

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF CENTURYLINK

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SUMMARY

CenturyLink provides inmate calling services (ICS) and traditional local and interexchange telecommunications services. CenturyLink recommends the establishment of an ICS Federal Advisory Committee (ICS FAC) to address the ICS issue. CenturyLink also provides the Federal Communications Commission (FCC) with information from its experiences as an ICS and wireline telecommunications services provider to update the record in this proceeding.

CenturyLink supports the FCC's decision to refresh the record in this proceeding and determine whether any further action on its part is needed. CenturyLink also supports interstate ICS rates that are just and reasonable. CenturyLink encourages the FCC to charter an ICS FAC that would enable all stakeholders to come together under the supervision of the FCC to present their respective concerns and work toward the development of a framework that would produce reasonable ICS rates, address the legitimate security, cost and administrative requirements of correctional facilities, and preserve the competitive ICS market. CenturyLink would welcome the opportunity to participate on an ICS FAC.

Correctional facilities determine ICS rates, and correctional facilities are best suited to guarantee ICS rates that are reasonable and balance the needs of their communities, their inmates and inmate families, the service providers with whom they contract as well as their own needs. But all stakeholders must first be brought together by the FCC for a structured discussion of an agreed upon framework and timeline for addressing the ICS issue.

Delay in achieving a final resolution of the ICS issue is not in the public interest. Action by the FCC to preempt the communications policy decisions of state corrections authorities would be problematic and invariably result in lengthy litigation that would delay achieving the

goal of securing just and reasonable ICS rates throughout the U.S. Any new ICS rules concerning the rates, terms or conditions for the provision of ICS should only apply to contracts entered into after the effective date of the rules.

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INTRODUCTION

CenturyLink¹ files these Comments in response to the Federal Communications Commission's (FCC's) Notice of Proposed Rulemaking (*NPRM*) released in the above-captioned docket.² The *NPRM* is predicated on the FCC's granting of "two longstanding petitions for rulemaking³ filed in the docket" that ask the FCC to act to secure just and reasonable rates for inmate calling services (ICS).⁴ The FCC states that it was motivated to release the *NPRM* at this time in order to "refresh the record and consider whether changes to [its] rules are necessary to ensure just and reasonable ICS rates for interstate, long distance calling at publicly- and privately-administered correctional facilities."⁵

¹ CenturyLink provides inmate calling services through its wholly-owned subsidiary Embarq Payphone Services, Inc. In the states where Embarq Payphone Services, Inc. operates, it does business as either CenturyLink or CenturyLink Payphone.

² *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, FCC 12-167, 27 FCC Rcd 16629 (rel. Dec. 28, 2012), 78 Fed. Reg. 4369 (Jan. 22, 2013).

³ The petitions are hereafter referred to as the First Wright Petition and the Alternative Wright Petition. The First Wright Petition was filed in CC Docket No. 96-128 on November 3, 2003, and the Alternative Wright Petition was filed in CC Docket No. 96-128 on March 1, 2007.

⁴ *NPRM*, 27 FCC Rcd at 16629 ¶ 1.

⁵ *Id.*

CenturyLink supports the FCC's decision to refresh the record in this proceeding and determine whether any further action is needed. CenturyLink also supports interstate ICS rates that are just and reasonable. CenturyLink believes that the lengthy, albeit dated, record in this proceeding demonstrates that significant, legitimate concerns have been presented by the petitioners, correctional facilities' representatives and ICS providers. A decision by the FCC to modify its existing rules or adopt new rules will require a keen sensitivity to both the jurisdictional and practical limits on FCC action where state law enforcement and public safety interests are affected. For this reason, CenturyLink urges the FCC to consider the chartering of an ICS Federal Advisory Committee (ICS FAC) under the Federal Advisory Committee Act (FACA)⁶ to bring all stakeholders that have demonstrated an interest in this proceeding to the table for the purpose of providing the FCC with their guidance, expertise and recommendations in advance of FCC action on the *NPRM*. CenturyLink also provides the FCC with information from its experiences as an ICS provider and a full service wireline telecommunications services provider to update the record in this proceeding.

DISCUSSION

I. THE FCC SHOULD CONVENE AN ICS FEDERAL ADVISORY COMMITTEE TO PROVIDE IT WITH GUIDANCE, EXPERTISE, AND RECOMMENDATIONS

The FCC should charter an ICS FAC that would enable all stakeholders involved in the ICS issue to come together under the supervision of the FCC, employing the organizational structure required by the FACA,⁷ to present their respective concerns and work toward

⁶ 5 U.S.C. APPENDIX Sec. 2.

