

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

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

**REPLY COMMENTS OF
THE WRIGHT PETITIONERS,
THE D.C. PRISONERS' LEGAL SERVICES PROJECT,
AND
CITIZENS UNITED FOR REHABILITATION OF ERRANTS,**

Lee G. Petro

DRINKER BIDDLE & REATH LLP
1500 K Street N.W.
Suite 1100
Washington, DC 20005-1209
(202) 230-5857

February 8, 2016

SUMMARY

What's past is prologue.

In the *Third Further Notice of Proposed Rulemaking*, the FCC asked for specific cost data regarding ICS video visitation and advanced ICS communications services, along with international ICS calls. The Wright Petitioners noted in our comments that this information could only come from ICS providers and correctional authorities. Other than some very limited information from CenturyLink, no other ICS provider submitted any of the requested information, and only one correctional authority submitted comments in the proceeding, which also failed to provide responsive information.

Instead, the ICS providers' message was clear – do not adopt any further regulations.

This position, however, ignores the fact that the lack of any competition to serve ICS consumers has led to the consolidation of the prison-industrial complex, with a limited number of companies offering a “suite” of ICS services. This bundling has led to high rates for ICS video visitation and other advanced ICS communications services, while the ICS providers continue to agree to pay high site commissions.

The FCC must continue in its efforts to protect ICS consumers by introducing competition into the ICS marketplace, requiring that ICS providers provide annual cost and revenue information, establish caps on international ICS and ICS video visitation and advanced ICS communication services, and close the remaining loopholes associated with ancillary fees. The ICS providers have expressed their clear intent to fight any further reform, while they continue to bid for new contracts with high site commissions, so it must be the case that they expect to continue to charge unjust, unreasonable and unfair rates and fees unless the FCC steps in and adopts further reforms.

TABLE OF CONTENTS

SUMMARY i

TABLE OF CONTENTS ii

DISCUSSION..... 2

 I. COMPETITION IN THE ICS INDUSTRY..... 2

 II. THE FCC MUST ENSURE VIDEO VISITATION AND ADVANCED ICS
 COMMUNICATIONS SERVICES ARE NOT USED TO AVOID FCC REGULATION
 OF ICS INDUSTRY. 7

 III. THE FCC MUST COLLECT ANNUAL COST AND REVENUE DATA FROM ICS
 PROVIDERS. 12

 IV. THE FCC MUST REQUIRE SUBMISSION OF ICS CONTRACTS..... 13

 V. THE FCC MUST REGULATE INTERNATIONAL CALLING RATES..... 16

 VI. THIRD PARTY FINANCIAL TRANSACTION FEES..... 19

CONCLUSION 21

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

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

REPLY COMMENTS

Dorothy Wade, Annette Wade, Ethel Peoples, Laurie Nelson, Winston Bliss, Sheila Taylor, Katharine Goray, Ulandis Forte,¹ Charles Wade, Earl Peoples, Darrell Nelson, Melvin Taylor, Jackie Lucas, Peter Bliss, David Hernandez, Lisa Hernandez, Vendella F. Oura, along with The D.C. Prisoners’ Legal Services Project, and Citizens United for Rehabilitation of Errants, (jointly, the “Wright Petitioners”) hereby submit these Reply Comments in connection with the Third Further Notice of Proposed Rulemaking with the above-captioned proceeding.²

As has been the case throughout this proceeding, ICS providers again ignored the FCC’s request for the voluntary submission of cost data, this time with respect to ICS video visitation, advanced ICS communications services, and international ICS calling. Moreover, ICS providers rejected efforts to introduce competition into the ICS marketplace, refused to support additional data collection requirements and the submission of their contracts, even under protective cover.

¹ Martha Wright, the grandmother of Ulandis Forte, passed away on January 18, 2015

² *Rates for Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd 12,763 (2013) (individually, the “*Second R&O*” and “*3rd FNPRM*”). Reply Comments in response to the *3rd FNPRM* were to be due on February 1, 2016. On January 29, 2016, the Wireline Competition Bureau established February 8, 2016 as the new deadline for submitting reply comments. *See Order*, DA 16-107 (Jan. 29, 2016). *See also Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107 (2013) (individually, the “*First R&O*” and “*FNPRM*”) and Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 13,170 (2014) (“*Second FNPRM*”).

As discussed below, the Wright Petitioners urge the FCC to: (i) adopt rules that will introduce competition into the ICS marketplace; (ii) establish rate and fee caps for international ICS, ICS video visitation, and other advanced ICS communication services, (iii) require the submission of ICS providers' cost and revenue information for at least five years, starting with 2015 data, (iv) mandate the submission of ICS contracts within 30 days of execution; and (v) close remaining loopholes regarding third-party fees which serve only to inflate fees paid by ICS consumers.

DISCUSSION

I. COMPETITION IN THE ICS INDUSTRY.

In our Comments to the *3rd FNPRM*, the Wright Petitioners urged the FCC to adopt rules to introduce competition into the ICS marketplace. We noted that the prison-industrial complex has become consolidated, with a limited number of companies offering a “suite” of inmate-related services, including commissary services, email, video visitation, video phone, and telephone services.³ Other commenters also discussed this consolidation.⁴

In light of the accelerating movement among ICS providers to become a “one-stop” shopping alternatives for correctional facilities, we suggested that the FCC create two classes of ICS, wholesale and retail. We noted that this structure would insulate ICS consumers from the ICS provider that has contracted with the correctional authority (and perhaps has chosen to share its revenue through a site commission), and permit retail

³ *Wright Petitioners Comments*, pg. 4 (Jan. 19, 2016) (“*3rd FNPRM Comments*”).

