

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of Policies and Rules) CC Docket No. 94-158
Concerning Operator Service)
Providers and Call Aggregators)

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COMMENTS OF
THE INMATE CALLING SERVICES PROVIDERS TASK FORCE

The Inmate Calling Services Providers Task Force ("ICSPTF") submits these Comments in response to the Commission's Notice of Inquiry ("NOI") regarding inmate-only telephones.

ICSPTF is a task force of the American Public Communications Council, Inc., comprised of members who are providers of specialized inmate-only calling systems and related services. ICSPTF's members have years of experience in developing, maintaining and operating effective and secure inmate calling systems for prisons, jails and other types of correctional facilities.

The Commission's NOI seeks comment regarding what changes, if any, should be made to the rules applicable to inmate-only telephones in correctional institutions. Specifically, the Commission seeks comment on three issues: (1) the needs of inmate users; (2) the resources and needs of correctional institutions in providing telephone service for inmates; and (3) whether the goals of Section 226 and the public interest have been met through the Commission's current treatment of inmate-only telephones in correctional institutions.

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Attached as Exhibits 1 and 2 to these Comments are ICSPTF's Further Comments and Further Reply Comments submitted in the Commission's Billed Party Preference ("BPP") proceeding (CC Docket 92-77) on August 1, 1994 and September 14, 1994, respectively. In general, these pleadings are responsive to the Commission's queries in its NOI. In addition to ICSPTF, comments and letters which opposed BPP at correctional facilities and which otherwise addressed many of the questions asked by the Commission in this NOI were filed by (a) hundreds of our nation's correctional officials, including the Federal Bureau of Prisons, (b) several local exchange carriers ("LECs"), (c) many members of Congress, and (d) numerous other inmate calling services providers. The Commission should take note of these pleadings, as they are also responsive to the Commission's questions in this docket.

With regard to the specific questions asked by the Commission in this proceeding, ICSPTF responds as follows:

The Needs of Inmate Users.

There is no question that the largest need of inmates with regard to telecommunications services is the availability of equipment from which, at the discretion of correctional officials, inmates can place frequent and unsupervised calls. The benefits to inmates from the ability to participate in frequent telephone communications is well documented. For example, the May 6, 1993 Comments submitted in CC Docket 92-77 by the Citizens United for the Rehabilitation of Errants ("C.U.R.E."), an organization of

inmate families and others concerned primarily with inmate rights, state that:

there is strong empirical evidence that telephone communications are an essential means of preserving family and social ties that help to reduce recidivism, preserve the family unit, encourage prison discipline, and promote society's efforts to rehabilitate offenders.

C.U.R.E. Comments in CC Dkt. 92-77, (filed May 6, 1993), at 11.

As discussed in the next section of these comments, the Commission's current regulatory treatment of inmate telephones has increased calling opportunities for inmates by facilitating the development and deployment of inmate-only calling systems. These systems have been specifically designed to provide maximum calling opportunities for inmates, while at the same time meeting the specialized requirements of correctional officials.

As the term indicates, "inmate-only" calling systems are provided solely for inmate use. They are not available for use by the general public. More important, the sophisticated fraud control and security features of inmate-only calling systems, which are discussed in great detail throughout ICSPTF's Further Comments and Further Reply Comments (see Exhibits 1 and 2), alleviate the need for corrections officers to directly supervise inmate calling. This allows administrators to place more phones at correctional facilities which, in turn, creates more calling opportunities for inmates.

Other features of inmate-only calling systems have been designed to ensure that as many inmates as possible have the opportunity to use a phone. For example, most systems

automatically limit the time of calling by any given inmate in order to reduce waits and provide calling opportunities for other inmates.

Thus, unlike the conditions for inmate calling which were predominant as recently as ten years ago, inmates no longer have to share with non-inmate users what was typically a single payphone per facility -- a circumstance which invariably meant substantial delays and few, if any, calling opportunities due to the need for strict and direct supervision of any inmate call by corrections officers. The needs of inmates, therefore, have clearly been met through the deployment of these systems which, as explained below, is the direct result of the Commission's current regulatory treatment of inmate phones.

