on the rates and ancillary fees.”²⁶ Pay Tel has stated that regulation of video visitation and other advanced ICS is appropriate,²⁷ provided that proper data collection, regarding the costs incurred related to such services has been obtained and analyzed and that the Commission truly understands how the video visitation industry and other advanced ICS actually work prior to imposing new rules.²⁸ As the California State Sheriffs’ Association warns (and even pleads), the Commission should be wary of piling on more regulation without the information to do so the right way: “Facilities are about to face once-in-a-generation difficulties as a result of the Second Report and Order capping rates and discouraging site commissions. Please do not exacerbate the coming challenges with additional regulation that will likely harm, not help, inmate access to quality and affordable calling services.”²⁹

²⁵ See, e.g., Pay Tel Oct. 8 Ex Parte, at 2.

²⁶ Prison Policy Initiative, “Comments re Third Further Notice of Proposed Rulemaking ¶¶ 296-307”, at 5, WC Docket No. 12-375 (Jan. 19, 2016). See also Wright Petitioners’ Third Further Notice Comments, at 8 (urging the FCC to “adopt rules that prevent ICS providers from shifting the impact of the soon-to-be-eliminated unjust, unreasonable and unfair ICS telephone rates and ancillary fees onto video visitation consumers”).

²⁷ Pay Tel’s position stands in contrast to that of HRDC, which appears to favor a “ready, fire, aim” approach that would impose rate, fee and other regulations on these products and services before gathering the data to support them. HRDC Third Further Notice Comments, at 11 (arguing that “[c]omprehensive regulation for video visitation and other advanced communication technologies in detention facilities is needed now”).

²⁸ If the Commission desires to obtain meaningful cost data regarding video visitation and other advanced ICS products, a data collection along the lines of that undertaken in August 2014 related to ICS—only with a much improved format, reporting template, and instructions, see Section III, *infra*—may be necessary.

²⁹ California State Sheriffs’ Association, Comments, at 2, WC Docket No. 12-375 (Jan. 19, 2016).

Pay Tel supports the eventual adoption of per-minute rate caps and ancillary fee caps on video visitation and other services, as well as other rules promulgated in the Second Inmate Rate Order, like the prohibition on flat-rate charging. And, in order to promote competition in the manner set forth in Section I, Pay Tel urges the Commission, when it adopts those rules, to impose a modest cost-recovery fee additive on top of any such rate caps (determined by facility costs related to a given service) in order to create downward pressure on those caps and ultimately drive them lower, in lieu of site commissions.

Pay Tel strongly rejects the proposal by HRDC that “[v]ideo visitation should be provided at no cost with no ancillary fees, considering it is a service that is free to non-incarcerated persons.”³⁰ The idea that video visitation in correctional facilities is just like Skype technology and should therefore be free for inmates and their families and friends borders on the absurd.³¹ First, Skype is not a free service. The Skype model is predicated on the assumption that the two persons on either end of the video connection have paid for their Internet connections and the proper hardware necessary to facilitate the service. In no way does that resemble a cost-free service, and it certainly is not remotely applicable to the situation in a jail or prison, where an inmate has paid for neither an Internet connection nor the necessary hardware to use Skype or a related platform. Rather, there are very real, legitimate costs associated with video visitation that are incurred by ICS providers that must be recovered through charging appropriate rates and fees. The costs are hardware-related (computers, tablets (the technology toward which video visitation increasingly appears headed), etc.), connection-related (Internet/broadband), and security-related

³⁰ HRDC Third Further Notice Comments, at 10.

³¹ *Id.* at 5, 7.

(screening visits, and paying for a system to set up, approve and monitor visits).³² There are even substantial retention-based costs associated with storing data related to video visitation and other advanced ICS services. Inmates and their families must pay for such services—albeit at reasonable rates and charges—if they are going to be offered. HRDC’s suggestion of free, unregulated video visitation should be rejected.

