

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996</b>	)	<b>CC Docket No. 96-128</b>
	)	
	)	
<b>Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues In Pending Rulemaking</b>	)	<b>DA 03-4027</b>

**COMMENT OF MICHAEL S. HAMDEN ON ALTERNATIVE  
RULEMAKING PROPOSAL REGARDING INMATE CALLING SERVICES**

Having previously appeared in this proceeding on behalf of North Carolina Prisoner Legal Services, a nonprofit inmate advocacy group, the undersigned submits these comments as a private practitioner with more than 23 years of experience representing prisoners in a variety of matters, including issues pertaining to prison pay telephones.

**I. Brief Recapitulation of the History of this Proceeding**

In 2000, Martha Wright and others filed suit in the Federal District Court for the District of Columbia raising claims that rates on long-distance calls that originated from three privately operated correctional facilities violated sections of the Constitution; the Telecommunications Act, 47 U.S.C. § 151, *et seq*; and the Sherman Anti-Trust Act, 15 U.S.C. § 1, *et seq.*, among other laws. The District Court found that the Federal Communications Commission (FCC) had the requisite expertise to address these claims; that, indeed, the Commission was then grappling with related issues [*Implementation of the Pay Telephone Reclassification and Compensation Provisions of the*

*Telecommunications Act of 1996, CC Docket No. 96-128 (DA 93-4027)]*; and that the matter would be referred to the FCC under the “primary jurisdiction” doctrine. *Wright, et al v. Corrections Corp., et al.*, 1:00-cv-00293-GK (Memorandum & Order filed 22 August 2001, DC Cir.)

In November 2003, Martha Wright and other petitioners filed their first petition for rulemaking in the FCC to seek relief from anticompetitive practices concerning collect calls placed by people incarcerated in private prisons. The petition asked the Commission to: (i) “prohibit exclusive inmate calling service agreements and collect call-only restrictions at privately-administered prisons and require such facilities to permit multiple long distance carriers to interconnect with prison telephone systems,” and (ii) “require inmate service providers to offer debit card or debit account service as an alternative to collect calling services.”<sup>1</sup> The Commission has not ruled on that petition.

On 1 March 2007, Martha Wright and other petitioners filed an alternative proposal, in which they renewed their request for the Commission to provide relief from the “exorbitant rates,” per-call charges, and poor service associated with long-distance calls from private prisons.<sup>2</sup> Petitioners requested that, if the Commission did not grant their earlier request for relief, then the Commission should, alternatively, provide relief from the costs of long-distance collect calls from prison by: (i) establishing benchmark rates for those calls (at a maximum of \$0.20 per minute for debit calling and \$0.25 per minute for collect calling, with no per-call charge, and with higher benchmarks for providers offering prisoners a specified minimum amount of calling services free of

---

<sup>1</sup> *Wright* Petition at 3-4.

<sup>2</sup> Alternative *Wright* Petition at 8.

charge), and (ii) requiring prison telephone service providers to allow debit calling from prison.<sup>3</sup>

Since March 2007, many comments have been filed, along with studies and the affidavits of industry experts. It is one of those studies that is central to this comment, and which may provide grounds for a comprehensive resolution of excessive rates for phone calls of all relevant types originating in any correctional facility.

## **II. A Growing Regulatory Problem:**

### **A. Florida**

Over the last decade, the states have been confronted by these issues with increasing frequency. For example, presently pending in Florida is an investigation of a prison phone provider believed to have prematurely disconnected calls that were purportedly detected as 3-way calls, costing consumers an estimated \$6.3 million over a four-year period. This abusive practice is alleged to have occurred at a single Florida correctional facility, the Miami-Dade County Detention Center. In addition to restitution with interest, public staff has recommended a fine in excess of \$1.25 million. "Compliance investigation of TCG Public Communications, Inc." (Docket No. 060614-TC).

### **B. Washington**

In a recent Washington State investigation, telephone service provider AT&T overcharged families \$67,295 for more than 29,000 calls placed from two correctional facilities over a period over a four month period in 2005. AT&T agreed to reimburse the families and friends of Washington prisoners in a settlement agreed on 13 December

---

<sup>3</sup> Alternative *Wright* Petition at 2.

2007. AT&T will also pay \$302,705 in fines levied by the Washington Utilities and Transportation Commission. (Docket No. UT-060962).