The Needs and Resources of Correctional Institutions in Providing Telephone Service for Inmates.

As the attached comments of ICSPTF submitted in the BPP proceeding demonstrate, correctional officials have made clear that they need the ability to control inmate calling, including the decision of which carrier handles inmate calls from their facilities. See ICSPTF's Further Comments at 9-11; and Further Reply Comments at 16-20. Virtually all of the letters and comments filed in the BPP proceeding by hundreds of correctional officials throughout the nation have further demonstrated that need. The record in the BPP proceeding also makes clear that correctional facilities have limited resources generally, and virtually no

resources which they could use to independently provide inmate-only calling systems and related services.

The Commission's current regulatory treatment of inmate telephone service has allowed inmate calling services providers to meet these needs of correctional officials, as well as the calling needs of inmates as discussed above. First, since inmate-only telephones are exempt from the provisions of the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA") and the Commission's corresponding implementing regulations, correctional officials have been able to maintain necessary control over who their inmates are allowed to call (i.e. family, lawyers, social workers, etc.), as well as what type of call their inmates are allowed to place (i.e. collect only). Without that exemption, inmates would be free to place a call through any carrier they desired since carrier access codes could not be blocked. Unsuspecting carriers would have no way of knowing which calls are coming from an inmate facility, and no way of knowing what type of call restrictions correctional officials desired.¹ Correctional officials would have no effective means to prevent unwanted calling (i.e. calls to witnesses, victims, judges, conspirators, etc.) and

1 Although the LECs apparently offer a screening service which is designed to inform the carriers which calls originate from inmate institutions, that service is not universally available, and is particularly absent from most rural areas where many prisons and jails exist. Moreover, there are several other reasons why that service is inadequate to prevent unwanted calling by inmates. See ICSPTF Further Comments at 22-25; ICSPTF Further Reply Comments at 13-15 (Exhibits 1 and 2). In any event, even if a carrier received that screening code, there is no way it could know any of the specific restrictions that the correctional official desires for the particular inmate who is placing the call.

fraudulent billing to third-party numbers and stolen credit card numbers. Thus, the need of correctional officials to control inmate calling could not be met if the TOCSIA regulations applied to inmate-only telephones.

Second, the exemption from the unblocking rules has provided the incentive for inmate calling services providers to supply correctional facilities with sophisticated inmate-only calling systems at no cost to the facility. Thus, the Commission's current regulatory treatment of inmate telephones has allowed thousands of facilities that otherwise cannot afford to finance inmate calling systems the ability to offer inmates this important service.

**Whether the Goals of Section 226
and the Public Interest Have Been Met.**

The public interest has clearly been well served by the Commission's current regulatory treatment of inmate telephones. First, the inmate calling systems and specialized providers that have emerged as a result of the Commission's current policies have helped protect the public from fraud and criminal activity.² Second, the public has benefited from the positive effects of frequent inmate calling as described above, such as reduced recidivism, enhanced rehabilitation, etc. Third, millions of law-

² It is difficult to quantify specific reductions in fraud or telephone crime from inmate facilities as a result of the Commission's policies since the way correctional officials predominantly controlled inmate calling in the past was simply to deny inmates the ability to place unsupervised calls. Further, the provision of inmate calling service used to be a monopoly of the LECs, and only they would know information concerning historical levels of fraud.

abiding taxpayers have been spared of the need to finance inmate calling systems, since the Commission's current treatment of these systems gives providers the incentive to supply these systems to facilities at no cost.³ Finally, to the extent that one of the goals of Section 226 was to reduce telephone rates for public telephone consumers, the Commission's current treatment of inmate telephones has served that goal since the cost of the calling fraud that would otherwise occur without the benefit of inmate calling systems would undoubtedly be passed on to all consumers, including public telephone consumers, in the form of higher rates.