⁴ *See Prison Policy Initiative Comments*, Loophole On The Horizon: The Regulatory Harms Of Phone Companies Bundling Telecommunications Services With Prison Financial Services In One Contract, pg. 2 (Jan. 19, 2016). *See Human Rights Defense Center Comments*, pg. 4 (Jan. 19, 2016).

ICS providers to purchase access to that facility from the wholesale ICS provider. The consumer would then choose among the various retail ICS providers to determine the lowest rate.⁵ Competition among the retail ICS providers would satisfy the goal expressed in Section 276(b) of the Communications Act, as amended, to “promote competition among [inmate telephone service] providers and promote the widespread deployment of payphone services to the benefit of the general public.”⁶

We concluded that if the correctional authorities and ICS providers are opposed to introducing competition into the ICS marketplace, then they must “acknowledge (i) that the current ICS structure does not promote competition, (ii) that their practices have led to unjust, unreasonable and unfair rates being charged to ICS customers, and (iii) that the appropriate and legally sustainable solution is to accept the FCC’s authority to cap ICS rates and ancillary fees as set forth in the *Second R&O*.”⁷

Only one correctional organization filed comments in response to the *3rd FNPRM*. The California State Sheriffs’ Association urged the FCC “to refrain” from banning exclusive ICS contracts, citing “security concerns, impose logistical burdens, increase costs of providing ICS..., and perhaps diminish the quality of ICS that are provided.”⁸

The ICS providers were equally unsupportive. CenturyLink claimed that banning exclusive contracts would lead to higher costs and that the FCC lacks the statutory authority to do so.⁹ GTL made similar arguments, stating that there are “unique security

⁵ *3rd FNPRM Comments*, pg. 6.

⁶ 47 U.S.C. § 276(b)(1) (2016) (emphasis added).

⁷ *3rd FNPRM Comments*, pg. 7.

⁸ *California State Sheriffs’ Association Comments*, pg. 1 (Jan. 19, 2016).

⁹ *CenturyLink Comments*, pgs. 3-4 (Jan. 19, 2016).

needs” and that providing the ability of ICS consumers to choose among competing ICS providers would lead to higher ICS rates, or the elimination of ICS altogether.¹⁰ Securus argued that competition already exists in the ICS marketplace, and extensively cited the previously-provided December 8, 2014 Declarations from Geoff Boyd and Dave Kunde to argue against introducing multiple providers.¹¹ Finally, Pay Tel Communications expressed its opinion that banning site commissions and introducing a cost-recovery fee would have introduced competition, but “having multiple providers provide ICS in the same facility is unworkable.”¹²

Thus, it is clear that ICS providers and correctional authorities are strongly against the introduction of competition into the ICS marketplace. Similar opinions were expressed by these parties in earlier phases of this proceeding, and it would appear that nothing has changed.¹³ While Securus argued that “robust competition” already exists,¹⁴ it is clear from the record that ICS providers only compete to earn the right to be the monopoly provider at a particular correctional facility, and that ICS consumers do not benefit from this competition.¹⁵ Instead, ICS consumers never get to choose among ICS providers, and no ICS provider or correctional authority supports a change in this approach.

¹⁰ *GTL Comments*, pgs. 9-11 (Jan. 19, 2016).

¹¹ *Securus Comments*, pgs. 1-6 (Jan. 19, 2016).

¹² *Pay Tel Communications, Inc., Comments*, pgs. 4-5 (Jan. 19, 2016). Telmate, LLC, did not address this points in its comments.

¹³ *Third FNPRM*, 30 FCC Rcd at 12,900-12,901

¹⁴ *Securus Comments*, pg. 1.

¹⁵ *Second R&O*, 30 FCC Rcd at 12,765 (“[t]here is little dispute that the ICS market is a prime example of a market failure.”)(citing *First R&O*, 28 FCC Rcd 14,107, 14,129-30, para. 41). *See also Dissenting Statement of Michael O’Reilly*, *Second R&O*, 30 FCC Rcd at 12,972 (“there is no dispute that the prison payphone market as a whole does not seem to be functioning properly.”)(“*O’Reilly Dissent*”).

