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

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

INMATE CALLING SOLUTIONS, LLC
OPPOSITION TO PETITION FOR PARTIAL RECONSIDERATION

Charlena S. Aumiller, Esq., CPA
TN State Bar No. 31465
2200 Danbury Street
San Antonio, TX 78217
210-572-9552
caumiller@icsolutions.com

Attorney for Inmate Calling Solutions, LLC

February 26, 2016

SUMMARY

Inmate Calling Solutions, LLC ("ICSolutions") hereby submits this Opposition to Mr. Michael S. Hamden's Petition for Partial Reconsideration of FCC Order No. 15-136, requesting the FCC prohibit commissions, and replace them with a cost recovery fee, as well as provide clarifications. ICSolutions submits the Petition can be denied in its entirety pursuant to 47 C.F.R. §§ 1.429(l)(1) and (3). At minimum, ICSolutions recommends the FCC deny the request to reconsider the *Order* to include a prohibition or cap on commissions. Any rule attempting to cap or prohibit commissions would not only be ineffective and raise multiple constitutional questions, but it would also be in excess of the FCC's statutory authority and, therefore, unlawful. The FCC does not have the statutory authority to dictate how providers of inmate telephone services ("ITS") use their profits and, therefore, cannot prohibit or otherwise cap ITS providers' payment of commissions to facilities.

As for clarifying the terms "authorized fee," "mandatory tax," and "mandatory fee," ICSolutions finds the terms adequately defined in Rule 64.6000(b), as well as in Paragraph 191 of the *Order*. ICSolutions provides an example of an existing authorized fee, based on the definitions. ICSolutions also points out that any clarification provided would not prevent future ambiguities and, therefore, the process for requesting FCC consideration on whether a state or local law is preempted is the more appropriate means of addressing whether questionable fees are permissible pass-through fees or inconsistent with the FCC rules and, therefore, preempted. Nevertheless, while ICSolutions submits the terms are adequately defined, ICSolutions does not oppose further clarification from the FCC.

Regarding the clarification of the applicability of the *Order*'s rules to ITS providers' subsidiaries, as further described herein, ICSolutions submits such a clarification is unnecessary since the rules clearly require compliance by all providers, regardless if performed by a

subsidiary. Even though the rules for single-calls apply to third parties, ITS providers or their subsidiaries, affiliates or other related parties can process payment for a single call because ITS providers cannot require minimum funds. Any such call processing could only occur upon the informed request by the consumer and must comply with the fee caps that apply to all transactions processed by ITS providers and not third parties. While ICSolutions' position is the rules are clearly enforceable against either subsidiaries or parent companies providing ITS, ICSolutions does not oppose further clarification from the FCC.

TABLE OF CONTENTS

Opposition to the Petition for Partial Reconsideration

Inmate Calling Solutions, LLC ("ICSolutions") hereby submits this Opposition to Mr. Michael S. Hamden's Petition for Partial Reconsideration. The Petition requests that the FCC reconsider parts of FCC Order No. 15-136, particularly seeking the FCC to perform the following: (1) prohibit commissions or, alternatively, cap commissions to a specified cost-recovery fee added to the existing rate caps, (2) clarify the terms "authorized fee," "mandatory tax," and "mandatory fee," and (3) clarify that subsidiaries of ICS providers are subject to the single-call rule.

Much negativity has been thrusted at ITS providers throughout this proceeding, but no one has disputed that ITS providers deliver a valuable service that improves the quality of life for inmates while maintaining the necessary security. Thus, it is in everyone's best interest that ITS providers are fairly compensated by consumers using the service through just, fair, and reasonable rates. ICSolutions disagrees with Mr. Hamden about prohibiting commissions and replacing them with a cost recovery fee, a process which is the equivalent of capping commissions, because it is unnecessary and unwarranted to ensure the price caps enable ITS providers to receive fair compensation.

