

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

In the Matter of  Rates for Interstate Inmate Calling Services
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WC Docket No. 12-375

**COMMENTS OF ANDREW D. LIPMAN**

The undersigned respectfully submits the following comments in response to the Second Further Notice of Proposed Rulemaking in the above-captioned docket (FCC 14-158), released on October 22, 2014 (the “*2nd FNPRM*”), on behalf of certain clients with an interest in the regulation of inmate calling services (“ICS”).

These comments address legal issues relating to the scope of the Commission’s regulatory authority over ICS and so-called “ancillary” services. They do not address policy issues relating to how the Commission should or should not exercise its authority. In summary, these comments conclude that (1) the Commission has authority to regulate rates for intrastate ICS calls to promote competition and benefit the general public in accordance with Section 276, and to preempt State regulation of charges for intrastate ICS calls, to the extent such regulations are inconsistent with Commission requirements; and (2) the Commission’s authority over “ancillary services” under Section 276(d) is limited to *communications* services that are ancillary to ICS, and does not extend to non-communications services (such as financial transactions) offered by providers of ICS.

## **I. THE COMMISSION HAS STATUTORY AUTHORITY TO REGULATE INTRASTATE RATES**

The Commission has express statutory authority, under the plain language of Section 276 of the Communications Act of 1934, 47 USC § 276, to regulate both interstate and intrastate ICS. Section 276(d) includes ICS in the definition of “payphone service,” and subsection (b)(1) directs the Commission to establish a compensation plan for “all payphone service providers” applying to “each and every completed *intrastate and* interstate call ....” (Emphasis supplied.) Moreover, subsection (c) expressly preempts any State requirements that are inconsistent with the Commission’s regulations.

The Commission correctly outlined the basis for its authority over intrastate rates in the first Further Notice of Proposed Rulemaking in this docket.<sup>1</sup> In addition to citing the statutory provisions noted above, the Commission observed that, in *Illinois Public Telecommunications Ass’n v. FCC*, 117 F.3d 555, 562 (D.C. Cir. 1997), the D.C. Circuit held that the “fairly compensated” provision of section 276(b)(1) empowered the Commission to prescribe rates for local payphone calls. Because the Commission’s authority under that provision includes local rates, it necessarily must include rates for all other intrastate calls.

In the initial FNPRM, the Commission also asked for comment on whether Section 2(b) of the Act, 47 USC § 152(b), limits its authority to prescribe intrastate ICS rates. The short answer is “no.” The Supreme Court held that amendments to the Act that expressly extend Commission authority to particular intrastate services, like Section 276(b)(1), prevail over the more general terms of Section 2(b) that preserve State authority over intrastate services. *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 380-81 (1999).

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<sup>1</sup> *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107 at paras. 135-140 (2013), subsequent history omitted.

In comments on the initial FNPRM, NARUC argued that the Commission’s interpretation of Section 276 as extending to intrastate ICS rates is contrary to Section 601(c)(1) of the Telecommunications Act of 1996, set out as a note below 47 USC § 152.<sup>2</sup> The language of that provision directly contradicts NARUC’s position, though. The subsection provides that, “This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law *unless expressly so provided in such Act or amendments.*” (Emphasis supplied.) Section 276(c), which was adopted as part of the Telecommunications Act of 1996, does expressly provide for preemption of State law that is inconsistent with Commission regulations relating to payphone services, including ICS. Section 601(c)(1), by its own terms, therefore has no bearing on interpretation of Section 276.

NARUC also attempted to distinguish *Illinois Public Telecommunications* by arguing that the holding in that case only applied to local calls paid for by coins, and could not be extended to intrastate toll calls because “[payphone service providers] have no right to impose long-distance rates.”<sup>3</sup> This is simply wrong. Payphone service providers (PSPs) can and do set rates for long-distance calls, in the form of sender-paid coin rates for such calls (whether interstate or intrastate).<sup>4</sup> Thus, as a factual matter, there is no bright-line boundary between local rates charged by PSPs and toll rates charged by IXCs. Indeed, NARUC implicitly acknowledges this elsewhere in

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<sup>2</sup> Comments of NARUC, WC Docket No. 12-375, at 7 (filed Dec. 20, 2013) (“NARUC”).

<sup>3</sup> *Id.* at 10. *See also, e.g.*, Comments of Securus Technologies, Inc., WC Docket No. 12-375, at 6 (filed Dec. 20, 2013) (arguing that *Illinois Public Telecommunications* court did not consider intrastate toll rates).