Therefore, in light of this marketplace failure, and the unwillingness of ICS providers and correctional authorities to support multiple ICS providers serving a correctional facility, the FCC had only one other choice to protect ICS consumers – adopt caps on ICS rates and ancillary fees charged to ICS consumers. While the *Second R&O* took this approach, Securus, GTL, CenturyLink and Telmate have filed petitions for review and motions for stay in the U.S. Court of Appeals for the D.C. Circuit, challenging the FCC’s exercise of its statutory authority to set caps on ICS rates and ancillary fees.¹⁶

It would seem that no approach taken by the FCC to regulate ICS interstate and intrastate rates and ancillary fees would be acceptable to the ICS providers unless the FCC also relieves ICS providers from their existing, voluntary obligation to pay site commissions. Apparently, Securus, GTL and Telmate would have accepted caps on the ICS rates and ancillary fees if the FCC shifted the burden of site commissions onto ICS consumers through a cost-recovery fee.¹⁷ GTL, Securus and Telmate even advocated, on

¹⁶ See *Global Tel*Link, et al.*, No. 15-1461 and consolidated cases. Pay Tel has taken a different tack by setting up a website – www.mandatorycostrecovery.com – which urges correctional authorities to contact their congressional representatives to “ensure that phone access is preserved for inmates by mandating a specific per minute cost recovery rate additive for facilities.” It also contains an analysis from Don J. Wood which incorrectly asserts that “If rate caps are properly set at the level of efficiently-incurred costs (and site commissions are explicitly excluded from this definition of costs), there will be no money available for ICS providers to pay commissions.” See *An Analysis of the Treatment of Site Commissions in the FCC’s Second Report and Order in the Inmate Calling Services Proceeding*, attached hereto as Exhibit A. Mr. Wood presents similar reasoning to that which was presented in a document submitted by the Wright Petitioners on February 3, 2016. See <http://apps.fcc.gov/ecfs/document/view?id=60001422245>. While the Wright Petitioners do not assert that Pay Tel is the author of the previously-submitted document, the justification presented in that document is nearly identical to that contained in Mr. Wood’s analysis (compare Wood’s statement with Section II of the submitted document - “*In setting the rate caps, the FCC excluded the cost of site commissions and set rates below provider’s costs to force them to stop paying site commissions.*”).

¹⁷ *Ex Parte Submission of GTL, Securus and Telmate* (Sept. 14, 2014). See also *Ex Parte Submission of GTL, Pay Tel, Securus and Telmate* (Oct. 15, 2015) (urging summit to address proposal by Securus counsel, Andrew D. Lipman). See also *Ex Parte Submission of GTL, Securus and Telmate* (Oct. 15, 2015) (the FCC has authority to regulate interstate and intrastate ICS site commissions).

the eve of the adoption of the *Second R&O*, that “[p]romoting competition in the market for payphone services requires attention to the rates charged for every call, not just interstate ones” and that Section 276 granted to “the FCC the authority to regulate intrastate matters.”¹⁸

It is, therefore, astounding that the very same parties who advocated that the FCC has authority to regulate both interstate and intrastate ICS rates when they were trying to have the FCC step in and relieve them of their onerous but entirely voluntary business decision to pay site commissions, have since filed petitions for stay with the FCC,¹⁹ and petition for review and motions for stay with the US Court of Appeals, challenging the FCC’s authority under Section 276 to cap intrastate ICS rates.²⁰

In the end, only one conclusion can be reached from reviewing their flip-flops in advocacy and their refusal to compete against each other for ICS consumers – namely, that the ICS providers would prefer to simply maintain the status quo. However, the FCC does not have that luxury, as it is obligated to correct market failures to ensure that ICS rates and fees are just, reasonable and fair.²¹

¹⁸ See *Ex Parte Submission of GTL, Securus and Telmate*, pg. 6 (citing *New England Public Communications Council*, 334 F.3d 69, 76-77 (recognizing that, “in passing the 1996 Act’s payphone competition provision and the local competition provisions, Congress had exactly the same objective: to authorize the Commission to eliminate barriers to competition,” and noting that it would be similarly impossible to implement the Section 276 competition provisions “while limiting the Commission’s authority to interstate services”)).

¹⁹ See *Rates for Interstate Inmate Calling Services*, Order, DA 16-83 (Jan. 22, 2016)(dismissing petitions for stay filed by GTL, Securus and Telmate). See also *CenturyLink’s Petition for Stay Pending Judicial Review*, WC Dkt. 12-375 (Jan. 29, 2016).

²⁰ See, e.g., *Motion for Global Tel*Link for Partial Stay Pending Judicial Review*, No. 15-1461, pg. 3 (Jan. 27, 2016) (“Even more fundamentally, the Order is unlawful because the FCC lacks authority to set rate caps for intrastate ICS calls.”).

²¹ 47 U.S.C. § 201(b) (“any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.”) (emphasis added); See 47 U.S.C. § 205(a) (“the Commission is authorized and empowered to determine and prescribe what will be the just and

II. THE FCC MUST ENSURE VIDEO VISITATION AND ADVANCED ICS COMMUNICATIONS SERVICES ARE NOT USED TO AVOID FCC REGULATION OF ICS INDUSTRY.