ICSolutions submits the Petition can be denied in its entirety pursuant to 47 C.F.R. §§ 1.429(l)(1) and (3), and at minimum must be denied concerning the request for the prohibition of commissions. The FCC does not have the statutory authority to dictate how providers of inmate telephone services ("ITS") use their profits and, therefore, cannot prohibit the payment of commissions. As for clarifying the terms "authorized fee," "mandatory tax," and "mandatory fee," ICSolutions finds the terms adequately defined in Rule 64.6000(b), as well as in Paragraph 191 of the *Order*, particularly considering the references in to the *Truth-in-Billing Second Report and Order*. *Order*, at 97, nn. 682-83 (citing 20 FCC Rcd at 6469, para. 40). Nevertheless, while

ICSolutions submits the terms are adequately defined, ICSolutions does not oppose further clarification from the FCC. Regarding the clarification of the applicability of the *Order*'s rules to ITS providers' subsidiaries, as further described herein, ICSolutions submits such a clarification is unnecessary since the rules clearly require compliance. Even so, while ICSolutions' position is the rules are clearly enforceable against either subsidiaries or parent companies providing ITS, ICSolutions does not oppose further clarification from the FCC.

I. THE COMMISSION CANNOT REGULATE ITS PROVIDERS' PROFITS AND, THEREFORE, CANNOT PROHIBIT SITE COMMISSIONS.

Mr. Hamden is requesting the FCC to prohibit site commission payments and, as an alternative, increase the rate caps to include a cost-recovery fee. In support of this position, Mr. Hamden argues that the FCC's decision to permit commissions as a share of profits "offers ICS providers and correctional professionals virtually unlimited opportunities to generate revenues for the payment of commissions in new and nefarious ways." Petition, at i. According to Mr. Hamden, the rate caps "may not, in the aggregate, yield providers sufficient funds to pay existing site commissions to facilities . . . , new and increased charges on unregulated services can be anticipated, and, indeed, are almost certain." Petition, at i; *see also* Petition, at 5 ("As a direct consequence [to permitting site commissions]: . . . (2) providers will likely use revenues generated from unfair charges to inmates and their families for ***unregulated*** products and services in order to pay excessive site commissions; . . . .") (emphasis added). Mr. Hamden believes "[t]here is no real dispute that the Commission has the legal authority to prohibit site commission payments." Petition, at 6. Moreover, Mr. Hamden claims the allowance of commissions "puts in place a dynamic that is simply untenable." Petition, at 5.

It is curious that Mr. Hamden purports consumer advocacy on the one hand, *see, e.g.*, Petition, at ii, 5, and then argues for a rate cap increase by adding a cost-recovery fee on the other hand, Petition, at 2-3. Regardless if rates are increased to include a cost-recovery fee, it will not provide a legal basis for capping commissions.

A. While the FCC may have the authority to regulate prices in the form of rates and fees to ensure fair compensation for providing inmate telephone service, it does not have the authority to regulate how a provider uses its profits.

As evident by not appealing the *Order*, ICSolutions does not challenge that the FCC has the statutory authority to regulate the prices charged by ITS providers in the form of rates and fees, as the rates and fees are how ITS providers are compensated. Nor does ICSolutions challenge the reasonableness of the FCC's interpretation that regulations ensuring the ITS providers are "fairly compensated" includes the consideration of the fairness to consumers as payors of the compensation. While the appellants may dispute the semantics of these words and the FCC's resulting authority to regulate rates and fees, it cannot be reasonably disputed that § 276 and the remainder of the Telecommunications Act ("Act") have **no language authorizing the FCC to dictate how providers can use their profits**. Therefore, the FCC does not have the statutory authority to regulate how an ITS provider uses its profits.

Once earned, profits are the ITS provider's property. While the ITS providers that have requested the FCC to eliminate or otherwise cap commissions have cited several instances where the FCC has been able to regulate contracts of regulated entities with unregulated third parties, no proponent of such regulations has provided a single citation to the statute or other laws conferring the FCC with the authority to regulate how a provider uses its profits. Moreover, when one considers the basics of Mr. Hamden's request, he is asking one government agency (the FCC) to prohibit for-profit companies (ITS providers) from giving funds to other government agencies (facilities). Assuming the transfer of funds is a form of profit-sharing, as required under the FCC's *Order*, such a prohibition is an absurd restriction of freedom and is fundamentally wrong.