⁷ A federal advisory committee must have a charter that, among other things, identifies the committee's purpose and objectives. Subject to certain exceptions, the committee must publish timely notice of its meetings; interested persons must be permitted to attend meetings and file statements with the committee; committee documents must be made available for public

developing a framework that would produce reasonable ICS rates, addresses the legitimate security, cost and administrative requirements of correctional facilities (hereafter “facilities”) and provide ICS providers a sufficient financial incentive to continue serving the market. The formal purpose of the ICS FAC could be, as captured in the American Bar Association’s (ABA’s) 2005 resolution concerning ICS, *to produce a recommendation for the FCC that would afford prison and jail inmates a reasonable opportunity to maintain telephonic communication with the free community, and make available telephone services in the correctional setting with an appropriate range of options at the lowest possible rates in a manner that is consistent with sound correctional management and law enforcement and national security principles.*⁸ The ABA recognized that federal, state and local governments all needed to be a party to a comprehensive solution that was not constrained by jurisdictional boundaries. Fixes that are limited to federal, state or local markets, only, are an incentive for rate arbitrage. A fair, equitable and enduring resolution of the ICS issue can only be achieved by bringing all stakeholders together for a structured discussion of an agreed upon comprehensive framework and timeline for a resolution of the legitimate concerns raised by the petitioners and previous commenters in this proceeding. CenturyLink would welcome the opportunity to participate as a member of an ICS FAC.

inspection and copying; and detailed minutes of committee meetings must be kept. FACA §§ 9 and 10.

⁸ See American Bar Association, CC Docket No. 96-128, January 15, 2009, *Ex Parte* filing.

II. A HOLISTIC RATE STRUCTURE THAT ADDRESSES INTRASTATE AND INTERSTATE ICS WILL PRODUCE THE MOST EQUITABLE RESULT FOR ALL STAKEHOLDERS

A. Interstate Rate Caps or Benchmark Rates Could Harm Inmates

In the Alternative Wright Petition, petitioners request that the FCC “establish a benchmark rate for domestic interstate interexchange inmate debit calling service of \$0.20 per minute and a benchmark rate for domestic interstate interexchange inmate collect calling service of \$0.25 per-minute, with no set-up or other per-call charge.”⁹ CenturyLink believes that the imposition by the FCC of rate caps or benchmark rates for interstate, interexchange ICS could prove to be counter-productive by exacerbating the current challenges faced by inmates and their families to maintain telephone contact with one another. The best way to achieve a fair and equitable resolution of the ICS issue is to adopt a holistic rate structure that addresses both intrastate and interstate ICS and balances the needs of all stakeholders. Facilities and correctional systems (hereafter “systems”) are best suited to achieve that balance for their communities, their inmates and inmate families, the services providers that they rely on, and themselves.

The rates and charges determined by facilities are driven by the costs that facilities and ICS providers incur to provide ICS. For interstate ICS providers, margins on ICS contracts are already constrained by the robust competition that exists in the ICS market.¹⁰ Therefore, CenturyLink cannot support the Petitioners’ proposal that the FCC establish benchmark rates for interstate, interexchange ICS.

⁹ Alternative Wright Petition at 6.

¹⁰ CenturyLink typically competes against as many as six or more interstate ICS providers when it responds to requests for proposals from or on behalf of facilities.

The Alternative Wright Petition is over five years old and the data presented in support of it is quite stale. Still, CenturyLink agrees that \$17-20 for a 15 minute interstate call is very high.¹¹ It is also true that some facilities and systems are able to sustain rates of less than \$.10 per minute, far below the rates seen in other facilities and systems. CenturyLink supports the goal of having fair and reasonable rates for the widest possible range of prisoner-initiated calls. Nonetheless, CenturyLink submits that in order to preserve a sustainable, competitive market¹² for interstate ICS, service providers must be permitted the flexibility to charge rates and employ rate structures that allow them to recover the costs incurred to provide the services deemed necessary by facilities, as well as a sufficient return on ICS providers' investments to provide them with an ongoing incentive to serve the interstate ICS market. A decision by the FCC to calculate average costs¹³ and use those average costs as an input for an interstate ICS rate cap or benchmark rate regime (whether a single rate cap/benchmark rate or multiple rate

¹¹ "Typical long distance inmate collect calling rates include a per-call charge of \$3.95 plus as much as \$0.89 per minute." Alternative Wright Petition at 2 (citation omitted).

