Via Electronic Comment Filing System

October 13, 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, through its counsel, provides notice of certain October 8, 2015 meetings between the representatives of the Commission set forth below and, on behalf of Praeses, LLC, (i) Ann O’Boyle Day, Director, Correctional Services Division, Praeses, LLC, and (ii) Patrick Halley and the undersigned, outside regulatory counsel to Praeses, LLC (collectively “Praeses”). Specifically, Praeses met separately with the following Commission representatives: (i) Stephanie Weiner, Wireline Senior Legal Advisor for Chairman Tom Wheeler; Rebekah Goodheart, Wireline Legal Advisor for Commissioner Mignon Clyburn; and Lynne Engledow, Acting Deputy Division Chief, Wireline Competition Bureau; (ii) Travis Litman, Senior Legal Advisor for Commissioner Jessica Rosenworcel; (iii) Amy Bender, Wireline Legal Advisor for Commissioner Michael O’Rielly; and (iv) Nicholas Degani, Wireline Legal Advisor for Commissioner Ajit Pai.

The Fact Sheet Represents an Effective Policy Approach to ICS Regulation

Praeses expressed support for the policy positions set forth by the Commission in the Fact Sheet released on September 30, 2015. Praeses also noted that its clients generally share Praeses’ position that the inmate calling service (“ICS”) reform outlined in the Fact Sheet achieves the Commission’s goals. The Fact Sheet appears to incorporate a balanced tradeoff

1 47 C.F.R. §§ 1.1206(a)(1), (b)(1)-(2).

between substantially lower ICS rates and a Commission decision not to attempt to intervene in the manner in which Facilities contract with Providers.

As an initial matter, Praeses agrees with the Commission that lowering calling rates and restricting ancillary fees associated with ICS will continue the trend of increased inmate access to ICS that commenced with the Commission’s initial regulation of interstate ICS rates. Praeses noted that the trend of increased call volume unleashed by the 2013 ICS Order has continued over recent quarters. Specifically, Praeses reported that interstate ICS call volume at correctional facilities (“Facilities”) operated by Praeses’ clients increased nearly 70 percent and overall interstate revenue increased approximately 4 percent (excluding ancillary fees) between the April through October 2013 period (i.e., prior to the effective date of the 2013 ICS Order) and April through October 2014 period (i.e., following the effective date of the 2013 ICS Order). According to the most recent data available to Praeses, these figures have continued their upward trajectory. Interstate ICS call volume is now approximately 76 percent higher than before the effective date of the 2013 ICS Order and overall interstate ICS revenue has increased approximately 12 percent. Praeses expects that this same trend will affect intrastate ICS call volume and revenue once the Commission’s proposed new intrastate rate caps take effect, thereby substantially mitigating the loss of intrastate ICS revenue that will occur as a result of the lower intrastate ICS rates.

Further, Praeses explained that the various tiers of ICS rate caps set forth on the Fact Sheet are below Praeses’ understanding of the Facilities’ expectations. Nevertheless, based on its experience in validating calling patterns and advising Facilities on contract negotiations with ICS providers (“Providers”), Praeses believes that Providers will generally be able to provide services pursuant to these rate caps at a profit while still sharing ICS revenue with Facilities to enable, at minimum, recoupment of the Facilities’ ICS costs. In fact, since the Fact Sheet was released by the Commission, Praeses has encountered multiple instances in which Providers have responded to ICS requests for proposals (“RFPs”) from Praeses’ clients by proposing to offer ICS at or below the rate caps in the Fact Sheet while proposing market-driven revenue sharing arrangements with the Facilities.

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5 Praeses estimates that the percentage of all ICS calls that are intrastate calls has fallen several percentage points since the effective date of the 2013 ICS Order, but that intrastate ICS calls still represent over 85 percent of all ICS calls at the Facilities operated by Praeses’ clients. See id. at 6 (stating that approximately 90 percent of all ICS calls were intrastate calls as of January 2015).
Praeses also supports the Commission’s proposal to strictly limit the type of ancillary fees imposed by Providers and the dollar amount of such fees. Absent such tight regulation of ancillary fees, certain Providers may continue to increase the amount and type of ancillary fees in an effort to maximize revenues outside the currently contemplated action by the Commission.