### **C. Maine**

Maine saw the vast profits that prison phone services generate and set up its own operation. The Department charges 30¢ per minute, an amount it admitted is far in excess of actual costs. On 23 June 2008, the Maine Public Utilities Commission determined that it has jurisdiction over the Maine Department of Corrections telephone system and planned to open rate proceedings. The decision was made official on 1 August 2008 and is presently on appeal to the State Supreme Court. *Maine v. Pierce, et al.*, ME S.Ct. Docket No. 2007-467 (20 August 2008)(Utilities Commission Docket No. PUC-08-456).

### **Alabama**

In Docket No. 30632, the Alabama Public Service Commission conducted a general proceeding to determine the applicability to inmate phone service providers of the state's Communications Reform Act of 2005. Title 37, Code of Alabama, Chapter 2A, § 37-2A-1, *et seq.* Three service providers claimed the act applied and that they were free to charge what they chose for prisoner calls. One provider acceded to the position of Public Staff that the prison phone providers are subject to regulation.

Ultimately, the Commission concluded that it retains jurisdiction over inmate phone service providers who are subject to all previously issued Orders and Rules. Order of 10 March 2008 (Docket No. 30632).

On 10 June 2008 the Alabama Public Service Commission issued an Order in Docket No. 15957 seeking comments on the Public Staff's proposed rule revisions and rates for Inmate Phone Service ("IPS"). The proposed rates for collect calls are: \$2.25 ("set-up" charge) + 50¢ per minute for local calls and \$2.25 + 30¢ per minute for toll calls. Obviously, these rates seem far in excess of actual costs and a reasonable rate of return.

### **E.1. New Mexico**

There are also two related proceedings in New Mexico. On 25 July 2007, the New Mexico Public Staff petitioned the Commission to make an inquiry into the rates charged by prison phone providers in the state. The Commission issued a Notice of Inquiry on 31 July 2007 in Case No. 07-00316-UT.

On May 13, 2008, the Commission consolidated two previous protests of proposed tariff changes (T-Netix Telecommunications Services, Inc., Case No. 08-00142-UT, and Case No. 08-00143-UT – Evercom Systems, Inc.) with Case No. 07-00316-UT described above. This inquiry will now include a review of prison phone provider costs for all rates including any fees charged to open accounts or to make payments.

Actually, three kinds of non-tariffed fees are at issue –service fees (charged to customers setting up an account for the first time), "recharge fees" (billed when a customer reopens an account), and processing fees – imposed either by a service provider or a third party business – for processing a customer's payment.

On 3 July 2008, an Order issued in Case No. 07-00316-UT (Document #1048477) that required the inmate phone service providers to: 1) file all cost information related to

all of their existing or proposed rates, charges or fees; 2) participate in a status conference will at the Commission's offices to discuss the cost data and scheduling matters; and 3) that allowed the Evercom and T-Netix processing fees to go into effect, subject to refund.

## **2. New Mexico**

On 6 December 2007, the Commission issued an Order to Show Cause against Public Communications Services, Inc., Case No. 07-00442-UT, regarding untariffed fees charged "each time the customer sets up or recharges a prepaid service account." These charges were not disclosed to or approved by the PSC.

Again, three kinds of non-tariffed fees are at issue – "recharge fees" (billed when a customer reopens an account), service fees (charged to customers setting up an account for the first time), and processing fees – imposed either by a service provider or a third party business – for processing a customer's payment.

In a 13 May 2008 order, the Commission expanded the investigation to include all prison phone providers operating in New Mexico. This is an enforcement proceeding to "investigate any instance where any ICS provider imposed a charge that is not tariffed."

## **F. North Carolina**

On 1 May 2008, the North Carolina Utilities Commission ruled in favor of providers of prisoner telephone services, allowing the companies to charge higher telephone rates to the friends and families of prisoners for local collect calls. Initially, petitioners sought waiver of a rule which limited the rates. The petition was supported by the Public Utilities Commission Staff with a recommendation that instead of waiver, the rule should be modified pending publication and an opportunity for public comment. Unsuccessfully challenging the waiver request, the increased rates, and the proposed rule

as revised by Public Staff, was North Carolina Prisoner Legal Services, a nonprofit organization that provides legal advice and assistance to prisoners.

As in other cases, higher rates for prisoner-initiated telephone calls in North Carolina are driven by “commissions” paid to correctional facilities or agencies in exchange for the right to provide exclusive telephone services, thus creating a monopoly. This practice, conveys an appearance of impropriety and will bring the corrections profession into disrepute as the matter gains greater public attention.