As noted in our 3rd FNRPM comments, the FCC has requested a substantial amount of information that can only come from ICS providers and correctional facilities. We even provided a helpful chart – Exhibit A – which detailed the information requested by the FCC so that ICS providers and correctional authorities could respond to the FCC’s request.²² The Wright Petitioners did make an attempt to obtain the video visitation rate information requested by the FCC, and provided what could be found as Exhibit B. The information provided therein showed a great range of rates charged by ICS providers.²³

The Wright Petitioners also provided a discussion of the FCC’s authority to regulate video visitation and other new services offered by ICS providers, concluding that the FCC has ample authority to prescribe just, reasonable and fair rates for ICS video visitation and advanced ICS communications services.²⁴ Other parties, such as the Prison Policy Initiative, HRDC, Verizon, and the Electronic Frontier Foundation, also support the FCC

reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable.”) (emphasis added); See 47 U.S.C. §276(b)(1) (“In order to promote competition among [ICS] providers and promote the widespread deployment of payphone services to the benefit of the general public...the Commission shall take all actions necessary...to establish a per call compensation plan to ensure that all [ICS] providers are fairly compensated.”) (emphasis added). Rather than just being an optional “a la-carte” order (See *O’Rielly Dissent*, pg. 1), these obligations were imposed upon the FCC by Congress in the Communications Act of 1934, as amended.

²² 3rd FNRPM Comments, pg. 9, Exhibit A.

²³ *Id.*, pg. 10.

²⁴ *Id.*, pgs. 13-14.

using its statutory authority to ensure that ICS video visitation and advanced ICS communications services are available at just, reasonable and fair rates.²⁵

Other than CenturyLink, no ICS provider provided any response to the detailed questions raised by the FCC.²⁶ Instead, GTL and Securus merely assert that ICS video visitation is an information service, and thus the FCC has no authority to regulate its rates and fees.²⁷ Telmate agrees with GTL and Securus, and argues that video visitation and other ICS offerings are advanced services for which the FCC cannot utilize its authority under Section 276 to regulate.²⁸

On the other hand, Pay Tel Communications urged the FCC to regulate ICS video visitation and advanced ICS communications services.²⁹ Specifically, Pay Tel argued “that the ‘same perverse incentives’ that have harmed the traditional ICS market exist and will infect the video visitation and other advanced ICS markets if left unchecked.”³⁰ In fact, Pay Tel urged the FCC to include in its next mandatory data collection requirements for specific cost information.³¹

²⁵ See *Prison Policy Initiative Video Visitation Comments* (Jan. 19, 2016); See also *HRDC Comments* (Jan. 19, 2016); See *Verizon Comments* (Jan. 19, 2016); See *Electronic Frontier Foundation Comments* (Jan. 19, 2016).

²⁶ See *CenturyLink Comments*, pgs. 6-7 (providing cost of video kiosks, bandwidth requirements, and minutes of use of remote video visitation).

²⁷ See *Securus Comments*, pg. 6. See *GTL Comments*, pg. 3.

²⁸ See *Telmate Comments*, pg. 13.

²⁹ *Pay Tel Communications Comments*, pg. 8.

³⁰ *Id.* (citing *3rd FNRPM*, at ¶ 305).

³¹ *Id.*, pg. 9 (“Among the cost categories that ICS providers should be required to report, if the Commission is going to gather any meaningful data on which to base any rate or fee regulation as to these advanced services, are capital investment, costs of service, commission payments, and ancillary service charges, among others.”).

Clearly, the FCC expected ICS providers to be more responsive than they were, with only one provider submitting the minimum information on some costs and MOU. As with the *NPRM* in the proceeding, the FCC relied on ICS providers, and they simply chose not to respond. In light of most ICS providers' decision to punt on responding to the FCC's request for information, they can no longer argue that the FCC did not provide a reasonable opportunity to provide their input.

Furthermore, nothing in the discussions provided by Securus, GTL or Telmate undercut the Wright Petitioners' analysis that the FCC has authority to regulate ICS video visitation and advanced ICS communications services. The Wright Petitioners, HRDC and the Prison Policy Initiative provided detailed discussions of the state of the ICS video visitation industry, and a vast majority of the ICS providers simply declined to engage.

To provide some perspective on the current practices of bundling ICS services together, the Wright Petitioners obtained the Request for Proposal, responsive bid proposals, and the recently-signed contract, for a ICS telephone and video visitation system in Douglas County, Oregon. The RFP and the agreement are attached hereto as Exhibit B.

The RFP requested that ICS providers submit proposals for an ICS telephone and ICS video visitation system, and also indicated that "[t]he County will consider offers or recommendations from proposers for services not specifically identified in this RFP as required but which, in the County's sole discretion are deemed related to those that are required and have the potential to the reduce the County's costs, improve the level of service, or reduce the County's risk."³² And the ICS providers did not disappoint.

³² See Exhibit B, *RFP*, Section 6.2(B).

Four ICS providers responded to the RFP – ICSolutions, GTL, Securus, and Legacy. Each ICS provider offered ICS telephone and ICS video visitation systems, and ICSolutions, GTL and Legacy also offered their suite of services, including remote ICS visitation, ICS voicemail, and ICS email services. All four providers also offered their suite of enhanced security systems such as voice biometrics, visitation scheduling systems, and advanced commissary services.

In fact, the chosen ICS provider – ICSolutions – highlighted its “intimate relation and uninhibited access” to the County’s current commissary provider, which just happened to be a sister company in the Keefe Group.³³ And, of course, each ICS provider responding to the Douglas County RFP also proposed to share the revenue earned from their respective suite of services, including the ICSolutions’ proposal to share (i) 75% of the ICS telephone revenue, (ii) 50% of remote ICS video visitation revenue, (iii) \$0.20 from each ICS email, and (iv) \$.05 of each ICS photo email.³⁴ One of the ICS providers offered to pay even higher commissions for each of the same services.³⁵

This case is but one example of the willingness of ICS providers to bundle their ICS telephone service with other ICS services to win ICS contracts. It also illustrates their

³³ See Exhibit C, ICSolutions Bid Proposal, Tab 3, pg. 10.