III. THE COMMISSION’S ONE-TIME DATA COLLECTION SHOULD BE ACCELERATED, BUT THE COMMISSION MUST FIRST REVIEW AND REVISE THE COLLECTION’S INSTRUCTIONS, FORMAT AND TEMPLATE IN ORDER TO OBTAIN MEANINGFUL, ACTIONABLE DATA.

Pay Tel agrees with the Wright Petitioners that the Commission should establish for its next mandatory data collection a much “more comprehensive and uniform format to collect the data.”³³ The Commission’s August 2014 Mandatory Data Collection template and format were flawed, leading to significant inconsistencies in how ICS providers responded to the Mandatory Data Collection that, unfortunately, the Commission then relied upon in setting and justifying the Second Inmate Rate Order’s rate caps—error which makes the Order vulnerable to legal challenges and threatens to undermine the positive aspects of reform to date.

Recent filings from two small ICS providers offer evidence of these flaws with the Commission’s Mandatory Data Collection and the resulting problems with the Second Inmate Rate Order. Custom Teleconnect and Correct Solutions Group have identified themselves as being the two “efficient” providers³⁴ to whom the Commission repeatedly cited in the Second Inmate Rate

³² Indeed, even HRDC concedes there are costs associated with Skype, citing to the Philippines’ Solicitor General’s donation of computers and pledge to absorb the \$20 per month Internet connection fee associated with the service. *Id.* at 7.

³³ Wright Petitioners’ Third Further Notice Comments, at 16.

³⁴ See Letter from Patrick Temple, Manager, Correct Solutions, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (Jan. 19, 2016) (“Correct Solutions Jan. 19 Letter”); Letter from

Order to justify its rate caps, pointing to the very low costs at which purportedly “efficient providers” operate.³⁵ Both Custom Teleconnect and Correct Solutions Group followed the Mandatory Data Collection’s instructions and submitted truthful responses to same.³⁶ As the companies explain, however, neither provides a “complete end-to-end ICS service,”³⁷ and the cost information they submitted “represent[s] the costs to perform only a subset of the functions that must be performed [for end-to-end ICS service] and *does not* represent all of the costs necessary to provide a complete ICS service[,]”³⁸ nor does the data “illustrate the total cost elements required to deliver a complete ICS solution.”³⁹ To the extent that the Commission relied on their data to justify its rate caps, the companies argue, such reliance was in error, and they urge the Commission to actually reconsider its actions.⁴⁰ Both companies point to significant flaws in the Mandatory Data Collection in explaining their cost data submissions, noting that the Data Collection was “limited in its format and questions asked.”⁴¹

In spite of the obvious flaws and limitations of the Mandatory Data Collection, the Commission in the Second Inmate Rate Order repeatedly chastised the majority of ICS providers for overstating costs and operating inefficiently. It argued, for instance, that “[t]he record evidence

Bill Perna, General Manager, Custom Teleconnect, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (Jan. 21, 2016) (“Custom Teleconnect Jan. 21 Letter”).

³⁵ See, e.g., Second Inmate Rate Order, at ¶¶ 49, 58, 60, 64-66, 73, 96, 116, 142.

³⁶ Correct Solutions Jan. 19 Letter, at 1; Custom Teleconnect Jan. 21 Letter, at 2.

³⁷ Correct Solutions Jan. 19 Letter, at 1. See Custom Teleconnect Jan. 21 Letter, at 1 (explaining that Custom Teleconnect is a wholesale provider of telecommunications services that provides centralized cloud services and billing and collections to ICS companies nationwide that then resell Custom Teleconnect’s centralized platform).

³⁸ Correct Solutions Jan. 19 Letter, at 1 (emphasis in original).

³⁹ Custom Teleconnect Jan. 21 Letter, at 1.

⁴⁰ Correct Solutions Jan. 19 Letter, at 2; Custom Teleconnect Jan. 21 Letter, at 2.

