

of choice. In particular, Congress voiced objection to the treatment of travelers at airports, hotels and other transient locations who placed calling card calls without advance notice as to the identity or rates of the carrier serving the phones.<sup>6</sup>

These purposes are not implicated by restrictions placed on inmate telephone service by prison administrators. Inmates are not the general public or travelers stopping briefly in a public location, and thus are not subject to the concern that they may become victims of abusive and confusing tactics if unable to choose their "home" carrier. Indeed, the underlying theme of the legislation is that travelers should be able to access the same carrier to which their home or business phone is presubscribed, a concern not applicable to correctional institution prisoners. Furthermore, although correctional agencies may receive compensation from Gateway and other telephone services firms, their interest in "blocking" access is not to maximize their commercial profits, but rather (as discussed below) to control prisoner behavior and prevent fraud. These sorts of objectives are manifestly in the public interest, and there is ab-

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<sup>6</sup> See, e.g., Senate Rep. at 3 n.7 (all airport phones often presubscribed); House Rep. at 4 (Blocking "is an even more serious problem at isolated or restricted locations such as airports or hospitals, where all the telephone equipment is presubscribed to one OSP"); Cong. Rec. S14307 (Oct. 1, 1990) (Sen. Breaux) (Concerned with users "at a hotel or motel, on the side of a country road or major highway, in a hospital, airport, train or bus depot, at a high school or university"); Cong. Rec. H5869 (Sept. 25, 1989) (Rep. Wise) (Consumers in hotels, hospitals or airports should "have a right to request your ordinary operator, whatever that company might be").

solutely no indication that Congress intended to prohibit their achievement.<sup>7</sup>

Analysis of settled law and practice respecting prisoner access to telephone services also confirms the conclusion that Congress likely did not intend to subject correctional institutions, or their serving carriers, to federal regulation. First, it has been customary in the telephone industry for several years -- even prior to the advent of operator services competition -- to restrict the availability of certain types of interstate services at prison payphones. Indeed, a set of ANI II information digits ("07") has been designated within the Feature Group D access protocol to signify prison payphones and similar locations at which some billing arrangements are restricted in order to diminish the risk of fraud.<sup>8</sup> There is no suggestion that Congress desired to alter these customary practices.

Second, contemporaneous actions by federal executive agencies indicate that they do not construe the AOS Act to re-

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<sup>7</sup> For these same reasons, several state regulatory commissions have already recognized that firms serving correctional institutions should not be required to adhere to the strict rules applicable to operator services providers in general. Gateway has been granted waivers of the AOS rules in Washington and New Mexico. Texas has exempted "confinement facilities" from most of the operator services rules, including the posting, non-blocking and LEC operator access requirements, and Georgia recently proposed rules that would require carriers serving prisons to block services and numbers that "may jeopardize the integrity and security of the institution and the safety of the public." (Proposed GPUC Rule 515-12-1-.30(19)).

<sup>8</sup> See Bellcore, Notes on the BOC IntraLATA Networks, Section 12.53 (April 1986).

quire operator services firms serving inmate populations to unblock alternative carrier access or to prohibit collect-only prisoner telephone usage policies. In November 1990 -- well after the President had signed the AOS Act -- the Justice Department's Federal Bureau of Prisons issued an RFP for purchase of telephone equipment and services. Under the RFP, contractors are required to provide services "to the inmate population on a controlled basis," and all inmate calls must be routed "with circuit instructions to allow collect calls only." Furthermore, the RFP specifically instructs that service providers must be "capable of creating a pool of numbers that may be restricted to all accounts (to include 1-800, 1-900, 1-976, etc.)."<sup>9</sup> Thus, the nation's largest prison administrator certainly does not believe that the AOS Act constrains its ability to apply restrictions to inmate telephone usage.

Third, courts have for years reviewed and approved a wide variety of restrictions on prisoner telephone privileges. This stems from the courts' general and long-standing reluctance to interfere with matters of internal prison administration, including such issues as menus, mail and visitation procedures, as well as telephone privileges.<sup>10</sup> Inmate telephone usage may be limited

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<sup>9</sup> See Bureau of Prisons Solicitation No. 100-527-0 for Inmate Telephone Systems, Sections C.2.3.6.g, C.2.3.6.k (Nov. 2, 1990).

