

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	<b>WC DOCKET 12-375</b>
	)	
Rates for Interstate Inmate Calling Service	)	[FCC 14-158]
<hr/>		

**COMMENTS OF THE  
ARIZONA CORPORATION COMMISSION  
ON THE SECOND FURTHER NOTICE OF PROPOSED RULEMAKING**

**I. INTRODUCTION.**

The Arizona Corporation Commission (“ACC”) submits these comments in response to the October 22, 2014 Federal Communications Commission (“FCC”) Second Further Notice of Proposed Rulemaking (“Second FNPRM”) on inmate calling services (“ICS”).<sup>1</sup> The ACC has significant concerns with the FCC’s proposals for intrastate ICS. The FCC’s proposals rely heavily on preemption of state authority over intrastate ICS. The ACC concurs with the comments of the National Association of Regulatory Utility Commissioners (“NARUC”) and other states that have filed comments in this proceeding that individual states are in the best position to oversee and investigate issues relating to intrastate ICS rates and service quality.

**II. BACKGROUND.**

**A. ICS in Arizona is Subject to the Oversight of the ACC and the ADOC.**

The ACC, created by the Arizona Constitution, regulates Arizona’s public service corporations, including telecommunications providers. The ACC has been granted the authority to prescribe just and reasonable rates to be collected by public service corporations and to make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety of the employees and patrons of such corporations.<sup>2</sup> As a constitutionally created agency, the ACC

---

<sup>1</sup> *In the Matter of Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC 14-158, *Second Further Notice of Proposed Rulemaking* (rel. October 22, 2014).

<sup>2</sup> Ariz. Const. art. XV, Section 3.

is considered the “fourth branch” of Arizona government.<sup>3</sup> Arizona courts have found that the ACC has exclusive authority to set rates for public service corporations operating in Arizona. The ACC also has broad authority to investigate service quality complaints against telecommunications providers in Arizona.

The ACC regulates customer-owned pay telephone providers (“COPTs”) including COPT inmate calling service providers, similar to Competitive Local Exchange Carriers (“CLECs”). COPT providers are subject to the provisions of Title 14, Chapter 2, Article 9 of the Arizona Administrative Code.

The Arizona Department of Corrections (“ADOC”) is the state agency that enters into contracts with Payphone Service Providers (“PSPs”) for the provision of ICS.

**B. The Wright Petitions.**<sup>4</sup>

The current proceeding is in response to a petition filed by Martha Wright with the FCC seeking relief from high long-distance calling rates from correctional facilities.<sup>5</sup> The Petition sought to ban exclusive ICS contracts and collect-call-only restrictions in correctional institutions. Ms. Wright also filed an alternative rulemaking proposal in CC Docket No. 96-128 on March 1, 2007. That petition asked the FCC to require a debit-calling option, prohibit per-call charges and establish rate caps for interstate interexchange ICS. The FCC states that many have urged it to act since the rates that inmates and their families pay for phone calls “render it

---

<sup>3</sup> *Stop Exploiting Taxpayers v. Jones*, 211 Ariz. 576, 580, 125 P.3d 396, 400 (App. 2005)([T]he status of the Arizona Corporation Commission as a fourth branch of government, wholly separate from the legislative, executive, and judicial branches).

<sup>4</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Petition of Martha Wright et al. for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking, Docket No. 96-128 (filed Nov. 3, 2003)(First Wright Petition); *See also Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Petitioners’ Alternative Rulemaking Proposal, CC Docket No. 96-128 (filed Mar. 1, 2007)(Alternative Wright Petition).