### **G. Other States**

Meanwhile, other states have made serious efforts to put a stop to the abuses. For instance, in Missouri, New York, and Michigan have significantly reduced prison telephone rates and commissions. And in one state, Nebraska, correctional officials have simply refused to accept any commission, preferring instead to chose prison phone services on the basis of quality of service, responsiveness, and other such ordinary consumer concerns.

### **III. State Utility Commissions are Unable to Regulate A Nationwide Industry**

This patchwork of widely varying regulation demonstrates that a national framework is sorely needed. Lacking authority to act beyond its borders, state utilities commissions are simply unable to reign-in the abuses of the prison telephone industry. These commissions would greatly benefit from oversight of the industry by, and guidance from the Federal Communications Commission.<sup>4</sup>

---

<sup>4</sup> In 2006, the National of State Utility Consumer Advocates (NACUSA) adopted the following resolution:

[R]esolved that NASUCA urges states, the Federal Communications Commission and the U.S. Congress under their proper jurisdictions to take action to reform inmate telephone rates by:

1. Ensuring that the price of calls from inmates are just and reasonable, and

### **A. The Wood Report**

A report was prepared using the FCC’s “marginal location analysis,” which is designed to “cover costs and provide a reasonable return at a break-even location with no commission.” Don J. Wood, Inmate Calling Services – Interstate Call Cost Study (filed 15 August 2008)(hereafter, *Wood Report*). (A 2002 ruling of the FCC prohibited the use of commissions as an element of costs. Order on Remand & Notice of Proposed Rulemaking, FCC 02-39, ¶ 15, p. 8, and ¶ 38, p. 15 (CC Docket No. 96-128, 21 February 2002). Rather, commissions are negotiable allocations of profits between the correctional facility (or “site locations”) and the prison phone service provider. *Id. See also*, Second Report & Order, FCC 97-371 (CC Docket No. 96-128, 9 October 1999); and Third Report & Order, FCC 99-7, ¶ 156 (CC Docket No. 96-128, 4 February 1999).

### **B. A COMPARISON: *Wright* Alternative Petition Proposed Rates with Prisoner Phone Industry Cost Study Rates**

The “benchmark rates” proposed by the *Wright* Alternative Petition (20¢/minute for debit-card calls and 25¢/minute for collect calls, with no per call/fixed cost charge) are listed first in each category of the following chart.

The *Wood Report* “Cost Study Rates,” filed on behalf of certain members of the prisoner phone service industry on 15 August 2008 appear as the second listing under each category below.

- 
2. Discouraging or reducing “commissions” paid by telephone companies to correctional institutions, and
  3. Encouraging the use of prepaid debit accounts for inmates whereby inmates or their called parties may buy low-cost minutes, and
  4. Continuing to allow collect calls from inmates but at rates that are just and reasonable . . .



In the chart that follows, costs for calls of various durations are compared using the *Wright* “benchmark” proposal and the *Wood Report* cost determination.

**Chart 1\***

<u>Type of Call</u>	<u>Fixed Cost</u>	<u>Per Minute</u>	<u>10 Minutes</u>	<u>15 Minutes</u>	<u>20 Minutes</u>
<i>Wright</i> Collect Rate		\$.25	\$2.50	\$3.75	\$5.00*
IPS Collect Call*	\$2.49 +	\$.07 =	\$3.19	\$3.54	\$3.89**
<i>Wright</i> Debit Rate		\$.20	\$2.00	\$3.00	\$4.00*
IPS Debit Call*	\$1.56 +	\$.06 =	\$2.16	\$2.46	\$2.76**

**OTHER RELEVANT DATA**

Current Prisoner Phone Service Rates

**Inter-State Collect Call Rates**

<u>Inter-State Call</u>	<u>Surcharge</u>	<u>Per Minute</u>	<u>10 Minutes</u>	<u>15 Minutes</u>	<u>20 Minutes</u>
Evercom Systems Inc. 4/1/08 Tariff *	\$3.95	\$.89	\$12.85	\$17.30	\$21.75

\*The inter-state rates charged by Evercom Systems, Inc., are believed to be representative of the rates charged by the Prison Telephone Service Industry.