In addition, Praeses guardedly supports the apparent clarification in the Fact Sheet regarding the legality of site commissions. It is Praeses’ understanding that the Fact Sheet clarifies that there is no regulation by the Commission of the private contractual arrangements competitively negotiated between Facilities and Providers with respect to their sharing of ICS revenue. Praeses continues to believe that the Commission can effectively drive down the actual cost of ICS to inmates and their friends and family members by establishing ICS rate caps and tight restrictions on ancillary fees and that the Commission does not need to attempt to directly regulate site commissions to do so. Further, this approach enables the Commission to avoid the profound jurisdictional challenges associated with attempting to directly regulate site commissions. It also creates an incentive for Facilities to increase inmates’ access to ICS over the long term by freeing the Facilities to use their judgment as expert agencies regarding how to recover their ICS costs and fund inmate welfare programs.

With respect to the very short 90-day transition period set forth in the Fact Sheet, Praeses stated that it believes that its Facilities clients will be able to coordinate with their Providers all back-office actions necessary to comply with the new ICS rate caps and ancillary fee restrictions within this timeframe. However, due to the sheer magnitude of the number of ICS contracts that may need to be modified to reflect these new rates and other operational matters, Praeses asserted that it is not feasible to negotiate and execute all such contracts within this time period, especially in light of the sometimes complex state and municipal procurement regulations involved. Accordingly, Praeses encouraged the Commission to allow Providers and Facilities to continue to operate under their existing agreements until at least the earlier of the expiration of such agreements and two years from the date that the actions contemplated by the Fact Sheet become effective. If the Commission nevertheless ultimately adopts this 90-day transition

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6 See Letter from Phil Marchesiello, Counsel to Praeses LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 12-375, at 3-6 (filed Sept. 9, 2015) (“Praeses Sept. 9 Letter”).

7 Praeses Comments at 40. Praeses has no objection to Andrew Lipman’s proposal for the Commission to “grandfather all existing ICS contracts that require payment of site commission so that ICS providers and correctional facilities can appropriately transition to the FCC’s new rate caps.” Letter from Andrew D. Lipman, Morgan, Lewis & Bockius LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 12-375, at 3 (filed Oct. 9, 2015). However, for the reasons previously asserted by Praeses, Praeses objects to Mr. Lipman’s alternative proposal for the Commission to adopt a Facility Administrative Support Payment. Id.; Praeses Sept. 9 Letter at 4-5.
period, Praeses’ clients expect to execute any required amendments following the transition period—and in some instances substantially after the end of the transition period.

The ICS Reform Set Forth in the Fact Sheet Does Not Constitute an Unconstitutional Taking

Praeses also responded to certain arguments that have been made in this proceeding asserting that the Commission’s ICS rate caps amount to a taking in violation of the Fifth Amendment of the U.S. Constitution unless the Commission also bans site commissions. As an initial matter, nothing in the Fact Sheet suggests in any way that the Commission intends to require Providers to pay site commissions to Facilities. To the contrary, the Fact Sheet suggests that the Commission intends not to adopt site commission regulations. Therefore, to the extent that a Provider chooses to pay a site commission to a Facility going forward, the Provider will make this choice voluntarily and in its own interest. Such intended offering by a Provider cannot conceivably amount to an unconstitutional taking merely because the Provider would have preferred to generate a higher profit level from serving a particular Facility.

Providers are for-profit companies. Consequently, a Provider presumably will not offer to pay a site commission to a Facility if such payment would prevent the Provider from realizing a profit from serving the Facilities and inmates at the newly established rate caps. Therefore, if a Facility seeks a site commission level that no Provider can afford to pay while still realizing a profit, the Facility will have to adjust its site commission expectation to secure a Provider to serve its inmates. Thus, the competitive RFP process utilized by Facilities to assign ICS contracts to Providers will both (i) ensure that Facilities do not overreach in a manner that would prevent them from securing a mutually acceptable ICS contract with a Provider, and (ii) prevent any Provider from suffering an economic loss as a result of the combination of the site commission sought by a Facility and the ICS rates applicable to that Facility under the Fact Sheet.