What, if any, Changes Should Be Made.

To the extent that any changes should be made, the Commission should adopt a reasonable rate benchmark for inmate calls. Users of inmate calling services should not have to pay unreasonable rates for inmate calls. Although the overwhelming majority of inmate calling services providers charge reasonable rates, allegations that a handful of providers may be charging excessive rates continue to exist. A benchmark will clearly help ensure that all users of inmate telephone service are protected from unreasonable rates. At the same time, the benefits of the current system would not be lost.

³ In other contexts of prison administration, many states have recognized the need to shift the cost burden for correctional facilities away from general taxpayers, and more toward the cost-causers. See, e.g., "More and More Jails are Charging Inmates for their Incarceration", Wall Street Journal, March 3, 1995, at 1.

In an *ex parte* presentation on February 21, 1995, ICSPTF provided the Commission with specific proposals for how that benchmark should be set and enforced. See Exhibit 3. In general, ICSPTF proposed that inmate calling rates should not exceed a maximum of fifty cents (\$.50) above the operator services charge, and fifteen cents (\$.15) per minute above the rate charged by the dominant carrier for this type of calling. In no case should the rate charged for a single call exceed two dollars (\$2.00) above the dominant carrier rate. See *Ex Parte* Letter of the ICSPTF submitted in CC Docket Nos. 92-77 and 94-158, (filed February 21, 1995). After considerable discussion about this proposal with industry members, ICSPTF is confident that this proposal will protect users from unreasonable rates, while allowing most providers to recover for their reasonable costs.

In this regard, the Commission should not consider any proposals that would destroy the benefits of the current system, or that would create unnecessary fraud and security risks. For the reasons stated in ICSPTF's Further Comments and Further Reply Comments (Exhibits 1 and 2), BPP is clearly one such proposal that the Commission should reject for correctional facilities.

Another proposal that would be catastrophic for inmate calling would be the expansion of the "aggregator" definition to correctional institutions.⁴ Clearly, the "exceptional

⁴ ICSPTF notes that the Introduction section of the NOI states that the Commission seeks specific comment on whether the definition of "aggregator" should be expanded to include correctional institutions. However, the Commission seeks no such comment in the applicable text of the NOI pertaining to inmate-only telephones. ICSPTF presumes, therefore, that the Commission is not

circumstances" that the Commission found warrants the exclusion of inmate telephone service from TOCSIA have not changed since the Commission's earlier decision. Inmates are still inmates. There is no record that the behavioral pattern of inmates or the other unique circumstances of inmate institutions have changed since the Commission last considered the issue.

The fact is that, in addition to eliminating the financial incentives that have allowed correctional officials to provide inmate-only calling service, the application of the "aggregator" definition to correctional facilities would pose severe fraud and security risks at these institutions. Indeed, the National Toll Fraud Prevention Committee has exhaustively studied the risk of fraud at inmate facilities, and has strongly recommended that correctional facilities allow "0+ Collect only" service for inmates because of the enormous fraud risks involved with any other type of dialing. See Statement of the National Toll Fraud Prevention Committee, attached as Exhibit 4.⁵

Moreover, the Commission should take note that the definition of "aggregator" is statutory. The Commission is therefore restricted in its ability to waive any of the provisions of TOCSIA once the "aggregator" definition is determined to apply. See, GTE

considering any proposal that would repeal the Commission's earlier decision exempting inmate telephones from the TOCSIA regulations, and that the reference for such comments in the Introduction section was inadvertent. If, on the other hand, the Commission actually meant to solicit comment on this issue, ICSPTF asks that the Commission make that intention clear so that correctional officials can be so notified.