Current Prisoner Phone Service Tariffed Rates

**50 State Average Intra-lata Collect Call Rates**

	<u>10 Minutes</u>	<u>15 Minutes</u>	<u>20 Minutes</u>
<b>Intra-lata call:</b> Long distance calls inside the state, near the local calling area	\$5.42	\$6.71	\$8.00

Current Prisoner Phone Service Tariffed Rates

**50 State Average Inter-lata Collect Call Rates**

	<u>10 Minutes</u>	<u>15 Minutes</u>	<u>20 Minutes</u>
<b>Inter-lata call:</b> Long distance calls inside the state, further from the local calling area	\$8.64	\$11.14	\$13.68

Current Prisoner Phone Service Tariffed Rates  
**50 State Average Local Collect Call Rates Intra-State**

	<u>10 Minutes</u>	<u>15 Minutes</u>	<u>20 Minutes</u>
<b>Local call</b>	\$2.92	\$3.01	\$3.10

**Notes Regarding Chart 1**

\*The *Wright* Petitioners' proposed rates of \$.20/minute and \$.25/minute based on the comparative costs of 20 minute calls in particular prisons and prison systems. *Wright Alternative Rulemaking Proposal*, pp. 20 – 22. None the less, costs for 10, 15 and 20 minute calls have been calculated using the *Wright* Petitioners' proposed rates. Beginning with calls of about 14 minutes, the *Wright* Petitioners' proposed rates begin to exceed those proposed in the *Wood Study*.

\*\*It should be noted that the figures that appear in the IPS rates represent the lower of two cost calculations made by Mr. Don Wood, an industry expert retained by six of the eight payphone providers involved in the *Wright Proceeding*.

**IV. General Conclusion**

The rates shown above are **well below the current long distance rates** that are being charged for prisoner phone calls in every state in the nation. In other words, six prisoner telephone service providers have submitted documentation to the FCC that they can provide services at lower costs than they are charging at present, and for calls of about 14 minutes or more in duration, at lower rates than the *Wright* Petitioners have demanded.

To put it differently, the *Wood Study* demonstrates that rates very near those proposed by the *Wright* Petitioners provide fair compensation while eliminating commissions and substantially reducing over-all expenses to the people bearing the cost of prisoner-initiated phone calls. (In some situations, the *Wood Report* figures result in

slightly higher rates; in other cases, the rates would be lower. Calls of about 14 minutes or more would be less costly under the rates proposed in the *Wood Report*.)

In short, it seems ***there is some common ground upon which it may be possible to forge a comprehensive resolution to this intractable injustice*** which may meet with the satisfaction of many of the interested parties.

## V. Jurisdiction

It is clear that the FCC has plenary authority and the jurisdiction to impose regulations that address the interests of all the parties to this dispute in a way that serves the public interest. Section 276 of the 1996 Telecom Act requires the FCC “to ensure that all payphone service providers (including inmate phone service providers) are fairly compensated for each and every completed intrastate and interstate call . . .” The scope of the Commission’s authority should be broadly construed. 47 U.S.C. § 151. *See also, e.g.,* 47 U.S.C. § 154(i)(Commission authorized to issue such orders, promulgate such regulations, and take such actions as necessary to effectuate purposes of Act). *Accord,* 47 U.S.C. § 303(r); 47 U.S.C. § 201(b)(regulation in public interest). *See also, e.g., In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets,* Report and Order, FCC 08-87, ¶ 15 & n.48 (Mar. 21, 2008)(authority to regulate contractual arrangements between common carriers and other entities not ordinarily subject to FCC regulation); *Cable & Wireless P.L.C. v. FCC,* 166 F.3d 1224 (D.C. Cir. 1999)(Commission’s authority not limited by “extra-jurisdictional” effects of an otherwise proper exercise of regulatory authority); and *FCC v. Midwest Video Corp.,* 440 U.S. 689, 706 (1979)(regulation to achieve purpose of the Act is within the power of the Commission).

## **VI. Proposal**

The FCC must establish a comprehensive, fair rate for all intra-state and interstate prisoner telephone calls that covers legitimate costs and provides a reasonable rate of return to prison phone providers.

### **A. A comprehensive approach is required.**

As the Commission previously intimated, the “benchmark” must be comprehensive - “[T]he record in this proceeding strongly suggests that any solution to the problem of high rates for inmates must embrace the states.” Order on Remand at ¶ 29. To achieve workable benchmark rates that are “fair and reasonable,” and which fairly compensate the prison service provider for “each and every call” the benchmark must apply (with such adjustments as may be necessary and appropriate) to both interstate and intrastate calls. New technologies and practices (*e.g.*, “slamming” and “arbitraging” render any formulae to address one, but not the other, untenable from the outset.)

