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ALABAMA PUBLIC SERVICE COMMISSION
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SECRETARY

Re: GENERIC PROCEEDING TO DETERMINE)
APPLICABILITY OF THE)
COMMUNICATIONS REFORM ACT OF 2005) DOCKET 30632
TO INMATE PHONE SERVICE)

ORDER

BY THE COMMISSION:

By Order dated November 6, 2007, under this Docket, the Commission sought comments from interested parties on the staff's conclusion that Inmate Phone Service (IPS) is not subject to regulation in accordance with the Communications Reform Act of 2005 (the Act) and remains under the full jurisdiction of the Commission.

Comments were received from Global Tel*Link Corp (Global Tel*Link), and from Pay Tel Communications, Inc. (Pay Tel). Joint comments were submitted by Evercom Systems, Inc., T-NETIX Telecommunications Services, Inc., and Southern Public Communications Association (collectively, "Inmate Service Provider Commenters" or "ISP Commenters"). Global Tel*Link and ISP Commenters concluded that the Act is applicable to IPS providers while Pay Tel concurred with the staff that IPS is not subject to the Act and should remain subject to Commission jurisdiction.

Staff opined that IPS is limited to automated, collect only, calling which includes operator surcharges. The correctional facility, with whom the IPS provider has a contract, is neither a user of

the services or a customer. The inmates are users of the facilities provided; however, inmates are not billed for the services because the calls are collect only. The recipients of inmate calls, who are billed by the IPS providers, are IPS customers. The contract with the correctional facility is essentially a location fee that allows for instrument placement. Therefore, IPS does not fall within the provisions of a "contractual agreement" with the "existing customer or potential customer" because no such agreement exists.

*Global Tel*Link asserts that IPS agreements with correctional facilities are "Contract Offerings" as such is defined by the Act. Global Tel*Link argues that in reaching the determination that the contracts between IPS providers and correctional facilities are not "contract offerings" or "contractual agreements" as contemplated by the Act, the Commission draws two erroneous conclusions.*

First, the Commission states that the correctional facility with which an IPS provider has a contract is neither a user of the services nor a customer, but is instead merely a recipient of a "location fee" that allows for placement by the IPS provider of telephone instrumentation. In fact, the correctional facility is both a user of the services and a customer. The provision of a telephone connection from inside a correctional facility to the public switched telephone network is only one piece of the service offered by IPS providers. The myriad of security features and call tracking and monitoring features are services provided to correctional facilities that aid in the detection of criminal activity and protect the health and welfare of the public.¹

The Commission also mistakenly states that inmates who use IPS, while users of the facilities, "are not really users of the service, because "inmates are not billed for the services because the calls are collect only." There are many correctional facilities that elect to have the IPS provide debit calling cards directly to inmates, who can purchase the cards at the facility's commissary, and pay for outgoing calls with their own money, as opposed to having the calls billed to the called party.²

¹ *Comments of Global Tel*Link Corporation, dated December 6, 2007, p. 3*

² *Id.*, pp. 3-4

ISP Commenters offered an illustration on the relationship that exists between the contracting party and the inmate users of the services.

These are contracts between Inmate Telephone Service Providers and local, county, state, or federal government agencies responsible for running correctional institutions. These governmental agencies determine the safety and security features and functions to be installed on the telephone system. These governmental agencies also determine where inmate phones are placed within the facility, determine when inmates are permitted to make calls, determine if inmates are restricted from calling certain numbers, have the ability to monitor inmate conversations, and control all features and services used on the Inmate Telephone System. The correctional facility is truly the retail contracting "customer" and the rates charged for Inmate Telephone Services are determined by these contracts.³

Not unlike any corporate business office that contracts for a telephone system, where an employee, visitor or other transient individual is permitted to use the system for an operator assisted call, i.e. a collect call, these individuals are not considered the "customer" nor is the party receiving the collect call considered the "customer" for the purposes of the telephone system contract. In this example the employee, transient individual, or recipient of the call may be considered users of the contracted telephone system; however, they are not the "customer" of record.

Detainees in correctional institutions are similarly situated in that they are transient individuals and are permitted to use the Inmate Telephone System contracted for by the correctional facility, but they are not the contracting customer nor is the party receiving the call the contracting customer.⁴

ISP Commenters conclude that the Act is clear in its intent that all telecommunications contract service offering fall under its provisions.

ISP Commenters believe the Alabama Communications Reform Act of 2005 is clear when it says; "**Any** retail contractual agreement, whether or not memorialized in writing, by which a local exchange or inter-exchange carrier offers **any** communications service to **any** existing customer or potential customer". (Emphasis added.) Nowhere in the Act does it carve out, or remove, telephone service contracts between Inmate Telephone Service Providers and governmental agencies running correctional institutions when defining "contract offering." Therefore, ISP Commenters respectfully disagree with Staffs interpretation that Inmate

³ Evercom Systems, Inc., T-NETIX Telecommunications Services, Inc., and Southern Public Communications Association (collectively, "Inmate Service Provider Commenters" or "ISP Commenters"), dated December 6, 2007, pp. 1-2

⁴ Id., p. 2

Phone Services do not fall within the provisions of a contract offering as defined by the Communications Reform Act of 2005.⁵

Pay Tel agrees with the Commission staff's determination, articulated in the Order, that the Communications Reform Act of 2005 does not and should not apply to IPS or IPS providers.⁶ With regard to contractual service offerings, Pay Tel asserts that the contracts between IPS providers and inmate facilities are not covered under the Act.