¹² That there is vigorous competition among ICS providers for contracts with facilities and systems to provide ICS is undeniable and not seriously challenged by Petitioners. That facilities and systems elect to use exclusive contracts to secure services from ICS providers does not make ICS providers monopolists or the services that they offer monopoly services. Facilities determine inmate calling rates, and CenturyLink has no market power in the relevant product and geographic markets that it serves -- the national market for the provision of ICS and related services to facilities and systems. Concerns about the calling rates paid by some inmates and their families are understandable and worthy of a structured discussion among all stakeholders to find solutions to lessen the burden on inmates and their families. *See* Section I. above discussing CenturyLink's recommendation that the FCC charter a FAC to address the issues raised by the stakeholders that have participated in this proceeding. The characterization of ICS rates as "monopoly rates" (Alternative Wright Petition at 22) is an unfortunate mischaracterization that does not aid in achieving a constructive resolution of legitimate concerns.

¹³ CenturyLink provides both traditional interexchange services and ICS. Contrary to the representation made in the Alternative Wright Petition, CenturyLink's experience demonstrates that traditional interexchange services and interexchange ICS are not comparable. Traditional interexchange services and interexchange ICS have significantly different architectures, features, operations and cost structures.

caps/benchmark rates that vary according to a proxy variable such as inmate population) is virtually certain to produce market distortions and unintended negative consequences, including a diminution in the range of calling services available to inmates. The vast differences in the communications system infrastructures, physical infrastructures, and security requirements of the multitude of facilities served by ICS providers make uniform rates, or generally applicable rate caps or benchmarks, impractical and potentially harmful.

Caps on ICS rates have the potential to stifle innovation or otherwise limit services available to facilities, particularly enhanced security/investigative services. Current security/investigative services sought by facilities include voice biometrics, word search, speech-to-text conversion, and the integration of multiple databases. Rate caps are a disincentive for the development of more advanced services that, when initially introduced, will result in higher costs.¹⁴

B. ICS Rate Structures that Align with How Costs Are Incurred Are Reasonable

Interstate ICS providers incur both fixed and variable costs. They recover these costs through a combination of per-minute and per-call charges. Rate structures that generally align with the manner in which costs are incurred are just and reasonable, and facilities and their service providers should be free to continue using rate structures that are composed of per-minute and per-call charges. The FCC asks whether the elimination of set-up or other per-call

¹⁴ As noted above, CenturyLink believes that rate caps for interstate ICS are an ill-conceived response to concerns of high inmate calling rates. Specific to establishing a rate cap for debit calling services, it should be noted that the cost to establish debit services, if possible at all, varies widely depending upon individual facilities' systems capabilities (*e.g.*, banking/trust or commissary systems used for account funding). This makes establishing a uniform rate cap for debit calling a particularly bad idea.

charges would ensure just and reasonable ICS rates.¹⁵ CenturyLink believes that prohibiting the use of per-call charges by interstate ICS providers is not supported by the facts and would constitute arbitrary decision-making by the FCC.¹⁶ The FCC should decline to prohibit per-call charges for interstate ICS.

1. Fixed Costs

In general, the telecommunications business is a high fixed costs business, and most fixed costs are incurred before any revenues are generated. This is especially true in the ICS market. Common up-front fixed costs include phone equipment installation (especially costly in a high-security prison/jail environment), specialized call processing equipment and warranty expense. Common ongoing fixed costs include access circuits, specialized technicians, feature R&D, and the maintenance of myriad databases to control fraud, track illegal activity and manage called-party billing.

There is an incredibly wide variance in the costs associated with providing interstate ICS to different facilities.¹⁷ For an interstate ICS provider, each facility installation is a custom build with installation costs that vary significantly among facilities. Custom up-front costs include:

¹⁵ *NPRM*, 27 FCC Rcd at 16637 ¶ 18.