Moreover, the adoption by the Commission of the ICS regulatory framework also cannot constitute a taking when applied to existing ICS contracts. The Commission expressly determined in the 2013 ICS Order that lowering interstate ICS rates does not implicate a valid property interest under the Fifth Amendment, and this determination is no less true with respect to the Commission’s upcoming order in this proceeding. According to the Commission:

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9 See 2013 ICS Order, 28 FCC Rcd at 14163-65 ¶¶ 103-107. In the 2013 ICS Order, the Commission lowered intrastate ICS rates and held that Providers could not consider site commissions if called upon to defend their intrastate rates. But, as apparently will be the case in
We reject arguments that our reforms adopted herein effectuate unconstitutional takings. It is well established that the Fifth Amendment does not prohibit the government from taking lawful action that may have incidental effects on existing contracts. Although we do not concede that any incidental effects would “frustrate” the contractual expectations of ICS providers, even if that were the case, such “frustration” would not state a cognizable claim under the Fifth Amendment …. In this context, any incidental effect on providers’ contractual expectations does not constitute a valid property interest under the Fifth Amendment.10

Even if Providers held a cognizable property interest in their ICS contracts that was subject to Fifth Amendment takings jurisprudence, which the FCC previously has determined that Providers do not, ICS regulation by the Commission does not constitute a regulatory taking.11 As the Commission has recognized, the framework for evaluating regulatory takings claims is based on three factors identified by the U.S. Supreme Court: “(1) the economic impact of the government action on the property owner; (2) the degree of interference with the property owner’s investment-backed expectations; and (3) the ‘character’ of the government action.”12 An evaluation of these three factors makes clear that the ICS policies set forth in the Fact Sheet cannot constitute a regulatory taking even when applied to existing contracts between ICS Providers and Facilities.

the Commission’s upcoming ICS order, the Commission did not then prohibit the payment of site commissions by Providers. Id.

10 Id. at 14163 ¶ 103 (citations omitted).

11 The complete elimination of private contractors’ business models—the regulatory destruction of entire markets—has multiple times been held to not constitute a regulatory taking. ICS regulation by the Commission falls short of that high bar. See, e.g., Hunteigh USA Corp v. United States, 525 F.3d 1370 (Fed. Cir. 2008) (regulation eliminating private contractors’ ability to provide airport screenings not a taking); cf. Air Pegasus of D.C., Inc. v. United States, 424 F.3d 1206 (Fed. Cir. 2005) (new regulations of air traffic destroying a company’s business model not a taking).

First, no Provider has demonstrated that it will be forced to operate at a material loss under a specific, existing ICS contract. General and vague claims regarding the potential for such losses are insufficient to demonstrate that a taking has occurred. Moreover, as noted above, it is likely that there will be a substantial increase in intrastate call volume as a result of the Commission’s new regulations, which may increase intrastate ICS revenue. Further, if intrastate ICS revenue instead decreases under the new rate caps, Providers’ site commission obligations also will fall because most site commissions in existing ICS contracts are structured as a percentage of ICS revenues. Consequently, given the fixed costs and economies of scale involved with the provision of ICS, it may be the case that Providers will find that their ICS contracts remain profitable at the new ICS rates despite the continued payment of site commissions. Further, Providers are economically sophisticated and, as such, in most cases have negotiated terms in their ICS contracts that take into account the possibility that the FCC will modify permissible ICS rates. Such terms, as well as more general change of law provisions and/or force majeure provisions, may require some level of mutual renegotiation of individual ICS contracts. Any such amendments are likely to prevent any loss to a Provider that otherwise may have occurred as a result of the ICS policies set forth in the Fact Sheet. For these reasons, it ultimately is not currently possible for a Provider to determine what economic impact its continued payment of a required site commission will have under an existing contract. In addition, when addressing this first factor, the Commission previously has held that an “economic impact” caused by new regulation of a particular communications sector may be “outweighed by [the Commission’s] public interest objective[] of … protecting consumers.”