⁴¹ Custom Teleconnect Jan. 21 Letter, at 2.

indicates that average reported costs are exaggerated and in any case exceed efficient costs[.]”⁴² The revelations from Custom Teleconnect and Correct Solutions Group call into question all such statements about what it means to be an “efficient” provider, not to mention the lawfulness of the Second Inmate Rate Order’s caps.

While Pay Tel supports the Commission’s additional one-time data collection and even a possible extension thereof, the Commission should revise its format, template, and instructions in light of its experience with the previous filings. To receive meaningful and consistent cost data, the Commission must account for the varied arrangements by which ICS providers provide service.⁴³ The Commission should require that providers submit some means by which the accuracy of the data provided can be verified, and Pay Tel supports the Wright Petitioners’ recommendation that ICS providers submit audited financial statements, provided, of course, that they are kept confidential.⁴⁴ The Commission should seek comment on the design and content of any data collection template to be used, as well as on the minimum level of supporting documentation that will be required in order for a provider’s costs to be considered. Upon receiving such comment, the Commission should also convene a meeting of cost analysts from the various interested groups (inmate advocates, facilities, and ICS providers) to discuss how to craft the instructions and template in order to obtain meaningful, reliable, consistent, understandable data.

⁴² See, e.g., Second Inmate Rate Order, at ¶ 52 n.170.

⁴³ Pay Tel is uncertain what the Wright Petitioners mean when they ask that the Data Collection be expanded “to include granular revenue information,” but Pay Tel is in favor of requiring providers to submit data that is detailed enough to be accurately and meaningfully analyzed and used should the Commission find it necessary to revise its ICS regulations in the future. Wright Petitioners’ Third Further Notice Comments, at 16.

⁴⁴ *Id.*

Pay Tel also supports the Wright Petitioners' call for the next Mandatory Data Collection to occur sooner than is currently planned, and no later than March 17, 2017.⁴⁵ Pay Tel is concerned that statements certain ICS providers—namely NCIC and ICSolutions—have made in marketing materials indicate a perpetuation of the commissions system that led to unreasonable rates and fees in the first place. NCIC, for example, has boasted to potential clients in a nationwide marketing campaign that “[b]ased on the rate and fee caps [in the Second Inmate Rate Order], most inmate phone providers should be able to offer commissions or cost-recovery in the range requested by the NSA at \$.02 per minute for facilities over 1,000 inmates, \$.05 for facilities of 350-999 inmates and \$.08 per minute for jails less than 349 inmates.”⁴⁶ And Keefe Group, the commissary parent company of ICSolutions, sent a memorandum to the nation’s Sheriffs promising that “ICSolutions will not stop paying commissions.”⁴⁷ Conversely, other much larger providers, even with their efficiencies of size, have concluded that the new rate caps “do not allow ICS providers to recover the cost of site commissions they are required to pay,” thereby forcing providers to render service at below cost levels.⁴⁸

⁴⁵ *Id.*

⁴⁶ See Email from Bill Pope, President, NCIC, to various corrections professionals (Oct. 27, 2015) (emphasis in original) (attached hereto as Exhibit 1).

⁴⁷ See Letter from Chris Markham, Account Manager, Keefe Group and ICSolutions, to various corrections professionals (attached hereto as Exhibit 2). Note, in particular, that the Keefe Group memorandum appears to admit that ICSolutions violated the Commission’s rules as set forth in the First ICS Order by admitting that, “[i]n 2013, when other companies stopped paying [commissions] on interstate calls ICSolutions continued to pay.” *Id.*

⁴⁸ See, e.g., Motion of Global Tel*Link for Partial Stay Pending Judicial Review, *Global Tel*Link v. FCC*, Nos. 15-1461, *et al.*, at 2 (D.C. Cir. filed Jan. 27, 2016). See also Motion of Telmate, LLC for Stay Pending Judicial Review, *Global Tel*Link v. FCC*, Nos. 15-1461, *et al.*, at 13 (D.C. Cir. filed Jan. 29, 2016) (“[T]he rules will have one of two effects: either they will deprive providers of fair compensation for calls, or they will cause providers to bypass facilities demanding site commissions, and in turn deprive inmates of ICS.”).