### **B. Commissions must be eliminated.**

Commissions are not a part of legitimate costs but rather a profit sharing arrangement agreed by the prison phone service provider and the facility or system through contract. It is commissions that lay at the heart of spiraling costs for prisoner-initiated phone calls because, in order to compete successfully, a provider must offer higher commissions than its competitors. Thus, if Company A is awarded the contract on a promise to pay X% of profit in commissions, bidding on the next contract will require Company B to offer X + Y% of profit in order to entice the facility or system to award the contract to Company B. While this practice may encourage the various prison phone providers to keep costs to a minimum so savings can be diverted to commissions, none of

these savings are passed on to consumers. The effect is to set in place a system that ensures that no calls can be connected for “fair and reasonable costs to the consumers.” Instead of weighing the relative merits of a contract proposal on the basis of quality of services offered and the responsiveness of a prison phone company to customers, the decision almost always turns on the potential revenue a contract may generate.

Under the existing regime, the only other conceivable basis for competition is security and other features offered by the various competitors, which may be understood as a component of “quality of services.”

**C. The FCC must close potential loopholes.**

In eliminating commissions, the FCC must close the door to mechanisms that would allow service providers to increase service fees that unfairly and unjustifiably increase the price of prisoner phone calls.

Examples of workarounds that can sustain the already excessive cost of prisoner-initiated phone calls include practices of “billing companies,” often wholly owned subsidiaries of the prison phone providers or their corporate parent. These billing companies may charge a fee for a customer to establish a pre-paid account; charge again to process a customer’s payment, and confiscate sums left in an account which has been inactive for a period of time. These “tack-on” charges dramatically increase the cost of communicating with incarcerated loved ones, but they do not appear as a part of the per-minute charge reflected on a telephone bill. Such charges should be subsumed within the determination of actual costs per call and otherwise prohibited.

**D. Prison phone providers must continue to be viable businesses.**

The FCC must exercise its authority to establish a fair rate to ensure the financial viability of prisoner pay phone providers. It is clear that there can be no telephone service for prisoners and their families if there are no businesses that provide such services. Businesses operate to generate profit, and viability in this context means that in exchange for the provision of valuable telephone services, we should expect a responsible business to generate a reasonable profit. The *Wood Report* sets forth specific information and rates which ensure such an outcome.

**E. The Commission should require debit calling and other calling options consistent with sound correctional practices and security concerns, including pre-paid, debit, and collect calls.**

Correctional facilities of all kinds must first protect the safety of the community, those who work in the facility, and those who are in custody. So, with legitimate security concerns in mind, every facility should provide the broadest possible range of calling options, both to encourage downward pressure on rates, and to encourage incarcerated people to maintain contact with loved ones and their communities. (The *Wood Report* also analyzed the cost of debit calls.)

Once a fair rate is established, the FCC should defer to state utilities commissions to address a purported need for cost increases that arise from the provision of service in a particular state.

As cost structures may vary in some limited circumstances, prisoner telephone service providers should be afforded the opportunity to petition a particular state public utilities commission to request a rate adjustment.

In such a case, any deviation from the FCC-established rate would have to be justified with complete, specific cost information that supports the request. For instance, if costs are higher in a particular state, the service provider would have a mechanism to seek an appropriate rate-adjustment so telephone services will be available to prisoners. Consumers, their representatives, prisoner advocates, and other interested parties would have an opportunity to assess and oppose the proposed rate deviation. If the supporting documentation were deficient or unpersuasive, the utilities commission can be expected to deny the requested rate.

**F. Other affected interests, though their concerns be genuine, are not relevant to this proceeding.**

This proposal has addressed the interests of consumers who wish to communicate with incarcerated loved ones, with the prison phone service providers that make those communications possible, and with the impact of this approach on state utilities commissions. The concerns of one important group will be addressed here.

