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June 12, 2015

ARTHUR BLOOSTON
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Via ECFS

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Room TW-A325
Washington, DC 20554

**Re: Written *Ex Parte* Communication
WC Docket No. 12-375; Inmate Calling Services**

Dear Ms. Dortch:

The National Sheriffs' Association (NSA),¹ by its attorney, hereby submits a written ex parte presentation in the above-referenced docket concerning the NSA cost survey and NSA's position that Sheriffs should be compensated for the costs they incur to allow inmate calling service (ICS) in jails.²

In the *Second Further Notice of Proposed Rulemaking (SFNPRM)*, the Commission proposed the elimination of the payment of site commissions as a category to correctional facilities, including jails. However, in light of its statement in the *Order*³ that "some portion of payments to correctional facilities 'may, in certain circumstances, reimburse correctional facilities for ... costs,' such as security costs, that the Commission would likely consider reasonably and directly related to the provision of ICS,"⁴ the Commission asked 1) whether correctional institutions incur any costs in the provision of ICS and, if so; 2) how to quantify them; and 3)

¹ NSA has had discussions with a number of parties concerning compensation for Sheriffs. NSA intends to continue those discussions to determine whether any agreement can be reached.

² NSA will submit a proposed definition of Jail in a subsequent filing.

³ *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 12-375, 28 FCC Rcd 14107 (2013) (subsequent history omitted) (*Order*).

⁴ *Rates for Interstate Inmate Calling Services*, Second Further Notice of Proposed Rulemaking, WC Docket No. 12-375 (rel. Oct 22, 2014) at ¶ 39 (*SFNPRM*).

how the facilities should recover such costs.

As shown herein, NSA's cost survey and other evidence in the record demonstrates that Sheriffs and jails incur costs in the provision of ICS. The NSA cost survey and other information provided in the record also provides a basis to quantify those costs. Further, the record supports the recovery of the cost incurred by Sheriffs and jails as a per minute add-on to the ICS rates charged by ICS providers for their services.

Sheriffs and Jails Incur Costs in the Provision of ICS

NSA's cost survey submitted on January 12, 2015, provided information on the cost to Sheriffs to provide security and administrative functions necessary to allow ICS in jails. Sheriffs operating jails in 23 states and the District of Columbia reported the number of hours per week officers, supervisors and other employees spent on monitoring/security duties and administrative duties in connection with ICS and the annual compensation for the officers and employees engaged in these duties. With respect to monitoring/security duties, the Sheriffs reported time spent on call monitoring, responding to ICS system alerts, responding to law enforcement requests for records/recordings, call recording analysis, enrolling inmates for voice biometrics, and other duties. With respect to administrative duties, the Sheriffs reported time spent on system administration, answering questions from the public, answering questions from inmates, blocking/unblocking numbers, providing escorts for phone repairs, educating inmates on the use of ICS and other duties. Sheriffs also were asked to provide the most recent three months of data from ICS providers concerning the total minutes of use for the facility for each month. From this data, the per minute cost for each facility was calculated.

There is no reasonable dispute that Sheriffs and the officers and employees working in jails perform security and administrative duties that are reasonably and directly related to the provision of ICS. In a number of cases, the duties performed by Sheriffs, officers and employees and reported via the NSA survey are the same or similar in nature as the security features found by the Commission in the *Order* as recoverable cost. Thus, in the *Order*, the Commission found that security features such as monitoring calls is a recoverable cost.⁵ In many cases, if not most, officers monitor calls to determine whether criminal activity is taking place and whether inappropriate calls are being made via the ICS system. The Commission also stated that security features inherent in the ICS providers' network, such as the cost of recording and screening calls and the blocking mechanisms used to ensure that inmates cannot call prohibited parties would likely constitute recoverable costs.⁶ However, it is officers who determine the numbers to be blocked and unblocked. The cost of voice biometrics systems provided by ICS providers are recoverable. However, it is officers who enroll inmates in the voice biometrics service. The Commission has stated that it would likely find as recoverable, the cost of the storage of inmate call recordings necessary for court proceedings and the cost of maintenance and repair of the ICS

⁵ *Order* at ¶58.

⁶ *Order* at ¶53, note 196.

network.⁷ While ICS providers may perform necessary maintenance on ICS equipment in jails, it is officers who must provide for their security while in the jail.

