

November 5, 2009

Writer's Direct Contact
(202) 887-8743
FKrogh@mofo.com

EX PARTE NOTICE

Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128; Petitioners' Alternative Rulemaking Proposal

Dear Ms. Dortch:

Petitioners Martha Wright, *et al.* ("Petitioners") respond to the most recent filing by Pay Tel Communications, Inc. ("Pay Tel") seeking special treatment for inmate calling service providers serving local jails and other small correctional facilities ("Pay Tel Letter").¹ The Pay Tel Letter and supporting documents raise no new issues. Moreover, Pay Tel and its expert, Don J. Wood, have yet to offer any credible support for their assertions, apart from points that are not contested.

A. Introduction

The Pay Tel Letter and supporting Wood Declaration are merely another attempt to shore up the inmate calling service providers' inadequate cost study ("Cost Study"),² which

¹ See letter from Marcus W. Trathen, Counsel to Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (June 15, 2009) ("Pay Tel Letter"), Exh. A, Declaration of Don J. Wood in Response to Petitioners' November 19, 2008 and December 23, 2008 *Ex Parte* filings, and to the December 22, 2008 *Declaration of Douglas A. Dawson* (June 11, 2009) ("Wood Declaration"), Exh. B, Declaration of Robin Norton, Technologies Management, Inc. (Apr. 24, 2009), and attachment, "Rates for a 10 Minute Inmate Local Collect Call as of April 2009" ("Norton Declaration and Chart").

² See Don J. Wood, Inmate Calling Services Interstate Call Cost Study, CC Docket No. 96-128 (Aug. 15, 2008) ("Cost Study").

Marlene H. Dortch
November 5, 2009
Page Two

challenged the interstate inmate calling benchmark rates and related relief requested in Petitioners' Alternative Rulemaking Proposal ("Proposal").³ Petitioners previously explained the inadequacies of the Cost Study in various filings, including a December 23, 2008 ex parte filing ("Petitioners' Letter").⁴ The Pay Tel Letter now challenges the methodology and estimated costs set forth in the expert declaration of Douglas A. Dawson in support of Petitioners' Letter ("Dawson Response to Cost Study") as inconsistent with the Commission's approved methodology under Section 276(b)(1)(A) of the Communications Act ("the Act"). Pay Tel also elaborates on its farfetched arbitrage argument and its insistence that prepaid calling costs are much higher than debit calling costs.

Pay Tel and Mr. Wood previously failed to justify the inmate calling service providers' rates and practices, and their latest elaboration merely confirms that Petitioners' requested relief should be granted immediately. Petitioners accordingly request that the Commission impose benchmark rates and that debit calling be offered as a required option to collect calling in correctional facilities. If the Commission ultimately decides to require prepaid calling, rather than debit calling, as an option, Petitioners request that prepaid calling be subject to the benchmark rate imposed for debit calling as well as the safeguards that Petitioners have requested for prepaid calling.⁵

B. The Wood Declaration Fails To Undermine Mr. Dawson's Critique Of The Cost Study.

The Dawson Response to Cost Study confirmed that the Cost Study inflated the actual costs of providing interstate inmate calling services through the use of an unrepresentative sample of correctional facilities and other fatal flaws.⁶ Mr. Dawson

³ 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).

⁴ Letter from Frank W. Krogh, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (Dec. 23, 2008) ("Petitioners' Letter"), Exh. A, Declaration of Douglas A. Dawson in Response to the "Inmate Calling Services Interstate Call Cost Study" and Other Recent Filings (Dec. 22, 2008) ("Dawson Response to Cost Study"), Exh. B, "Local Inmate Collect Call Rates Compiled by Kay Perry, Chair, Citizens United for Rehabilitation of Errants," Exh. C, Contract No. 8426000003-AA Between Montgomery County, Md. and Global Tel*Link Corp. at 1, 11 (May 15, 2008).

⁵ See Letter from Frank W. Krogh, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 17-18 (Nov. 19, 2008) ("Petitioners' Nov. 2008 Letter").

⁶ See Dawson Response to Cost Study, ¶¶ 3-29.