<sup>5</sup> *See In the Matter of Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, *Report and Order and Further Notice of Proposed Rulemaking* (rel. September 26, 2013).

all but impossible for inmates to maintain contact with their loved ones and their broader support networks, to society's detriment.”<sup>6</sup>

On September 26, 2013, the FCC took steps to reform interstate ICS.<sup>7</sup> The FCC required inmate phone providers to charge cost-based interstate rates to inmates and their families. It also established safe-harbor rates at or below which rates would be treated as lawful. The safe harbor rates adopted were \$0.12 per minute for debit and prepaid interstate calls and \$0.14 per minute for collect interstate calls. The FCC also adopted an interim hard cap on ICS providers' rates of \$0.21 per minute for interstate debit and prepaid calls, and \$0.25 per minute for collect interstate calls. A waiver process was also instituted to address unique circumstances. Further, the FCC found that site commission payments not reasonably related to the provision of ICS are not recoverable through ICS rates. The FCC additionally required that ancillary charges (for services ancillary to the provision of ICS) must be cost based.

Several PSPs and state correctional facilities filed a Motion for Stay with the D.C. Circuit Court of Appeals. The D.C. Circuit Court of Appeals stayed the following three rules pending resolution of the appeal: 1) the requirement that rates be based on costs, 2) the safe harbor rule, and 3) the requirement that ICS providers file annual reports and certifications.

On October 22, 2014, the FCC issued a Second FNPRM to adopt comprehensive, permanent ICS reforms.<sup>8</sup> In the Second FNPRM, the FCC proposes to extend many of these same requirements to intrastate ICS. The FCC also seeks comment on additional proposals that go beyond those adopted in the September 26, 2013 Report and Order. In order to implement the intrastate ICS reforms, the FCC proposes to broadly preempt state authority in this area.

...  
...  
...

---

<sup>6</sup> *Id.* at para. 1.

<sup>7</sup> *Id.* at paras. 5-7.

<sup>8</sup> *In the Matter of Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, *Second Further Notice of Proposed Rulemaking* (rel. October 22, 2014).

### III. THE FCC SHOULD DEFER TO THE STATES WITH RESPECT TO THE PROVISION OF INTRASTATE ICS.

#### A. Neither Sections 276 or 201 of the Communications Act of 1934, as Amended, Give the FCC the Power to Broadly Preempt State Authority over ICS.

In the Communications Act of 1934, Congress set up a dual system of state and federal regulation of telephone service. Under 47 U.S.C. Section 151, the FCC has authority to regulate interstate and foreign commerce in wire and radio communication. However, Section 152(b) states that “nothing in [the Act] shall be construed to apply or give the Commission [FCC] jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.” The Supreme Court has interpreted Section 152(b) as “not only a substantive jurisdictional limitation on the FCC’s power, but also a rule of statutory construction.”<sup>9</sup>

The FCC relies upon both Sections 276 and 201 of the Communications Act of 1934, as amended, to preempt state authority over intrastate ICS. Congress enacted Section 276 as part of the Telecommunications Act of 1996 (“1996 Act”). This Section was aimed at preventing unfair competition in the payphone market.<sup>10</sup> Historically, only incumbent local exchange companies provided payphone services.<sup>11</sup> The development of “smart” payphones in the mid-1980s saw the advent of independent payphone service providers (“PSPs”) which began competing with the local exchange carriers.<sup>12</sup> PSPs earned their revenues from either coin calls or from contracts with toll providers (“IXCs”) or operator service providers (“OSPs”) for collect and calling card calls.<sup>13</sup> However, PSPs were largely uncompensated for dial around coinless calls. Congress enacted Section 276 to ensure a level playing field in the payphone market and to ensure that PSPs would be compensated for all calls.<sup>14</sup>

---

<sup>9</sup> *Louisiana Public Service Commission v. Federal Communications Comm’n*, 476 U.S. 355, 373 (1986).

<sup>10</sup> *See Illinois Public Telecommunications Ass’n v. Federal Communications Comm’n*, 752 F.3d 1018 (D.C. Cir. 2014).