In rate regulation, an agency acts as an intermediary for setting prices that balance the needs of the payor-consumers and the providers, which has long stood on the principle that the law and the regulating agency do not guarantee profits to a provider. *Federal Power Comm'n v. Nat. Gas Pipeline Co.*, 315 U.S. 575 (1942) ("[R]egulation does not insure that the business shall produce net revenues . . . . [T]he hazard that the property will not earn a profit remains on the company in the case of a regulated, as well as an unregulated, business."). Regulating how entities can or cannot spend their profits would be an impermissible overreach that attempts to supplant the regulated entity's management decisions with the agencies. Rate regulation thus permits agencies to rule on the authorized charges, but once those charges are determined to be set in accordance with the law, the regulated entity is responsible for its own operations, including earning revenue, cost efficiencies, and operating profitably. It is undeniable that how an entity uses its profits can drive its future operations.[1] Thus, an agency cannot maintain its hands-off approach to the regulated entity's operations and overall profitability if it starts regulating management decisions on how profits are used.

In addition to having no statutory authority to prohibit commissions, the U.S. Constitution protects certain expenditures and, therefore, an attempt to completely prohibit commissions in all forms is likely to be challenged as unconstitutional. Regulators often exclude charitable or political contributions in establishing authorized charges because inclusion

[1] For example, entities – regulated or otherwise – must often make the choice between reinvesting their profits in technology to expand services in the future or providing dividends to investors. *See* Kevin Keller, *This is Why Amazon is Dominating Walmart Now*, TIME.COM (Sept. 18, 2015), http://time.com/4040160/amazon-walmart/. In unregulated industries, entities often set competitive prices, including reducing prices through rebates and coupons, to entice consumers to pick their product or service over those of a competitor.

would result in an "involuntary levy," *see, e.g., El Paso Elec. Co. v. New Mexico Pub. Serv.*, 706 P.2d 511, 513 (NM 1985) (citations omitted) ("Courts in a number of states have disallowed the inclusion of charitable contributions in utilities' operating expenses for rate-setting purposes. We find persuasive their reasoning that charitable contributions, if included in utility companies' operating expenses, would constitute an 'involuntary levy' on the ratepayers, who have no voice in where such contributions go and 'who, because of the monopolistic nature of utility service, are unable to obtain service from another source and thereby avoid such a levy.'"). While ratemakers are often within their broad statutory authority to determine just, fair, and reasonable rates by excluding expenditures to charities or nonprofits, as well as political contributions in rate calculations for consumers, the authority to set rates is different than the authority to control expenditures. Indeed, a regulator's attempt to prohibit expenditures would raise several constitutional questions, including but not limited to the freedom of speech in the First Amendment. .

The permissibility of commissions without the inclusion of recovery in rates is similar to how many jurisdictions treat lobbying efforts. Many regulators and courts alike have excluded the costs of lobbying efforts – similar to commissions – are expenditures intended to increase profitability and, therefore, are costs properly borne by the shareholder:

> Similar reasoning [for excluding charitable contributions] applies with even more force to lobbying expenditures, and the majority of states exclude those expenditures from utility companies' operating expenses. Again, a utility's ratepayers have no control over the nature or the goals of the utility's lobbying. **Lobbying by utility companies seeks to enhance company profitability and therefore primarily benefits the companies' shareholders. It is the shareholders, rather than the ratepayers, who properly should bear the cost.**

El Paso, 706 P.2d at 513-14 (citations omitted) (emphasis added). Similar to lobbying, the payment of commissions is undertaken by the ITS provider with the intent to enhance company profitability and, therefore, primarily benefits the ITS providers' shareholders. Consequently, it is the shareholders, rather than the consumers, who properly should bear the cost.

B. If a service is "unregulated," then the FCC cannot regulate it.

Mr. Hamden raises the concern that, without the prohibition of commissions in all forms, ITS providers will raise rates of unregulated services in order to increase revenue and profits to increase commissions. Petition, at 2. Mr. Hamden's reasoning is flawed and cannot be relied upon as a legal basis to prohibit commissions. First, if a service is truly unregulated, then the FCC has no authority to regulate whether a provider pays commissions on the unregulated service. Second, the pricing for unregulated services is presumed to be controlled by traditional market forces and independent of the FCC's rate and fee caps. Thus, Mr. Hamden's arguments that the FCC's regulation of ITS is correlated with the pricing of unregulated services is wholly speculative and, therefore, cannot support a reconsideration.