Securus and GTL argue that they perform many of the security duties in jails, including those identified by NSA. However, as Pay Tel shows in its May 8, 2015 ex parte,⁸ the jails that it serves perform almost all of these duties, including, importantly, the monitoring of calls to detect illegal activity and to protect the public. CenturyLink also shows that jails perform many of these duties.⁹ Similarly, Network Communications International Corp. (NCIC) states that facilities staff for the average jail "will often handle as much as 90% of the onsite work."¹⁰ Even Securus acknowledges that it does not perform all of the duties related to security in connection with ICS. For example, in its December 8, 2014, ex parte, Securus shows that it does not perform duties including the transporting of inmates to phones; enrolling inmates in biometrics; and determining numbers to be blocked and unblocked.¹¹

Thus, it is clear that Sheriffs and jails perform security and administrative functions necessary to allow ICS in jails. In addition, it is clear that Sheriffs and jails perform some of the same functions that ICS providers perform in some cases and, presumably, whose cost they included in the cost study filed with the Commission. There is no valid reason and it would be arbitrary and capricious to find that the cost of security and administrative functions are not recoverable simply because they are performed by Sheriffs and officers and employees in jails.

The NSA Cost Survey and Other Record Evidence Provides the Ability to Quantify the Cost to Sheriffs and Jails

The NSA cost survey provides the inputs for a sampling of jails of all sizes for the hours spent on ICS related duties, the salaries and benefits for the officers and employees performing the ICS-related duties and the number of ICS minutes for the jails. This input data was then used to calculate a per minute cost to perform the duties associated with ICS for each jail. Simply by excluding the highest cost jails (any result over \$1.00), which might reasonably be considered outliers, the average per minute cost for jails is: \$0.409 for jails with 1-99 ADP; \$0.209 for jails with 100-349 ADP; \$0.088 for jails with 350-999 ADP; and \$0.059 for jails with 1000-2499 ADP. NSA's survey includes only one facility with ADP of 2500 or more, with a per minute compensation amount of approximately \$0.007.

These results can then be compared to and tested by the analysis of other parties. For

⁷ *Id.*

⁸ Ex Parte Letter from Timothy G. Nelson on behalf of Pay Tel Communications, Inc., dated May 8, 2015, at 4 and Exhibit A.

⁹ Ex Parte Letter from Thomas M. Dethlefs, Associate General Counsel, Regulatory for CenturyLink, dated September 19, 2014, at Attachment A.

¹⁰ Ex Parte Letter from William L. Pope, President, NCIC, dated Dec. 17, 2014 at 1.

¹¹ Ex Parte Letter from Stephanie A. Joyce on behalf of Securus Technologies, Inc., dated December 8, 2014, at 2 and attached handout.

example, in analyzing the NSA data to determine a per minute compensation amount, Pay Tel excluded results where the facility staff minutes exceeded 50% of the reported inmate conversation minutes on the basis of its experience that "higher figures are typically associated with on-going investigations that would not be considered for Cost Recovery purposes."¹² NSA believes this is a reasonable approach to analyzing and testing the inputs in the NSA Cost Survey. Pay Tel also excluded results where the facility reported costs that resulted in a per minute compensation rate greater than \$0.21, the interim interstate rate cap for prepaid calls.¹³ Based on its analysis, Pay Tel concludes that the NSA cost survey supports a per minute cost recovery amount of \$0.094 for jails with ADP of up to 349 and \$0.059 for jails with ADP of 350-2,499.

CenturyLink calculates the per-minute facility cost for monitoring 10% of the calls placed by inmates at prisons or jails at \$0.0528.¹⁴ It is important to note that CenturyLink's calculation only includes one "key cost that correctional facilities incur in allowing inmate calling"¹⁵ namely, monitoring cost, and it only includes monitoring 10% of calls, although CenturyLink acknowledges that actual levels of call monitoring will vary among institutions and within inmate populations. CenturyLink also states that its analysis is conservative because it presumes that all monitoring is recorded rather than live, which allows productivity efficiencies.

