

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF CENTURYLINK

CenturyLink, Inc. on behalf of itself and its subsidiaries submits these reply comments in connection with the Commission’s *Further Notice of Proposed Rulemaking*¹ in the above-captioned proceeding. In particular, CenturyLink responds to specific issues raised in comments submitted by Pay Tel Communications, Inc. (“Pay Tel”), the Martha Wright Petitioners, and the Correctional Institution Commenters.

I. THE COMMISSION DOES NOT HAVE AUTHORITY TO REGULATE INTRASTATE ICS RATES

Pay Tel asserts in its comments that the Commission has authority to preempt below cost intrastate inmate calling service (“ICS”) rates because such rates deny Inmate Calling Service Providers “fair compensation” in violation of Section 276 of the Act.² Pay Tel relies on its own costs to make this argument. In its recent waiver request, Pay Tel asserts that its costs of providing inmate calling services range from \$0.21 per minute for debit calls to \$0.23 per minute for prepaid and collect calls, excluding site commissions.³ Accordingly, Pay Tel requests that the Commission preempt rate caps below these levels regardless of whether they are imposed by

¹ *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, FCC 13-113, WC Docket No. 12-375 (rel. Sept. 26, 2013) (*Order or Further Notice*), Errata rel. Oct. 22, 2013 and Nov. 6, 2013, FCC 13-113.

² Pay Tel Comments at 2-9, filed December 20, 2013.

³ Pay Tel’s Petition for Waiver of Interim Interstate ICS Rates at 7, filed Jan. 8, 2014.

state public utility commissions or the correctional institutions themselves. Pay Tel notes in its comments that it disagrees with the Commission's conclusions that Section 276 was intended to ensure that rates are "fair" from a consumer point of view and that Section 276 may serve as a basis for the assertion of jurisdiction over non-rate aspects of intrastate ICS.⁴

Pay Tel's argument is actually an argument that Section 276 authorizes the Commission to determine a price floor on ICS rates and to preempt state rate caps that are below that floor. In that sense, it is consistent with CenturyLink's comments that Section 276 only authorizes the Commission to establish "fair compensation" for intrastate ICS rates when viewed from the perspective of the ICS provider. As CenturyLink stated in its initial comments, where the ICS provider and a correctional institution enter into a contract establishing the compensation the ICS provider will receive for intrastate calls, Section 276 is satisfied and the Commission has no further authority to act with respect to intrastate rates.⁵

In their comments, the Martha Wright Petitioners assert that "it is functionally impossible to separate the interstate and intrastate components of ICS" and therefore that the FCC is justified in applying Section 2(b) of the Communications Act to assert jurisdiction over intrastate ICS. This is simply wrong. The "impossibility exception" to Section 2(b) of the Act does not provide a basis for the Commission to preempt the regulation of intrastate ICS rates, because ICS providers are readily able to distinguish between intrastate and interstate calls, and in fact do so as a routine contractual requirement.⁶ In fact, the security protocols at most correctional

⁴ Pay Tel Comments at 3, fn. 8, filed Dec. 20, 2013.

⁵ CenturyLink Initial Comments at 5, filed Dec. 20, 2013.

⁶ All of CenturyLink's contracts require it to separately rate calls as local, intraLATA intrastate, interLATA intrastate, or interstate.

institutions actually ensure this by requiring disclosure of called party information in order to insulate witnesses, jurors, law enforcement personnel, crime victims, and other parties needing protection from inmates.

The Martha Wright Petitioners' argument that the interstate and intrastate components of ICS cannot be separated is based on a fundamental misunderstanding of how the jurisdiction of calls is determined under the FCC's rules. The Martha Wright Petitioners assert that because a typical ICS call is routed to a centralized calling center located in a different state, the jurisdiction of the call has somehow been made uncertain.⁷ However, the FCC has traditionally determined the jurisdiction of a call based on the endpoints of the call, not the route it follows.⁸ Thus, the fact that the call has been routed out of state before reaching the called party does not convert a call that is otherwise intrastate into an interstate call. Nor does it cause uncertainty as to the jurisdiction of the call.⁹

II. PREPAID CALLS AND COLLECT CALLS SHOULD BE GROUPED TOGETHER FOR PURPOSES OF SETTING THE PERMANENT SAFE HARBORS AND RATE CAPS

Pay Tel proposes that the Commission separate debit and prepaid calling and instead group prepaid calling with collect calling for purposes of setting the permanent safe harbors and rate caps. CenturyLink strongly agrees with this reasonable proposal. Debit calls are far less expensive to administer than prepaid calls, which are more properly grouped with collect calls.