5 An industry report chaired by Southern Bell arrives at similar conclusions. That report is also attached at Exhibit 4.

Airphone, et. al., 8 FCC Rcd 6171, at fn. 22 (1993). An example of the types of untoward consequences that would follow at correctional institutions is illustrated by the practical impact that the unblocking requirement for access code 800 numbers presents; that is, that "aggregators" effectively have no option but to unblock access to virtually all 800 numbers, not just access code 800 numbers, since it is technically impossible for even the most advanced equipment to comprehensively distinguish between access code 800 numbers and other types of 800 numbers which may not be subject to the unblocking rules. This means that, in addition to all the other problems that extension of the "aggregator" detention would present, inmate-only telephone equipment subject to the "aggregator" definition would technically be forced to allow inmates the ability to call most, if not all of the millions of 800 numbers, including retail stores, banks, credit card centers, travel firms, etc. In short, there are millions of locations that inmates would be able to call. Thus, the application of the "aggregator" definition to correctional institutions would have several far-reaching and unintended consequences -- consequences that the Commission would effectively have no means to "solve" since its ability to waive statutory definitions is restricted.

Conclusion

As a task force that is devoted to improving the conditions for inmate calling, ICSPTF has welcomed the opportunity to comment in this proceeding. In addition to the comments filed in this

proceeding, the Commission should take note of the extensive record that has already been developed in other proceedings concerning inmate calling and the unique circumstances that inmate facilities present. Clearly, upon review of the substantial record that has been developed in this proceeding and others, the Commission should conclude that to the extent any changes in its regulatory treatment of inmate telephones is warranted, a reasonable rate benchmark for inmate calls, such as proposed by ICSPTF, should be adopted. At the same time, the Commission should make clear that it will not pursue proposals, such as extending BPP or the "aggregator" definition to correctional facilities, since such proposals would create fraud and security risks at inmate institutions, drastically reduce calling opportunities for inmates, and ultimately do more harm to the public than good.

Respectfully submitted,



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EXHIBIT 1

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

In the Matter of)
)
Billed Party Preference) CC Docket No. 92-77
for 0+ InterLATA Calls)

FURTHER COMMENTS OF THE
INMATE CALLING SERVICES PROVIDERS TASK FORCE

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Dated: August 1, 1994

SUMMARY

The Inmate Calling Services Providers Task Force ("ICSPTF") of the American Public Communications Council ("APCC") is an organization comprised of companies that provide specialized inmate calling systems, administer those systems and carry inmate calls. The Commission's Further Notice of Proposed Rulemaking (FNPRM) in this docket seeks additional comment on whether billed party preference (BPP) should apply to inmate calls. Both the record that has been compiled to date, and the record that is currently being compiled, demonstrate that BPP should not apply to inmate institutions.

First, because of the unique circumstances involving prison and jail administration, the Commission should defer to prison and jail officials on decisions relating to the management of their facilities, including how they manage inmate calling and which carrier they choose to handle inmate calls. The federal courts have long recognized the need to defer to prison officials on decisions of this sort. The Commission should follow the courts' lead and refrain from regulating prison administration by requiring BPP at inmate facilities.

Second, the Commission has already recognized that inmate phones raise "exceptional considerations" that warrant their exclusion from any Commission regulation. The same "exceptional considerations" that warranted that decision are also present here. The Commission should abide by its previous ruling and exempt inmate phones from BPP.

Third, the record clearly indicates that BPP will hamper the ability of prison and jail officials to adequately control inmate calling. BPP would destroy the economic base for specialized inmate calling systems; take away the revenue stream that supports the administration of those systems; and prevent prison and jail officials from routing inmate calls to a carrier they know is qualified to handle inmate calls and legally obligated to honor the facilities' call restrictions.

Fourth, BPP would diminish the ability of prison and jail officials to exercise needed control at prisons by reducing inmate access to phones. Inmate rehabilitation efforts would suffer, and the revenue stream supporting important inmate programs, such as drug rehabilitation, family visitation, and vocational training would also disappear.