Correctional professionals and others have long encouraged reasonable rates and the broadest possible range of calling options (in light of legitimate security concerns) for prisoner telephone services.<sup>5</sup> Some of these organizations have filed comments in opposition to the *Wright* benchmarks without commenting on the Wood Report or its implications. Should the *Wright* benchmarks be adopted, these comments assert two general concerns: the loss of revenue to the facilities will negatively impact programs and services; and security will be compromised. Presumably, these concerns would not be

---

<sup>5</sup> See, e.g., American Correctional Association Public Correctional Policy on Inmate/Juvenile Offender Access to Telephone (24 January 2001); American Correctional Association Standard Governing Correctional Telephone Services (August 2002); National Sheriffs' Association Resolution, final ¶ (14 June 1995); American Bar Association Policy Regarding Prison and Jail Inmate Telephone Services (August 2005); and the National Association of State Utility Consumer Advocates Resolution 2006-02, "Fair Rates for Calls from Inmates of Correctional Institutions."

ameliorated by adoption of the *Wood Report* or this proposal. These objections will be addressed in the following paragraphs.

**G. Revenue derived from prison telephone contracts is generated from the imposition of a hidden and unjust tax upon vulnerable people to benefit the public and should be disallowed as a matter of principle.**

It is not clear what percentage of revenue derived from prison phone contracts is dedicated to prison programs and services. Some anecdotal estimates put the number at well below 30%. Ordinarily, the revenue generated from such contracts is deposited into the coffers of the governing body to be used for the benefit of the public, generally. Recall that the state of Maine has implemented its own prison telephone service, charging rates two or three times above actual cost in order to generate revenue.

But even those correctional facilities and systems that use the proceeds of prison telephone contracts in whole or in part to benefit prisoners do so at the expense of the prisoners' families. Moreover, as prisoners are in custody of the government for the supposed good of society, the cost of their care should be borne by the public. *See, e.g., Spicer v. Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926) (“[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.”) Thus, to seek to recover fees for the administration of services and programs, including the maintenance and operation of a prison telephone system, is to impose an unjust tax upon people who are often themselves impoverished and who have little political influence, the families of prisoners.

Furthermore, it is unseemly and of dubious ethical propriety for the custodians of a literally captive group to prey upon emotional connections with loved ones – husbands and wives, or parents and children – merely to derive profit. Such a practice is certain to



bring the profession into disrepute and erode the public's largely justifiable confidence in the honorable people who commit themselves to public service as correctional officers and officials.

So, to the extent that comparatively few facilities may lose some revenue derived in an unscrupulous way simply is not a legitimate concern for the Commission in these proceedings.

**H. Telephone privileges for prisoners are premised upon sound correctional policies regarding security and are permitted only to the extent that such concerns are met.**

The second general category of concern from correctional professionals rests on security concerns, some of which are deserve consideration. But let's first clear out the underbrush of thorny arguments that obscure serious concerns.

The idea that the abrogation of commissions would have an adverse effect on the development of security devices and measures simply misperceives the components of legitimate cost and the fundamentals of competition among prison phone service providers. Research and development are legitimate costs of a great many industries, and telecommunications is no exception. For correctional professionals, safety and security are primary concerns. Because security concerns must be satisfied as a prerequisite to the operation of a correctional telephone system, it is, and will continue to be a priority of every service provider to satisfy those concerns. After all, one cannot even begin to vie for business if the system offered is unsecure or fails to meet the stated needs of correctional professionals.

Indeed, competition to develop ever more effective and efficient security measures will provide an important basis for competition among providers (rather than how much money the provider can offer through commissions).

Neither is the elimination of commissions likely to have any appreciable impact upon the number of phones available at any correctional facility. There are two important reasons that is so: (1) telephones are used as a control mechanism to reward good behavior and to discourage rule violations; and (2) correctional professionals have long recognized that the maintenance of family ties significantly increases the chance of a prisoner to successfully transition back into the community.<sup>6</sup>

Finally, we come to a very real security concern, sometimes referred to as “arbitrage.”

**I. Fraud can best be reduced, and security can best be enhanced by adopting a comprehensive approach to rate-setting in the prison phone context.**

Should the FCC chose to dispose of the *Wright* proceedings on narrow grounds, rates will have been set for long-distance calls that originate from either of three privately operated prison facilities. In that event, consumers could easily circumvent the higher rates of intra-lata and local calls, and nothing will have been accomplished to resolve these problems in a definitive way, despite more than a decade of deliberation.

This practice of “arbitraging” is already developing as a consequence of ridiculously high prison phone rates. As understood by the undersigned, one purchases a wireless phone at the local Wal-Mart, for instance. Such a phones costs about \$18.00.