C. Even if the FCC granted Mr. Hamden's Petition, his desired results are unlikely because the many forms of commissions make effective regulation unfeasible.

Even if the FCC could overcome the legal barriers to regulating how an ITS provider uses its profits, attempting to regulate commissions as set forth in Mr. Hamden's Petition would be a cumbersome and heavy administrative burden that is unlikely to achieve the desired results. The FCC defined "site commissions" broadly to essentially include any transfer of money or other goods and services of value beyond what is necessary for the provision of basic inmate calling services. *See Order*, App. A, § 64.6000(t). This broad definition is necessary because, as Mr. Hamden pointed out in his Comment dated July 13, 2013 and filed in this Docket No. 12-375, even when a jurisdiction attempts to regulate site commission payments in their traditional percentage-of-revenue form, new methods to pay commissions replace the old form of commissions.

Mr. Hamden provided multiple examples in New Mexico to show how an ITS provider would include in bids other goods and services, such as computers, not essential to the provision of basic ITS. Thus, even if the FCC had narrowly defined site commissions to include only monetary payments, a new form of transferring value from the ITS provider to the facility would likely emerge to replace the traditional form of percentage-of-revenue site commission payments. *See* Prison Policy Initiative, *Eliminating Commissions Is Not Essential to Comprehensive Prison Phone Regulation, and It May Not Be Practicable to Eliminate All of the Varied and Evolving Forms That Such Payments Take*, WC Docket No. 12-375 (Aug. 12, 2015) (informing the FCC of instances in which ITS providers have contributed commissions in the form of rents, political contributions, and more). Indeed, it is a futile attempt to regulate various site commission payments because it will only result in the "whack-a-mole" game the FCC is attempting to avoid. *See*, e.g., *Stay Denial*, ¶ 51; FCC's Opposition to Motion for Stay, at 30; *Order*, at 94, ¶ 185 and n. 656 (discussing how prohibition of specific ancillary charges now existing is futile since new ancillary charges will simply emerge to replace the prohibited ones).

Because there is no definition of commission that would enable effective enforcement of the prohibition or limitation on commissions, the most effective mechanism to normalize the transfer of value from ITS providers to facilities is through a cap of the overall rates and fees.

D. The rate and fee caps adequately provide the intended protections of fair costs of inmate calling services to consumers.

Regulating commissions, even if possible and lawful, is unlikely to accomplish Mr. Hamden's desired effect of reducing rates below the caps. Petition, at 3. Regardless of whether commissions are permitted, it is realistic to expect that the rate caps will be the rates in place at a vast majority of the facilities nationwide. Based on the design of the rate caps being a result of averaging costs, the lower-cost calls are unlikely to benefit from lower rates since ITS providers will need to offset the higher-cost calls. Rate and fee caps are the most comprehensive means of reducing costs to consumers. Taking the additional, unnecessary (and unlawful) step of eliminating commissions or capping them with a pass-through cost recovery fee can only lead to "pad the bottom line" of the ICS providers, as Mr. Hamden referred to it in his original comment in this Docket. Hamden Comment, W.C. Docket No. 12-375, pg. 8 (July 31, 2013) (discussing how some of the revenue from high rates and fees goes to facilities as commissions, while "[t]he remainder merely supplies an embarrassment of riches to pad the bottom-line of industry powerhouses . . . ."). Such an approach results in no benefit of cost reduction for consumers but, instead, likely results in a reduction in inmate services that are supported by commissions.

Mr. Hamden's concerns of high costs are sufficiently addressed with the rate and fee caps. Without rate caps, commissions could be passed-through to consumers without meaningful market constraints. With rate caps, however, the FCC has forced any commissions to occur as a share of profit, rather than a pass-through amount. The rate caps therefore provide an economic restraint that results in a limit of commissions equal to or lesser than the profit the ITS provider earns. With the new constraint, the rate and fee caps accomplish the ultimate goal of ensuring fair compensation, as paid by consumers, by protecting them from exorbitant rates and fees for inmate calling services, regardless if commissions are paid. If fairness of inmate calling costs to the consumers is at the heart of Mr. Hamden's concern, then the *Order*'s rules setting rate and fee caps accomplish that goal. *See* Prison Policy Initiative, *Eliminating commissions is not essential to comprehensive prison phone regulation*, WC Docket No. 12-375 (Aug. 12, 2015).

