

Writer's Direct Contact
202/887-8743
FKrogh@mofocom

February 24, 2009

Electronic Ex Parte Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Petitioners' Alternative Rulemaking Proposal
CC Docket No. 96-128

Dear Ms. Dortch:

Petitioners Martha Wright, *et al.* ("Petitioners"), respond to filings by Michael S. Hamden purporting to present a "comprehensive resolution" of the issues raised in the record generated by Petitioners' Alternative Rulemaking Proposal ("Proposal").¹ Although Mr. Hamden's filings recommend some reduction in inmate calling rates, they fail to represent the Proposal and the state of the record accurately and undermine, perhaps inadvertently, the relief supported by the record.²

¹ Petitioners' Alternative Rulemaking Proposal, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (Mar. 1, 2007) ("Proposal"); FCC Public Notice, *Comment Sought on Alternative Rulemaking Proposal Regarding Issues Related to Inmate Calling Services*, 22 FCC Rcd 4229 (WCB 2007).

² See letter from Michael S. Hamden to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (Feb. 8, 2009) ("Hamden Letter"); Written Ex Parte Presentation of Michael S. Hamden on Alternative Rulemaking Proposal Regarding Inmate Calling Services, *Implementation of the Pay* (Footnote Continued)

Marlene H. Dortch
February 24, 2009
Page Two

The Proposal requests that the Commission: (1) impose interstate inmate long distance calling benchmarks of \$0.20 per minute and \$0.25 per minute for debit calls and collect calls, respectively, from all correctional facilities; and (2) require that all service providers offer debit calling as an option to collect calling in all facilities. Unfortunately, Mr. Hamden repeats an error made by one of the inmate calling service providers and incorrectly characterizes the relief sought in the Proposal as confined to three privately administered prisons.³ As Petitioners pointed out some time ago, the Proposal expressly requests the imposition of benchmark rates on “all interstate inmate telephone services,” whether originating at public or privately administered correctional facilities.⁴ The straw man to which Hamden compares his proposed resolution thus does not exist.

Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Dkt. No. 96-128 (Oct. 29, 2008) (“Hamden Presentation”).

³ See Hamden Letter at 1; Hamden Presentation at Part VII(J). Because the Hamden Presentation has no page numbers, it will be cited in this manner throughout. See also, Comments of Pay Tel Communications, Inc. at 5-6, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (May 2, 2007) (“Pay Tel Comments”) (characterizing Proposal as focusing exclusively on inmate calling services at private prison facilities). Hamden’s approach bears an uncanny resemblance to Pay Tel’s position in a number of respects, as explained below.

⁴ See Petitioners’ Reply Comments at 2-3 n.3, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (June 20, 2007) (“Petitioners’ Reply Comments”); Proposal at 15 (“Benchmark rates, which would apply to all interstate inmate telephone services, also have the advantage of obviating any need for” distinguishing between “privately administered and publicly administered facilities.”).

Marlene H. Dortch
February 24, 2009
Page Three

Hamden's proposed resolution suffers from several additional flaws.⁵ First, although he correctly notes that the cost study submitted by the inmate calling service providers ("Cost Study") yields results that largely support the proposed benchmark rates, he fails to realize that the Cost Study actually inflates the costs of providing inmate calling services, due to sampling and other methodological errors.⁶ As Petitioners have explained at length, when those errors are taken into account, the Cost Study demonstrates that Petitioners' benchmark rate recommendations are, if anything, too generous.⁷ The Cost Study in fact shows that even service providers carrying calls from the smallest and most economically "marginal" correctional facilities have interstate costs largely consistent with the proposed benchmark rates. Larger facilities, where most interstate inmate calls originate, have even lower costs.⁸

Nevertheless, echoing Pay Tel and other service providers, Hamden suggests that some service providers would not be "financially viable at all locations under Petitioners' proposal."⁹ Because the requested benchmark rates are high enough to

⁵ It should be noted that Hamden also overstates the extent of support in the record for his flawed approach. See Hamden Letter at 2. For example, the Brennan Center for Justice expressly supported the Proposal and cited the Hamden Presentation as a filing by one of the "concerned individuals" supporting the requested relief. Letter from Melanca Clark, Counsel for the Ad Hoc Coalition for the Right to Communicate, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 1 & n.1 (Dec. 4, 2008). The National Association of State Utility Consumer Advocates took a different approach from Hamden by advocating a rebuttable presumption that interstate inmate calls should be charged at ten cents per minute and that this federal benchmark be used as a guideline by the states, rather than a rule binding the states. *Ex Parte* Presentation of the National Association of State Utility Consumer Advocates at 4-7, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (Jan. 20, 2009).

⁶ See Hamden Presentation at Parts IV(B), V (commenting on Don J. Wood, Inmate Calling Service Interstate Call Cost Study, CC Docket No. 96-128 (Aug. 15, 2008) ("Cost Study")).