The Commission, if it is to regulate ICS with the purpose of facilitating the widespread availability of the service, must better understand how it is that the larger companies cannot pay site commissions and recover costs, while companies like NCIC and ICSolutions claim they can. One tool at the Commission's disposal is through an improved data collection. It would seem NCIC's and ICSolutions' marketing-oriented promises to continue paying site commissions, despite the Second Inmate Rate Order's rate caps, suggest an intention to engage in one of the following courses of conduct, each of which raises its own regulatory concerns:

- Pay “whatever it takes” to get the next contract, perhaps motivated by factors other than prudent, long-term business judgment—such as a desire to position one's company for possible sale;
- Price service below cost in order to secure other, more lucrative business (e.g., commissary operations) from which monopoly profits can be had; or
- Subsidize call revenue from unregulated fees and services—the problem the Commission is trying to eliminate with the Second Inmate Rate Order.

Any of these options should be explored by the Commission as they raise substantial regulatory concerns about the long-term viability of ICS. Pricing below cost for any of the reasons outlined above cannot be the basis for further downward adjustment of ICS rates and may call for further regulatory intervention to promote fair competition and the widespread availability of the service, as required by Section 276.

Certain of the inmate advocates' proposals for a recurring Mandatory Data Collection are overkill. Specifically, HRDC argues that the Commission should use its subpoena power to obtain certain cost information.⁴⁹ This measure is unnecessary. The Commission previously made clear

⁴⁹ HRDC Third Further Notice Comments, at 8.

that providing willful false statements in response to its prior Mandatory Data Collection is a crime punishable by fine and even imprisonment, and ICS providers must certify the accuracy of the data submitted.⁵⁰ Those are certainly already strong enough procedural safeguards in place to ensure the integrity of the data submitted. Still, the Commission must keep a watchful eye on ICS providers and be willing to enforce its rules. Should the Commission have good reason to suspect that an ICS provider is failing to comply with the rules, it must investigate that provider and levy appropriate punishment if it finds unlawful behavior.

IV. THE COMMISSION SHOULD REJECT CALLS FOR A CONTRACT FILING REQUIREMENT.

The Commission should reject the inmate advocates' renewed calls for a requirement that ICS providers file their contracts with facilities. The Commission will already be obtaining the contractual information these parties are seeking through its annual reporting and certification requirement,⁵¹ and there is no additional benefit to be gained from forced public disclosure of the contracts themselves (but substantial additional burden would result from such a mandate).⁵²

HRDC complains about having to litigate regarding obtaining access to certain contractual details.⁵³ But battles over whether certain contractual information should be publicly disclosed would continue even if ICS providers were forced to turn over their contracts. While ICS contracts

⁵⁰ See ICS Mandatory Data Collection Instructions, at 2, available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-327664A1.pdf (reminding ICS providers that “[w]illful false statements in responses to this information collection are punishable by fine and/or imprisonment” (citing 18 U.S.C. § 1001)).

⁵¹ See 47 C.F.R. § 64.6060.

⁵² Thus, HRDC's argument that the “burden on ICS providers to post these documents on their websites is minimal and the benefits to the public are enormous” is misguided. HRDC Third Further Notice Comments, at 9.

⁵³ *Id.*

are, as a general matter, public records, they do still—as the Wright Petitioners concede⁵⁴—contain proprietary information, which companies have a right to try and keep private.⁵⁵ ICS providers (and facilities) would be forced to spend substantial resources redacting trade secrets and privileged or confidential commercial and financial information before filing contracts with the Commission, and, undoubtedly, groups like HRDC and the Wright Petitioners⁵⁶ would constantly claim that the contracts were over-redacted. The ongoing litigation would just be shifted to a different forum. It is clear that the inmate advocates are not going to be satisfied until every term of every ICS contract is disclosed; unfortunately for them, much of the information in those agreements is in fact protected from disclosure by law.

