

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

In the Matter of:)

Rates for Interstate Inmate Calling Services)

WC Docket No. 12-375

**NETWORK COMMUNICATIONS INTERNATIONAL CORP.
OPPOSITION TO PETITION FOR PARTIAL RECONSIDERATION**

Network Communications International Corp. (“NCIC”)¹ submits this opposition to the Petition for Partial Reconsideration (“Petition”)² filed by Michael S. Hamden in the above-captioned matter. NCIC stands alone as the only inmate calling service (“ICS”) provider to fully support the Commission’s decision to cap interstate and intrastate per minute inmate calling rates, as well as services ancillary to the provision of inmate calling services. As such, NCIC urges the Commission to deny the Petition to the extent it requests reconsideration of the Commission’s thoughtful decision not to prohibit or cap site commissions.

I. Background

On January 19, 2016, Mr. Hamden filed a Petition for Partial Reconsideration of the Commission’s Second Report and Order and Third Further Notice of Proposed Rulemaking (“Order”).³ The Petition requests that the Commission reconsider several aspects of the Order,

¹ NCIC, based in Longview, Texas, was established in 1995 and provides inmate calling services in the United States and 12 other countries. In the United States, NCIC provides direct and wholesale services to more than 600 city, county, parish, and state jails in 43 states.

² *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Petition for Partial Reconsideration (filed Jan. 19, 2016) (“*Petition*”).

³ *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd. 12763 (2015) (“*Order*”).

including a prohibition on site commissions, or, alternatively, a cap on commissions to a correctional facility cost-recovery fee. The Petition argues that site commissions should be prohibited or capped to prevent ICS providers from charging excessive inmate calling fees to subsidize exorbitant site commission payments.⁴ While Mr. Hamden’s Petition is noble in intent, he fails to realize a one-size-fits-all model does not work for jails as each jail has a completely different cost structure in offering inmate phone services.

II. Prohibiting or Capping Site Commissions is Unnecessary Given the Commission’s Reforms that Cap Per Minute Rates and Eliminate Excessive Ancillary Fees and Single Payment Call Prices

While the Petition accurately recognizes that the payment of site commissions by ICS providers is a practiced business model, it fails to recognize that the reforms adopted in the Order will unhinge such payments from the inflated ICS rates once paid by prisoners and their families. Exorbitant site commissions (sometimes as high as 96 percent)⁵ emerged because calling rates, ancillary fees, and single payment call prices were not effectively regulated. In the regulatory dead-zone that existed prior to the Order, ICS providers offered facilities inflated site commissions to win contracts, and then made up the difference with excessive rates, single payment calls, and ancillary fees.⁶

While many state public service commissions have had rate caps for more than a decade, these limitations were sidestepped by ICS providers. Indeed, some ICS providers are still billing

⁴ See Petition at 5-14. The Petition also seeks clarification of the terms “authorized fee,” “mandatory tax,” and “mandatory fee,” and clarification that subsidiaries of ICS providers are subject to the single call rule. NCIC’s opposition only addresses the Petition’s arguments pertaining to site commissions.

⁵ Order ¶ 122.

⁶ See Letter from Thomas M. Dethlefs, Associate General Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Aug. 28, 2014) (stating as an explanation for its agreement to pay a 96 percent site commission, that “bidders were obliged to *utilize ancillary fees to cover costs* that otherwise could not be recovered in per-minute rates after deducting the County’s required commissions.”) (emphasis added).

calls at rates as high as \$14.99 per call,⁷ but billing the calls through entities neither certified nor incorporated in the state, thereby avoiding regulatory scrutiny. Moreover, compounding the problem, ancillary fees were rarely, if ever, regulated, by federal or state regulators.

With the implementation of the Commission's Order, which capped calling rates, capped ancillary funding fees at or near cost, and eliminated as many as twelve other hidden fees, the ICS market will undergo a fundamental change such that the payment of substantial site commissions by ICS providers will be difficult, if not impossible.⁸ As a result, ICS providers that seek to remain in business will necessarily have to reduce the payment of site commissions to levels that provide *reasonable* cost-recovery to facilities. What is *reasonable* cost recovery will vary by the individual jail or prison, which is why the Petition's alternative proposal, to replace site commissions with a "modest cost-recovery mechanism," is a bad idea.⁹

While such a one-size-fits-all approach may meet the cost recovery demands of some facilities, it will not work for every jail and prison across the country.¹⁰ Jails in particular utilize a wide variety of cost structures for providing inmate phone services. For example, smaller jails, unlike larger jails and prisons, often provide both bandwidth and maintenance services, meaning they incur more costs than the ICS provider in offering phone services. It is therefore inevitable

⁷ Order ¶ 158.

⁸ Inmate rights groups have agreed that once rates and ancillary fees were set at reasonable levels, there would be no need to regulate site commissions. See Letter from Lee G. Petro, counsel for the Wright Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed Sept. 8, 2015) ("rather than have the FCC serve as the arbitrator between ICS providers and correctional authorities with respect to their completely optional revenue-sharing agreements, the FCC should leave these private negotiations to be resolved between the parties, and focus instead on protecting ICS consumers from unjust, unreasonable and unfair charges, practices, classifications, and regulations.").

⁹ Petition at 13.