Marlene H. Dortch
November 5, 2009
Page Three

demonstrated that the Cost Study “can only serve as supporting a high ceiling over the reasonable cost of serving smaller, marginal correctional facilities, but provides no support for any floor under a reasonable cost estimate.”⁷

As Mr. Dawson points out in his supplemental Declaration, attached hereto as Exhibit A (“Dawson Response to Ex Parte”), the Wood Declaration neglects to address a number of Mr. Dawson’s criticisms of the Cost Study.⁸ Thus, Wood implicitly accepts Mr. Dawson’s findings that the Cost Study lacks even the most minimal supporting cost data necessary to justify its conclusions. In the absence of such data, Mr. Dawson’s prior cost analysis (“Dawson Alternative Declaration”) stands unrefuted.⁹ Pay Tel and Wood also fail to rebut Mr. Dawson’s conclusion that, even using a “marginal location” sampling methodology, the results of the Cost Study are largely consistent with the Petitioners’ proposed benchmarks of \$0.20 per minute for interstate debit calls and \$0.25 per minute for interstate collect calls. For example, the 25-location sample used in the Cost Study yields a cost equivalent to \$0.19 per minute for a 12-minute interstate debit call and a cost under \$0.24 per minute for a 15-minute interstate collect call, which are lower than Petitioners’ requested benchmark rates. Given the unusually high cost sample used in the Cost Study, its results confirm that the proposed benchmarks were, if anything, too high, rather than too low, as rates reflecting average inmate calling costs.¹⁰

1. The Marginal Location Sampling Methodology Is Inapplicable To The Lucrative Inmate Payphone Market.

Rather than defend the Cost Study against these challenges, Pay Tel and Mr. Wood instead devote most of their attention to their claim that Mr. Dawson’s average cost methodology conflicts with the requirement of Section 276(b)(1)(A) that the Commission ensure that payphone service providers “are fairly compensated for each and every” call. Wood sets out an elaborate “death spiral” scenario in which an average cost methodology drives out all carriers except the one serving the lowest cost facility. Pay Tel and Wood argue that the marginal location sampling methodology that Wood used in the Cost Study is the only approach approved by the Commission for payphone cost analyses to avoid such a

⁷ *Id.*, ¶ 16.

⁸ Declaration of Douglas A. Dawson in Response to Pay Tel Communications, Inc. Ex Parte and to Declaration of Don J. Wood, ¶¶ 3-4, 11 (Nov. 2, 2009), attached hereto as Exh. A (“Dawson Response to Ex Parte”).

⁹ *See* Declaration of Douglas A. Dawson in Support of Petitioners’ Alternative Proposal (Feb. 16, 2007) (“Dawson Alternative Declaration”), attached as Appendix B to the Proposal.

¹⁰ Dawson Response to Ex Parte, ¶ 4.

Marlene H. Dortch
November 5, 2009
Page Four

“death spiral.”¹¹ Using that methodology, Wood examined costs only from “marginal” facilities, where “the service provider is just able to recover its costs and locations in which the provider is unable to recover its costs.”¹²

As Petitioners have explained previously, the marginal location sampling methodology used in the Cost Study is inapplicable to the lucrative inmate payphone market.¹³ Pay Tel has argued that Petitioners confused two separate payphone compensation policies, but the Commission’s orders confirm Petitioners’ analysis. The Commission initially developed its non-inmate payphone compensation methodology in the *Methodology Order* “to ensure that the current number of payphones is maintained.”¹⁴ As the Commission explained in the *Inmate Payphone Order*:

In the [*Methodology Order*], the Commission, . . . to promote widespread payphone deployment, concluded that it should set a payphone compensation rate that would be large enough “to ensure that the current number of payphones is maintained.” To accomplish this goal, the Commission adopted a methodology that permitted a significant contribution to common costs. That policy has little or no application in the prison context because . . . prison payphones are already profitable.¹⁵

Thus, the “policy” “goal” that has “no application in the prison context” is not limited to a particular cost allocation methodology, but, rather, is “to promote widespread payphone deployment” by setting “a payphone compensation rate that would be large enough ‘to ensure that the current number of payphones is maintained.’”¹⁶ The same discussion in the

¹¹ Pay Tel Letter at 1-2; Wood Declaration, ¶¶ 8, 12-21.

¹² Cost Study at 4.