¹⁶ The FCC asks for comment concerning inmates incurring multiple per-call charges when calls are dropped after a pause in the inmate's conversation. (*NPRM* at 16642-43 ¶ 19.) In such situations, dropped calls likely result from the operation of a feature intended to detect attempts to initiate three-way conference calls. Three-way conference calls are prohibited by facilities for security reasons. Three-way conference call detection features use algorithms that analyze a variety of data points (including prolonged periods of silence in a conversation) to flag suspicious activities. The algorithms are capable of mistakenly flagging benign activities and dropping calls. Because of the potential for such mistakes, all but one of CenturyLink's customers requires flagging the call record within the database, but not disconnecting the call in progress. CenturyLink's single customer that does require immediate termination of the call is a state correctional system with per-minute-only calling rates.

¹⁷ "For example, there are varying sizes of correctional facilities with some housing as low as 250 inmates (or less) and others housing as many as 2,500 inmates. There are various inmate populations housed in these different correctional facilities, including male adults, female adults,

- Inmate voice model enrollments when voice biometrics are installed¹⁸
- Inter-building cabling, moves/adds/changes as a result of facility construction¹⁹
- Word search or other specialized software installations, per facility requirements
- On-site personnel to manage personal identification numbers (PINs), allowed numbers, inmate inquiries, refund requests and other matters
- Additional personnel to aid investigators in call tracking²⁰
- Sometimes complex system integrations with other providers/systems such as commissary, banking/trust, and offender management databases
- Custom feature development as required by facility security staff

Individual interstate ICS calls, in contrast to traditional TDM calls or cell phone calls, are typically paid for by the called party through real-time or near real-time account set-up. The costs to manage these billing relationships are driven more by the number of calls rather than their average length. Examples of these costs include bank transaction fees associated with

male juveniles, female juveniles, undocumented male aliens, undocumented female alien[] adults, as well as families. There are various security levels at these facilities including maximum, medium, minimum and low which affect the costs of providing inmate long distance telephone service from those facilities. There are differences in the age of the facilities and the distance between the facilities and the nearest population center. There are varying level[s] of staff available to assist in the operation and maintenance at these different facilities. All of these factors impact the costs of providing inmates' long distance telephone service at each of these facilities.” Comments of the Association of Private Correctional and Treatment Organizations, CC Docket No. 96-128, filed May 2, 2007, at 5. As appealing as it might seem for the FCC to impose uniform, capped ICS rates, the FCC could not do so and reasonably accommodate the many cost differences that exist among facilities.

¹⁸ Voice biometric identity verification is not to be confused with voice recognition software, which is referenced in the Dawson 2003 affidavit that accompanied the First Wright Petition.

¹⁹ The Texas Department of Criminal Justice contract required CenturyLink to install tens of millions of dollars in infrastructure to support inmate calling which, prior to the installation, was not available.

²⁰ For example, a typical 1000-bed county detention facility generates roughly 30,000 calls and 360,000 minutes per month, even at the higher rates typically seen at county facilities. Monitoring only one quarter of the calls requires approximately 10 full-time dedicated personnel. Call monitoring personnel are typically employed directly by the facility and are an expense to the facility associated with providing calling services to inmates. It is not uncommon, though, for interstate ICS providers to be contractually obligated to provide such personnel to a facility, and the personnel costs are additional costs that must be recovered by interstate ICS providers.

funding accounts and labor costs for customer service representatives. The cost for customer service representatives is especially high in the ICS market because of the unique “by the call” billing relationships that must be established for called parties and the large number of inquiries that must be handled. In nearly all cases, ICS providers are required for security reasons to query data bases containing billing information, victims’ telephone numbers, allowed number lists, registered attorneys and other screens in order to validate the permissibility of each call attempted. Other fixed costs include technical support, call control equipment warranties, fixed access line charges, and specialized in-state field technicians.

Taken together, fixed costs constitute a significant portion of an interstate ICS provider’s operating costs. It is just and reasonable for ICS providers to recover fixed costs that are incurred on a per-call basis through per-call charges.²¹ Accordingly, the FCC should deny Petitioners’ request that all per-call charges for interstate ICS be prohibited.

2. Variable Costs

The variable costs incurred by ICS providers include called party billing, bad debt and per-minute network transport. Increasingly, variable costs include royalty fees to third parties for specialized security features such as voice biometric identification, keyword search, and software to detect and track suspicious activity. CenturyLink has deployed some of these technologies at a number of its ICS customers’ facilities. Utilization of these technologies in facilities is still somewhat limited, and accurate demand forecasts are not yet possible.