GTL states that the per minute cost for administrative and investigation costs in county facilities is \$0.008-\$0.021 per minute, with a median rate of \$0.016 per minute.¹⁶

Praeses, LLC states that based on a survey of its Correctional Clients the average cost per minute is \$0.18 with a standard deviation of \$0.12. Praeses also states that it believes "the majority of the Correctional Clients did not have sufficient time or resources to account for all of their ICS costs when completing the survey" and, therefore, Praeses believes that "the averages most likely significantly underestimate the ICS costs of certain Correctional Clients."

Based on these analyses, NSA supports a per minute compensation rate for jails as follows:

¹² Ex Parte Letter from Timothy G. Nelson on behalf of Pay Tel Communications, Inc., dated May 8, 2015, at 6.

¹³ Although there may be a policy reason for excluding these facilities, it is not clear that the fact that a facility has higher costs than the interim ICS rate is a valid reason to exclude a facility.

¹⁴ Ex Parte Letter from Thomas M. Dethlefs, Associate General Counsel, Regulatory for CenturyLink, dated September 19, 2014, at 2 and Attachment B.

¹⁵ *Id.*

¹⁶ Reply Comments of Global Tel*Link Corp., Attachment 2 entitled Correctional Facility ICS Cost Analysis for Global Tel*Link Corporation, by Stephen E. Siwek and Christopher C. Holt, Economists Incorporated, at 10, (Jan. 27, 2015).

<u>ADP</u>	<u>Per Minute Compensation</u>
1-349	\$0.09-\$0.11
350-2,499	\$0.05-\$0.08
≥2,500	\$0.01-\$0.02

With respect to jails with ADP $\geq 2,500$, a compensation amount of \$0.01-\$0.02 per minute is in line with NSA's survey data which shows a per minute cost of slightly less than one cent for a facility of this size and GTL's per minute cost for jails.

With respect to jails with ADP of 350-2,499, a compensation amount of \$0.05- \$0.08 per minute is in line with the analysis by Pay Tel, CenturyLink and NSA's cost survey, excluding outliers.

With respect to jails with ADP of less than 350, a compensation amount of \$0.09-\$0.11 per minute is in line with Pay Tel's analysis, although it is significantly less than the results of the NSA cost survey, excluding outliers. NSA believes this is an acceptable compromise, however, because jails of this size have the fewest employees and are the least able to perform cost studies and because there is a benefit to facilities of this size of the certainty of a compensation amount, even if it is less than their total cost.

Claims that NSA's Cost Survey is not Sufficient to Draw Conclusions Are Without Merit

Some parties contend that NSA's cost survey and the record in general is not sufficient for the Commission to draw any conclusions concerning the costs incurred by Sheriffs and jails in connection with ICS services. For example, the Lipman Ex Parte¹⁷ argues that the number of NSA survey respondents is small and there is no analysis of whether these respondents constitute a representative sample of NSA's membership; only three months of data were used; and no calculations were provided of average costs and standard deviation. Mr. Lipman also argues that the survey does not provide sufficient details to validate the result because NSA does not separately identify the costs for each task and only separates information into two broad categories ; NSA does not explain the methodology for allocating time between various tasks and categories and NSA did not provide a copy of the survey or any work papers.¹⁸

These claims are without merit. As an initial matter, the NSA survey shows that payments to Sheriffs from ICS providers cannot be labeled as "kickbacks" as they, at least in part, compensate Sheriffs for costs they incur to allow ICS in jails. The NSA survey also shows that Sheriffs incur real and significant costs for duties that must be performed to allow ICS in jails. It would be a departure from Commission precedent and rate-setting principles to find that such costs cannot be recovered.

As for Mr. Lipman's general criticism that the NSA cost survey does not provide

¹⁷ Ex Parte Letter filed by Andrew D. Lipman, dated April 8, 2015, at 11.

¹⁸ *Id.*

sufficient detail, NSA notes that as unregulated entities, Sheriffs are not required to keep data in the same format as entities regulated by the Commission. Sheriffs and jails also do not have staffs that include attorneys, accountants and economists schooled in the art of ratemaking principles and Commission rules and regulations on cost studies. NSA notes that one ICS provider has indicated it spent over \$400,000 to prepare the Commission's cost survey. Sheriffs do not have money in their budgets to perform such cost studies.

