Via Electronic Comment Filing System

September 9, 2015

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

Re: Notice of ex parte meetings of Praeses LLC
Rates for Interstate Inmate Calling Services
WC Docket No. 12-375

Dear Ms. Dortch:

By this letter, and pursuant to Sections 1.1206(a)(1) and (b)(1)-(2) of the rules of the Federal Communications Commission ("FCC" or "Commission"), Praeses LLC ("Praeses"), through its counsel, provides notice of certain August 31, 2015 and September 1, 2015 meetings between the undersigned, on behalf of Praeses, and representatives of the Commission. Specifically, Praeses met separately on August 31 with (i) Matthew Berry, Chief of Staff for Commissioner Ajit Pai; (ii) Travis Litman, Senior Legal Advisor for Commissioner Jessica Rosenworcel; and (iii) Madeleine Findley, Gil Strobel, Rhonda Lien, Thomas Parisi, Bakari Middleton, and Lynne Engledow from the Wireline Competition Bureau; and Richard Mallen (by phone) from the Office of General Counsel. In addition, on September 1, Praeses met with Amy Bender, Wireline Legal Advisor for Commissioner Michael O’Rielly.

Praeses provided background in each meeting regarding the company. Praeses was founded in 1987 and has approximately 100 employees divided into three divisions. In addition to divisions that develop software for the U.S. military and state and local governments, Praeses has a division that assists correctional facilities ("Facilities") to evaluate and negotiate contracts with inmate calling services ("ICS") providers ("Providers"), monitor the compliance of such Providers with the contracts, and comply with local, state, and federal regulation of ICS. Praeses’ Facility clients include operators of private, regional, and county jails and statewide departments of correction that together house over 400,000 inmates.

On behalf of its Facility clients, Praeses has been closely monitoring the instant proceeding. The company met with the foregoing Commission staff to share its views regarding

1 47 C.F.R. §§ 1.1206(a)(1), (b)(1)-(2).
the appropriate regulatory treatment of site commissions—views that are shaped by Praeses’ extensive experience interacting with both Facilities and the Providers. Praeses asserted during these meetings that the Commission does not need to regulate site commissions to accomplish its objective in this proceeding of increasing inmate access to ICS. This objective can be realized merely by capping ICS rates and tightly regulating ancillary fees, which will lead to lower overall ICS costs and increased ICS usage.

Moreover, like the Commission, Facilities are expert governmental agencies. These agencies are established and governed by state and local statutes that expressly charge them with housing inmates and promoting inmate welfare. Consequently, it would be inappropriate for the Commission to develop policies that disadvantage Facilities in order to provide benefits to Providers, which are private, profit-seeking companies. Indeed, to the extent that there is a means available to the Commission to accomplish its objective in this proceeding without causing concomitant harm to Facilities, the Commission should adopt such approach. In addition, Praeses does not believe that the Commission has adequate statutory jurisdiction to regulate site commissions. Consequently, if the Commission adopts an order in this proceeding that promulgates new rules prohibiting site commissions, Praeses believes that the order will be vulnerable on judicial appeal.

With this background, Praeses discussed three approaches to site commissions that have been raised by participants in this proceeding: (i) prohibit site commissions outright; (ii) implement a cost recovery mechanism that is separate from the ICS rate paid by inmates to Providers and prohibit Providers from paying any other site commissions to Facilities; and (iii) completely refrain from regulating site commissions. As set forth herein, Praeses explained that the Commission should adopt the third approach. Praeses asserted that the first two approaches, i.e., banning site commissions and imposing a Facility ICS cost recovery mechanism, pose insurmountable jurisdictional challenges because the Commission lacks authority to regulate site commissions under Sections 276(b)(1)(A) and 201(b) of the Communications Act of 1934, as amended (“Act”).² In addition, the second approach also poses substantial administrative challenges that would undermine this approach even if it did not suffer from jurisdictional shortcomings. By contrast, the third approach enables the Commission to accomplish its objective of reducing the cost of ICS to inmates and their friends and family members without raising any jurisdictional or administrative issues and without inappropriately intervening in the ICS contracting practices of the Facilities.

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The Commission Should Not Prohibit Site Commissions

The Commission should refrain from attempting to prohibit site commissions outright. The vast majority of participants in this proceeding, including Providers, Facilities, and most public interest advocacy organizations, have opposed such a blanket ban of site commissions. These parties uniformly have asserted that Facilities bear meaningful costs and that the FCC should not deprive Facilities of a mechanism for recouping these costs. Praeses agrees with this consensus position for two primary reasons.