Mr. Hamden wants the FCC to prohibit commissions and replace it with a cost recovery fee, which is the equivalent of capping commissions. Petition, at 13. But, it does not follow that an additive capped cost recovery fee will put downward pressure on rates more so than permitting commissions in capped rates. Even if commissions were included in the calculation of the rate caps, they would be just one part of the whole compensation that the ITS providers receive and the consumers pay. Controlling one cost component of compensation is unnecessary because the FCC capped the overall prices, putting a downward pressure on both commissions and fees, by looking at the fairness of the total compensation as a whole. Certainly, regulating the overall rate of compensation, which includes rates per minute of use and fees, is more efficient and effective than trying to regulate the various cost components of compensation.

E. Prohibition of commissions is unnecessary for the FCC's *Order* to survive the appeal.

Mr. Hamden supports his Petition for Partial Reconsideration by contending the FCC may be able to end the current appeals in Case No. 15-1461 (and consolidated cases) in the U.S. Court of Appeals for the D.C. Circuit in favor of the *Order*, so long as the FCC prohibits commissions and adds a pass-through cost-recovery fee. Petition, at 3, 6-7. It is understandable why Mr. Hamden believes the appeal would end, since many of the appellants offered to not appeal the *Order* under similar conditions. *See Ex Parte Presentation*, Global Tel*Link, Securus, PayTel, & Telmate, pgs. 2-3 (Oct. 16, 2015) ("If, however, the FCC issues an order that (a) adopts the rate caps and fees stated in the Fact Sheet, and (b) establishes a maximum facility admin-support payment in the form of a per-minute, capped additive rate, consistent with the Lipman proposal, the companies will not seek judicial review of these matters."). But, not all of the appellants were part of this offer. Additionally, Mr. Hamden's argument assumes that any changes made by the FCC will not generate litigation from other parties, ignoring the likelihood that others will protest or appeal the reconsidered order.

As Mr. Hamden pointed out, this *quid quo pro* offer was qualified with a limitation. Petition, at 14 (noting the offer was a "conditional pledge"); *see also Ex Parte Presentation*, Global Tel*Link, Securus, PayTel, & Telmate, pg. 3, n. 5 (Oct. 16, 2015).. While Mr. Hamden focuses on capping commissions, there are many arguments on appeal that have nothing to do with prohibiting or capping commissions. Indeed, much of Securus's Motion for Stay and related Reply in the appeal has little to do with the regulation of commissions. For example, Securus argued the FCC's authority is limited to communication services, ignoring the fact that the statutory language authorizes the FCC to establish rules for "***<u>pay</u>***phone service providers". Telecommunications Act, § 276(b)(1)(A) (emphasis added). The term "payphone" plainly includes both the payment for phone services as well as the phone services themselves. In addition, Securus argued that "both the Act and FCC policy expressly require promotion of innovation by introduction of ***new*** services, not just improvement of old ones. Securus Motion for Stay, at 9-10; Securus Reply, at 6. This argument focuses on the portion of the Act's § 157(a) that states new technologies shall be encouraged, but it ignores the statutory language expressly authorizing the FCC to oppose new technologies if it is inconsistent with the public interest. *See also* Telecommunications Act, § 157(b) (limiting the FCC to 12 months to consider whether new technologies are in the public interest).