---

<sup>6</sup> See, e.g., U.S. Department of Justice, Office of the Inspector General, *Criminal Calls: A Review of the Bureau of Prisons' Management of Inmate Telephone Privileges*, Ch. II, n.6 (Aug. 1999), available at <http://www.usdoj.gov/oig/special/9908/callsp2.htm> (last accessed 30 January 2005) (“telephone usage and other contacts with family contribute to inmate morale, better staff-inmate interactions, and more connection to the community, which in turn has made them less likely to return to prison...”) and State of Louisiana Department of Public Safety and Corrections, *Time in Prison: The Adult Institutions*, p. 5 (2004).

One then purchases calling cards with minutes that cost as little as 10¢ each. When one calls to “set-up” the account, one simply provides the zip code for the locale where one’s incarcerated loved one is held. Subsequent calls are billed as local. Obviously, this practice could be arranged in whatever manner is most advantageous to the consumer.<sup>7</sup> *See also*, Ex Parte Letter Filing of 24 August 2007, Alliance for Telecommunications Industry Solutions (“ATIS”) Telecommunications Fraud Prevention Committee.

This practice creates two problems that are immediately apparent. First, correctional authorities have no means by which to track the call to prevent fraud, threats, the conduct of illegal businesses, or other such conduct. Second, prison phone service providers are not fairly compensated for the call; indeed, they may receive no compensation whatever if a billing arrangement has not been agreed with the out-of-state carrier.

This legitimate and very real concern can be remedied only through a comprehensive approach to rate-setting for prisoner-initiated calls of all types (including interstate and intrastate) and from all kinds of correctional facilities (either privately or governmentally operated). And, short of removing all phones from the premises of correctional facilities, only in this way can the legitimate concerns of correctional professionals be addressed.

#### **ULTIMATE CONCLUSION & PROPOSED RESOLUTION**

For about 15 years, the prison phone service industry has been permitted to exploit the friends and families of prisoners shamelessly, despite the best efforts of state utilities commissions and notwithstanding reasoned, incremental efforts by the FCC.

---

<sup>7</sup> This information is widely disseminated on the internet and is readily accessible on prison “talk boards,” list serves, and the like.

These regulatory measures have proven to be ineffectual in curbing the abuses of an industry driven by a desire for windfall profits that has been prodded by the need to offer ever higher commissions.

Perennially underfunded correctional operations have impelled correctional professionals to seek ways to fulfill their legal and constitutional obligations. Thus have they been drawn into a Faustian bargain in which their integrity and professionalism is brought into question by a growing dependence on profits generated by prison telephone services. The cost of these services have unjustly fallen upon the shoulders of a vulnerable and politically powerless group who too often are given no choice but to pay extortionate phone rates or forego conversations with loved ones who are incarcerated.

The time for remedial action is long overdue. The Federal Communication Commission should immediately act to:

- (1) No matter whether originating in a private or a governmentally operated correctional facility, establish a fair rate for *all* intra-state and inter-state prisoner telephone calls by eliminating commissions while allowing legitimate costs and providing a reasonable rate of return for service providers.
- (2) Foreclose all opportunities to circumvent the elimination of commissions by ensuring that third party payment fees are passed through to families at cost with no mark-up or profit for prison phone service providers.
- (3) Require debit calling and other calling options consistent with sound correctional practices and security concerns, including pre-paid, debit, and collect calls; and

(4) Defer to state utilities commissions to address a purported need for cost increases that arise from the provision of service in a particular state.

Respectfully submitted this 29 day of October, 2008.

---

Michael S. Hamden  
NC State Bar #12752  
1612 Homestead Road  
Chapel Hill, NC 27516  
(919) 605 - 2622  
[Michael.Hamden@HamdenConsulting.com](mailto:Michael.Hamden@HamdenConsulting.com)

#### **CERTIFICATE OF SERVICE**

I, Michael S. Hamden, hereby certify that a copy of the foregoing *COMMENT OF MICHAEL S. HAMDEN ON ALTERNATIVE RULEMAKING PROPOSAL REGARDING INMATE CALLING SERVICES*, has been served by placing the document into an envelope, first-class postage pre-paid, and depositing the envelope into a receptacle for delivery by the United States Postal Service, and addressed as follows:

[Remainder of page left blank intentionally.]