V. THE COMMISSION DOES NOT NEED TO REGULATE INTERNATIONAL ICS, BUT IF IT DOES, RATE CAPS MUST BE HIGHER THAN THOSE IN THE SECOND INMATE RATE ORDER.

Pay Tel disagrees with the inmate advocates who argue that the Commission should extend the Second Inmate Rate Order’s rate and fee caps to international calls.⁵⁷ Neither the Second Inmate Rate Order’s rates, nor the ICE ICS contracts rates for international calls, properly take into account the costs associated with international ICS.

The ICE ICS contract rates of \$0.35 per minute for international calls to mobile phones and \$0.15 for calls to land lines resulted from a public bid for the ICS contract with the most significant demand for international calling. The ICE contract is entirely based on serving the

⁵⁴ Wright Petitioners’ Third Further Notice Comments, at 18 (arguing that certain information should not be considered proprietary).

⁵⁵ *See, e.g.*, 5 U.S.C. § 552(b)(4) (protecting “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential”).

⁵⁶ The Wright Petitioners seem to admit the contracts contain confidential information, as they try in their comments to conclusively determine, up front, what information should not be deemed confidential and what should be divulged. *See* Wright Petitioners’ Third Further Notice Comments, at 18.

⁵⁷ *See, e.g., id.* at 19-20.

calling needs of foreign citizens detained while in the United States. For reasons of economies of scale alone, this is not an appropriate benchmark for the costs of international calls for the rest of the ICS market. While the simplicity of an averaged rate is appealing, the cost to terminate international calls varies widely, ranging from pennies per minute to nearly ten dollars per minute. The ICE ICS contract's average rates are much too low to offset the impact of higher cost calls to those more costly destinations when they occur—the ICE ICS contract's \$0.15 per-minute rate to call an international land line is actually lower than the domestic rate cap for most facilities. Pay Tel questions whether the Commission needs to regulate international ICS, as it makes up a tiny fraction of total ICS calls. For example, international calls make up only 0.06% of Pay Tel's total calls. International call costs for Pay Tel vary dramatically, ranging from pennies per minute to more than \$7 per minute. While the highest cost locations are remote and rarely called, there are also high costs for calls to certain mobile phone carriers in several more commonly called countries, including Italy (costs up to \$1.92 per minute), Chile (costs up to \$0.94 per minute), and Cuba (costs up to \$0.78 per minute). If an international rate cap is deemed necessary, Pay Tel recommends that a rate of at least \$0.50 per minute be adopted for jails to accommodate this broad range of costs.

VI. THE COMMISSION MUST REGULATE THIRD-PARTY FINANCIAL TRANSACTION FEES AND OTHER RELATED FEES TO CLOSE POTENTIAL LOOPHOLES THAT WOULD CIRCUMVENT REFORM.

Pay Tel generally agrees with the inmate advocates that further regulation is necessary regarding third-party financial transaction fees, single-call programs, and other mechanisms by which other providers seek to exploit loopholes in the Second Inmate Rate Order.⁵⁸ Pay Tel strongly supports the Wright Petitioners' position that "the FCC must take an affirmative role in

⁵⁸ See Pay Tel Third Further Notice Comments, at 15-16.

ensuring that ICS customers are not charged unjust, unreasonable and unfair ancillary fees – either by the ICS provider, or because the ICS provider (who is not chosen by the ICS customer) has elected to maximize its revenue by entering into agreements with third parties that split up the proceeds earned from excessive fees charged to ICS customers.”⁵⁹

As to third-party financial transaction fees, Pay Tel agrees with Prison Policy Initiative that the Commission must revisit, clarify, and/or revise its regulations to the extent that while the rules “ostensibly prohibit phone companies from charging unreasonable deposit fees,”⁶⁰ as written they may inadvertently “provide[] a direct path for the industry to immediately subvert”⁶¹ that prohibition through revenue-sharing agreements, imposition of “unlimited fees’ through related [and unregulated] transactions[,]”⁶² bundling regulated and unregulated services in the same facility-provider contracts, and other creative means. Pay Tel has expressed⁶³ and continues to share the concerns voiced by Prison Policy Initiative that language in the new rules pertaining to fees that prevents ICS providers from adding any “markup” to the fee assessed by third parties opens the door to revenue-sharing agreements wherein the third party assesses an unreasonable fee and then shares it with the ICS provider (and, arguably, no “markup” would have been added by

⁵⁹ Wright Petitioners’ Third Further Notice Comments, at 20-21.