Moreover, as previously mentioned in Part I.A, many appellants are challenging the FCC's interpretation of statutory language. ICSolutions agrees with the appellants that the "[i]nterpretation of a word or phrase depends upon reading the whole statutory text," including "the purpose and context of the statute." *Dolan v. Postal Service*, 546 U.S. 481, 486 (2006). Even if the language is successfully argued as ambiguous, the remainder of the Act and Congressional Findings from other amendments strongly suggests Congress did not intend for the term "fair" to be a minimum only. Indeed, interpreting the term "fair" to allow the FCC to set only minimums in § 276 would conflict with the use of the term "fair" in § 204(b) and §

205(a) of the Act, where the FCC is authorized to establish new charges or changes to existing charges that are "just, fair, and reasonable." In addition, the Congressional Findings in Section 2 of Public Law 101-435, amending § 226 of the Act, and available with the text of the official Act from the Government Printing Office's website, are particularly strong indicators as to Congress's intent for "fair" rates and fees when consumers do not have a choice of providers. *See* Congressional Findings, Pub. L. 101-435, § 2 (1990), available publicly at www.gpo.gov (reproduced in Appendix A for convenience) (finding "(3) a variety of providers of operator services now compete to win contracts to provide operator services to hotels, hospitals, airports, and other aggregators of telephone business from consumers, . . . (10) a combination of industry self-regulation and government regulation is required to ensure that competitive operator services are provided in a fair and reasonable manner.").

Even if a modification to the *Order* prohibiting or otherwise limiting commissions could make the appeal end, such a modification is unnecessary for the *Order* to survive the appeal on these grounds. Appellants make two main arguments to support their position that commissions should be prohibited or otherwise limited: (1) the ITS providers cannot renegotiate their contracts if the FCC does not prohibit or otherwise limit commissions, thereby preventing "fair compensation," and (2) the FCC has acted arbitrarily and capriciously by not prohibiting or limiting commissions after finding that they are the primary driver of high rates and fees.

As for the first argument, the *Order* indicates the approach to commissions in this *Order* is consistent with the approach the FCC took in the 2013 Rate Order, FCC Order No. 13-113, for the interim rate caps. *See Order*, at 57, ¶ 118 (affirming the conclusions from the 2013 Rate Order and providing no language suggesting the approach in the 2015 Rate Order was a departure from the approach taken in the 2013 Rate Order). Despite the fact that the 2013 Rate

Order contained no language prohibiting the payment of commissions on interstate revenue,[2] several of the appellants quickly renegotiated their contracts to eliminate commissions with the rate reduction. *Order*, at 106, ¶ 213; *see also* Wright Petitioners Consolidated Comments, WC Docket No. 12-375 at Exhibit B (Mar. 11, 2014). Given that there was no express prohibition on commission payments, the appellants must have inferred a prohibition on payments using the logical construction of the various applicable laws, including state contract law and the contention that they could not receive just, fair, and reasonable compensation while paying commissions on interstate revenue subject to the interstate rate caps, which excluded the cost of commissions.

The Restatement (Second) of Contracts, §§ 261, 264, addresses similar situations:

> 261. Discharge by Supervening Impracticability
>
> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.
>
> 264. Prevention by Governmental Regulation or Order
>
> If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.[3]

---

[2] Many of the appellants often cite the FCC's Public Notice, issued on August 20, 2014, to support their claim that the FCC prohibited payment of site commissions because rates including such amounts would be "unjust and unreasonable." But, the Notice has no such language. It re-affirms the findings on commissions from the 2013 Rate Order, which has no prohibition on the payment of interstate commissions. And, in Footnote 7 of the Notice, the FCC acknowledged that at least one provider continued to pay commissions on interstate revenue.

[3] Restatement (Second) of Contracts § 266 applies to excusing performance when contracts are entered into after a law comes to exist.. *See, e.g.*, *Twombly v. Ass'n of Farmworker Opportunity Programs*, 212 F.3d 80, 84-85 (1st Cir., 2000) (reversing summary judgment dismissing a workers' compensation claim because the relevant law was passed before the contract).

The same principles and relevant factors exist at the time of this *Order* as did at the time of the 2013 Rate Order. Thus, while the appellants appear to argue that commissions must be impossible through an outright prohibition or other limitation for ITS providers to renegotiate contracts, this position is wholly unsupported by past actions under similar facts, law, and circumstances. Just as the appellants were able to renegotiate contracts as a result of the 2013 Rate Order, even though paying commissions under those rate caps was only impractical and not impossible, the appellants are also able to renegotiate contracts under this *Order.*

For the facilities where the common law does not apply to contracts, and site commissions are expressly required by local ordinance or state statute (*e.g.*, Texas), the *Order* states that the FCC can and will preempt the inconsistent requirement. *Order*, at 105, ¶ 211. Similar to the common ratemaking approach to exclude charitable and political contributions and lobbying expenditures since those costs benefit the shareholder, the FCC has found commissions are not considered a cost of service necessary to provide ITS, but still permits the payment of commissions so long as the costs are borne by shareholders and paid as an apportionment of profits. Therefore, the FCC permits ITS providers and facilities to voluntarily negotiate whether commissions will be paid and at the profit-sharing amount that will be enforceable under contract law. *See also Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) ([W]hile it may be that the Commission may not normally impose upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain . . . it is clear that a contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility . . . .").