Pay Tel agrees with the Staff's determination that the "contract offerings" which the Act removes from the Commission's jurisdiction are not the kinds of contractual arrangements under which IPS operates. The Act divests the Commission of jurisdiction over "any new contract offering," Ala. Code § 37-2A-4(e), and defines a "contract offering" as any *retail* contractual agreement...by which a local exchange or inter-exchange carrier offers any communications service to any existing customer or potential customer." Id. § 37-2A-2(6) (emphasis added). Because IPS calling services are offered pursuant to contracts between confinement facilities and contract IPS providers – and are not "retail" contracts between the provider and a "customer" – the Commission retains jurisdiction over services provided under IPS contracts. As the Order correctly states, the correctional facility with whom the IPS provider has a contract is not a "user" or a "customer" of the services at all.⁷

The Commission takes issue with Global Tel*Link's assertion that "the correctional facility is both a user of the services and a customer." The correctional facility does not use the telecommunication services provided the inmates for their outgoing and incoming calls. The correctional facility's calling is not made over payphones, is not subject to automated collect operator surcharges and is certainly not subject to the rate schedule applicable to inmate calling. That the correctional facility uses ancillary supervisory and security features to control inmate calling is insufficient to conclude that they are "customers" of inmate calling service.

⁵ Id., p. 2

⁶ Comments of Pay Tel Communications, Inc., dated December 7, 2007, p. 1

⁷ Id., p. 4

The Commission staff argued that the parties called by inmates are really the customers of IPS because they are ultimately billed for the calls. Global Tel*Link countered with the assertion that many inmate facilities offer inmates calling cards, paid for with the inmate's own money, making them the customers of IPS. There was no substantiation provided by Global Tel*Link as to how many IPS calls are placed using calling cards issued to inmates nor any proof that the money used to purchase them comes from the inmates rather than the inmate's families. Given the relatively high cost of a 10 to 15 minute inmate call, it is difficult to conceive how inmates might have access, while incarcerated, to sufficient disposable income to afford calling cards unless those funds are provided externally.

The Commission concurs with ISP Commenters' use of the description "transient users" in defining inmates' use of its services but takes issue with the contention that inmates are similarly situated to any employee of a corporate business office, visitor to that office, or other transient individual who is permitted to use the corporate telephone system for an operator assisted call. First, those individuals used in the analogy given by ISP Commenters are not required to make an operator assisted call but have alternatives such as cellular phones and calling cards to make calls at a corporate business office. Inmates have no such options available to them. Secondly, even if the transient callers at a corporate business office do choose to make an operator assisted call, the rates will almost assuredly be much lower than those charged by IPS providers because the corporate business will make an economical, usually lowest cost selection, of the provider for their own telecommunication needs. Inmate facilities are not users of inmate services and have no incentive to choose the lowest cost provider for inmate services. When it comes to choosing an IPS provider, the inmate facility's choice may hinge on the commissions offered by the IPS provider to the inmate

facility based on inmate calling volume rather than the most economical rates for the inmates or their families.

ISP Commenters argue that the definition of "contract offering," in § 37-2A-2(6) of the Act, does not exclude contracts offered by IPS providers. However, the definition does not include all contracts offered for telecommunication services but those offered by "a local exchange or inter-exchange carrier."

(6) Contract Offering. Any retail contractual agreement, whether or not memorialized in writing, by which a *local exchange or inter-exchange carrier* offers any communications service to any existing customer or potential customer. (emphasis added)

IPS is a payphone service and the FCC determined that payphone service providers are not local exchange or inter-exchange telecommunications carriers.

We conclude that section 251(c)(4) does not require incumbent LECs to make services available for resale at wholesale rates to parties who are not "telecommunications carriers" or who are purchasing service for their own use. The wholesale pricing requirement is intended to facilitate competition on a resale basis. Further, the negotiation process established by Congress for the implementation of section 251 requires incumbent LECs to negotiate agreements, including resale agreements, with "requesting telecommunications carrier or carriers," not with end users or other entities. We further discuss the definition of "telecommunications carrier" in Section IX of the Order.