⁶⁰ Prison Policy Initiative, “Comment Re: Second Report and Order and Third Further Notice of Proposed Rulemaking ¶ 306 – Loophole on the horizon: The regulatory harm of phone companies bundling telecommunications services with prison financial services in one contract,” at 2, WC Docket No. 12-375 (Jan. 19, 2016).

⁶¹ *Id.* at 4.

⁶² *Id.* at 2.

⁶³ Pay Tel Third Further Notice Comments, at 15-16.

the provider and the rule therefore would not have been broken—although the spirit of the rule would be eviscerated).⁶⁴

Prison Policy Initiative also discusses in detail the problems with single-call programs, including how such programs “fleece consumers” and “defraud the correctional facilities” (because revenues from such calls are non-commissionable).⁶⁵ While Pay Tel disagrees with Prison Policy Initiative that single-call programs should be banned altogether, Pay Tel has long advocated for Prison Policy Initiative’s alternative approach to these programs—that the Commission should impose caps on them of a \$3.00 maximum automated phone payment fee, plus otherwise applicable per-minute rates.⁶⁶ Pay Tel currently offers this capability at the regulated rate and fee when customers choose to pay with a credit or debit card, confirming the economic feasibility of the proposed solution, and confirming that such services can be offered with a per-minute, and not a flat, rate.

* * *

⁶⁴ See Prison Policy Initiative, “Comment Re: Second Report and Order and Third Further Notice of Proposed Rulemaking ¶¶ 147, 182-189, 291 – Single-Call loophole persists in new regulations,” at 1, WC Docket No. 12-375 (Jan. 19, 2016) (“PPI Third Further Notice Single Call Comment”).

⁶⁵ Prison Policy Initiative, “Comment Re: Second Report and Order and Third Further Notice of Proposed Rulemaking ¶¶ 324-326 – the new regulations leave a loophole for unjust profit-sharing via Western Union and MoneyGram,” at 1-2, WC Docket No. 12-375 (Jan. 19, 2016).

⁶⁶ PPI Third Further Notice Single Call Comment, at 10. See Pay Tel Second Further Notice Reply Comments, at 39; see also Letter from Marcus W. Trathen, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, Attachment, “Ethical Proposal for Reform of Inmate Calling Rates and Fees,” at 2, WC Docket No. 12-375 (Oct. 3, 2014).

Dated: February 8, 2016

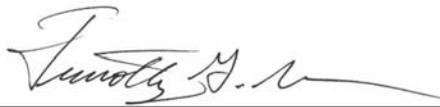
Respectfully submitted,

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EXHIBIT 1

From: Bill Pope [mailto:Bill.Pope@ncck.com]
Sent: Tuesday, October 27, 2015 1:55 PM
To: Bill Pope
Subject: FCC ruling last week

Dear Corrections Professionals,

Last week, the Federal Communications Commission voted on and approved the caps on inmate phone calling rates and ancillary funding fees. Here is a link to the [FCC press release](#) summarizing their ruling. The final ruling should be posted in the register in about 3 weeks, so the caps for state and federal prisons will go into effect in 90 days after it is posted and 180 days for county and city jails.

