

July 28, 2016

**ELECTRONICALLY FILED**

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

Re: **WC Docket No. 12-375, Rates for Interstate Inmate Calling Services**

Dear Ms. Dortch:

The undersigned parties Securus Technologies, Inc. and Pay Tel Communications, Inc. have a vested stake in the outcome of the above-referenced inmate calling services docket.

We write in response to the Fact Sheet released by the Commission on July 14, 2016, announcing that Chairman Wheeler and Commissioner Clyburn have circulated a proposed order on reconsideration in this docket for consideration at the Commission's August open meeting. The Fact Sheet states that the proposed item responds to the Petition for Reconsideration of the Second Report and Order in this docket filed by Michael S. Hamden. In that petition, Mr. Hamden urged the Commission to "reconsider the proposal, endorsed by some inmate advocates, facilities, and providers alike, to replace the site commissions system with **a modest, mandated cost-recovery mechanism.**"<sup>1</sup> As Mr. Hamden himself just wrote, "meaningful, lasting reform cannot be achieved without the prohibition or strict limitation on site commission payments."<sup>2</sup> The Commission appears poised to take neither course and thus will not grant any of the relief Mr. Hamden sought.

The Fact Sheet indicates that the proposed item on circulation will propose increases in the Commission's stayed inmate calling services ("ICS") rate caps to "account for jails' and prisons' legitimate ICS costs[,]" but it does not directly address Mr. Hamden's proposal to establish a specific cost-recovery rate element that would replace existing contractual site commissions.

As the Commission has explained, "site commissions 'distort the ICS marketplace' by creating incentives for the facilities to select providers that pay the highest site commissions, even if those providers do not offer the best service or lowest rates."<sup>3</sup> The Commission predicted "that prohibiting such payments will enable the market to perform properly and encourage selection of ICS providers based on price, technology, and services rather than on the highest site

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<sup>1</sup> Petition for Partial Reconsideration at ii, WC Docket No. 12-375 (Jan. 19, 2016) (emphasis added).

<sup>2</sup> Letter from Michael S. Hamden to Marlene H. Dortch, FCC, at 2, WC Docket No. 12-375 (July 22, 2016) (providing notice of ex parte meeting with Stephanie Weiner, Senior Legal Advisor to Chmn. Wheeler, and others).

<sup>3</sup> *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 13170, 13180 ¶ 21 (2014) ("*Second FNPRM*") (cited in Second Report and Order and Third Further Notice of Proposed Rulemaking, FCC 15-136 ¶ 122 (rel. Nov. 5, 2015) ("*Second Report and Order*")).

commission payment.”<sup>4</sup>

Yet the Commission chose not to prohibit or even limit site commissions in its *Second Report and Order*. Instead, the Commission expressed the view that the establishment of rate caps and limitations on ancillary service charges would be adequate to constrain the pernicious effects of site commission payments.<sup>5</sup>

The undersigned parties urge the Commission to adopt the original intent of Mr. Hamden’s proposal, which was to establish a specific rate element for recovery of correctional institutions’ ICS-related costs in lieu of contractual site commissions:

Such a mechanism could provide a very real incentive for correctional authorities to encourage increased minutes of use, it would drive down ICS rates over the long-term, and it would increase business for ICS providers. In that way, the perverse and destructive practices that have grown out of permissiveness toward site commissions could at last be terminated and reversed.<sup>6</sup>

This concept, as Mr. Hamden noted, has been endorsed not only by ICS providers but also by a state regulator,<sup>7</sup> some inmate advocates,<sup>8</sup> and representatives of correctional facilities.<sup>9</sup> Four of the primary providers of ICS in the United States, representing more than 90% of industry revenue in 2014, similarly endorsed this approach in a joint letter filed in this docket on October 15, 2015.<sup>10</sup>

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<sup>4</sup> *Second FNPRM* ¶ 21.

<sup>5</sup> *Second Report and Order* ¶ 128.

<sup>6</sup> Hamden Petition at ii; *see also id.* at 13 (“The adoption of a facility cost-recovery fee might hasten a final resolution of all the matters addressed in the Second ICS Order.”).

<sup>7</sup> Letter from Darrell Baker, Director, Utility Services Division, Alabama Public Service Commission, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (July 13, 2015) (advocating cost recovery fee).

<sup>8</sup> The Prison Policy Initiative endorses a cost-recovery proposal in lieu of a hands-off approach to site commission payments. *See* “What can states do after the FCC has ruled?,” Prison Policy Initiative, <http://www.prisonpolicy.org/blog/2015/10/21/states-after-fcc/> (Oct. 21, 2015) (advocating that states enact a statutory, per-minute ceiling on site commission payments to facilities; and further suggesting that a three cent per-minute cap would “give facilities an incentive to push the rates down in order to increase usage”). Mr. Hamden had earlier noted that “[a] modest facility ‘cost recovery’ fee in the form of a small per-minute charge added to the rate caps would provide an incentive for facilities to seek the lowest possible calling rates. ... Indeed, it is likely that only through such a mechanism can real downward pressure be exerted on ICS rates.” Letter from Michael S. Hamden to Hon. Mignon Clyburn, Commissioner, FCC, WC Docket No. 12-375, at 6 (Sept. 23, 2015).