¹³ Dawson Response to Cost Study, ¶¶ 7-10; Petitioners’ Nov. 2008 Letter at 3-5.

¹⁴ See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 2545, 2571 (1999) (“*Methodology Order*”), *aff’d sub nom. American Public Communications Council v. FCC*, 215 F.3d 51 (D.C. Cir. 2000).

¹⁵ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand and Notice of Proposed Rulemaking, 17 FCC Rcd 3248, 3256 (2002) (“*Inmate Payphone Order*”) (quoting *Methodology Order*, 14 FCC Rcd at 2571).

¹⁶ *Id.*

Marlene H. Dortch
November 5, 2009
Page Five

Methodology Order also explained that the same policy goal required that the calculation of a payphone compensation rate be based on a “marginal payphone location” sampling methodology.¹⁷ The Commission concluded that basing payphone compensation on a marginal location methodology would “ensure the widespread deployment of payphones” and thereby “promote the continued existence of the vast majority of payphones”¹⁸ -- the policy goal later found to be inapplicable to the “profitable” inmate payphone market in the *Inmate Payphone Order*.¹⁹

Because Mr. Wood admits that he cherry-picked low profit and unprofitable “marginal” locations in the 25-facility summary and added three money-losing facilities in the 28-location summary in the Cost Study, the results are invalid, except perhaps as an indication of service costs for the smallest and most unprofitable marginal facilities.²⁰ Under that approach, inmate payphone rates would have to be set to enable carriers serving the highest cost facilities to recover all of their interstate costs, while guaranteeing tremendous profits from most interstate inmate calls, most of which are made from larger, lower cost facilities.²¹ Pay Tel’s demand for interstate rates covering its highest cost operations appears to be a continuation of its standard approach to pricing, which has been “to raise its interstate long distance rates to make up for the losses from below-cost local collect call rates.”²² As the Commission pointed out, “[a]ny such subsidy or cross-subsidization would inhibit competition at the intrastate level, contrary to our policies encouraging competition in all telecommunications markets.”²³

Moreover, contrary to Pay Tel’s argument, the payphone compensation methodology that it endorses was “not designed to make every payphone profitable,” even in the non-inmate payphone context.²⁴ “Payphones with sufficiently low call volumes or sufficiently

¹⁷ *Methodology Order*, 14 FCC Rcd at 2571.

¹⁸ *Id.*

¹⁹ *Inmate Payphone Order*, 17 FCC Rcd at 3256.

²⁰ Cost Study at 4-5, 9.

²¹ Dawson Response to Cost Study, ¶ 8.

²² Comments of Pay Tel Communications, Inc. at 17 n.40, *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”).

²³ *Inmate Payphone Order*, 17 FCC Rcd at 3258 n.63 (quoting *Billed Party Preference for InterLATA 0+ Calls*, 13 FCC Rcd 6122, 6154 (1998)).

²⁴ *Methodology Order*, 14 FCC Rcd at 2580.

Marlene H. Dortch
November 5, 2009
Page Six

high costs will not be profitable, regardless of the compensation amount.²⁵ In demanding such a one-sided approach, Pay Tel ignores that Section 276(b)(1)(A)'s "fairly compensated" requirement is not a one-way street that provides only a high floor under all payphone rates. Rather, the rates must "balance the interests of [payphone service providers] and those parties that will ultimately pay" the required compensation, so that rates are "fair to both payphone owners and the beneficiaries of these calls."²⁶ The *Inmate Payphone Order* denied a service provider request for a local inmate call surcharge in part because, "given the great diversity of local costs . . . , a national surcharge on local calls would result in excessive recovery in many states and confinement facilities."²⁷

Similarly, the Pay Tel approach would result in "excessive" compensation "in many . . . confinement facilities," in violation of the "fairly compensated" requirement of Section 276(b)(1)(A). The Commission should not calibrate its relief in this proceeding solely to enable carriers serving the lowest volume, highest cost facilities to recover their costs, as Pay Tel and Wood advocate. Rather, if the concern is that carriers serving such facilities could not recover their costs under benchmark rates based on average costs, a tiered approach, as suggested by Pay Tel,²⁸ should meet all legitimate concerns, as long as higher than average rates for the smallest facilities (*e.g.*, under 25 prisoners), are balanced by lower than average rates for the largest facilities (*e.g.*, over 250 prisoners), and the average rates are equivalent to the requested benchmarks.²⁹