³⁴ See Exhibit C, ICSolutions Bid Proposal, Tab 7, pg. 147, as amended.

³⁵ See Exhibit C, Legacy Bid Proposal, pg. 12. We note that Legacy apparently did not respond to the FCC’s Mandatory Data Collection requirement in August 2014, despite the fact that the FCC ordered all ICS providers to submit their cost data. See *First R&O*, 28 FCC Rcd at 14,172. See *Commission Announces Inmate Calling Services Data Due Date*, DA 14-829 (June 17, 2014). Legacy has been providing ICS since 1996 (<http://legacyinmate.com/About/>). Legacy serves a large number of correctional facilities (<https://www.legacyinmate.com/prepaid/facility>), and was clearly aware of the FCC proceeding, as it issued several statements on its blog. See e.g., <http://tinyurl.com/hvtgese> and <http://tinyurl.com/jygi7wn>. We urge the FCC to review whether an enforcement action should be brought to consider sanctions for Legacy’s failure to submit their cost data.

continued willingness to pay site commissions on each element of their service, even with full knowledge that the FCC was looking closely at further regulation of ICS rates and fees.

One ICS video visitation company, iWebVisit.com, expressed its difficulty in competing as a stand-alone video visitation company, stating that it:

has not been able to compete as effectively in some sectors of the corrections industry against companies that offer bundled services, “free” systems, commission offers and, sometimes, higher consumer pricing. While iWebVisit would prefer not to see new regulation on technology companies or new administrative burdens placed on the FCC, some form of accountability for ICS providers, and minimally a restriction against bundling by ICS providers of their regulated communications services with unregulated video visitation systems, would appear to be in the best interest of consumers.

Another advanced ICS communications service provider, Smart Communications, filed comments regarding the provisioning of ICS email services. Smart Communications disagreed with Prison Policy Initiative that ICS email takes advantage of existing hardware, and stated:

Smart Communications is the only provider that does not have another line of business to subsidize the cost of equipment necessary to deliver two-way electronic messaging services...[and \$.05 per message rates]...represents a purely add-on service where the equipment has been subsidized by other services, such as a commissary vendor.³⁶

Based on the comments from iWebVisit and Smart Communications, it would appear that operating as a stand-alone business providing ICS video visitation and advanced ICS communications services is very difficult when confronted with the bundled offerings of ICS providers such as Securus, GTL, Telmate and ICSolutions.

Therefore, we urge the FCC to step in and protect ICS consumers from high rates and fees arising from ICS providers’ established practice of bundling together ICS telephone, video visitation, and advanced ICS communications services. The FCC has the

³⁶ *Comments of Smart Communications Holdings, Inc.*, pg. 6 (Jan. 30, 2016).

authority to regulate such services, and it is clear that these bundled services do not serve the interest of ICS consumers, or other stand-alone ICS service providers.

III. THE FCC MUST COLLECT ANNUAL COST AND REVENUE DATA FROM ICS PROVIDERS.

Next, as discussed in our Comments, the FCC must expand and modify its mandatory data collection requirements. Specifically, we urged the FCC to (i) require a mandatory data collection no later than March 17, 2017 (one year after the effective date of the Second R&O), (ii) revise the Mandatory Data Collection Form and Instructions, and (iii) expand the collection to include granular revenue information.³⁷ HRDC submitted similar comments, proposing that the FCC require annual mandatory data collections for at least five years.³⁸

Pay Tel Communications supported the requirement of an additional mandatory data collection in two years, and made similar suggestions about reforming the information that is required to be submitted.³⁹ In addition, Pay Tel supported a requirement that “the scope of an ICS provider’s operations be fully reported along with that provider’s relevant costs.⁴⁰ No ICS provider suggested that the FCC add additional mandatory collections, and Telmate suggested that the FCC should “consider the extensive record already assembled.”⁴¹ Securus, GTL and CenturyLink indicated that the process was very burdensome, and Securus expressed its opinion that the requirement for additional

³⁷ *3rd FNPRM Comments*, pg. 16.

³⁸ *HRDC Comments*, pg. 8.

³⁹ *Pay Tel Communications Comments*, pgs. 9-10.

⁴⁰ *Id.*, pg. 12.

⁴¹ *Telmate Comments*, pg. 14.

biennial reporting “would be so extraneous and burdensome that it seems more punitive than beneficial.”⁴²

There is no question that the information collected in the 2014 mandatory data collection was critical to the adoption of the caps on ICS rates and fees. The Wright Petitioners agree with Pay Tel that the FCC must modify the information to be submitted by ICS providers, and agree with HRDC that the FCC should require mandatory data collections on an annual basis for the near future.

The ICS industry is going through both consolidation among ICS service providers, and a change from being completely unregulated to having caps imposed on rates and fees. The FCC should collect cost and revenue data on an annual basis for at least five years so that it can properly take into consideration the impact of the (i) marketplace consolidation and (ii) regulatory changes.