<sup>4</sup> *See, for example*, <http://www.closetraveler.com/wp-content/uploads/2014/08/public-pay-phone.jpg> (visited Dec. 8, 2014), and [https://en.wikipedia.org/wiki/File:FairPoint\\_payphone\\_in\\_Vermont.jpg](https://en.wikipedia.org/wiki/File:FairPoint_payphone_in_Vermont.jpg) (visited Dec. 8, 2014) for photographs of coin telephones offering domestic long-distance calls for 25 cents per minute.

its comments, stating that “intrastate toll rates ... are *not always* provided by the payphone equipment owner[,]” implying that they sometimes are.<sup>5</sup>

Furthermore, NARUC’s argument ignores crucial language in the court’s holding in *Illinois Public Telecommunications*. In that case, the court was reviewing a Commission order that preemptively deregulated local coin rates, and the States argued that the Commission lacked authority to preempt their regulation of such rates. The court first summarized the petitioners’ argument,

that § 276(b) does not manifest the clear congressional intent necessary to preempt the States’ power over local coin rates. ... Their point is that if the Congress had intended to give the Commission jurisdiction over local coin rates, instead of requiring only generally that PSPs be “fairly compensated,” then it would have stated specifically that it was giving the Commission the authority to set the rates for such calls.<sup>6</sup>

It then squarely rejected this argument, holding that the term “compensation” did include the authority to prescribe regulations governing end user rates, and to preempt inconsistent State regulations:

It is undisputed that *local coin calls are among the intrastate calls* for which payphone operators must be “fairly compensated”; the only question is whether in § 276 the Congress gave the Commission the authority to set local coin call rates in order to achieve that goal. We conclude that it did. The States’ and the NASUCA’s argument to the contrary notwithstanding, the Congress has in fact used the term “compensation” elsewhere in the Act in such a way so as to encompass rates paid by callers. ... Because the only compensation that a PSP receives for a local call (aside from the subsidies from CCL charges that LEC payphone providers enjoy) is in the form of coins deposited into the phone by the caller, and there is no indication that the Congress intended to exclude local coin rates from the term “compensation” in § 276, we hold that the stat-

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<sup>5</sup> NARUC at 7 (emphasis supplied).

<sup>6</sup> 117 F.3d at 562.

ute unambiguously grants the Commission authority to regulate the rates for local coin calls.<sup>7</sup>

The key element in the court's holding was the conclusion that the statutory term "compensation" encompassed rates paid by callers. The court's discussion referred to rates paid in the form of coins deposited into the phone because that was the only category of rates affected by the FCC regulations under review in that case. Nothing in the court's analysis, however, suggests the method of payment had any bearing on its interpretation of the statutory language. Rather, the italicized language above clearly shows the contrary: that the court considered local coin calls merely as part of a broader class of intrastate calls subject to the FCC's authority under Section 276. Indeed, as noted above, Section 276(b)(1) requires fair compensation for "every intrastate and interstate call[.]" without any distinction between local and toll calls, so there is no basis in the statutory language for the distinction that NARUC seeks to draw.

Similarly, CenturyLink erroneously argued that the Commission "has never ... previously claimed that Section 276 provides it general authority over intrastate end-user rates for any form of payphone services."<sup>8</sup> In fact, the order reviewed in *Illinois Public Telecommunications* asserted that the Commission had authority to preempt State regulation of end-user rates for local coin calls, and that aspect of the order was affirmed. Just as there is no basis for interpreting Section 276 to limit the Commission's authority to local calls, there is also no basis for an interpretation that would limit that authority to exclude end-user rates.

NARUC also argues that the Commission's authority under Section 276 is limited to prohibiting discrimination by Bell Operating Companies.<sup>9</sup> This is both a misreading of the statute

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<sup>7</sup> *Id.* (emphasis supplied).

<sup>8</sup> Comments of CenturyLink, WC Docket No. 12-375, at 5 (filed Dec. 20, 2013).

<sup>9</sup> NARUC at 8.

and inconsistent with the holding in *Illinois Public Telecommunications*. Although subsection (a) of Section 276 includes provisions specifically prohibiting discrimination by Bell Operating Companies, it is clear that Congress did not intend that subsection to limit the scope of the remaining provisions. Subsection (b)(1) expressly requires the Commission to adopt regulations addressing five specific subjects relating to payphone services, only two of which—clauses (C) and (D)—relate to preventing BOC discrimination. This makes it clear that Congress intended subsections (a) and (b) to address overlapping but not identical subject areas; subsection (a) therefore cannot be interpreted as expressing the sole purpose of the entire section.

In short, the arguments presented by NARUC and others in an effort to preserve State jurisdiction over ICS rates are contrary to the statutory language and to past judicial construction of the Act, and should be rejected.

## **II. THE COMMISSION’S REGULATORY AUTHORITY OVER ANCILLARY SERVICES IS LIMITED TO COMMUNICATIONS SERVICES**

The *2nd FNPRM* proposes to adopt new rules “reforming” ancillary charges imposed by ICS providers, and asks for comments on the scope of the Commission’s legal authority over such charges. *2nd FNPRM*, paras. 85-86. Section 276(d) defines “payphone service” as meaning “the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.” Thus, some class of “ancillary services” is subject to the Commission’s authority under Section 276, but the scope of that class is not defined by the statute.