2. Any Benchmark Rate Structure Should Address The Problem Of Disconnected Inmate Calls.

Wood once again insists that any inmate rate benchmark be structured to include a per-call amount as well as a usage rate. Mr. Dawson has explained why that rate structure is unnecessary,³⁰ and Petitioners have explained why the frequency of premature disconnections makes a significant per-call amount problematical.³¹ The Commission has

²⁵ *Id.*

²⁶ *Id.* at 2570-71, 2579.

²⁷ *Inmate Payphone Order*, 17 FCC Rcd at 3259.

²⁸ 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).

²⁹ Dawson Response to Cost Study, ¶¶ 18-19.

³⁰ *Id.*, ¶¶ 25-29.

³¹ Petitioners' Nov. 2008 Letter at 15-17.

Marlene H. Dortch
November 5, 2009
Page Seven

acknowledged the possibility that premature disconnections “have the unintended, and perhaps unnecessary, effect of increasing the costs incurred by inmates and their families.”³² Moreover, Pay Tel has conceded that Petitioners raise a “legitimate issue” with regard to premature disconnections.³³

To address the problem of disconnected calls, Petitioners have recommended that, if the Commission ultimately decides to include a per-call charge option in an interstate inmate calling benchmark, it should also require that such a per-call charge be waived automatically -- *i.e.*, without requiring any application for refund or other action by the consumer -- for any call reinitiated by the same prisoner to the same number within two minutes of the end of the previous call. Petitioners also would accept Pay Tel’s suggestion that such a requirement be qualified by a condition that the total duration of any such reinitiated call, including both portions of the call, not extend beyond the permitted length of the original call, as long as the payphone system is programmed to terminate a reinitiated call to the same number just before a second per-call charge would be assessed. It would be necessary for the payphone system to terminate reinitiated calls, just as inmate payphone systems terminate other calls of a particular duration, because it would be impossible for the parties to time both portions of a disconnected and reinitiated call in order to hang up just before a second per-call charge is assessed.

If the Commission decides to include a per-call charge, the average per-call and usage charges in that case also should be calibrated to generate the same total revenue as the requested benchmark per-minute rates for interstate debit and collect inmate calls of average length, based on reliable call-length data.³⁴ Where the rules in a particular correctional facility establish a shorter permitted call length, the charges should be readjusted to generate the same total revenue as the requested benchmark rates for a call of the maximum permitted duration in that facility.

³² *Inmate Payphone Order*, 17 FCC Rcd at 3278.

³³ Letter from Marcus W. Trathen, Counsel to Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 2 (Oct. 17, 2008) (“Pay Tel Oct. 2008 Letter”).

³⁴ Dawson Response to Ex Parte, ¶ 7. Securus (in the case of interstate calls) and Embarq assert that average inmate call length is about 12 minutes. *See* Petitioners’ Nov. 2008 Letter at 17 n.76. Pay Tel asserts that the average interstate inmate call length in the facilities it serves is slightly under nine minutes. Pay Tel Letter at 3 n.2.

Marlene H. Dortch
November 5, 2009
Page Eight

3. Any Benchmark Rate Should Reflect A Termination Cost Of No More Than \$0.02 Per Minute.

Wood also defends the \$0.06 and \$0.07 per minute usage rates derived in the Cost Study as reflecting long distance call termination costs, as opposed to Dawson's more realistic \$0.02 per minute estimate of termination costs. Wood argues that the higher figure is necessary in order to recover for all of the inmate calls that are not compensated, due to incomplete, unbillable and uncollectible calls.³⁵ As Mr. Dawson points out, however, those factors were reflected in the *per-call* amounts calculated in the Cost Study and thus should not have been recovered again in the *usage* rate.³⁶ However the Commission ultimately decides to structure the benchmark rates, the total rate should reflect no more than \$0.02 per minute for termination costs.