⁷ Martha Wright Petitioner Comments at 7, filed Dec. 20, 2013.

⁸ *Core Communications, Inc. v. FCC*, 592 F.3d 139, 144 (D.C. Cir. 2010).

⁹ Similarly, in conventional long distance calling, the use of a calling card platform or operator services center located in another state does not alter the regulatory jurisdiction of a call that is intrastate between calling and called parties.

Debit calls as traditionally implemented involve a direct draw from a commissary or inmate bank account. The inmate account is typically funded with no transaction costs. In contrast, prepaid calls involve funding costs including debit/credit card transaction fees. Prepaid calls also have chargeback costs (similar to bad debt for traditional collect billing), which are a significant cost in the ICS business. In addition, prepaid calls often require representative time for taking deposits and handling inquiries. In total, these additional costs of handling prepaid calls are substantial, and they justify grouping prepaid calls with collect calls.

In the *Order*, the Commission decided to group debit and prepaid calls together based on a small sample of charges in eight states taken from a June 8, 2013 *ex parte* filing submitted by the Human Rights Defense Center (“HRDC”). The Commission concluded, wrongly in CenturyLink’s view, that a single rate for both debit and prepaid calls should be set “given the evidence that costs for both billing approaches were substantially similar.”¹⁰ However, the June 8, 2013 HRDC *ex parte* did not provide any information about the relative costs of providing debit, prepaid and collect calls. In addition, the same *ex parte* provided evidence of many other states where rate structures contradicted the conclusion that the rates for debit and prepaid calls should be the same. Significantly, in fifteen of the states listed, the rates for debit calls were actually lower than the rates for prepaid and collect calls.¹¹

¹⁰ *Order* ¶ 63, n. 231 (citing the states of Arizona, Maryland, Missouri, Nebraska, New Hampshire, South Carolina, South Dakota and Virginia, where prepaid and debit rates were equal). This was the only evidence cited in the Commission’s justification that debit and prepaid costs were substantially similar.

¹¹ Six states listed in the HRDC June 8, 2013 *ex parte* provide rates with a unique discount for debit, with no discount for prepaid versus collect (Louisiana, Maine, Massachusetts, North Carolina, Rhode Island and Texas). An additional three states listed prepaid rates as “N/A” with a discount for debit versus collect (Minnesota, North Dakota and Tennessee). CenturyLink understands that prepaid and collect rates in these states are also equal. Six additional states

Furthermore, the June 8, 2013 HRDC *ex parte* did not provide any information as to how the rates were derived. Of the eight states the Commission relied upon, at least three had set the rates for debit calls and prepaid calls, meaning that the grouping was not based on a voluntary decision by ICS providers.¹² This may have been true for the other five states as well. The Commission must conclude -- both from providers' comments and *prima facie* evidence seen in the market -- that prepaid calling is fundamentally more expensive to provide and therefore deserving of a premium compared to debit calling.

III. ANY DISTINCTION BETWEEN JAILS AND PRISONS MUST ACCOUNT FOR THE WIDE VARIANCE IN THE COST OF SERVING THESE CORRECTIONAL INSTITUTIONS

Pay Tel also proposes in its comments that the Commission alter the regulatory framework it has adopted and replace it with a scheme that reflects cost differences between jails and prisons.¹³ While the justifications Pay Tel gives for a distinction between jails and prisons are generally appropriate, the differences in the cost of serving jails versus the cost of serving

(Colorado, Idaho, Kansas, Pennsylvania, Vermont and Wyoming) were reported to have a "graduated" rate structure with prepaid discounted versus collect and debit discounted versus prepaid. CenturyLink also notes that Kansas recently changed its rate structure to one where only debit was discounted versus collect. This debit-only discount structure, in addition to the structure in Texas (both served by CenturyLink), were the result of procurement processes that allowed bidders flexibility in designing the overall rate structure consistent with relative costs.