Challenges in accurately forecasting demand combined with diversity in the utilization of new

²¹ Some facilities require ICS providers to charge on a per-minute basis only. The reasons for doing so vary. Per-minute charges-only requirements are more prevalent in state correctional facilities with long-term inmates who have more regular calling patterns and fewer incidents of fraud.

technology by facilities makes implementing interstate ICS rate caps or benchmark rates even more problematic.

3. ICS and Payphone Cost Structures have Few Similarities

The FCC asks “whether the underlying cost and demand factors for public payphones and ICS are similar enough to justify using a cost methodology designed for public payphones to set ICS rates.”²² It also asks for comment concerning the extent to which ICS rates and call volumes vary among facilities.²³

CenturyLink is a provider of both ICS and public payphone services, and it observes that there are few similarities between the two services. Public payphones are not recorded or monitored. Nor are communications patterns, voice, or other analyses required to be performed on public payphone calls as a part of the service offered to the public. Call volumes over public payphones have dropped to *de minimis* levels principally due to cell phone displacement.

ICS rates, call volumes, and revenues vary widely among different facilities and systems across the country. In general, long-term facilities have one-third or less of the call volumes per inmate of short-term detention, higher turnover (typically local) facilities. The calling rates determined by facilities served by CenturyLink range from an average of \$1.00 per call to just under \$5.00 per call.

C. Lowering Calling Rates has Varying Affects on Call Volumes

The FCC inquires about the impact that lower ICS rates have on call volumes.²⁴ The FCC states that “the 2011 GAO Report found that only approximately 25 percent of inmates in

²² *NPRM*, 27 FCC Rcd at 16639 ¶ 26.

²³ *Id.*

²⁴ *Id.* at ¶ 27.

the Federal Bureau of Prisons use their entire monthly allotted minutes for calls and that if rates were lowered it would encourage greater communications with families, . . .”²⁵

CenturyLink can offer no specific insight into the GAO’s observation concerning the likely stimulation of increased call volumes among Federal Bureau of Prisons (FBOP) inmates were calling rates to be lowered. CenturyLink notes that the FBOP is one of a very small number of systems that impose a restriction on the number of minutes that inmates are allowed for monthly calls. The vast majority of facilities and systems across the spectrum of large to small facilities and short-term detention to long-term detention facilities allow unlimited calling for inmates otherwise eligible to use the phone system.

CenturyLink’s experience is that the impact of lower rates on call volumes varies among facilities and systems. CenturyLink has observed that call volumes are generally correlated with inmates’ average length of incarceration. Long-term inmates in state facilities tend to spend to a budget -- thus a decrease in rates does tend to increase call volume. Typically, inmates do not go back to their original amount spent but generally get to within 15% of the original spend-per-inmate average. However, the upward adjustment is slow and takes approximately 12 months to occur. For short-term detention inmates, rates have a minimal impact on call volumes. This is due to short-term detention inmate calls principally being more necessary than discretionary -- *e.g.*, securing bonding and defense preparation.

Increases in calling volumes also have a corresponding impact on the costs incurred by ICS providers and facilities. ICS providers incur increased validation, database, infrastructure, and network costs. Facilities incur additional costs to monitor the increased numbers of calls.

²⁵ *Id.*

D. Collect Calling and Debit Calling

The FCC asks whether there should be different per-minute rate caps for collect and debit calling.²⁶ CenturyLink reiterates its opposition to rate caps for ICS. But, should rate caps be adopted by the FCC, there should not be different rate caps for debit calling and collect calling.

It is true that if debit calling can be cost-effectively implemented at a facility, it is less expensive to administer on an ongoing basis for an ICS provider than collect calling. Costs eliminated by debit calling include: bad debt/credit card charge-backs; the cost of funding transactions (credit card fees, manual handling of money orders); and personnel for funding transactions and customer inquiries, all of which are substantial. The reason that these costs are eliminated for an ICS provider is because they are instead transferred to the facility or an outside deposit services vendor (funds are deposited by family members or others into inmates' bank or commissary accounts). For this reason, ICS providers will often offer slightly lower rates as an incentive for debit calling. This is only seen, though, at facilities where, taking into account systems requirements and security considerations, debit calling can be cost-effectively implemented.²⁷ The existence of these conditions precedent for debit calling at facilities is far

²⁶ *Id.* at 16640 ¶ 30.

²⁷ *Systems issues:* Software interfaces must be able to be established between a facility's bank or commissary account management systems and an ICS provider's debit account management system. PINs must be issued to inmates upon booking/intake and some facilities, especially small facilities, do not have systems capabilities to do so.