NSA also notes that it appears the majority of ICS providers did not comply with the standards Mr. Lipman believes should be imposed on Sheriffs. Expert Don J. Wood found that three out of fourteen ICS providers only provided redacted versions of their filings to Mr. Wood for analysis; six of the remaining eleven providers "produced only a copy of the data collection template, with no description of how the study was performed and no supporting workpapers;" "three providers produced a brief description of the overall methodology used in the study, but no supporting workpapers or calculations;" and only two providers produced supporting workpapers.¹⁹ Thus, it appears that the same criticisms Mr. Lipman levels at the NSA cost survey apply equally to the ICS cost data.

In spite of their flaws, however, Mr. Wood states that with respect to eight of the ICS cost studies, "important elements of the results of the studies can be validated, and many of the reported results are consistent in ways that inform the Commission on issues of cost levels and variation."²⁰ As shown herein, the same is true of the NSA cost survey and, for the same reasons, the NSA cost survey also can inform the Commission on issues of levels of compensation for Sheriffs.

NSA also notes that in this very proceeding, the Commission set interim interstate rates for ICS calls based on an incomplete data set. Therefore, the number of respondents to the NSA cost survey and the other criticisms leveled against the survey, do not preclude the Commission's ability to draw conclusions from the data and establish compensation for Sheriffs.

As for Mr. Lipman's specific points, NSA responds to each point as follows:

1. The NSA survey respondents are a representative sample of jails of different sizes and in different states. Except for jails with ADP of 2,500 or greater, there are numerous respondents in each category of jail by size.
2. Three months of minutes of use (MOU) data is sufficient to determine a monthly average of MOU. However, even if the Commission believes more data is necessary, they should seek to obtain more data. It is not a basis to reject the entire cost survey.
3. The NSA cost survey provides data inputs. The Commission or any party can perform calculations they believe are appropriate.

¹⁹ Expert Report of Don J. Wood, January 12, 2015, at 15.

²⁰ *Id.* at 16.

4. NSA provided data on the time spent on ICS related tasks in two broad categories, instead of identifying the costs for each task, because not all Sheriffs provided a separate cost for each task. Sheriffs were asked to identify time for the following monitoring/security duties: call monitoring, responding to ICS system alerts, responding to law enforcement requests for records/recordings, call recording analysis, enrolling inmates for voice biometrics, and other duties. Sheriffs were asked to identify time for the following administrative duties: system administration, answering questions from the public, answering questions from inmates, blocking/unblocking numbers, providing escorts for phone repairs, educating inmates on the use of ICS and other duties. Very few Sheriffs provided time for a task that was not listed or in the “other” category.
5. NSA did not provide the completed surveys because they are confidential. However, if the Commission believes it is necessary to do so, NSA could provide redacted versions of the surveys.

Facility Costs Should Be Recovered Via a Per Minute Amount Added to the Per Minute ICS Rate

The NSA cost survey and other record evidence supports the adoption of a tiered, per minute compensation amount, that would be added to the per minute ICS rate set by the Commission and paid to Sheriffs and/or jails, as the appropriate mechanism to recover facility costs. The record demonstrates that an additive, per minute compensation amount for Sheriffs is not only appropriate, but it also would promote the deployment of ICS in jails, which is one of the Commission's mandates pursuant to Section 276 of the Act. As the record amply demonstrates, ICS is a discretionary service in the vast majority of jails and there is no requirement to provide access to ICS at all. Even in those cases where a Sheriff may wish to provide access to ICS or where a Sheriff may have some obligation to allow some access to calling, Sheriffs have broad discretion in the number of hours during which calling can take place. Therefore, if Sheriffs do not receive compensation, they would have the incentive to reduce the amount of unrecoverable cost by reducing access to ICS.

The NSA cost survey and information provided by ICS providers also shows that the duties performed by Sheriffs and officers and employees in jails in connection with ICS are labor intensive. Therefore, an adequate per minute compensation would keep pace with Sheriffs' costs if minutes of use increase. However, if Sheriffs are not adequately compensated, then an increase in minutes of use would simply increase the amount of time officers must spend on ICS-related duties and the amount of unrecoverable cost incurred by Sheriffs.

The fact that the per minute cost of ICS-related duties in jails varies also supports a tiered, per minute compensation amount, with a higher compensation amount for smaller jails, and further demonstrates that an averaged, one-size-fits-all compensation amount is not appropriate. A single, averaged compensation amount would not adequately compensate jails and, in particular, small jails, for the duties they perform and it would tend to overcompensate

large facilities, like prisons.