With regard to independent public payphone providers, however, we agree with the American Public Communication Council's argument that such carriers are not "telecommunications carriers" under section 3(44). We therefore also agree with the American Public Communications Council's contention that the services independent public payphone providers obtain from incumbent LECs are telecommunications services that incumbent LECs provide "at retail to subscribers who are not telecommunications carriers" and that such services should be available at wholesale rates to telecommunications carriers. Because we conclude that independent public payphone providers are not "telecommunications carriers," however, we conclude that incumbent LECs need not make available service to independent public payphone providers at wholesale rates. This is

consistent with our finding that wholesale offerings must be purchased for the purpose of resale by "telecommunications carriers."⁸

A "telecommunications carrier" is defined as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226)." A telecommunications carrier shall be treated as a common carrier under the Act "only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage." A "telecommunications service" is defined as the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." We conclude that to the extent a carrier is engaged in providing for a fee domestic or international telecommunications, directly to the public or to such classes of users as to be effectively available directly to the public, the carrier falls within the definition of "telecommunications carrier."⁹

IPS fits the definition of services provided by telecommunications aggregators, which the FCC explicitly identifies as not included in its definition of telecommunications carriers.

The term "aggregator" means any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services.¹⁰

Thus, ISP Commenters' illustration of "transient" usage to describe the service provided to inmates by IPS providers is relevant but contradicts their conclusion that IPS is subject to the Act.

The staff asserted that IPS is not a service available directly to the public. Rather, it is an exclusive arrangement offered only to correctional facilities and end users with no other alternative providers. The definition for "telecommunications services" in § 37-2A-2(19) of the Act includes the terminology "The offering of telecommunications for a fee directly to the public, or to any classes of users as to be effectively available directly to the public, regardless of the facilities used"

⁸ In the Matter of: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC 96-325, Adopted August 1, 1996, par 875-876.

⁹ Id., par 992.

¹⁰ U.S. Code, Title 47, Chapter 5, Subchapter II, Part I, § 226 (a)(2)

is verbatim the same terminology used by the FCC in its definition of telecommunications services, referenced above. The FCC's interpretation of telecommunication services is, therefore, very instructive when determining what constitutes an eligible telecommunications carrier. The FCC Order is clear that payphone service providers and, thus, IPS providers are not telecommunications carriers. According to § 226 of the U.S. Code as previously referenced, IPS providers are telecommunications "aggregators" and are excluded by the FCC from those carriers who provide telecommunications services. That IPS is not provided "for a fee directly to the public or to any classes of users as to be effectively available directly to the public" is intuitive. Pay Tel's comments indicate agreement with that position.

Pay Tel agrees with the Staffs reasoning that the lynchpins of the Act's deregulatory scheme are the "multiple competitors" and the "market-based competitive forces" at play in the residential and business telecommunications market. Moreover, Pay Tel concurs that IPS is not and cannot be among the services the Act seeks to deregulate because of the unique manner in which IPS is provided. While the Act contemplates deregulating those telecommunications services provided to consumers who have a broad array of providers to choose from, IPS simply does [sic: not] fit within this category of service. IPS is offered only to callers within confinement facilities. There are no "multiple competitors" for callers to choose from in this environment and no "market-based competitive forces" at play. Rather, because of the particular nature of the confinement facility setting, inmate callers have only one option for service. And as articulated in its stated legislative purpose, the Act was intended to loosen regulation in the context of markets where consumer options exist--not where choices are constrained as they are in confinement facilities.¹¹

Given the unique context within which IPS is provided, Pay Tel believes that continued regulation of IPS is needed and urges the Commission to retain jurisdiction over IPS.¹²

The Commission concludes that IPS contracts with inmate facilities are not covered under the definition of contract offerings in § 37-2A-2(6) of the Act. Furthermore, § 37-2A-5(a) of the Act, defines the process for election (to be regulated under the Act). Only incumbent local

¹¹ Comments of Pay Tel Communications, Inc., dated December 7, 2007, p. 3

¹² Id., p. 4

exchange carriers, local exchange carriers, or inter-exchange carriers are identified as eligible for regulation under the Act. Payphone Service providers who do not meet the definition of telecommunications carriers, thus IPS providers, are not included among those who may elect regulation under its terms. Therefore, the provisions of the Act do not apply to IPS providers and § 37-2A-11 of the Act is clear when it says that "nothing in this chapter shall...alter the jurisdiction, rights, powers, authority, or duties of the commission except as specifically provided for in this chapter."

IT IS, THEREFORE, ORDERED BY THE COMMISSION, That, the Act is not applicable Payphone Service not provided by telecommunication carriers, including IPS.

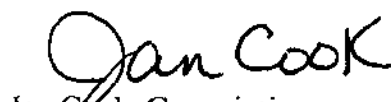
IT IS FURTHER ORDERED, That IPS providers must comply with all previous Commission Orders and Rules relative to Payphone Services and IPS.

IT IS FURTHER ORDERED, That this Order shall be effective as of the date hereof.

Done at Montgomery, Alabama, this 10th day of March, 2008.

ALABAMA PUBLIC SERVICE COMMISSION


Jim Sullivan, President


Jan Cook, Commissioner


Susan D. Parker, Commissioner

ATTEST: A True Copy


Walter L. Thomas, Jr., Secretary