Security issues: The theft and use of an inmate's PIN by another inmate. Although facilities have a variety of methods to combat PIN theft, not all facilities are consistently successful. This issue is nonexistent for collect calling since there is nothing to steal. Calls that are billed through traditional collect or prepaid collect methods are able to generate a billing name and address associated with the called number, and ICS providers are able to require verified billing name and address information tied to a credit card or other payment instrument prior to establishing prepaid collect accounts. Facilities are better able to track and monitor the receiving party of an inmate call. Debit calling, however, provides no billing relationship with the called party. Debit calls to certain services -- *e.g.*, prepaid "throw" phones -- are difficult to track without a separate called party registration and verification process. Such a process is cumbersome for long-term

from universal.²⁸ All credible ICS providers have developed flexible debit interface capabilities; however, facilities' interface capabilities vary widely.

Approximately 70 percent of CenturyLink's ICS customers offer debit calling. Debit calling varies widely by facility. In county facilities, it ranges between 10 percent and 35 percent of total revenue. In state facilities, it ranges between 20 percent and 50 percent of total revenue. Although CenturyLink would prefer to implement debit calling everywhere that it provides ICS, it firmly believes that it would be a mistake for the FCC to require debit calling due to the challenges that it would present for many facilities and systems. Additionally, CenturyLink does not support a prohibition on collect calling-only limitations.

Finally, CenturyLink believes that prepaid collect calling is a viable ICS option and has been for many years. Virtually all ICS providers offer a prepaid collect calling option. For CenturyLink, prepaid collect calling can constitute up to 75% of total call volume. CenturyLink does not share Petitioners' concerns about prepaid collect calling.²⁹

E. ICS Providers Vigorously Compete to Win Contracts

ICS contracts are awarded in open and transparent procurement processes, and their award to service providers on an exclusive basis is necessary in order to ensure systems integrity and the availability of a single set of security features and data tracking capabilities. Exclusive contracts do not drive high rates in the ICS industry. In fact, exclusive contracts

detention inmates and essentially unworkable in short-term detention settings. While many facilities are able to accept this risk, others are not.

²⁸ At ¶ 31 of the *NPRM* (27 FCC Rcd at 16640-41), the FCC notes that the State of Iowa offers debit calling only. Unlike any other state in the U.S., Iowa runs its own calling platform, including the financial and billing portions.

²⁹ See *NPRM* at 16641 ¶ 33.

exert downward pressure on ICS rates by allowing ICS providers to offset up-front systems and facilities installation costs with increased revenue over the life of a contract.

ICS calling rates are determined by facilities³⁰ during a structured procurement process in which consideration is given to the security features, services, and, in some cases, the amount of site commissions offered by ICS providers competing to secure the award. Multiple interests must be considered and balanced by facilities and systems as they perform the task of procuring specialized equipment, monitoring services and calling services. Circumstances, needs and resources vary among facilities and systems. State and local management officials are in the best position to equitably balance competing interests. CenturyLink believes that the state and local officials charged with managing or overseeing the operations of facilities and systems should be given substantial deference on matters such as competition policy and the use of exclusive contracts. Should errors be made in balancing competing interests or decision-making, state and local elected officials are well positioned to rectify those errors and can be held accountable by the electorate should they fail to respond.

F. Site Commissions

The FCC asks how lowering or eliminating site commissions have affected rates.³¹ The answer varies by facility. As a general matter, site commissions, which are typically structured as a percentage of gross calling revenue, reduce an ICS provider's available revenue to cover up-front and per-call fixed costs. Accordingly, ICS providers are able to operate with lower calling rates when site commissions are not required. The following are two recent examples experienced by CenturyLink where site commissions were eliminated mid-contract.

³⁰ See fn. 12 above rebutting the charge of "monopoly rates."

³¹ *NPRM*, 27 FCC Rcd at 16642-43 ¶ 37.

At the South Carolina Department of Corrections (DOC) in early 2008, commissions were eliminated from a prior level of 45.0 percent:

- Prior rates included flat-rated (surcharge only, no per minute) calls for local, and slightly higher rates (including a surcharge and per-minute rate) for long distance, with an average cost per call of approximately \$2.70.
- Subsequent rates maintained the same basic structure but at lower levels, with an average cost per call of approximately \$1.35.