On October 1, 2015, I distributed an email with the proposed rates and the FCC seems to have mirrored those rates and fees. Fortunately, the FCC still chose NOT to regulate commissions because of jurisdictional concerns, which means you will be able to receive commissions, albeit, at lower percentages than have been offered in the past few years. On October 16, four inmate phone providers recommended commission / cost-recovery caps of \$.01 - \$.03 per minute based on facility sizes and told the FCC that if those recommended caps were included in the final ruling that they would not file appeals on the ruling. These recommendations were much below what the National Sheriffs Association was seeking for cost-recovery for most of their jails. Based on the rate and fee caps ruled upon today, most inmate phone providers should be able to offer commissions or cost-recovery in the range requested by the NSA at \$.02 per minute for facilities over 1000 inmates, \$.05 for facilities of 350-999 inmates and \$.08 per minute for jails less than 349 inmates. This final ruling should be perceived as a win-win for inmates and for the jail and prisons.

Here is a recap of the proposed caps based on inmate populations. The FCC plans to preempt local and intrastate rates, so all your calls will fall under this pricing:

0-349 inmates:	\$.22 per minute
350-999 inmates:	\$.16 per minute
1000+ inmates:	\$.14 per minute

State & Federal prisons: \$.11 per minute

Collect calls will be allowed a slightly higher price, but will then be lowered to the same rates as debit after 2 years.

Calls can only be billed in 1 minute billing increments.

Funding Fee Caps:

- \$5.95 – Live Agent Funding
- \$3.00 – Automated Agent Funding
- \$2.00 – Paper Bill Fee
- \$0.00 - 3rd Party Payment Vendor such as Western Union or MoneyGram (only Vendor fee is applicable – Provider cannot add a fee)

After implementation of the ruling, you may need to renegotiate your current contract with your inmate phone provider. Although you may be offered a lower commission, you can expect significant increases in your call counts and minutes after the new rates and fees are implemented, minimizing the impact on your budget.

To view all documents filed in these proceedings (docket 12-375), here is the link: [FCC Docket 12-375](#)

Contrary to press releases sent out last week by a couple of inmate phone providers, inmate phone service will not be discontinued at small and medium-sized jails. If your inmate phone provider chooses to discontinue servicing your facility, please contact NCIC or your state/national corrections association or sheriff association to find a new provider. There are no less than 15 regional inmate phone providers who specialize in providing service to small to medium sized jails.

On a different note, during the FCC Commissioners meeting on October 22, Commissioner Pai spoke about contraband mobile phones and how the FCC is now faced with the task of helping correctional facilities eliminate this problem. NCIC will be submitting comments on how to eliminate cell phone signals in your jails and prisons without the need of purchasing equipment. Based on our experiences in our jails in Central America, we have found that the mobile phone companies are able to control their signals based on V&H coordinates, eliminating the need for investments out of your budgets. We will be providing updates on this project in the next few months.

Feel free to contact your local NCIC representative for more information on how we plan to maximize inmate calling and commission payments under the new rate regime.

Bill Pope

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EXHIBIT 2



Dear Valued Customer

As I am sure you are aware the FCC published the final rules from the recently adopted inmate telephone rates and fees proceedings. Some inmate telephone service providers, including your own, might be telling you commissions are going to cease because the rates are set below their costs. Or they might be encouraging you to sign a one or two year extension until everything works its way through the courts.

I can't speak to the operational efficiencies of these companies or what the future might bring from any legal challenge. However, I can tell you ICSolutions will not stop paying commissions. In 2013, when other companies stopped paying on interstate calls ICSolutions continued to pay. Interstate commissions are not illegal. The FCC has now, unequivocally stated, they do not prohibit providers from sharing their profits and paying site commissions to facilities.

Certain providers are going to mount a legal challenge trying to force the FCC to restrict commissions. Depending upon the size of your facility they want your commissions capped between 6%-11%. This approach is certainly not in the best interests of your facility and defeats the competitive bidding process. We believe in the free market and the continuation of healthy competition to determine the winners and losers.

Of course it is not all about the dollars. Our investigative tools, integrated video visitation, key word search, voice biometrics, labor saving features and great support/service make us the company our competition fears the most.

Please consider giving me call so I can show you the real impact of the FCC rulings and the best technology in the industry.

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