<sup>10</sup> Since incarceration necessarily entails limitation or withdrawal of many individual rights, courts have concluded that the formulation of inmate telephone service policies is subject to a correctional institution's discretion. Jeffries v. Reid, 631 F. Supp. 1212 (E.D. Wash. 1986). Prisoners have no right to unlimited telephone use. Lopez v. Reyes, 692 F.2d 15 (5th Cir. 1982).

so long as reasonable and effective means of communication remain available, i.e., where the limitation is rational in the face of the legitimate security interests of penal institutions. Pell v. Procunier, 417 U.S. 817 (1974); Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978); Benzel v. Grammer, 869 F.2d 1105 (8th Cir.), cert. denied, 110 S. Ct. 244 (1989). Applying this standard, courts have permitted limitations on the number and length of inmate phone calls, routine monitoring of prisoner telephone conversations, prior sign-up requirements, rules necessitating written authorization for calls to attorneys and, as in the case of Gateway, restrictions of prisoner telephone use to collect calls.

The clearest example of the judicial approach to restrictions on inmate telephone privileges is Wooden v. Norris, 637 F. Supp. 543 (M.D. Tenn. 1986), in which the district court ruled that the installation of coinless, collect-only telephone equipment for state and federal prison inmates was a permissible exercise of correctional institution discretion.

[T]he Court concludes that the justification offered by the administration for installation of the coinless telephone system is compelling. The coin-operated telephone system in existence at the prison prior to 1979 led to fraudulent billing, vandalism, and inmate calls to victims of their crimes. In addition, introduction of free-world money to operate these phones led to illicit trade and activities among prisoners. Although . . . the prison could have implemented less restrictive alternatives to combat these problems . . . the federal courts should not delve into the day-to-day resolution of 'complex and intractable' prison problems which are peculiarly within the province of the legislative and executive branches of government. Id. at 555 (citations omitted).

Thus, there is no question but that restricting inmate telephone usage to collect-only calls is within the powers open to prison administrators. Of course, Congress is presumed to know the state of the law when it acts, and similarly is presumed not to intend to change settled law without some express indication to that effect. Since no such intention to change the law respecting prisoner telephone options appears in the Act's language or its legislative history,<sup>11</sup> there is little basis on which to conclude that Congress desired to preclude blocking of inmate access to non-collect calls or to subject firms serving correctional institutions to the myriad requirements imposed under the Act.

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<sup>11</sup> Attributing such a purpose to Congress could also be problematic constitutionally. Most prison systems are run by state governments, which are accorded substantial independence under the principles of federalism basic to American constitutional government. The courts have recognized that prison administration is of acute interest to the states, Meachum v. Fano, 427 U.S. 215 (1976), and involves sensitive areas of state social policy, Manney v. Cabell, 654 F.2d 1280 (9th Cir. 1980), cert. denied, 455 U.S. 1000 (1982). Under the constitutional doctrine of "intergovernmental immunities," a state's ability to structure integral operations in areas of traditional governmental functions has generally been immune from federal regulation or restriction. EEOC v. Wyoming, 460 U.S. 226 (1983); United Transp. Union v. Long Island RR, 455 U.S. 678 (1982); National League of Cities v. Usery, 426 U.S. 833 (1976). Although the current validity and scope of the intergovernmental immunities doctrine is unsettled, see Garcia v. San Antonio Metro. Trans. Auth., 469 U.S. 528 (1985) (overruling National League of Cities), it is clear that the Constitution places some limits on congressional regulation of the states, as states, in matters that affect aspects of state sovereignty. Prison administration certainly appears to be such an area of classic state governmental responsibility, and thus if the AOS Act were intended to apply to state correctional institutions, it could face serious constitutional challenge.

**II. The Commission Should Exercise Its Authority Under Section 226(g) of the Act to Protect Correctional Institutions from Exposure to Fraud**

Section 226(g) of the Act provides that "[i]n any proceeding to carry out the provisions of this section, the Commission shall require such actions or measures as are necessary to ensure that aggregators are not exposed to undue risk of fraud." As explained in the Senate Report, this section mandates that the FCC "undertake a comprehensive examination of all the problems with fraud and all potential solutions to those problems," and "adopt measures to ensure that aggregators are adequately protected against fraud." Senate Rep. at 21. These fraud protections will necessarily "require the cooperation of telephone companies and interstate interexchange carriers." House Rep. at 12.

The Further Notice does not specifically request comment on what steps the Commission should take pursuant to Section 226(g). Gateway submits that, in light of the clear directive of the Act, the Commission should determine in this rulemaking that an exception to (or waiver of) the Act's requirements is warranted for firms serving correctional institutions, in order to prevent exposing prisons to an undue risk of fraud for inmate-only telephone services.<sup>12</sup> Given the traditional deference paid

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<sup>12</sup> Blocking of access to non-collect services and other carriers helps prevent prisons from being subject to fraudulent billing for calls improperly billed to the phones, but in addition allows prison administrators to implement policies wholly consistent with the Act. For example, Gateway frequently blocks access to local exchange operators in order to eliminate harassment of

to correctional institution internal administration, as well as the blatant inconsistency between the Act's mandatory aggregator requirements and the public interest purposes of restricted inmate-only telephone service, Commission action along these lines is plainly warranted.