At the Michigan DOC in mid-2008, commissions were eliminated from a prior level of 50.99%:

- Prior rates that were set by Michigan to achieve certain internal objectives were a somewhat complex mixture of local versus long distance and day versus evening discounts, with an average cost per call of approximately \$5.30.
- Subsequent rates were reduced to between \$.10 and \$.12 per minute for intrastate calls and between \$.12 and \$.15 per minute for interstate calls, with an average cost per call of approximately \$1.10.

The reason for these outcomes is straightforward. In order to cover the significant up-front and ongoing fixed costs incurred in these contracts, higher calling rates were necessary when the payment of site commissions was required by the facilities.

G. Fresh Look

The FCC asks whether it would be appropriate for it to mandate a fresh look period or whether any new ICS rules should apply only to contracts entered into after the adoption of new rules.³² Any new ICS rules concerning the rates, terms or conditions for the provision of ICS should apply only to contracts entered into after the effective date of the new rules.

ICS contracts typically consist of a three to five-year “base” period with extension options of two to three years. ICS providers then price features and services to recoup costs over time, and “payback” periods can be three or more years. These long-term capital commitments are made with a certain set of assumptions, one of the most important being the rates that they will be allowed to charge. Further, the *change of law* provisions in ICS contracts as applied to

³² *Id.* at 16646 ¶ 46.

rates are at best vague, and in most cases, the ability to renegotiate rates is prohibited. Applying new rules to existing ICS contracts could result in the confiscation of ICS provider property. The actual consequences are not capable of being determined at this time but could include litigation to recover damages and a temporary or permanent halt to the provision of ICS by service providers.

H. Rate Arbitrage from Non-Geographic Numbers

Jurisdictional rate arbitrage is currently a serious concern for ICS providers and facilities. Today, where intrastate ICS rates are lower than interstate ICS rates, an out-of-state called party (a party in a state different than the facility detaining the inmate and to whom the inmate makes calls) obtains a virtual telephone number local to the facility from a cell phone or voice over Internet protocol (VoIP) service provider. As a result, the ICS call is assessed the lower intrastate rate instead of the appropriate interstate rate by making the call appear to be jurisdictionally intrastate.³³ Interstate ICS rate caps have the potential to provide an incentive for a reversal of today's jurisdictional arbitrage. In-state called parties may obtain virtual out-of-state telephone numbers to avoid paying the appropriate intrastate rate.

Rate arbitrage practices are a serious issue for corrections officials. The services used to arbitrage rates (prepaid cell phones and VoIP services) are difficult to track and investigate. The use of call forwarding is prohibited by virtually all facilities because corrections officials are unable to ascertain the actual terminating point of such calls.

The most effective way to prevent these arbitrage practices is to eliminate the economic incentive to engage in such practices. This can best be accomplished by equalizing rates across

³³ Rate arbitrage has also spawned an industry of call forwarding companies who, for a monthly service fee, obtain virtual local telephone numbers for called parties and using VoIP technology forward calls to the called parties' true telephone numbers.

jurisdictions -- local, intrastate interexchange, and interstate interexchange. The facilities are best positioned to act to accomplish this. CenturyLink's experience is that almost half of state DOCs have implemented postalized rates for in-state or all domestic calls, and it is an increasing trend where state regulators allow this flexibility for in-state calls.

I. Bill-Related Call Blocking

As noted previously, ICS providers prefer debit calling given the low cost of billing management. However, given the availability of prepaid collect programs, debit is not required to prevent call blocking issues. CenturyLink and many other ICS providers operate different billing programs that effectively address the issue of billing arrangements with CLECs or cell phone companies that typically do not offer 3rd party billing products. These programs automatically route cell phone customers, in "real-time" as they accept inmate phone calls, to live agents or automated systems to set up alternative payment arrangements for future calls (commonly called "prepaid collect"). During the transaction, customers are fully informed of all fees as well as lower-cost alternatives for establishing and funding accounts.

For short-term detention inmates, these types of programs are the primary way to complete calls since the time required to fund an inmate's bank or commissary accounts, and for the inmate to transfer funds to his or her telephone account, is simply too long. In some facilities served by CenturyLink where an inmate-paid debit calling option exists, called party-paid options (traditional collect and prepaid collect options) still exceed 85 percent of overall call volume. CenturyLink intends to continue providing these programs.