<sup>11</sup> *See American Public Communications Council v. Federal Communications Comm’n*, 215 F.3d 51, 53 (D.C. Cir. 2000).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

In Section 276 of the 1996 Act, in addition to other requirements, Congress directed the FCC to prescribe regulations that:

- (A) Establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone...; and
- (B) Discontinue all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subparagraph (A).<sup>15</sup>

As used in Section 276, the term payphone service means the “provision of public or semi-public pay telephones, **the provision of inmate telephone service in correctional institutions** and any ancillary services.” (emphasis added).<sup>16</sup>

While Section 276(c) provides that “[t]o the extent that any State requirements are inconsistent with the Commission’s regulations, the Commission’s regulations on such matters shall preempt such State requirements, the Courts have held that “Section 276 should not be read to confer upon the FCC jurisdiction...unless Section 276 is so unambiguous or straight forward so as to override the command of Section 152(b).”<sup>17</sup> Congress also imposed an explicit rule of statutory construction in Section 601(c)(1) which provides that the Act’s provisions shall not be read to supersede existing law unless expressly provided in the Act. In other words, where there is any question, the Act’s provision must be construed to avoid preemption.<sup>18</sup> Thus, Section 276 must be read in *pari materia* with 47 U.S.C. Section 152’s reservation of authority over intrastate matters.<sup>19</sup>

Of concern is that the FCC, in the Second FNPRM, is going well beyond its mandate under Section 276 of the 1996 Act, and hence its reliance upon this provision of the Act to

---

<sup>15</sup> 47 U.S.C. § 276.

<sup>16</sup> 47 U.S.C. § 276(d).

<sup>17</sup> *Illinois Public Telecommunications Association v. Federal Communications Comm’n*, 117 F.3d 555, 561 (D.C. Cir. 1997)(citing *Louisiana Pub. Serv. Comm’n*, 476 U.S. at 377).

<sup>18</sup> See NARUC Comments filed on December 20, 2013; *see also* Section 601(c)(1) which provides that “[t]his Act and the amendments 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.” 47 U.S.C. § 261(b) and (c) (1996).

<sup>19</sup> *Accord* NARUC Comments filed December 20, 2013.

preempt state authority over ICS is misplaced. As discussed above, the primary purpose of Section 276 was to prevent unfair competition by the incumbent local exchange carriers against the payphone providers. The other express purpose of this Section was to ensure that the payphone providers were fairly compensated for all calls placed using their payphones. At the center of the FCC's payphone compensation proceedings **has been the compensation of payphone providers for coinless calls.**<sup>20</sup>

In response to the Wright Petition, the FCC has significantly expanded the scope of its review and potential preemption of state authority well beyond that contemplated and/or permitted by Section 276 of the Act.<sup>21</sup> The ACC does not believe that the FCC can use Section 276 to broadly preempt state authority over ICS to the extent discussed in the Second FNPRM. For instance, as NARUC points out, the FCC itself has never construed its authority under Section 276 to extend to intrastate toll services.<sup>22</sup> In addition, the ACC does not believe that Section 276 gives the FCC authority to forbid site commissions in contracts between the PSP and the state correctional facilities. This would also go well beyond what the FCC ordered with respect to the reformation of interstate ICS rates.<sup>23</sup>

The other provision of the 1934 Act relied upon by the FCC is Section 201 which gives the FCC authority to ensure that all charges, practices, classifications, and regulations for and in connection with interstate or foreign communications by wire or radio, shall be just and

---

<sup>20</sup> See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order*, 11 F.C.C.R. 20541, 1996 WL 547458 (Sept. 20, 1996) (“First Report and Order”); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Second Report and Order*, 13 F.C.C.R. 1778, 1997 WL 868694 (October 9, 1997) (“Second Report and Order”); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Third Report and Order, and Order on Reconsideration of the Second Report and Order*, 14 F.C.C.R. 2545, 1999 WL 49817 (Feb. 4 1999) (“Third Report and Order”)(collectively “Payphone Compensation Orders”).

<sup>21</sup> Accord December 2013 Comments of NARUC.

<sup>22</sup> See NARUC December 2013 Comments.

<sup>23</sup> In its *Report and Order and Further Notice of Proposed Rulemaking* in this Docket released on September 26, 2013, the FCC did not prohibit site commissions in contracts between the PSP and the state correctional facility. Instead the FCC determined that they were not a cost of providing communications service and could not be included in rates.

reasonable. Like Section 276, this section is subject to the reservation of authority to the states under Section 152(b) over intrastate matters.