IV. THE FCC MUST REQUIRE SUBMISSION OF ICS CONTRACTS.

The *3rd FNPRM* sought public comment on whether it should “require ICS providers to file all contracts, including updates, under section 211(b) authority.”⁴³ Noting that “members of the public must ‘unnecessarily expend time and money to obtain records’ of ICS contracts,” the FCC recognized the value of having the “actual contract” to review.⁴⁴ The Wright Petitioners supported the adoption of a requirement for ICS providers to submit their ICS agreements to the public, noting that the FCC had authority to do so.⁴⁵

⁴² *Securus Comments*, pgs. 8-9. See *GTL Comments*, pg. 12; See *CenturyLink Comments*, pg. 9.

⁴³ *3rd FNPRM*, 30 FCC Rcd at 12,910.

⁴⁴ *Id.* (citing *HRDC Ex Parte Submission*, pg. 1 (July 30, 2015)).

⁴⁵ *3rd FNPRM Comments*, pg. 17.

HRDC agreed, correctly noting the critical importance of its nationwide effort (including lawsuits, if necessary) to gather ICS contracts.⁴⁶

Not surprisingly, every ICS provider filing comments was against the submission of their contracts. One common argument was that the FCC imposed requirements that the ICS providers post their rates and ancillary fees on their websites and in their annual reports to the FCC.⁴⁷ Another common argument was that the burden in producing the agreements would be very high.⁴⁸ Securus adds an additional argument, stating that the disclosure of its contracts would be the same as posting their client list, which is considered a trade secret.⁴⁹

First, it is important to note that no ICS provider argued that the FCC doesn't have statutory authority to collect the contracts pursuant to Section 211(b) of the Communications Act. Next, efforts to analogize to the lack of similar requirements for non-dominant carriers is misplaced,⁵⁰ because, of course, ICS providers are the dominant carrier (in fact the only carrier, see Section I above) serving a particular correctional facility. Further, the notion that a list of facilities served by an ICS provider is a "trade secret" is absurd, especially when one considers that Securus posts a rate calculator on its website that lists each facility.⁵¹ Other providers also list the facilities to whom they

⁴⁶ *HRDC Comments*, pg. 9. Indeed, without the publication of its groundbreaking survey of rates in April 2011 (<https://www.prisonphonejustice.org/media/issues/04pln11.pdf>), and the subsequent efforts to maintain the information at www.prisonphonejustice.org, it would have been exponentially more difficult for the Wright Petitioners to advocate before the FCC.

⁴⁷ *See GTL Comments*, pg. 6; *See Securus Comments*, pg. 11; *See CenturyLink Comments*, pgs. 10-11; *See Telmate Comments*, pg. 11; *See Pay Tel Communications Comments*, pg. 14.

⁴⁸ *See e.g., GTL Comments*, 5-6 and *Pay Tel Communications Comments*, pg. 13.

⁴⁹ *Securus Comments*, pg. 10 (internal citations omitted).

⁵⁰ *GTL Comments*, pg. 7 (internal citations omitted).

⁵¹ *See Securus Rate Calculator*, available at <https://securustech.net/call-rate-calculator>.

provide service and Section 64.6060.⁵² Thus, if ICS providers were attempting to keep secret the facilities to whom they provide service, they are not succeeding.

The obvious question, then, is what value does reviewing the contracts provide that is not met through these other approaches. As noted above in Section II, contracts entered into by ICS providers provide a comprehensive picture of the services that are being provided to a correctional facility. For example, the annual reporting requirements established in Section 64.6060 do not cover all of the bundled services that ICSolutions will be providing to Douglas County, Oregon, nor will the reporting requirements highlight the fact that ICSolutions' sister companies provide commissary services to the same facility, with whom ICSolutions has an "intimate relationship and uninhibited access."⁵³

As ICS providers assemble their "suite" of services, it will be necessary to determine if they are bundling regulated and unregulated services together in a manner that artificially raises ICS rates and ancillary fees. Moreover, as discussed below, the FCC is looking into the pass-through of third-party fees, and it will be necessary to see the contracts to determine if those fees are actually being charged by unaffiliated third-parties, or instead recently acquired sister companies, such as J-Pay Inc. and JLG Technologies, which were recently acquired by Securus.⁵⁴ Currently, the only way to obtain information is through the labor-intensive FOIA process, which is also costly when litigation ensues.

⁵² See *CenturyLink Corrections*, <http://centurylinkcorrections.com>; See *Telmate's Getting Out*, https://pay.gettingout.com/#/deposit_facility/; See *ICS Solutions Bid Proposal for Douglas County, Exhibit C*; See *Legacy Inmate*, <https://www.legacyinmate.com/prepaid/facility>;

⁵³ See *Exhibit C*, ICSolutions Bid Proposal, Tab 3, pg. 10.

⁵⁴ See *Securus Technologies, Inc. Announces Acquisition of JLG Technologies and Affiliated Companies* (June 11, 2014) (<http://tinyurl.com/h93esqk>). See also *Securus Technologies, Inc. Completes Transaction to Acquire JPay Inc.*, (July 31, 2015) (<http://tinyurl.com/h3cf8s2>)

As such, in the absence of competitive pressures which would reduce ICS rates and fees, and in light of the bundling of regulated and unregulated services, ICS providers are clearly similar to the dominant landline carriers of yesteryear, and the FCC must take all necessary steps to ensure that ICS rates and fees are just, reasonable and fair.