¹² This information is drawn from the procurement requests for ICS in Missouri, Nebraska and South Carolina. Specifically:

- Missouri DOC 2010 RFP B2Z11019 (p. 39, A.1. "Cost Offer") mandated that debit and prepaid rates be equal, with a separate allowed surcharge for collect calls.
- Nebraska DCS 2008 RFP 2505Z1 (section 2.D.6) "Inmate family pre-pay accounts are considered "Debit" accounts and will be subject to the Debit calling rate."
- South Carolina DOC 2010 RFP 5400001449 (p. 17) stating that offered rates must be for "collect calls, with a discount given for pre-paid calling" where pre-paid calling is defined as "pre-paid by both calling parties" (p. 18).

¹³ Pay Tel Comments at 17-24.

prisons are not absolute. There are some prisons that are more costly to serve than jails, and the range of costs of serving jails and prisons is very wide.¹⁴ This is true because ICS services are really managed secure IT and site operation services, not simple common carrier telecommunications services, and differences in requirements at particular correctional institutions lead to great variability in the cost of service.

As a result, if permanent safe harbors and rate caps are to be set based on a distinction between jails and prisons, there must be significant headroom in the safe harbors and rate caps for both jails and prisons to account for the wide differences in the cost of serving facilities within each of these types of correctional institutions.¹⁵

In addition, the Commission should not set either the safe harbor levels or the rate caps at average cost. The use of average cost as the basis for the safe harbors effectively renders the safe harbors meaningless under the Commission's current construct. In the *Order*, the Commission determined that the safe harbors for debit and prepaid calls (\$0.12) and for collect calls (\$0.14) are not satisfied by a particular ICS provider if that provider's rates at any facility exceed the safe harbor levels.¹⁶ As CenturyLink explained in its initial comments, the current safe harbor levels have been set below CenturyLink's weighted average cost of service at the

¹⁴ One of CenturyLink's highest cost-per-minute customers is Texas Department of Criminal Justice, the largest state prison system in the United States. This cost is significantly higher than interim safe harbor levels. See August 2, 2013 *ex parte* Letter of John E. Benedict, CenturyLink, to Marlene H. Dortch, Secretary, Federal Communications Commission.

¹⁵ It is also appropriate to provide similar additional headroom for other high-cost facilities, like juvenile detention centers and secure mental health facilities, where the economics similarly would require higher safe harbors and rate caps.

¹⁶ *Order* ¶ 60, n. 226.

correctional institutions it serves. Thus, there is no way for CenturyLink to avail itself of the safe harbors without incurring a significant loss. The same may be true for other ICS providers.

To set the rate caps at average cost is also wholly inappropriate because it means that the cost of service at roughly half the correctional institutions will exceed the rate caps. Stated another way, roughly half of all correctional institutions will be uneconomic to serve absent a waiver of the rate caps. For rate caps to be reasonable there must be significant headroom to account for the variability of the cost of serving various correctional facilities. ICS providers would rationally discontinue serving high-cost facilities including jails and other facilities where costs to provide service are above the cap.

IV. CORRECTIONAL INSTITUTION MUST HAVE DISCRETION TO BLOCK CALLS WHEN APPROPRIATE

Comments filed by the Ohio Department of Corrections and a group of correctional institutions rightly emphasize that correctional institutions must have full discretion to determine when call blocking is appropriate.¹⁷ CenturyLink agrees. Correctional institutions necessarily have authority to manage whether, how, and when ICS services are used. Blocking of ICS calls to particular numbers or of particular types is routinely required by correctional institutions.

The Commission should recognize that ICS providers must abide by the determinations that correctional institutions make about call blocking, and that ICS providers are not free to second-guess the directives of correctional institutions in managing ICS at their facilities. If the Commission were understood to disallow blocking when ordered by correctional authorities, ICS providers would be unable to serve correctional facilities that require blocking.

¹⁷ Comments of the Ohio Department of Rehabilitation and Correction at 8-10, filed Dec. 20, 2013; Comments of Correctional Institutions at 10-12, filed Dec. 20, 2013.

V. CONCLUSION

As outlined in CenturyLink's initial comments, the Commission does not have authority to regulate intrastate ICS rates, and it should not further regulate interstate ICS rates. However, if the Commission is to adopt any additional regulations, it should group prepaid calls with collect calls in setting the safe harbor and rate cap levels. Furthermore, if there is to be a distinction between jails and prisons in the permanent rules, there should be significant headroom in the safe harbor and rate cap levels to account for the wide variability in the costs of serving these two types of correctional institutions. Finally, the Commission must leave determinations concerning call blocking to correctional institutions, which are necessarily in the best position to assess whether call blocking is appropriate.

Respectfully,

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