A number of parties have urged the Commission to regulate ancillary charges that they characterize as “excessive” or “deceptive,” but very few of these have engaged in any analysis of

the Commission's legal authority to take such action.<sup>10</sup> For example, the Human Rights Defense Center's argument in support of Commission authority to regulate ancillary charges simply quotes the definitional clause of Section 276(d) noted above, and then asserts without any citation or other support that "[f]ees related to the management of ICS phone accounts fall within the scope of 'ancillary fees.'"<sup>11</sup> Simply saying this does not make it so.

The Commission, of course, cannot regulate any service unless authorized to do so by Congress. "[A]n agency literally has no power to act, ... unless and until Congress confers power upon it." *Louisiana PSC v. FCC*, 476 US 355, 374 (1986). That power must be found in "the language of the statute enacted by Congress. ... [Courts] will not alter the text in order to satisfy the policy preferences" of an administrative agency. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002).

The Commission must seek to determine the meaning of the term "ancillary services" in the context in which it was used by Congress in Section 276. The structure of the "payphone services" definition as well as the overall statutory scheme both require that the term "ancillary" be interpreted in a limited sense. The Supreme Court has cautioned that interpretation of a statute must "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Gustafson v. Alloyd Co.*,

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<sup>10</sup> See, e.g., Comments of Pay Tel Communications, Inc., WC Docket No. 12-375, at 30-34 (filed Dec. 20, 2013); Comments of Human Rights Defense Center, WC Docket No. 12-375, at 9-10 (filed Dec. 20, 2013) ("HRDC"); Reply Comments of Martha Wright *et al.*, WC Docket No. 12-375, at 12-16 (filed Jan. 13, 2014); Reply Comments of Pay Tel Communications, Inc., WC Docket No. 12-375, at 18-19 (filed Jan. 13, 2014). Ironically, although Pay Tel devoted extensive attention in both initial and reply comments to the Commission's legal authority to preempt State regulation of intrastate rates, its arguments in support of limits on ancillary charges were supported by no statutory analysis whatsoever.

<sup>11</sup> HRDC at 9.

513 U.S. 561, 575 (1995) (quoting *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961)). A statutory interpretation must be based upon “the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). “A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.” *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988).

Here, sections 1 and 2 of the Act provide the general context within which section 276 must be considered. Section 1 declares that the purposes of the Act include “to make available ... a rapid, efficient, Nation-wide and world-wide wire and radio *communication service* with adequate facilities at reasonable charges ....” 47 USC § 151 (emphasis added). Section 2(a) specifies that the provisions of the Act apply to “communication by wire or radio ....” 47 USC § 152(a). In short, the purpose of the Act is to regulate communications, not to regulate financial transactions or sales of other goods or services. Further, section 276(b)(1)(A) specifies that any compensation plan adopted by the Commission must ensure that providers “are fairly compensated for *each and every completed intrastate and interstate call* ....” 47 USC § 276(b)(1)(A) (emphasis supplied). “Ancillary services” in section 276(d), therefore, must be construed as meaning *communications* services that are ancillary to the completion of interstate and intrastate ICS *calls*. This could include, for example, charges for operator services or directory assistance that are in addition to the basic per-minute charge for a call.

The Commission’s proposed “reform” of ancillary charges, however, goes far beyond the limits that Congress intended. The *2nd FNPRM* proposes to prohibit or cap some types of so-called ancillary charges that are not charges for completion of a call, or even charges for a

communications service at all, such as “account establishment by check or bank account debit; account maintenance; payment by cash, check, or money order; monthly electronic account statements; account closure; and refund of remaining balances[,]” para. 89; and money transfer service fees, para. 104. The Commission also asks open-ended questions about possible prohibitions or caps on other, unspecified ancillary charges.

For the reasons explained above, the Commission does not have statutory authority to regulate fees for financial transactions such as electronic fund transfers and other methods of funding an account. These are not charges for communications services, nor are they related to the completion of individual calls. In the *First Report and Order* in this docket, the Commission relied on precedent holding that “billing and collection services provided by a common carrier for its own customers are subject to Title II,” and by analogy concluded that it could regulate such services when performed by an ICS provider for its customers. *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 14107, para. 114 (2013). That analogy only holds up, however, to the extent that the ICS provider is billing for completed calls, since that is the extent of the Commission’s regulatory ambit under Section 276. When the ICS provider is billing a customer for some other service, such as a money transfer, the Commission’s jurisdiction is not applicable.

### III. CONCLUSION

For the reasons stated above, the Commission should determine that (1) it does have jurisdiction under Section 276 to regulate rates, terms, and conditions for intrastate ICS calls, but (2) its jurisdiction over “ancillary services” is limited to communications services provided in connection with the completion of ICS calls, and does not extend to any other services offered by an ICS provider to its customers.

Respectfully submitted,

*s/ Andrew D. Lipman*

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