Gateway suggests that the Commission consider two potential ways of providing relief to correctional institutions and their carriers with respect to prisoner services. First, the Commission could amend the proposed definition of "provider of operator services" in Section 64.708(i) of its Rules to exempt carriers which provide services only to correctional institutions for use by authorized inmates.<sup>13</sup> Second, the Commission could

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(Footnote continued from previous page)

operators and prank calls, as well as the potential for fraud stemming from prisoners misleading operators. Gateway's automated equipment can also screen calls so that improper or unwarranted calls to specific telephone numbers (jury members, sheriffs, police, trial witnesses, judges, emergency agencies, known drug dealers, etc.) cannot be placed. If the Act's requirements of access to other carriers -- or to operators for rate quotations on request -- were applied to prisoners, inmates could bypass Gateway's equipment and render these protective limitations entirely ineffective.

<sup>13</sup> Under this approach, Section 64.708(i) would be revised by adding an additional sentence: "A common carrier or other person shall not be considered a provider of operator services to the extent it provides interstate telecommunications services to correctional institutions for use by authorized inmates under such restrictions as may be imposed by the correctional institutions." By the same token, of course, the Commission could also amend the definition of "aggregator" in proposed Section 64.708(b) of the Rules to provide that the term "does not include any federal, state, county or municipal correctional institution."

determine that interstate carriers should adhere to correctional institution directions respecting restricted inmate carrier access, blocking, posting and related service limitations, such as availability of "live" operator services. Under Section 226(g), the Commission may direct carriers to block access or take other steps directed by correctional institutions in order to prevent fraud, without exposing carriers to potential liability for violation of the Act or the Commission's rules.

Neither of these alternatives implicates the "separate" rulemaking required by the Act with respect to mandatory unblocking of 10XXX access and pay telephone provider compensation. Act § 226(e); see Further Notice, Para. 21 & n.41. Such decisions are far broader than those necessary to resolve the appropriate treatment of correctional institutions. More significantly, this separate proceeding has not yet been instituted and may not be completed until July 1991. Id. Postponing decision on the matters presented here would leave correctional institutions and their serving carriers in a state of limbo, without any definitive ruling permitting continuation of restricted inmate-only service. Indeed, award of the Justice Department prison telephone contract discussed above could be jeopardized by delay, since the RFP itself incorporates blocking requirements that may be unlawful if correctional institutions are "aggregators" subject to the Act. Prompt FCC action under Section 226(g) is particularly appropriate in this proceeding in view of the compelling evidence that Congress did not intend to subject firms

providing inmate-only services to regulation as "operator services" providers.

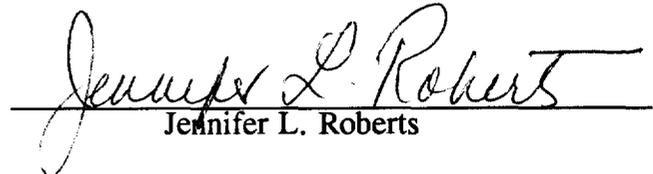
CONCLUSION

Gateway's business of providing restricted interstate services to correctional institutions for use by authorized inmates does not constitute "operator services" within the meaning of the Act. Although the Act does not expressly exempt such services, its purpose of protecting the general and travelling public is wholly inconsistent with the traditional deference to prison administration limitations on inmate access to and use of telephones. These limitations are designed to prevent fraudulent billings and control harassing or inappropriate inmate behavior.

Because Section 226(g) of the Act provides ample authority for the Commission to protect correctional institutions from fraud, the Commission should amend its rules to validate carrier provision of service subject to the blocking and other limitations directed by prison administrators. The Act mandates that the Commission take all necessary steps to protect against fraud, and these steps are particularly warranted in order to

## CERTIFICATE OF SERVICE

I, Jennifer L. Roberts, do hereby certify on this 17th day of August, 1992, that I have served a copy of the foregoing **REPLY COMMENTS OF GATEWAY TECHNOLOGIES, INC.** via first class mail, postage prepaid, or via hand delivery to the parties listed below.

  
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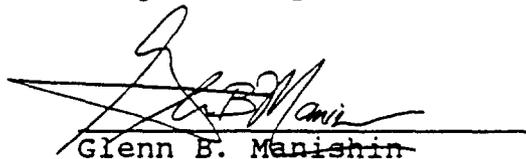
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accomplish the clear public interest objectives desired by state,  
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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Glenn B. Manishin", is written over a horizontal line.

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