State laws requiring commissions, however, abridge the ITS providers' freedom of contract by removing the ability to voluntarily negotiate a profit-sharing arrangement and, instead, impose a duty to pay commissions. Such duty converts commissions from permissible profit-sharing into a cost of service necessary to offer ITS in that jurisdiction. When the FCC has rules that commissions are not a cost of service, while a state or local law requires commissions as a cost of service, the laws necessarily conflict. One law must preempt the other. Here, the FCC's *Order* states that its rules will preempt inconsistent state and local laws. Therefore, state or local laws requiring commissions will be preempted because they are inconsistent with the FCC's findings that commissions are not a cost of service.

Regarding the second argument, as previously discussed in Part I.D, the FCC has issued rules that will control the harmful effects of commissions on rates and fees related to ITS. Moreover, while some of the appellants may argue that the facilities will not "voluntarily" reduce their requests for commissions, the FCC *Order* did not rely on the voluntary compliance by facilities. The FCC supported its statement that commissions will come down with comments from experts in the industry. *See Order*, ¶ 131 and n. 453. By the capping price of phone rates, overall supply is fixed. The demand for commissions cannot go above the maximum supply. Even if the demand is unlimited, the finite supply provides the market constraint necessary. ITS providers' argument that unrestrained demand will continue ignores the fact that all of the suppliers will be bound to the same rate and fee caps and, therefore, the finite "supply" will necessarily constrain the "demand."

II. THE FCC'S DEFINITIONS OF "AUTHORIZED FEE," "MANDATORY TAX," AND "MANDATORY FEE" ARE SUFFICIENT FOR ITS PROVIDER COMPLIANCE AND THE FCC'S ENFORCEMENT.

Mr. Hamden requests the FCC to clarify the terms "authorized fee," "mandatory tax," and "mandatory fee." ICSolutions finds the terms adequately defined in Rule 64.6000(b) and in Paragraph 191 of the *Order*, particularly considering the references in to the *Truth-in-Billing Second Report and Order,* 20 FCC Rcd at 6469, para. 40. *Order,* at 97, nn. 682-83. An example of an Authorized Fee would be the $0.10 for each completed inmate calls made from county, municipal or other local facilities not primarily housing DOC inmates. *See* Tenn. Code Ann. § 41-7-104(c). This fee is silent as to whether it is an add-on rate, but requires providers to remit $0.10 per completed call to the State Treasurer each quarter. *Id.* The fees collected are used to conduct training of the personnel at county, municipal, and other local facilities not primarily housing DOC inmates. *Id.*

Like Tennessee's usage fee to cover training costs, it seems that the costs to perform the background checks and other security required prior to permitting calls or visits to Texas State DOC inmates could qualify as an Authorized Fee or a Mandatory Fee, particularly if the costs are essentially a user fee, like an application fee, without markup. While clarification could be made by reconsidering the *Order*, such clarification is unlikely to cover all situations. However, understanding whether a state or locality imposed fee qualifies as a pass-through authorized fee, mandatory tax, or mandatory fee could best be addressed by ITS providers seeking to understand whether a state or local law is inconsistent with the *Order*, and therefore preempted. *See Order*, at ¶ 211.

In summary, while ICSolutions submits the terms are adequately defined, ICSolutions does not oppose further clarification from the FCC. Any guidance the FCC provides without basis in a real life example is susceptible to manipulation. Thus, while the FCC may provide clarity, the best clarity may come from governmental agencies or ITS providers submitting inquiries about whether specific fees or taxes that exist today or, for future fees or taxes, prior to their establishment are consistent with the *Order* and, therefore, qualify to be passed-through without markup as an authorized fee, mandatory tax, or mandatory fee.