C. Pay Tel's Arbitrage Argument Remains Unpersuasive And Factually Unsupported.

Pay Tel, without substantive support from Mr. Wood, reprises its arbitrage argument once again. Pay Tel hypothesizes that, if the requested benchmark rates are adopted by the Commission, they will be lower than local and intrastate inmate rates in most states, leading parties receiving calls from inmates in nearby facilities to acquire cell phones and VoIP telephones with out-of-state numbers. Petitioners have addressed this argument repeatedly.³⁷ Pay Tel concedes that the opposite arbitrage is occurring now, but argues that grant of the requested relief will flip the arbitrage incentives. Pay Tel asserts that, because the vast majority of calls made from jails and other local facilities are local or intrastate long distance calls, the arbitrage problem will expand because the low benchmark rates will provide an opportunity to make all of the local and intrastate calls at lower interstate rates.³⁸ As Mr. Dawson points out, however, Pay Tel hypothesizes this arbitrage behavior occurring largely in jails and other local facilities, where the turnover is too high to allow for such sophisticated, multi-step behavior. The *weekly* turnover rate for jails housing fewer than 100 inmates is over 100 percent.³⁹ That is too short a period to enable parties receiving calls

³⁵ Wood Declaration, ¶¶ 22-23.

³⁶ Dawson Response to Ex Parte, ¶¶ 5, 16.

³⁷ See Petitioners' Nov. 2008 Letter at 10; letter from Deborah M. Golden, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 3 (Oct. 10, 2007).

³⁸ Pay Tel Letter at 4.

³⁹ Bureau of Justice Statistics, U.S. Dep't of Justice, *Jail Inmates at Midyear 2008*, Table 4 (Mar. 2009).

Marlene H. Dortch
November 5, 2009
Page Nine

from those transient inmates to arrange for services with out-of-state numbers. Thus, the scenario hypothesized by Pay Tel is least likely to occur in the very situation -- confinement in a jail or other local facility -- where Pay Tel is most concerned about such behavior. At larger facilities, where turnover is lower, there is more time for corrections personnel to check the telephone numbers that inmates request permission to call.⁴⁰

Pay Tel depicts this arbitrage hypothesis as a security issue, but other service providers have accommodated to called parties' use of services with numbers not matching the parties' locations. Global Tel*Link Corp. ("GTL") suggests that services that provide alternative telephone numbers to parties for the receipt of inmate calls should be required to submit billing name and address information to third party providers for such numbers, just as other carriers do, so that inmate calling service providers could verify the information by conducting a Line Information Data Base dip.⁴¹ GTL states that where identity and/or address information cannot be easily ascertained, it works with the called party to allow an inmate call to be completed without the risk of a security breach, such as in the case of military personnel or college students keeping hometown cell phone numbers while stationed or attending school elsewhere.⁴² Securus Technologies, Inc. states that it has no objection to the use of VoIP numbers that are local to a prison to receive calls from inmates located far from the called parties, explaining that "legitimate residential VoIP-based service providers can provide subscribers with any telephone number they choose, but that number becomes the subscriber's registered terminating telephone number."⁴³

In other words, the use of a local number to receive calls from a distant inmate, or, presumably, the use of an out-of-state number to receive calls from a nearby or in-state inmate, as hypothesized by Pay Tel, presents no security issue as long as the number can be linked to the identity and address of the party using the number. The Michigan Department of Corrections ("Michigan DOC") has approved this type of VoIP routing service using local numbers. According to the Michigan DOC:

Many friends and families of prisoners are also switching to VOIP in order to save money on long distance charges by obtaining a telephone number with the same area code that the

⁴⁰ Dawson Response to Ex Parte, ¶ 25.

⁴¹ Reply Comments of Global Tel*Link Corp. at 11, *Petition for Declaratory Ruling of Securus Technologies, Inc.*, WCB Dkt. No. 09-144 (Sept. 10, 2009).

⁴² *Id.* at 12.

⁴³ Reply Comments of Securus Technologies, Inc. in Support of Petition for Declaratory Ruling at 18, *Petition for Declaratory Ruling of Securus Technologies, Inc.*, WCB Dkt. No. 09-144 (Sept. 10, 2009).

