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By ECFS
Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: *Rates for Interstate Inmate Calling Services*
WC Docket No. 12-275

Dear Ms. Dortch:

Pursuant to Section 1.1206(b) of the FCC's rules, the foregoing is submitted into the record of the above-referenced proceeding, to address whether the FCC may adopt a benchmark Inmate Calling Service (ICS) rate for intrastate calls. As discussed below, the FCC specifically sought comment on this issue, and the adoption of a benchmark ICS intrastate rate fits squarely within the well-established "logical outgrowth" test in accordance with FCC precedent.

Interested parties must have adequate notice in an informal rulemaking of "either the terms or substance of the proposed rule or a description of the subjects and issues involved."¹ This requires that the rule be a logical outgrowth of the published proposal, that is, that a reasonable party "*ex ante*, should have anticipated that such a requirement might be imposed"² or that the notice "advise interested parties that comments directed to [a given topic] should be made."³ While comments alone are insufficient to show that sufficient notice was provided, they may support an inference that these parties view the rule to be a logical outgrowth of the initial description of the issues involved.⁴

As far back as 2002, the FCC considered direct regulation of intrastate rates, and called for comment on cost and revenue data for local ICS collect calls to determine how to potentially regulate intrastate rates consistent with the demands of Section 276.⁵ In the most recent NPRM, the FCC observed that the regulation of interstate calls could influence intrastate rates, and called for comment on the relationship between intrastate and interstate rates.⁶ The FCC also called for comment on how best to encourage changes in intrastate ICS rates, and noted that the increased use of VoIP by ICS providers may affect the ability of state regulators to control intrastate ICS

¹ 5 U.S.C. § 553(b)(3) (2012).

² *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

³ *See Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991).

⁴ *See First Am. Discount Corp. v. CFTC*, 222 F.3d 1008, 1015 (D.C. Cir. 2000).

⁵ Order on Remand and Notice of Proposed Rulemaking, 17 F.C.C. Rcd. 3248, 3277 (February 21, 2002). The Commission received comment on the current regulation of local ICS calls. *See* Pay Tel Communications, Ex Parte Presentation, CC Docket No. 96-128 (filed April 20, 2007).

⁶ *NPRM*, at 13-14.

calls.⁷ Besides calling specifically for comment on its authority to regulate interstate, interexchange ICS rates under section 276(b)(1)(A), the FCC also called for comment on the sources of authority to regulate ICS rates in general.⁸

In response to the *NPRM*, a number of parties specifically addressed the possibility that the FCC might regulate intrastate ICS rates. While NARUC and the Wright Petitioners disagree over whether the FCC has the jurisdiction to regulate intrastate ICS rates, they are both clearly aware that the text of the *NPRM* raised the possibility of direct FCC intervention in intrastate rates.⁹ Even some parties that disagree with the Petitioner's proposals note that regulation of intrastate ICS calls would be a necessary part of any comprehensive reform of the ICS industry.

For example, CenturyLink states that 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."¹⁰ CenturyLink is concerned that if the FCC only regulated interstate rates, inmates might engage in "jurisdictional rate arbitrage," shifting intrastate calls to numbers covered by regulated interstate rates.¹¹

Telemate likewise notes the potential damage that could be done to the ICS market if the FCC only regulates interstate ICS. Moreover, it expresses concern at the effects of interstate rate caps as a standalone regulatory solution, thus accepting the conclusion that the FCC has the authority under Section 276 to regulate rates paid by inmates not only for interstate calls but for intrastate calls as well.¹²

GTL goes further in its analysis of the application of Section 276 to intrastate regulation.¹³ GTL notes that under Section 276 the FCC has an obligation to ensure fair compensation for both interstate and intrastate ICS services, and indicates that it might be appropriate for the FCC to regulate intrastate ICS rates if this was necessary to fulfill the FCC's statutory mandates.¹⁴ Finally, PayTel urges the FCC to consider "all aspects of local and non-local, intrastate and interstate calls at both prisons and jails."¹⁵

Thus, there should be no reasonable question that the FCC can address intrastate ICS rates in the instant proceeding. The FCC directly called for comment on its ability to encourage states to change their intrastate ICS policies, and asked for comment on the sources of FCC authority to address ICS rates including Section 276(b)(1)(A), which explicitly references intrastate calling. As the numerous comments addressing the possibility of direct FCC

⁷ *Id.* at 19.

⁸ *Id.*

⁹ *See* NARUC Comments at 4; Wright Petitioners Comments at 14

¹⁰ *See* CenturyLink Comments at 4.

¹¹ *See id.* at 16.

¹² *See* Telemate Comments at 4, 8-10

¹³ *See* GTL Comments at 32-33.

¹⁴ *Id.* at 33.

¹⁵ *See* Pay Tel Comments, pg. 3.

intervention in intrastate ICS rates indicate, reasonable commenters believe that such action would be a logical outgrowth of the initial proposal. Therefore, sufficient notice has been provided that the FCC could establish benchmark rates covering both interstate and intrastate ICS calls.

Should there be any questions regarding this submission, please contact undersigned counsel.

Respectfully submitted,



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Attachment

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