CenturyLink does not block calls without providing an opportunity to fund a prepaid collect account or otherwise pay for a call. The only exceptions are "active blocks" placed on a number by the facility (*e.g.*, victims, criminal activity on the number) or the called party (who has chosen not to receive calls from the facility).

J. The FCC's Legal Authority

The FCC's authority over the ICS market is limited. In context, Section 276 of the Communications Act of 1934 (Act)³⁴ was adopted by Congress among a set of provisions intended to prevent Bell Operating Companies from using any residual market power that they may have retained since the AT&T Divestiture to disadvantage non-Bell competitors in the fledgling competitive payphone market. The nondiscrimination focus of the FCC regulations authorized under subsection 276(b)(1)³⁵ supports the conclusion that the inclusion of inmate telephone service in correctional institutions in the definition of payphones that is found in subsection 276(d)³⁶ was not intended to be a grant of plenary regulatory authority to the FCC over the ICS market and all entities involved in it. Any attempt by the FCC to directly regulate the non-common carrier activities of facilities and systems would be exceedingly problematic and inevitably result in lengthy litigation that would only delay achieving the goal of just and reasonable ICS rates throughout the U.S.

To the extent that the FCC has jurisdiction over some aspect of the ICS market, it is with respect to the rates charged for interstate ICS provided by service providers subject to its jurisdiction under Titles II of the Act. Were the FCC to exercise its authority to cap the rates that ICS providers can charge for their services without corresponding adjustments being made by facilities and systems, the result would be to make the ICS market uneconomic to serve. ICS providers would have no incentive to continue serving the ICS market or, if they did continue to serve the market, offer the breadth of services that they provide to facilities and inmates today.

³⁴ 47 U.S.C. § 276.

³⁵ 47 U.S.C. § 276(b)(1).

³⁶ 47 U.S.C. § 276(d).

The net result would be to make it more, rather than less, difficult for inmates and their families to maintain telephonic contact with one another.

CenturyLink reiterates its suggestion that the FCC convene an ICS FAC to facilitate a comprehensive solution that addresses the respective needs and interests of all stakeholders affected by, or responsible for, the provision of ICS. A fair, equitable and enduring resolution of the ICS issue can only be achieved through the adoption of a holistic rate structure that addresses both intrastate and interstate ICS and balances the needs of all stakeholders. Facilities and systems are best suited to facilitate a balanced resolution for their communities, their inmates and inmate families, the service providers with whom they contract, and themselves. But all stakeholders must first be brought together by the FCC for a structured discussion of an agreed upon framework and timeline for addressing this matter.

CONCLUSION

The FCC's decision to initiate the *NPRM* is commendable. CenturyLink supports the FCC's decision and the goal of making just and reasonable ICS rates available across the U.S. Achieving the goal of just and reasonable ICS rates in a manner that fairly addresses the legitimate interests of all stakeholders will require the development of a comprehensive, multi-jurisdictional framework that takes into account the security, cost and administrative requirements of facilities and allows ICS providers the opportunity to recover a reasonable return on their investments. CenturyLink believes that the best way to develop such a framework is through the convening of an ICS FAC to marshal, in a structured manner, the guidance, expertise and recommendations of affected stakeholders with a demonstrated interest in resolving the ICS issue. CenturyLink would welcome the opportunity to participate on an ICS FAC.

CenturyLink provides ICS and traditional local and interexchange telecommunications services. It understands the harms that can result from regulatory rate caps and jurisdictional rate arbitrage. CenturyLink believes that the implementation of a stakeholder-developed, holistic rate structure that addresses intrastate and interstate ICS is the best way to secure just and reasonable ICS rates, address legitimate public safety and law enforcement needs, and preserve a competitive ICS market.

Were the FCC to become embroiled in a legal dispute concerning the limits of its authority over the inmate communications policy decisions of state corrections authorities, it would inevitably delay a final resolution of the ICS issue and potentially limit the FCC's ability to bring about a final resolution of the ICS issue. Similarly, FCC action that abrogates the rates or rates structures in existing ICS contracts is likely to produce legal disputes that delay a final resolution of the ICS issue. Delay in achieving a final resolution of the ICS issue is not in the public interest. Accordingly, CenturyLink encourages the FCC to convene an ICS FAC that brings affected stakeholders together to develop a comprehensive solution to the ICS issue which can be offered to the FCC in advance of FCC action on the *NPRM*.

Respectfully submitted,

CENTURYLINK

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