Fifth, the record lacks sufficient clarity and concreteness regarding certain theories suggesting how multiple carriers could control inmate calling fraud in a BPP environment. It is nevertheless clear that any of the measures, if ultimately applied, would create substantial costs throughout the network -- costs that the Commission has failed to consider in its BPP analysis. Moreover, there are significant questions about their potential effectiveness, particularly when compared to the fraud control procedures that ICS providers follow.

Finally, the Commission has failed to analyze the costs of requiring BPP for inmate calls versus the only potential (and unlikely) benefit that BPP could bring to this form of calling --

reduced rates on some inmate calls. The Commission clearly must conduct such an analysis before it can consider applying BPP to inmate phones. It is nonetheless apparent that the costs of applying BPP to inmate facilities would substantially outweigh and alleged "savings" from reduced charges from some calls, particularly when the likelihood of that benefit occurring is scrutinized.

Indeed, a significant number of inmate call recipients are already the beneficiaries of rate caps that correctional officials impose in their contracts with ICS providers. Moreover, a close examination of the record reveals that the lowering of inmate calling rates is not a primary concern of the carriers supporting BPP at inmate institutions. Several carriers have made it clear that the reason they support BPP for inmate calls is because inmate calls would prove to be a guaranteed source of BPP's overall cost recovery. Moreover, considering the significant possibility that the use of access codes by other potential users of BPP will rise, inmate families and other who receive inmate calls may be left to pick up a substantial portion of BPP's enormous tab.

To the extent there is a need for rate adjustments for calls originating at certain inmate facilities, ICSPTF recommends that the Commission adopt a firm benchmark for reasonable inmate calling rates. Providers who charge rates that exceed that benchmark should be forced to justify their rates. A benchmark would clearly cost less than BPP, would be more effective at

ensuring reasonable rates, and would avoid the need for the Commission to interfere with prison and jail administration.

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the Commission's concerns about mandating BPP routing for inmate calls.

INTRODUCTION

ICSPTF filed Comments on July 7, 1992 ("Initial Comments"), and Reply Comments on August 27, 1992, in response to the Commission's original Notice of Proposed Rulemaking ("NPRM") in this proceeding, strongly opposing the application of BPP to inmate facilities. In addition to ICSPTF, a large number of parties, including certain state regulatory officials, prison and jail officials and correctional departments -- those that are in the best position to know whether BPP at inmate facilities is appropriate -- also filed comments or letters in response to the Commission's original NPRM opposing the application of BPP to inmate facilities. Since the release of the FNPRM, over 100 additional prison and jail officials have already sent letters or comments to the Commission opposing BPP.

The NPRM states that the current record is inadequate for the Commission to make a reasoned decision on whether to exempt inmate telephones from BPP. ICSPTF disagrees. The current record clearly indicates that BPP would cause unnecessary security risks and financial hardships for our nation's correctional facilities.

Moreover, as set forth below, there is a strong indication that the costs of applying BPP to inmate facilities significantly outweigh its only perceived and potential benefit -- the unlikely possibility of lower rates for some inmate calls. In fact, a significant number of inmate families may actually see their

calling rates *increase*, not decrease, under BPP, particularly if inmate calls are left to shoulder a disproportionate share of BPP's enormous costs.^{1/} To the extent there is a need for rate adjustments at certain facilities, there are other less intrusive, less costly and more effective regulatory options available to the Commission to achieve that goal.

Additional reasons -- both legal and practical -- why BPP should not apply to inmate institutions are also explained below. Moreover, the Commission has already recognized that inmate phones raise "exceptional" considerations and should therefore not be regulated in the same manner as other phones. Thus, it would clearly be unreasonable for the Commission to extend BPP to inmate facilities.

I. SUBSTANTIAL DEFERENCE MUST BE ACCORDED PRISON OFFICIALS IN THEIR MANAGEMENT OF INMATE FACILITIES

There are unique considerations involving prisons and the administration of prisons that the Commission must respect. A prison is not a hotel; a convicted criminal is not a typical consumer. A prison is a highly controlled, sensitive environment.