⁷ See Declaration of Douglas A. Dawson in Response to the "Inmate Calling Services Interstate Call Cost Study" and Other Recent Filings ¶¶ 3-16, 20-29 (Dec. 22, 2008) ("Dawson Cost Response"), attached as Exhibit A to letter from Frank W. Krogh, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (Dec. 23, 2008) ("Petitioners' Cover Letter"); letter from Frank W. Krogh, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 2-6 (Nov. 19, 2008) ("Petitioners' Cost Response").

⁸ Dawson Cost Response ¶¶ 14-19; Petitioners' Cover Letter at 2; Petitioners' Cost Response at 8-9.

⁹ Hamden Letter at 1.

Marlene H. Dortch
February 24, 2009
Page Four

sustain even calling services at most jails and other small facilities, establishing benchmark rates that are even higher, as Hamden appears to suggest, would saddle inmate families with unreasonably excessive rates, by any rational measure.¹⁰

Hamden also inexplicably would empower each state commission to increase all inmate rates, *including interstate rates*, in the state, which could potentially undo the nationwide relief sought by Petitioners.¹¹ Nowhere does he provide legal support for his proposed state circumvention of the Commission's Section 201(b) authority over interstate rates, nor is there any such precedent. Any request for a waiver of interstate rate benchmarks in an individual case should be filed at this Commission, not at a state agency.¹²

Hamden also qualifies his request for debit and other calling options with the phrase "consistent with sound correctional practices and security concerns."¹³ As the Petitioners have demonstrated, debit calling satisfies all legitimate security and other penological concerns.¹⁴ The Commission should require that inmate debit

¹⁰ Pay Tel suggests that the Commission might establish "tiered" benchmarks, pegged to the size of the served facility. *See* letter from Marcus W. Trathen, Counsel to Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 6 (Dec. 9, 2008). If the Commission ultimately chooses such an approach, rates slightly higher than the requested benchmarks might be appropriate for the smallest facilities, as long as typical facilities are covered by the requested benchmarks and rates covering larger facilities are lower than the requested benchmarks.

¹¹ Hamden Presentation at Part VII(F); Hamden Letter at 2.

¹² Petitioners take no position on Hamden's proposal to impose the same benchmarks on both interstate and intrastate inmate rates, except that: (1) Petitioners oppose any step that would delay action on their requested interstate rate relief while parties compile a legal and factual record supporting intrastate rate relief; and (2) in the event that the Commission does subject intrastate inmate rates to benchmarks, it should couple such relief with a "downward ratchet" provision prohibiting inmate service providers from increasing existing interstate or intrastate inmate rates that are lower than the benchmarks. Thus, as part of the order resolving this proceeding, any interstate or intrastate long distance or local inmate rates that are already lower than the benchmarks should be required to be maintained at their current lower levels.

¹³ Hamden Presentation at Part VII(E).

¹⁴ *See, e.g.*, Petitioners' Reply Comments at 25-29.

Marlene H. Dortch
February 24, 2009
Page Five

long distance calling be offered as an option to collect calling in all facilities, without qualification.¹⁵

Echoing another theme reflected in the service providers' filings, Hamden also criticizes so-called "arbitrage" by inmate families and others receiving calls from prison inmates.¹⁶ He apparently disapproves of inmate families acting like other consumers by choosing legal service options that reduce the cost of telecommunications, such as wireless or VoIP services with numbers that are local to the facilities where their loved ones are incarcerated. Leaving aside whether such rational consumer choices by non-inmates should ever be prohibited, it is at least clear that interstate rate relief, as requested in the Proposal, should reduce the incentive to avoid paying excessive interstate long distance rates by using services with local numbers. Thus, the requested interstate benchmark rates should be the ideal antidote to the economic behavior that concerns Hamden and the service providers.¹⁷

¹⁵ If, however, the Commission ultimately decides to require prepaid calling, rather than debit calling, as an option to collect calling, prepaid calling should be subject to the safeguards spelled out in Petitioners' Reply Comments at 29-30 and Petitioners' Cost Response at 17-18.

¹⁶ Hamden Presentation at Parts VII(I) and (J). *See also*, letter from Marcus W. Trathen, Counsel to Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (Sept. 9, 2008).

¹⁷ Hamden does make a useful point about extraneous charges by service provider affiliates. Inmate service providers, often acting through affiliates or subsidiaries, impose additional charges over and above the service rates for billing or establishing an account. Such abusive charges should be prohibited. Moreover, any charges by third parties, such as payment processors chosen by customers, should be passed along at cost, with no mark-up. *See* Hamden Presentation at Part VII(C).

Marlene H. Dortch
February 24, 2009
Page Six

In accordance with Section 1.1206(b)(1) of the Commission's rules, a copy of this presentation is submitted for inclusion in the record of the above-captioned docket. Please do not hesitate to contact the undersigned with any questions or concerns about this letter or the issues discussed.

Very truly yours,

/s/ Frank W. Krogh
Frank W. Krogh

Counsel to Petitioners

cc: Acting Chairman Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Robert M. McDowell
Scott M. Deutchman
Jennifer McKee
Scott K. Bergmann
Nick Alexander
Dana R. Schaffer
Albert Lewis
John Hunter
Pamela Arluk
Lynne Engledow
Darryl Cooper
Douglas Galbi