¹⁰ See Letter from Mary J. Sisak, counsel for National Sheriffs Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2 (filed Nov. 21, 2014). In addition, it should be noted that city jails, which typically have high inmate phone service costs, were not represented during the Commission's rate regulation proceedings.

that, under the one-size-fits-all approach proposed in the Petition, many facilities will not be able to recover their ICS costs and will be forced to reduce inmate access to phones.

III. Prohibiting or Capping Site Commissions Will Result in Reduced Access to Inmate Phones

Jails and prisons incur costs when they provide inmate access to calling services, such as managing and monitoring calls. Even the Petition admits that “it seems clear that facilities do incur *some* administrative and security costs that would not exist but for ICS.”¹¹ The Petition also admits that there is “little clarity” as to the precise costs incurred by facilities due to the “failure of correctional professionals to provide reliable measurements” and the “inherent variability of correctional facilities.”¹² With these admissions, it is inexplicable that the Petition seeks to eliminate site commissions or impose a one-size-fits-all cap on a fundamental source for correctional facilities to recover the cost of providing inmate calling services. The Petition’s proposal is especially baffling because it comes at a time when the volume of inmate calls is set to increase dramatically with implementation of the Order’s rate caps and other reforms that will make it cheaper for inmates to make calls.

This dramatic increase in anticipated call volume is not simply theoretical hyperbole. As an ICS provider, NCIC has been able to implement rate trials in approximately eighteen jails using the Commission’s rate caps, or the comparable Alabama Public Service Commission rates. These rate changes have stimulated call increases of 50 percent to 300 percent. For example, in 15 county and city jails in Alabama, call volume increased over 57 percent between the start of the rate trial in October 2014 and March 2015 by just changing our local rates from a flat price of \$2.70 to \$.20 per minute. In February 2016, after displacing a competitor at Brazos County Jail,

¹¹ Petition at 12.

¹² *Id.* at 12.

Texas, and lowering rates to \$.16 per minute, inmate calling increased 247 percent. Also, at Gregg County jail, after displacing a competitor and lowering rates to \$.21 per minute in April 2015, inmate calling increased by over 300 percent. It is common sense that, as the volume of inmate calls increase, the workload of jails and prisons to manage and monitor these calls will similarly increase. If site commissions are prohibited or capped, some facilities will be forced to stifle this growth in call volume by decreasing inmate access to phones due to a lack of resources. Therefore, instead of undermining the reforms made in the Order and triggering a reduction in inmate access to phones, the Commission should allow market forces to determine reasonable site commissions for the nation's diverse array of correctional facilities.

IV. The Commission Does Not Have Legal Authority to Prohibit Site Commissions

As NCIC has previously stated in this proceeding, the Commission does not have authority to regulate site commissions.¹³ Indeed, the Seventh Circuit has held that site commissions are outside the scope of governmental agency regulation.¹⁴ In addition, the Commission itself has determined that operator-assisted call commissions are not within the scope of Section 276.¹⁵ The Commission has also previously held that it is not the Commission's role to meddle in private contracts made freely between parties.¹⁶

¹³ Comments of Network Communications International Corp., WC Docket No. 12-375 at 9-11 (filed Jan. 12, 2015).

¹⁴ See *Arsberry v. Illinois*, 244 F.3d 558, 566 (7th Cir. 2001) (“States and other public agencies . . . have to get revenue somehow, and the ‘somehow’ is not the business of the federal courts unless a specific federal right is infringed.”).

¹⁵ See *Payphone Industry Rules and Policies (Reconsideration)*, 11 FCC Rcd 21233 ¶ 52 (1996) (“Because the *level of 0+ commissions paid pursuant to contract* on operator service calls is *beyond the scope of both Section 276* and this proceeding, we decline to require, as requested by NJPA, that ‘LECs are required to make available, on a nondiscriminatory basis, any commission payments provided to their own payphone divisions in return for the presubscription of operator service traffic to the LEC.’”) (emphasis added).

¹⁶ See *Telecommunications Relay Services & The Americans With Disabilities Act of 1990*, CC Docket No. 90-571, Fifth Report and Order, 17 FCC Rcd 21233 ¶ 24 (2002) (“the Commission does not regulate payphone rates, the contractual relationship between a payphone owner and the long distance carrier for the payphone equipment, or the rates for calling cards, including prepaid cards”). If the Commission prohibits site commissions provided for in

In the Order, the Commission explicitly stated that, because it did not prohibit site commissions, it did not need to determine whether it had such authority.¹⁷ If the Commission were to now reverse course, it would jeopardize the important reforms it implemented in the Order. Indeed, additional legal challenges would likely come from the thousands of jails and state departments of corrections that receive site commissions. Instead of facing this uncertainty, the Commission should consolidate the gains it made in the Order and stick to its plan to “monitor the market and [] take appropriate action” if there is not a decrease in site commissions.¹⁸

V. Conclusion

For the foregoing reasons, NCIC urges the Commission to deny the Petition to the extent it requests reconsideration of the Commission’s decision not to prohibit or cap site commissions.

Respectfully submitted,

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contracts between ICS providers and correctional facilities, it is in effect dictating the terms of contracts to which it is not a party.

¹⁷ Order ¶ 130.

¹⁸ *Id.* ¶ 132.

CERTIFICATE OF SERVICE

I, Joseph A. Cohen, hereby certify that, on this 23rd day of March, 2016, a copy of the foregoing Opposition was served on the Petitioner, Michael S. Hamden, by electronic mail to m2007hamden@cs.com.

/s/ Joseph A. Cohen