V. THE FCC MUST REGULATE INTERNATIONAL CALLING RATES.

Next, in response to the FCC's request for comments on establishing rate caps for international ICS calls, the Wright Petitioners demonstrated that the FCC had both the authority and the obligation to ensure that international ICS rates and fees were just, reasonable and fair.⁵⁵ We noted that specific information regarding cost and availability of providing international ICS calls is only available from the ICS providers, and indicated that we too would be interested in reviewing their submissions.⁵⁶

Two ICS providers – Securus and Telmate – did not even discuss international ICS in their comments. Pay Tel Communications stated that the volume of international ICS calls is very low, and most are covered under the ICS contract with the U.S. Immigration and Customs Enforcement.⁵⁷ CenturyLink indicated that the cost to transport and terminate international calls is higher, and that “simple network and termination costs...to many African and East European countries can be \$0.25 per minute or greater.”⁵⁸ Finally, GTL noted that there are different costs associated with terminating calls to landline and mobile numbers.⁵⁹

⁵⁵ *3rd FNPRM Comments*, pgs. 19-20.

⁵⁶ *Id.*, pg. 20.

⁵⁷ *Pay Tel Communications Comments*, pgs. 14-15.

⁵⁸ *CenturyLink Comments*, pg. 11.

⁵⁹ *GTL Comments*, pgs. 8-9.

A comment from Margaret Bick notes that GTL is charging \$11.25 per phone call between the US and Canada. She also notes that she has been charged between \$9.95 and \$12.30 by Western Union to fund her account.⁶⁰ Additionally, the New Jersey Advocates for Immigrant Detainees, the New York University School Law Immigrant Rights Clinic and the American Civil Liberties Union of New Jersey urged the FCC to adopt an international rate cap at \$0.16.⁶¹

Because no ICS provider actually provided the detailed information requested by the FCC,⁶² the Wright Petitioners assembled the rates being charged by most of the ICS providers. As shown in Exhibit D, there is a considerable range in rates among the various ICS providers, and most do not charge different rates for landline and mobile terminations.

For example, it would appear that Telmate charges \$0.50 per minute for all international calls, regardless of the termination point. NCIC also charges a flat fee, but it is \$1.50 per minute. ICSolutions charges a \$4.00 surcharge, and then \$1.00 per minute for all international ICS calls, and Legacy charges a \$3.99 surcharge, and \$.99 per minute flat fee. Pay Tel Communications has several different options, with some distinguishing between calls to Mexico, North American Numbering Plan countries, and all other countries. Securus and GTL charge different rates depending on the country, but do not distinguish between landline and mobile terminations.

Finally, CenturyLink imposes a “connect fee” and a “per minute” fee, which do not depend on the country being called, or whether the call terminates to a landline or mobile number. CenturyLink appears to charge the highest rates, with connect fees ranging from

⁶⁰ *Margaret Bick Comments*, Feb. 1, 2016.

⁶¹ *See New Jersey Advocates for Immigrant Detainees, et. al.*, Comments, pg. 7.

⁶² *3rd FNRPM*, 30 FCC Rcd at 12,912-12,914.

\$1.00 to \$4.00 with per-minute rates ranging from \$.60 to \$1.09, and flat fee rates between \$5.00 and \$9.90.

Based on the wildly divergent international ICS rates among similarly-situated ICS providers, it does not appear that the deciding factor for ICS providers when setting international ICS rates is either the termination point or whether the call is going to a landline or wireless phone. If NCIC charges a uniform rate of \$1.50 per minute to all countries, it is not clear why an ICS consumer calling from CenturyLink's phones in Sumter County, Florida pays \$4.99 to connect and \$.89 per minute, especially when one considers that CenturyLink "offers network and data systems management, Big Data analytics and IT consulting, and operates more than 55 data centers in North America, Europe and Asia...[and]...broadband, voice, video, data and managed services over a robust 250,000-route-mile U.S. fiber network and a 300,000-route-mile international transport network."⁶³ The contrast among ICS providers is even more stark when one considers that all calls from ICE facilities pay \$0.15 per minute for calls to landlines and \$0.35 per minute for calls to mobile numbers.⁶⁴

Thus, it would appear that, despite comments from CenturyLink and GTL asserting that it costs more to complete international ICS calls, there is no reasonable justification for the differences in the rates actually being charged. Previously, we have shown that the differences in rates among ICS providers for domestic interstate ICS calls were widely divergent,⁶⁵ and then subsequently showed the same for domestic intrastate ICS calls.⁶⁶ In

⁶³ See *CenturyLink About Us*, <http://www.centurylink.com/aboutus/companyinformation/>.

⁶⁴ See *3rd FNPRM*, 30 FCC Rcd at 12,913.

⁶⁵ See *Wright Petitioners Comments*, pg. 20 (March 25, 2013).