Marlene H. Dortch
November 5, 2009
Page Ten

prisoner is located. There have been questions raised from facilities as to whether VOIP is allowable or considered call forwarding. After researching and learning more about this technology, VOIP is not call forwarding and is allowable.⁴⁴

Thus, the Michigan DOC, which is directly responsible for security in its prisons, has concluded that VoIP services using numbers local to a prison for the receipt of inmate calls by parties distant from the prison do not present a security issue. Pay Tel also attempts to link its security argument with the problem of contraband cell phones in prisons, but, as Mr. Dawson points out, more reasonable long distance inmate rates would *reduce* the incentive to smuggle cell phones into prisons,⁴⁵ not “exacerbate” those incentives, as Pay Tel illogically suggests.⁴⁶

Moreover, the factual underpinnings of Pay Tel’s arbitrage argument -- *i.e.*, that the requested benchmark rates would be lower than inmate local rates -- are questionable. Pay Tel previously stated that grant of the requested relief would still leave its local inmate collect rates 33 percent *lower than* its interstate inmate collect rates.⁴⁷ Pay Tel now offers the Norton Declaration and Chart, however, to demonstrate that, for a 10-minute call, the local inmate collect rate charged in jails and other local facilities in 30 states would be *higher than* the requested benchmark interstate inmate collect rate.⁴⁸ According to the Norton Declaration, the Chart is based on a variety of sources, such as state regulatory agencies.⁴⁹

That approach is flawed because, as Kay Perry, Coordinator of the Equitable Telephone Charges Campaign of Citizens United for the Rehabilitation of Errants, points out in her declaration, attached hereto as Exhibit B (“Perry Declaration”), no single uniform local inmate calling rate covers each state, as the Norton Chart suggests. Instead, there is a wide variety of inmate rates established in the inmate telephone service contracts negotiated by correctional and/or procurement officials in each local jurisdiction operating its own correctional system within each state, and many of those rates are different from the tariffed

⁴⁴ Memorandum from Dennis M. Straub, Deputy Director, Correctional Facilities Administration, Michigan Dep’t of Corrections, to Wardens, *Voice Over Internet Protocol (VOIP)* (Feb. 1, 2007) (emphasis in original).

⁴⁵ Dawson Response to Ex Parte, ¶ 24.

⁴⁶ Pay Tel Letter at 5.

⁴⁷ Pay Tel Comments at 17 n.40.

⁴⁸ Norton Declaration and Chart, attached as Exh. B to Pay Tel Letter.

⁴⁹ *Id.*

Marlene H. Dortch
November 5, 2009
Page Eleven

rate that Pay Tel's consultant examined for each state.⁵⁰ Unlike Pay Tel's consultant, Ms. Perry has been focusing exclusively on inmate rates for a few years and thus is more familiar with the variety of rates charged in that market.

For example, as Ms. Perry points out, there is a flat rate of \$2.50 for local inmate collect calls in Cuyahoga County, Ohio correctional facilities, which is significantly less than the \$6.35 rate shown for Ohio in the Norton Chart and no higher than the requested benchmark collect rate for a ten-minute interstate call.⁵¹ Given that the \$2.50 rate applies to a city the size of Cleveland, which is in Cuyahoga County, it is also questionable whether the \$6.35 rate is representative of local inmate collect rates in Ohio. Thus, if the requested relief is granted, it is not clear whether local inmate service rates charged in local correctional facilities throughout the United States will, on balance, be higher or lower than the requested benchmarks. Accordingly, even if Pay Tel's arbitrage hypothesis were otherwise realistic, Pay Tel has not provided the necessary factual predicate.

Finally, to the extent that any arbitrage behavior as hypothesized by Pay Tel might arise as a result of reduced interstate inmate calling rates, that would only justify Commission preemption of higher local and intrastate inmate calling rates in order to harmonize them with interstate inmate rates, not continuation of unreasonably excessive interstate rates. If Pay Tel were correct, the resulting arbitrage would frustrate the goals of interstate inmate rate regulation unless higher intrastate inmate rates were brought in line with the reduced interstate rates.⁵² Thus, Pay Tel's arbitrage argument would require all local and intrastate inmate rates, as well as all interstate inmate rates, that are now higher than the requested benchmark rates to be brought into line with the benchmark rates. Petitioners would certainly endorse that outcome. The only other choice is to reject the arbitrage argument entirely. As the National Association of State Utility Consumer Advocates advised in this proceeding, arbitrage arguments should not stand in the way of Commission action "to prevent unreasonable rates for interstate inmate calling."⁵³

⁵⁰ Declaration of Kay Perry, Coordinator of the Equitable Telephone Charges Campaign of Citizens United for the Rehabilitation of Errants, ¶¶ 3-5 (Oct. 20, 2009), attached hereto as Exh. B ("Perry Declaration").