In summary, the FCC does not have the authority to broadly preempt state authority over intrastate ICS.

**B. The Regulation of Prisons Is One of the Most Fundamental Historic State Police Powers and as Such Is Subject to a Presumption against Preemption.**

“It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.”<sup>24</sup> The Supreme Court also stated:

The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, and with his neighbor, or with his banker becomes, for the prisoner a dispute with the State. Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems. Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances. ...The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons.<sup>25</sup>

And, in a later case, the Supreme Court stated that “absent an ‘unmistakably clear’ expression of intent to ‘alter the usual constitutional balance between the States and the Federal Government,’ we will interpret a statute to preserve rather than destroy the States’ substantial sovereign powers.”<sup>26</sup> “One of the primary functions of government...is the preservation of

---

<sup>24</sup> *Preiser v. Rodriguez*, 411 U.S. 475, 491 (1973).

<sup>25</sup> *Id.* at 492.

<sup>26</sup> *See Gregory v. Ashcroft*, 501 U.S. 452 (1991).

societal order through enforcement of the criminal law, and the maintenance of penal institutions is an essential part of that task.”<sup>27</sup>

Thus, in any preemption analysis, there is a presumption that the historic police powers of States are not superseded unless that was the clear and manifest purpose of Congress.<sup>28</sup> Further, when the text of a preemption clause of a federal statute is susceptible to more than one reading, a court ordinarily accepts the reading that disfavors preemption.<sup>29</sup>

The FCC’s primary goal with respect to the Wright Petition is to ensure that the interstate payphone rates are just and reasonable. However, the FCC goes well beyond this in its Second FNPRM. The FCC proposes to preempt state authority affecting matters that are not within the FCC’s sphere of expertise; but rather fall within the unique scope of expertise of the state correctional facilities.

For instance, the FCC’s focus on recidivism rates without factoring in the experience of the states on this issue; its lack of focus on security issues arising from certain of its proposals which are well documented in the comments of state correctional facilities; and its seeming lack of any deference to state legislative or correctional facilities policy determinations on these issues are of significant concern. With respect to many of its preemptive proposals, the FCC has not overcome the presumption that where states have traditionally occupied a field, the police powers of the state are not be superseded by federal act, unless this is the clear and manifest purpose of Congress.<sup>30</sup> Here there is no clear and manifest purpose of Congress with respect to FCC authority to go beyond its traditional ratemaking function and venture into areas that are within the unique police power of the state in its regulation of correctional facilities.

---

<sup>27</sup> *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 209 (citing *Procurier v. Martinez*, 416 U.S. 396, 412, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974, *overruled on other grounds*, *Thornburgh v. Abbott*, 490 U.S. 401, 414, 109 S.Ct. 1874, 1882, 104 L.Ed.2d 459 (1989).

<sup>28</sup> *Cipollone v. Liggett Group*, 505 U.S. 504. See also *Altria Group Inc. v. Good*, 555 U.S. 70 (2008). (On questions of express or implied preemption of state law, there is assumption that historic police powers of states are not to be superseded by federal statute unless that was the clear and manifest purpose of Congress, especially when Congress has legislated in field traditionally occupied by states.)

<sup>29</sup> *Good*, 555 U.S. at 543.

<sup>30</sup> See *Wyeth v. Levine*, 555 U.S. 555 (2009).

C. **State Prisons Are Entitled to Deference in Areas within Their Unique Sphere of Expertise.**

“Since problems that arise in the day-to-day operation of corrections facilities are not susceptible of easy solutions, prison administrators should be accorded wide-ranging deference in adoption and execution of policies and practices that in their judgment are needed to ensure internal order and discipline and to maintain security.”<sup>31</sup>

The FCC in the FNPRM treads into areas and makes policy calls within the unique expertise of the Departments of Corrections and law enforcement offices of the various states. Where security issues are a concern or other issues are within the unique scope of the state correctional facilities area of expertise, the FCC should give more deference to the views of the state agencies with expertise in this area.