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13 *Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 524 (2002) (the Court will not consider a taking challenge to a rate setting methodology without specific evidence of a particular alleged taking); *Sinclair Broad. Group v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) (FCC’s actions did not constitute a taking where complainant did not provide evidence on which to determine that there would be significant interference with its business expectations).

14 2013 ICS Order, 28 FCC Rcd at 14164 ¶ 105 (“[T]he record supports the notion that lower rates are likely to stimulate additional call volume, enabling ICS providers to offset some of the impacts of lower rates without incurring commensurate added costs.”) (citation omitted).

15 Whether any such amendment to, or renegotiation of, a particular ICS contract is warranted necessarily will be based on the exact language of such contract and how it addresses Commission-mandated modifications to permissible ICS rates and ancillary fees. Unless the Commission expressly determines in its upcoming order in this proceeding that the Commission is implementing new site commission regulations or revising existing, legally binding policies governing site commissions, it is unlikely that any change of law or force majeure provisions will be triggered by the upcoming order’s characterization of site commissions.

Second, further regulation by the Commission of the ICS industry cannot legitimately be claimed to interfere with distinct investment-backed expectations. The instant proceeding has been active in some form for more than twelve years. All participants in the ICS industry, both Facilities and Providers, have been fully aware throughout this period that new and different ICS regulations may be adopted by the Commission. As the Commission has made clear in similar contexts, investors do not have a legitimate expectation that the Commission’s policies will not change over time, especially when they have been on notice for substantial periods, as they have been with respect to site commissions, that “any related investments had the potential to be affected by rules addressing such conduct.” As sophisticated economic actors, it was the responsibility of Providers to contractually protect themselves and their investors against foreseeable modifications of the FCC’s ICS regulatory framework and, as noted above, in many cases they have through targeted or general contractual terms in their ICS contracts.

Third, the ICS reform set forth in the Fact Sheet is intended to “help inmates and their families stay in touch by making calls more affordable, and benefit society as a whole by helping inmates transition more smoothly back into society upon their release.” This type of government action—aimed at protecting and promoting the public interest—weighs strongly in favor of a determination that any adverse effect on particular private parties does not constitute a regulatory taking. Federal agencies such as the Commission must have the right to promulgate such public interest regulations without these regulations being deemed to violate the Fifth Amendment, even when doing so may adversely affect existing contracts. To hold otherwise would functionally neuter the statutory authority granted to the Commission by Congress. It

17 2013 ICS Order, 28 FCC Rcd at 14164 ¶ 106 (“[O]ur actions do not improperly impinge upon investment-backed expectations of ICS providers. The Commission has been examining new ICS regulations for years, and various proposals – including rate caps and the elimination of compensation in ICS rates for site commissions – have been raised and debated in the record. In addition, some states have already taken action consistent with what we adopt here today. Given this background, any investment-backed expectations cannot reasonably be characterized as having been upset or impinged by our actions today.”) (citations omitted).

18 Retransmission Consent Order, 29 FCC Rcd at 3375 ¶ 38.

19 Fact Sheet at 1.


21 See, e.g., USA Corp v. United States, 525 F.3d 1370, 1380 (Fed. Cir. 2008) (“‘frustrating’ … business expectations … does not form the basis of a cognizable takings claim”); cf. Permian Basin Area Rate Cases, 390 U.S. 747, 790 (1968) (“We must reiterate that the breadth and complexity of the Commission’s responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties”).
effectively would empower private parties to restrict the authority of the FCC through private contracts that are strategically executed so as to be adversely affected by potential future FCC regulation, which would be an absurd result.

For the foregoing reasons, even if Providers were to be deemed to hold a property right in their expected ICS contract revenue stream, the ICS reform set forth in the Fact Sheet, including the Commission’s apparent determination not to regulate site commissions, nevertheless would not constitute an unconstitutional regulatory taking under the Fifth Amendment—even with respect to existing ICS contracts.

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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):

Stephanie Weiner
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