⁶⁶ See *Wright Petitioners Ex Parte Submission* (September 17, 2014).

both cases, the FCC stepped in and imposed a caps on domestic ICS rates and ancillary fees, and the FCC should do the same with respect to international ICS rates. Since the ICS providers had an opportunity to justify their higher rates, and none chose to do so, the FCC should cap international ICS rates at \$0.16 as proposed by other commenters.

VI. THIRD PARTY FINANCIAL TRANSACTION FEES.

Finally, the Wright Petitioners have urged the FCC to “prohibit the pass-through of ancillary fees that only serve to inflate the profits of ICS providers and their vendors.”⁶⁷ We noted that these ancillary fees are the product of side-deals with ICS vendors that are remarkably similar to deals between ICS providers and correctional authorities to pay site commissions. Detailed discussions of this problem was also presented by the Prison Policy Initiative in their comments addressing single-call and money transfer fees.⁶⁸ The Human Rights Defense Center also support the adoption of rules that would prohibit “any additional fees or markup that the ICS provider might impose on the end user.”⁶⁹

GTL and Telmate did not address this issue in their comments. Pay Tel Communications urged the FCC to “prohibit revenue-sharing agreements between ICS providers and financial companies that are assessing money transfer and payment processing fees,” believing that these actions would “give real meaning to the prohibition on mark-ups.”⁷⁰

⁶⁷ See *3rd FNPRM Comments*, pg. 22.

⁶⁸ See *Prison Policy Initiative Comments, Single-Call Loophole Persists In New Regulations*, pgs. 5-7 (Jan. 19, 2016). See also *Prison Policy Initiative Comments, The New Regulations Leave A Loophole For Unjust Profit-Sharing Via Western Union And MoneyGram* (Jan. 19, 2016).

⁶⁹ See *HRDC Comments*, pg. 10.

⁷⁰ *Pay Tel Communications Comments*, pg. 15-16.

CenturyLink also supports the rules adopted in the *2nd R&O* which prohibiting mark-ups, arguing:

- if an arrangement between an ICS provider and a third party results in a higher cost to an end-user than would otherwise be charged by that third party directly (a “base” cost), a markup has occurred. In other words, there is a markup regardless of whether it is the result of an explicit fee on top of the base cost, or whether a revenue-sharing agreement drives the cost above this base cost;
- the ICS provider could not pass through any charge from the party with which it has a revenue-sharing agreement because the charge would not be viewed as a “third party” charge; and
- [i]f an ICS provider has a financial interest in a payment firm, such as a full or partial ownership interest, revenue-sharing agreement, or the like, the ICS provider should not be able to pass through any charge from that firm if that charge exceeds the caps. Otherwise, some ICS providers will have an obvious incentive to purchase or establish separate payment service divisions and charge excessive fees claimed to be exempt from the Commission’s rules.⁷¹

Securus is the only party who urged the FCC to “[r]efrain from regulating financial transactions and the arrangements between ICS providers and financial vendors.”⁷²

Securus also argued that the FCC “lacks jurisdiction and authority over financial transactions,” and noted that it sought to stay the implementation of Section 64.6020, and will seek judicial review of this issue as well.⁷³ Subsequent to the filing of Securus’ comments, the FCC denied Securus’ petition for stay of Section 64.6020, finding that it has the requisite authority to regulate ancillary fees.⁷⁴

⁷¹ *CenturyLink Comments*, pgs. 12-13.

⁷² *Securus Comments*, pg. 13.

⁷³ *Id.*, pgs. 11-12 (internal citations omitted).


⁷⁴ *Rates for Interstate Inmate Calling Services*, Order Denying Stay Petitions, DA 16-83, pg. 23. (Jan. 22, 2016) (denying petitions for stay filed by Global Tel*Link, Securus Technologies, Inc., and Telmate, LLC).

In light of the extensive discussion of the FCC's authority to regulate ancillary fees in the *2016 Stay Order*, which followed on the heels of the extensive discussion of the FCC's authority to regulate ancillary fees in the *Second R&O*, the Wright Petitioners urge the FCC to take steps to ensure that 64.6020 does not become a mechanism to charge ICS consumers unjust, unreasonable and unfair ancillary fees. Prison Policy Initiative has aptly discussed the dangers associated with ancillary fees when the companies have revenue-sharing agreements, and several ICS providers, i.e., CenturyLink, ICSolutions and Pay Tel Communications, also support FCC's regulation of these transactions.⁷⁵ As such, the FCC must close all loop-holes and eliminate all efforts to gouge ICS consumers.

CONCLUSION

The FCC has made tremendous progress in protecting ICS customers from unjust, unreasonable and unfair ICS rates and fees. As discussed above, by taking a limited number of additional steps, the FCC can satisfy the goals that guided the Wright Petitioners – led by Ms. Martha Wright – to file the initial lawsuit in this matter. Through its efforts to remedy the remaining issues in the proceeding, the FCC can ensure that these lofty goals are met.

Respectfully submitted,

By: 

Lee G. Petro
DRINKER BIDDLE & REATH LLP
1500 K Street N.W.
Suite 1100
Washington, DC 20005-1209
(202) 230-5857

February 8, 2016

⁷⁵ See 3rd FNPRM, 30 FCC Rcd at 12,914-12,915. See *Pay Tel Communications*, pgs. 15-16.