Some commenters argue that the Commission should not determine a compensation amount for Sheriffs. Rather, they argue that the Commission should simply allow ICS providers and Sheriffs to determine a compensation amount that is payable from the ICS providers' profits. This is not appropriate because the security and administrative duties performed by Sheriffs and officers and employees in jails are directly related to ICS and, therefore, pursuant to Commission cost-recovery principles, they are recoverable. However, the cost data submitted by the ICS providers does not include these costs. Therefore, the per minute compensation amount that the Commission will determine for ICS rates will not include compensation for the costs incurred by Sheriffs and jails.

In addition, this proposed mechanism is not likely to ensure that all correctional facilities, including Sheriffs operating jails, and in particular, Sheriffs operating small jails, will receive compensation. In fact, it is likely that this mechanism will provide compensation, if at all, only to prisons operated by Departments of Correction, because they will have the bargaining power to obtain compensation from ICS providers. As the record shows, a number of ICS providers primarily serve prisons and the largest jails. If they have any excess profits that they are willing to share with correctional facilities, they will have the incentive to use that bargaining chip to obtain large prison contracts. Thus, this proposal is likely to lead to no compensation or under compensation for Sheriffs, which, as shown above, will lead to less access to ICS for inmates in jails.

Some parties contend that even if Sheriffs and jails incur costs, these costs should be recovered from taxpayers and not inmates and the people with whom they communicate. This argument ignores, and is contrary to, the Commission's precedent that costs should be recovered from the cost causer. The Commission has found that the calling and called party are the cost causer and the beneficiary of calls.²¹ Therefore, the costs incurred by Sheriffs in connection with ICS are properly recoverable from inmates and the people with whom they communicate. There is nothing in the Communications Act or Commission precedent that would justify shifting this cost to general taxpayers and the Commission has no authority under the Act to do so. Those who argue that the taxpaying public should pay for the provision of ICS also overlook the fact that inmates are not entitled to inmate calling services. Unlike food, shelter and healthcare, there is no obligation on the public at large to pay for inmate calling services.

Some argue, and the Commission has found, that the public benefits from ICS because it keeps children in touch with incarcerated parents and reduces recidivism, which reduces the costs

²¹ In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform -- Mobility Fund, 26 FCC Rcd 17663, at ¶744 (2011) (subsequent history omitted).

to our justice and prison systems. Even if this is true, it does not change the fact that the Communications Act and Commission precedent establish that costs incurred in connection with a service should be recovered from the cost causer. Nor does it change the fact that the Commission has no authority under the Communications Act to mandate the recovery of cost from general taxpayers. It also does not change the fact that in most cases ICS is a discretionary service and that Sheriffs have wide latitude in determining the extent of ICS calling that will be allowed.

Thus, the record demonstrates that a per minute compensation payable to Sheriffs for the security and administrative duties they perform in connection with ICS is justified under the Commission's precedent, will not violate the Commission's mandate to ensure reasonable rates, and will help to ensure the Commission's mandate to ensure access to ICS. The record also demonstrates that the per minute compensation payable to Sheriffs should be tiered, with a higher compensation amount payable to smaller jails.

The Record Supports a Transition Period for Compensation for Sheriffs

The record supports NSA's position that there should be a significant transition period before any new rules go into effect. NSA supports a transition period of at least two years before any new rules become effective to permit jails time to try to adjust their budgets so that ICS in jails can be continued. As there is no uniform budget cycle for jails, the 2016 budget for some jails has already been set and the budget for others will be set throughout the remainder of 2015. A two year transition period, therefore, will ensure that every jail has at least one full budget cycle to make adjustments to account for the loss of revenues they will experience as a result of ICS reform.

Conclusion

Based on the foregoing, NSA urges the Commission to adopt a tiered, per minute compensation amount for the security and administrative duties performed in jails in connection with ICS, that is an additive amount to the ICS rate. NSA urges the Commission to find an additive compensation amount for jails, based on ADP, as follows:

<u>ADP</u>	<u>Per Minute Compensation</u>
1-349	\$0.09-\$0.11
350-2,499	\$0.05-\$0.08
≥2,500	\$0.01-\$0.02

NSA also urges the Commission to adopt a two-year transition period before new rules go into effect.

If you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,

/s/ Mary J. Sisak