The Commission Lacks Jurisdiction to Prohibit Site Commissions. Neither Section 276(b)(1)(A) nor Section 201(b) of the Act provides the Commission with sufficient authority to ban site commissions. Section 276 only can be interpreted to provide the Commission with authority to regulate ICS if a single provision, Section 276(b)(1)(A), is read out of context and in a manner that is fundamentally inconsistent with the statute’s legislative history. Of course, if the statute does not provide the Commission with authority to regulate ICS, then it cannot provide the Commission with authority to regulate, much less ban, site commissions. The purpose of this statute, which is clear both on its face and in its legislative history, was to protect independent payphone service providers (“PSPs”)—i.e., the owners of physical payphones—from discrimination by Bell Operating Companies (“BOC”) and against revenue losses caused by the PSPs’ customers’ use of free dial around services. The “fair compensation” mandate in Section 276(b)(1)(A) only can be properly read in that context, and such protections are no longer applicable to Providers, which do not face BOC discrimination or a loss of revenue to dial around calls. The mere reference to “inmate telephone service in correctional institutions” in the definitions section of the statute does not somehow change the fundamental scope of the statute to cause Section 276(b)(1)(A) to newly provide the Commission with plenary authority over ICS.

Similarly, Section 201(b) of the Act does not provide the Commission with sufficient authority to prohibit site commissions from being paid to Facilities out of Providers’ interstate and intrastate ICS revenue. As an initial matter and as made clear by Section 2(b) of the Act,3 Section 201(b) does not provide the Commission with any authority over intrastate ICS, including the payment of site commissions from intrastate ICS revenue. Further, the Commission has held that site commissions represent an apportionment of profit by Providers between themselves and Facilities and that site commissions have no reasonable and direct relation to the provision of ICS.4 Although Section 201(b) may provide the Commission with authority to regulate interstate ICS charges and practices, it should not be interpreted to permit the Commission to regulate the manner in which Providers distribute their profits or to provide the Commission with authority over matters that have no reasonable or direct relation to ICS.

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4 See Comments of Praeses, LLC, WC Docket No. 12-375 at 20, 23 (filed Jan. 12, 2015).
Banning Site Commissions Will Reduce Inmate Access to ICS Over the Long Term

Banning site commissions is inconsistent with the Commission’s express objective in the instant proceeding. The Commission’s goal is to increase the access of inmates to ICS to enable the inmates to remain in communication with their friends and families, which the Commission believes, in turn, will reduce recidivism. Although a reduction in ICS rates and tight regulation of ancillary fees will further this goal, the elimination of site commissions is likely to have a countervailing effect over the long term. Subject to certain minimal requirements imposed by the judiciary, Facilities ultimately control the access of ICS to inmates. Consequently, if Facilities lose access to the funding that they use to support their ICS programs, which for most Facilities primarily is site commissions, then Facilities are likely to scale back these ICS programs over time or, at minimum, refrain from expanding the programs by increasing inmates’ access to ICS and incorporating new technologies. Facilities are not immune from financial realities. If their ICS costs increase due to increased ICS volume caused by Commission-mandated lower ICS rates, and the Facilities concurrently lose access to site commission funding to offset their ICS costs, then many Facilities will scale back their ICS programs over time.

Adopting a Facility Cost Recovery Mechanism Is Administratively and Judicially Unsound

Although it may be possible for the Commission to develop a cost recovery mechanism that enables Facilities to recoup their ICS costs, Praeses believes that the substantial administrative and jurisdictional challenges posed by such a highly regulatory approach to site commissions warrant against this proposal. Further, a significant majority of public interest advocacy groups, almost all Facilities, and several Providers disfavor the implementation by the Commission of a discrete regulatory mechanism for recovery by Facilities of their ICS costs. These proceeding participants instead advocated for the Commission to refrain from attempting to regulate site commissions.

The primary problem with the promulgation of a Facility cost recovery mechanism is jurisdictional. For such a regulatory framework to be effective, the Commission must ban any other payments by Providers to Facilities. As set forth above, the Commission does not have sufficient authority under the Act to ban site commissions outright. Even if the Commission did possess such authority, however, there nevertheless would remain substantial administrative hurdles to the development of a successful Facility cost recovery mechanism.

The Commission Would Need to Collect Better Facility ICS Cost Data. This proceeding has demonstrated how difficult it is for Facilities to accurately determine and report to the Commission their actual ICS costs. Absent concrete cost data, it is unclear how the Commission can develop an adequate Facility cost recovery mechanism. Governmental accounting systems are not well suited for separately delineating the costs to Facilities of ICS or prorating Facility costs that are shared between ICS and other Facility functions. Further, Facilities’ ICS costs can
vary substantially based on the type and size of the jails and prisons that they operate and based on the degree to which they outsource ICS rather than self-provisioning certain components. In addition, unlike with respect to Providers, the Commission to date has not provided Facilities with guidance regarding how to determine their ICS costs and what Facility costs the Commission believes to be properly allocated to ICS. As a result, although there seems to be broad consensus that Facilities bear real and substantial ICS costs, the record contains widely disparate estimates of these costs—estimates that vary by more than an order of magnitude.