Pamela Arluk  
Acting Assistant Division Chief  
Pricing Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554  
Pam.Arluk@fcc.gov

Best Copy and Printing, Inc.  
Portals II  
445 12<sup>th</sup> Street, S.W., Room CY-B402  
Washington, D.C. 20554  
FCC@BCPIWEB.COM

Lynne Hewitt Engledow  
Pricing Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554  
Lynne.Engledow@fcc.gov

Larry Fenster  
Kecia Boney Lewis  
WORLDCOM, Inc. d/b/a MCI  
1133 19<sup>th</sup> Street, N.W.  
Washington, D.C. 20036

Andrew D. Lipman  
Kathy L. Cooper  
Kathleen G. Ramsey  
Swidler Berlin, LLP  
3000 K Street, N.W., Suite 300  
Washington D.C. 20007

Counsel to the Association of Private  
Correctional and Treatment Organizations

Aaron M. Panner  
Kellogg, Huber, Hansen, Todd & Evans, PLLC  
1615 M Street, N.W., Suite 400  
Washington, D.C. 20036

Counsel to the RBOC Payphone Coalition

David C. Bergmann, Chair  
NASUCA Telecommunications Committee  
Assistant Consumers' Counsel  
Ohio Consumers' Counsel  
12 West Broad Street, Suite 1800  
Columbus, OH 43215-3285

Roderic V.O. Boggs, Executive Director  
Washington Lawyers Committee for Civil  
Rights and Urban Affairs  
11 Dupont Circle, N.W., Suite 400  
Washington, D.C. 20036

Stephen A. Young, Legal Counsel  
Ohio Dept. of Rehabilitation and Correction  
1050 Freeway Drive North, Suite 207  
Columbus, OH 43229

Paul C. Besozzi  
Paggon Boggs LLP  
2550 M. Street, N.W.  
Washington, D.C. 20037

Counsel to Evercom Systems, Inc.

Glenn B. Manishin  
Stephanie A. Joyce  
Kelley Drye & Warren LLP  
1200 19<sup>th</sup> Street, N.W., Suite 500  
Washington, D.C. 20036

Counsel to T-Netix, Inc.

Albert Lewis  
Acting Division Chief  
Pricing Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554  
Albert.Lewis@fcc.gov

Douglas Galbi  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554  
[Douglas.Galbi@fcc.gov](mailto:Douglas.Galbi@fcc.gov)

Mark D. Schneider  
Anita L. Wallgren  
Sidley Austin Brown & Wood, LLP  
1501 K Street, N.W.

Counsel to Corrections Corp. of America, Inc.

Anthony J. Annucci  
Deputy Commissioner and Counsel  
Dept. of NY Correctional Services  
1220 Washington Ave.  
Building 2, Harriman State Campus  
Albany, NY 12226-2050

Lawrence J. Lafaro  
Stephen C. Garavito  
Martha Lewis Marcus  
AT & T Corporation  
One AT & T Way  
Bedminster, NJ 07921

Laura K. Abel  
Patricia Allard  
Kirsten D. Levingston  
Kele Williams  
Brennan Center for Justice, NYU School of Law  
161 Avenue of the Americas, 12<sup>th</sup> Floor  
New York, NY 10013

Elizabeth Alexander, Director  
National Prison Project – ACLU  
915 15th Street, NW  
Seventh Floor  
Washington, DC 20005

Charles Sullivan, Executive Director  
Kay Perry, Chairperson  
Citizens United for Rehabilitation of Errants  
Post Office Box 2310  
Washington, D.C. 20013

Stephen J. Ingley, Executive Director  
American Jail Association  
1135 Professional Court  
Hagerstown, MD 21740

Deborah M. Golden  
Staff Attorney  
D.C. Prisoners' Project  
Washington Lawyers' Committee for  
Civil Rights and Urban Affairs  
11 Dupont Circle, Suite 400  
Washington, D.C. 20036

Stephen G. Seliger  
Laurie S. Elkin  
Seliger & Elkin, Ltd. #500  
155 North Michigan Avenue  
Chicago, IL 60601

Barbara J. Olshanksy  
Center for Constitutional Rights  
666 Broadway, 7<sup>th</sup> Floor  
New York, NY 10012

Doane F. Kiechel  
Frank W. Krogh  
Jennifer L. Kostyu  
Morrison & Foerster, LLP  
2000 Pennsylvania Avenue, N.W.  
Suite 5500  
Washington, D.C. 20006

Attorneys for Petitioners *Martha Wright, et al.*

**So Certified:**

---

Michael S. Hamden