III. THE FCC'S PROHIBITION ON FLAT-RATE CALLING AND PER-CALL OR PER-CONNECTION CHARGES CLEARLY APPLIES TO ALL INMATE CALLS.

Last, Mr. Hamden requests the FCC clarify the applicability of the *Order*'s "single-call rule" to ITS providers' subsidiaries. ICSolutions submits that the rules clearly apply to ITS providers and their subsidiaries alike. Indeed, if an entity is processing an inmate call, they are considered an ITS provider subject to the rules. *See* § 64.6000(s) (defining "Provider of Inmate Calling Services, or "Provider"). Thus, there cannot be such a thing as an "unregulated" subsidiary that is processing an inmate call in a means to violate the prohibition against flat-rate calling or the per-call or per-connection charges on consumers.

The FCC has defined "fees for single-call and related services" as a means of billing arrangements with a third party on a per-call basis. At the outset, this "single-call rule", which is actually the ability to charge fees for single-calls, must be a fee from a third-party. Because the classification is based on the relationship of the two entities, entities cannot be both a third party and a related party. Thus, when considering a specific transaction, entities are either a related party or a third party. Subsidiaries or other affiliates are related parties, and not third parties. *See* FASB Accounting Standards Codification Topic 850, *Related Party Disclosures*. Thus, ITS providers' subsidiaries would not qualify as a third party for charging single calls. This would also apply to the rule regulating "third-party financial transaction fees". Importantly, third parties and ITS providers and their subsidiaries alike must adhere to §64.6080, prohibition of per-call or per-connection charges on consumers, and § 64.6090, prohibition of flat-rate calling. As for third-party financial transaction fees, the *Order* is clear in that such fees must be passed through without a markup. *Order*, at 152, ¶ 324 and § 64.6000(a)(5).

Under ICSolutions' reading of the rules, the single-call fee is a pass-through fee similar to the third-party financial transaction fee, with the difference being that the single-call fee will also include the per-minute charges. *See Order*, ¶ 187.

What Mr. Hamden may be concerned with, but may not have articulated as such, is whether ITS providers will be able to process calls on a per-call basis. Considering the interdependencies of all the rules, the rules permit ITS providers to process a single call at the request of the consumer. However, the ITS provider is limited to the fee caps of $3.00 for automated transactions or $5.95 for live-agent transactions. With the prohibition of minimums in § 64.6100, ITS providers cannot force consumers to deposit more than a single call, if a single call is all the consumer wants to make. If it is in the public interest for third parties to process single-calls, it is in the public interest for ITS providers to also provide calls paid for one at a time, particularly if the applicable fees are more cost effective to consumers. Even though it is in the public interest for consumers to have this choice, ITS providers must adequately inform consumers of their choices, as required by § 64.6110.

While ICSolutions' position is the rules clearly apply and, thus, are enforceable against either subsidiaries or parent companies providing ITS, ICSolutions does not oppose further clarification from the FCC.

IV. Conclusion

For all of these reasons, ICSolutions submits that Mr. Hamden's Petition for Partial Reconsideration of the *Order* is denied in its entirety pursuant to 47 C.F.R. §§ 1.429(l)(1) and (3). At minimum, ICSolutions recommends the FCC deny the request to reconsider the *Order* to include a prohibition or cap on commissions. Any rule attempting to prohibit or cap commissions would not only be ineffective and raise multiple constitutional questions, but it would also be in excess of the FCC's statutory authority and, therefore, unlawful.

Respectfully submitted this 26th day of February, 2016.

By: /s/Charlena S. Aumiller__________
Charlena S. Aumiller, BPR No. 31465
Attorney for ICSolutions

CERTIFICATE OF SERVICE

I hereby certify that, on February 26, 2016, the forgoing Opposition was served via electronic mail on the following persons:

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

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

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

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

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

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

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

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

Michael S. Hamden
Attorney & Counselor at Law
1612 Homestead Road
Chapel Hill, NC 27516
M2007Hamden@cs.com
Petitioner

By: /s/Charlena S. Aumiller__________
Charlena S. Aumiller