Prison officials have a public responsibility to maintain an orderly and safe environment within their facilities. They must look after the health and well-being of their inmates and corrections officers, establish disciplinary procedures, manage

^{1/}Ironically, although the potential of lower rates for some inmate calls is the only benefit BPP could bring to inmate calling, the FNPRM itself observes that a primary reason for extending BPP to inmate calling is so inmate calls can help pay for BPP.

their inmates' schedules, provide education and recreational activities for their inmates, and encourage inmate rehabilitation. The use of the telephone is a vital tool in achieving and maintaining the delicate balance necessary to achieve all of these objectives. Telephone use, or denial thereof, can be a "carrot or a stick," a reward or a punishment, a legal requirement or a prohibited use, a tool for rehabilitation or a device to breach security.

The precise role and use of the telephone facilities is thus integral to management of the prisons and jails themselves. As with all other matters relating to the use of all other prison facilities, great deference must be given to the judgments corrections officials make on matters relating to the management and use of inmate calling systems.

The courts have long recognized the need to exercise restraint on issues pertaining to prison administration. The Supreme Court, for example, has held that

Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.

Turner v. Safely, 482 U.S. 78, 84-85 (1987). Thus, "it is well established that federal courts should not micromanage state prison systems." *Baker v. Holden*, 787 F. Supp. 1008, 1015 (D.Utah 1992). Indeed, "a federal judge is not a warden and substantial deference

must be accorded state prison authorities in the management of correctional facilities." *Id.*^{2/}

Just as a federal judge is not a warden, neither is the Commission. Nor is the Commission an expert agency in prison administration; the Communications Act does not confer it with authority to make decisions in this field. The federal courts refrain from micromanaging prisons. So should the Commission. The Commission must respect and defer to the decisions that prison officials make in the administration of their facilities.

The Commission would necessarily be regulating prison administration and interfering with the decisions that prison officials make by mandating BPP -- a form of access to the network -- from inmate facilities. As discussed below, prison officials must exercise control over inmate calling. A significant number of prison officials have determined that the most effective way to exercise that control is to centralize the processing of inmate calls, including control over those calls once they are in the network, in a single provider of inmate calling services who is qualified to handle inmate calls and who is contractually obligated to honor the prison official's required restrictions.

^{2/}See also, O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (Evaluation of penological objectives is committed to the considered judgment of prison administrators); Fortner v. Thomas, 983 F.2d 1024, 1029 (11th Cir. 1993) ("It is . . . settled that a prisoner's constitutional rights must be exercised with due regard for the 'inordinately difficult undertaking' of modern prison administration"); Lyon v. Grossheim, 803 F. Supp. 1538, 1545 (S.D. Iowa 1992) ("prisoners' constitutional rights may be significantly limited or substantially constrained in order to further legitimate objectives of the penal system").

If BPP is extended to inmate facilities, the Commission would make it unlawful for prison officials to decide on this form of control -- a decision that is clearly within their discretion to make. Instead, prison officials would be forced to comply with an intrusive federal mandate on inmate calling -- one established by an agency that has no experience with the many aspects of prison administration and prison security and the dedicated balancing necessary to ensure that all these needs are addressed.

By extending BPP to inmate institutions, the Commission would be substituting its judgement on a matter of prison administration for that of prison officials. Even where the First Amendment of the United States Constitution is at stake, the Supreme Court has refused to "substitute [its] judgment" for that of prison officials on "difficult and sensitive matters of institutional administration." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987). The Commission should similarly refrain from interfering with the management of prisons, and should therefore not mandate prison officials to use the BPP routing scheme.

Prison officials bear public responsibility for the actions of their inmates. They therefore must have the ability to exercise unfettered control over inmate calls in their entirety -- subject only to constitutional and explicit statutory constraints, not the Commission's judgment of how calls should be routed.