⁵¹ *Id.*, ¶ 4.

⁵² See *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986) (state regulation preempted "where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress"); *California v. FCC*, 39 F.3d 919, 931 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995) (preemption of intrastate rates justified if otherwise impossible to achieve goals of interstate regulation).

⁵³ Reply Comments of the National Association of State Utility Consumer Advocates at 7, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (June 20, 2007).

Marlene H. Dortch
November 5, 2009
Page Twelve

D. Any Benchmark Established For Prepaid Calling Should Be No Higher Than The Debit Calling Benchmark.

The Dawson Response to Cost Study demonstrated that the cost of providing inmate prepaid calling -- whether involving inmate prepaid accounts or prepaid accounts established by inmate families and others receiving calls from inmates -- is similar to the cost of providing inmate debit calling, contrary to Pay Tel's arguments.⁵⁴ Accordingly, if the Commission does not require that inmate debit calling be offered as an alternative to collect calling and chooses instead to require a prepaid calling option, the rate for such prepaid calling should be subject to the requested benchmark for inmate debit calling.

Pay Tel insists, however, that Mr. Dawson addressed only prepaid accounts set up by inmates, rather than the supposedly higher-cost prepaid accounts established by "unknown" persons receiving inmate calls.⁵⁵ As Mr. Dawson points out in the attached declaration, however, he did address prepaid accounts set up outside the correctional facility. Mr. Dawson also notes that Pay Tel still has not provided any credible support for its far-fetched contention that bad debt and other payment issues are almost as severe for prepaid services as they are for collect calling. Prepaid customers are not "unknown" to the service provider, as Pay Tel argues. Rather, they have already set up an account, been subjected to whatever credit check the service provider conducts, and paid for the call before it is dialed. Given these circumstances, Pay Tel's assertion that prepaid calling costs are significantly higher than debit calling costs cannot be given any credence.⁵⁶

E. Conclusion

Petitioners accordingly request that the Commission impose benchmark rates such that average interstate inmate rates are equivalent to those set forth in the Proposal -- \$0.20 per minute for interstate debit calls and \$0.25 per minute for interstate collect calls -- that service providers be required to waive any per-call charge in the circumstances described above, and that debit calling be offered as a required option to collect calling in correctional facilities. If the Commission ultimately decides to require prepaid calling, rather than debit calling, as an option, Petitioners request that prepaid calling be subject to the benchmark rate imposed for debit calling as well as the safeguards that Petitioners previously requested.⁵⁷

⁵⁴ Dawson Response to Cost Study, ¶¶ 30-36.

⁵⁵ Pay Tel Letter at 5-6.

⁵⁶ Dawson Response to Ex Parte, ¶¶ 19-21.

⁵⁷ See Petitioners' Nov. 2008 Letter at 17-18.

Marlene H. Dortch
November 5, 2009
Page Thirteen

Petitioners also request that any relief include a “downward ratchet” provision prohibiting inmate service providers from increasing existing inmate rates that are lower than the benchmark rates ultimately established.⁵⁸

In accordance with Section 1.1206 of the Commission’s rules, this letter and attachments are filed with your office for inclusion in the public record of the above-referenced proceeding. Any questions about the Proposal or the enclosed material should be directed to the undersigned.

Yours truly,

/s/ Frank W. Krogh
Frank W. Krogh
Counsel to Petitioners Martha Wright, *et al.*

Attachments

cc: Colin Crowell
Priya Aiyar
Jennifer Schneider
Nicholas Alexander
Carol Simpson
Christi Shewman
Sharon Gillett
Julie Veach
Donald Stockdale
Marcus Maher
Albert Lewis
Pamela Arluk
Lynne Engledow
Darryl Cooper
Douglas Galbi

dc-561968

⁵⁸ See letter from Frank W. Krogh, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 4 n.12 (Feb. 24, 2009).