<sup>9</sup> Letter from Mary J. Sisak, Counsel to the National Sheriffs’ Association, to Marlene H. Dortch, FCC, WC Docket No. 12-375 at 2 n.1 (July 14, 2015) (“NSA supports a per minute amount for Sheriffs and jails that would be in addition to the ICS rate established by the Commission. The Commission should make clear that ICS providers must remit the facility compensation to the correctional facilities.”). The undersigned acknowledge that NSA filed comments opposing Mr. Hamden’s petition for reconsideration, but it argued that the level of compensation Mr. Hamden was proposing was inadequate, not that it was opposed to the concept of a facility cost recovery rate element.

<sup>10</sup> Letter from Global Tel\*Link, Securus Technologies, Inc., Pay Tel Communications, Inc., and Telmate, LLC, WC Docket No. 12-375 (Oct. 15, 2015); *see also* Letter from Global Tel\*Link, Securus, and Telmate to Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O’Rielly, WC Docket No. 12-375, (Sept. 15, 2014).

The Fact Sheet essentially adds from 2 cents per minute to 9 cents per minute to the calling rates that were adopted in the *Second Inmate Rate Order*, but it does not make clear that these incremental amounts are specifically intended to establish the “modest, mandated cost-recovery mechanism” proposed by Mr. Hamden.

Accordingly, we urge the Commission to effectuate the intent of the petition for reconsideration by making clear in the forthcoming Order that the rate cap additive takes into account reasonable and legitimate costs that jails and prisons may incur in providing access to ICS and that ICS providers are authorized to remit amounts not to exceed the respective additives to correctional facilities as compensation for such costs. Pay Tel Communications, a signatory here, proposed this rule in recent meetings.<sup>11</sup> This rule will ensure that correctional facilities are reimbursed for such costs. For clarity, taking merely as an example the rates as stated in the Fact Sheet,<sup>12</sup> the Fact Sheet would be amended as follows to provide the necessary clarification (changes are bold and in italics):

- 13 cents/minute for debit/prepaid calls, in state or federal prisons, ***which includes up to a maximum of 2 cents per minute for facility cost recovery fees/site commissions*** (up from 11 cents/minute stayed Oct. 2015 rate)
- 19 cents/minute for debit/prepaid calls in jails with 1,000 or more inmates, ***which includes up to a maximum of 5 cents per minute for facility cost recovery fees/site commissions*** (up from 14 cents/minute stayed Oct. 2015 rate)
- 21 cents/minute for debit/prepaid calls in jails with 350-999 inmates, ***which includes up to a maximum of 5 cents per minute for facility cost recovery fees/site commissions*** (up from 16 cents/minute stayed Oct. 2015 rate)
- 31 cents/minute for debit/prepaid calls in jails of up to 349 inmates, ***which includes up to a maximum of 9 cents per minute for facility cost recovery fees/site commissions*** (up from 22 cents/minute stayed Oct. 2015 rate)

***No other site commission payment can be remitted to any facility other than the funds obtained via the cost recovery mechanism provided herein.***

The Commission cannot solve the fundamental legal flaws that have led the Court of Appeals for the District of Columbia Circuit to stay FCC rate orders *three times* simply by tinkering with the level of the rate caps. It must address the cost structure that underlies ICS rates by assuring correctional facilities of some source of revenue, other than contractual site

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<sup>11</sup> Pay Tel urged the Commission to clarify that a per-minute fee, not to exceed the additive, may be collected by ICS providers and remitted to facilities in lieu of other payments. This approach could be implemented through a regulatory directive or through a rebuttable presumption.

Letter from Marcus Trathen, Counsel to Pay Tel Communications, Inc., to Marlene H. Dortch, FCC, at 1 (July 22, 2016) (providing notice of ex parte meeting with Stephanie Weiner, Senior Legal Advisor to Chmn. Wheeler, and others).

<sup>12</sup> The undersigned do not agree that these rates are reasonable, are above the telecom costs of providing ICS, or are otherwise lawful. If these rates nonetheless are adopted, the explicit cost recovery mechanism will be a necessary component and will at least give certainty and uniformity to the site commission issue.

commissions, to allow them to cover the costs of providing access to ICS. Moreover, implementing cost recovery as a rate additive will help to ensure downward pressure on the rate to consumers as facilities will seek higher minutes of use, best achieved through a lower rate per minute, which in turn stimulates inmate calling. For these reasons, the undersigned urge the Commission to adopt Mr. Hamden's cost-recovery proposal expressly rather than simply raise caps in hopes that contractual site commission obligations will disappear. The Commission therefore should adopt a cost-recovery rate element that would be collected by ICS providers from their users and paid by them to the correctional facility in lieu of contractual site commissions.

Respectfully submitted,

/s/ Richard A. Smith  
Richard A. Smith  
CEO  
**Securus Technologies, Inc.**

/s/ Vincent Townsend  
Vincent Townsend  
President  
**Pay Tel Communications, Inc.**

Cc: Chairman Tom Wheeler  
Commissioner Mignon Clyburn  
Commissioner Jessica Rosenworcel  
Commissioner Ajit Pai  
Commissioner Michael O'Rielly  
Matthew DelNero, Chief, Wireline Competition Bureau  
Stephanie Weiner, Senior Legal Advisor to Chairman Wheeler  
Claude Aiken, Legal Advisor to Commissioner Clyburn  
Travis Litman, Legal Advisor to Commissioner Rosenworcel  
Nicholas Degani, Legal Advisor to Commissioner Pai  
Amy Bender, Legal Advisor to Commissioner O'Rielly  
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*(All via electronic mail)*