**The Commission May Be Unable to Prevent Cross-Subsidization.** A cost recovery mechanism may be difficult for the FCC to police to prevent abusive cross-subsidization by Providers. This is the primary reason that certain public interest advocacy groups ultimately determined that this regulatory approach will not be effective. It will be difficult to prevent the largest Providers with the deepest ICS technology portfolios from paying in-kind site commissions to Facilities to gain an advantage during the ICS RFP process. Such Providers will offer Facilities “gold plated” ICS that contains features and functions that other Providers cannot offer. This ultimately will be paid for by inmates through higher ICS rates justified by the Providers based on the costs that they incur for such “gold plated” ICS. To prevent such cost shifting, the Commission would have to very tightly define what constitutes basic ICS. Any such regulatory definition, however, necessarily would dictate to Facilities the manner in which the Facilities provide ICS and thereby eliminate the Facilities’ flexibility to tailor their ICS programs to the specific needs of their inmates and infrastructure. For example, the Commission is not qualified to determine and to dictate to Facilities which ICS security functions are necessary and appropriate and which should be prohibited as in-kind site commission payments. Similarly, the largest Providers may further entrench their dominant ICS market share by using their extensive unregulated product portfolios to cross subsidize their ICS offerings. These Providers may increase the rates that they charge inmates for unregulated products such as video visitation, and then offer disproportionate site commissions to Facilities with respect to these unregulated products if the Facilities select the Providers to provision ICS.

**The Commission Should Refrain from Attempting to Regulate Site Commissions**

The Commission should refrain from attempting to regulate the means by which Facilities contract with Providers. Instead, the Commission should establish ICS rate caps and tight restrictions on ancillary fees, which in combination will drive down the actual cost of ICS to inmates and their friends and family members and thereby enable them to afford to speak longer and more often. (Establishing ICS rate caps will be ineffective at lowering actual ICS costs if the Commission does not also limit the number of ancillary fees and cap the permissible amount of each fee.) Because Facilities will remain able to recover their ICS costs under this approach, the Facilities will have no financial incentive to reduce inmate access to ICS. To the contrary, they will be incented to expand inmates’ ICS access. Further, there is no compelling justification for the Commission to intervene in private contractual negotiations between
Facilities and Providers. Doing so will not further any Commission objective. Inmate access to ICS is dependent on ICS rates and ancillary fees, not on how ICS revenue is divided between Facilities and Providers.

Moreover, this approach does not suffer from the infirmities of the other two approaches discussed above. First, if the Commission does not attempt to regulate site commissions, the Commission will not face the same jurisdictional vulnerabilities on appeal that the Commission will face if it attempts to ban or regulate site commissions under Sections 276(b)(1)(A) and/or Section 201(b) of the Act. Second, this approach will avoid the administrative challenges inherent in attempting to develop a cost recovery mechanism. The Commission will not have to adjudicate the Facilities’ ICS costs or attempt to prevent cross-subsidization by Providers.

Praeses acknowledges that if the Commission refrains from banning or regulating site commissions then Facilities will use their RFP processes to drive down Provider compensation for provisioning ICS to a level near the actual cost to the Providers plus a profit margin that results from a competitive process. The Facilities, who have the most proximate relationship to inmate welfare, will retain the opportunity to receive a portion of the ICS revenue via site commissions. If the Commission determines at a later date that the objectives of the instant proceeding are not being achieved, the Commission may further lower ICS rates in the future under the same authority that the Commission uses to regulate ICS rates in the instant proceeding. In the interim, as between the Facilities and the Providers, the Commission should prefer for any surplus ICS revenue to be retained by the Facilities, which are government agencies, rather than by for-profit Providers. Any surplus captured by Providers will be distributed to their owners, which in the case of the largest providers are private equity groups. By contrast, if Facilities temporarily accrue ICS revenues in excess of their ICS costs, these revenues are likely to be used by the Facilities to fund other inmate welfare programs—programs intended to achieve the same reduction in recidivism that the Commission intends to achieve via the instant proceeding.

Andy Lipman, on behalf of an anonymous client or clients, has suggested that Providers will submit responses to Facility RFPs that are below the Providers’ costs and that, as a result, a Commission decision not to regulate site commissions will amount to an unconstitutional taking. See Andrew D. Lipman, How to Save the FCC’s Inmate Calling Rules from Being Reversed in Court, at 13-16 (attachment to Letter from Andrew D. Lipman, Morgan, Lewis & Bockius LLP, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed June 1, 2015)). This argument is not credible. Facilities may be able to drive Provider compensation down to a level that is equal to the Providers’ costs plus a market-appropriate profit margin, but the Facilities cannot force Providers to submit bids below that level. Providers are for profit companies. They have no economic incentive to submit RFP responses that do not enable them to recover their costs and make a profit, and they will not do so.
For the reasons set forth above, Praeses believes that the Commission should lower ICS rates, tightly regulate ancillary fees, and forego from attempting to regulate site commissions. This approach will accomplish the Commission’s objective of lowering the overall cost of, and increasing inmate access to, ICS. Moreover, it will do so without inflicting harms on Facilities, which are government agencies charged with maintaining inmate welfare. In addition, unlike the other approaches to site commissions proposed by certain participants in this proceeding, this approach does not suffer from profound jurisdictional problems that will cause the Commission’s ICS order to be vulnerable to a judicial appeal.

Please direct any questions regarding the foregoing to the undersigned.

Respectfully,

/s/ Phil Marchesiello
Phil Marchesiello
Counsel to Praeses LLC

cc (all via electronic mail):

Amy Bender
Matthew Berry
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