In its recent comments, the ADOC noted various areas where it and the Arizona legislature should be given deference with respect to their policy decisions since these decisions fall within their areas of expertise.<sup>32</sup> The comments filed by other State correctional institutions express similar views.

The FCC itself has recognized in its various *Payphone Compensation Orders* that the ICS market has many unique characteristics.<sup>33</sup> The FCC stated in part:

Although section 276 classifies inmate calling service as a payphone service, inmate calling services, largely for security reasons, are quite different from the public payphone services that non-incarcerated individuals use. First, virtually all inmate phone calls must be collect; there can be no coin calls or credit card calls. Second, prison security rules typically require that a special automated voice-processing system, rather than a pre-subscribed operator service provider (OSP) process inmate collect calls, in order to provide prison authorities with the ability to screen phone calls. Third, inmate calling service employ numerous blocking mechanisms to prevent inmates from making direct-dialed calls, access code calls, 800/900 calls, or calls to certain individuals like judges or witnesses. In fact, calls from confinement facilities often are limited to certain pre-approved numbers. Fourth, confinement facilities also require that phones be monitored for frequent calls to the same number, a sign of possible criminal activity or a scheme

---

<sup>31</sup> *Bell v. Wolfish*, 441 U.S. 520 (1979).

<sup>32</sup> See Arizona Department of Corrections December 31, 2014 Comments.

<sup>33</sup> See *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order on Remand and Notice of Proposed Rulemaking*, CC Docket No. 96-128 (rel. February 21, 2002).

to evade calling restrictions via call-forwarding or three-way calling. Fifth, confinement facilities usually require periodic voice-overlays that identify the call as being placed from a confinement facility, as well as listening and recording capabilities for all calls. Finally, inmate calling systems generally must provide detailed, customized reports for confinement facility officials.<sup>34</sup>

One such issue identified by the ADOC is the FCC's request for comment on requiring multiple providers at correctional institutions.<sup>35</sup> The FCC itself notes that requiring multiple providers at correctional institutions could present significant practical challenges and potentially could increase costs and therefore drive up rates. This is the type of issue that is likely to also implicate security concerns, and thus deference to the state correctional facilities would be appropriate.

In summary, the FCC should give deference to State correctional facilities with respect to intrastate ICS reforms that impact areas where their unique expertise is implicated.

**D. A One Size Fits All Approach Is Not Appropriate in the ICS Context.**

The ACC agrees with many commenters that a one size fits all approach to the issues raised in the Second FNPRM is not appropriate. This is particularly true with respect to intrastate ICS. As the comments filed in this Docket indicate, many states (and likely more now) have already taken action to reform intrastate ICS. Specifically, both NARUC and the FCC discuss the actions taken by states to reform ICS rates.

NARUC noted in its December 2013 Comments that the states of California, Nebraska, New Mexico, New York, Michigan, Missouri, Rhode Island, South Carolina, Alabama, Louisiana, Massachusetts, and Minnesota had instituted or were contemplating instituting intrastate ICS reforms. However, it is important to note that not all of the actions of the various states are consistent. For instance, some states such as New York and New Mexico have eliminated site commissions. Others, such as Alabama have not. Some states such as Louisiana have adopted rate caps for intrastate toll calls.<sup>36</sup> Others have not. This does not mean that the rates of all of these states are not just and reasonable.

---

<sup>34</sup> *Id.* at para. 9.

<sup>35</sup> Second FNPRM at para. 35.

<sup>36</sup> *See* NARUC December 2013 Comments at 5.

The ADOC noted in its comments filed on December 31, 2014, that its recent contract eliminates “ancillary fees”; establishes low per minute rates; but retains an allowance for commissions on intrastate calls to fund inmate education, as well as other programs benefiting inmates. *See* A.R.S. § 41-1604.03.

This demonstrates that there are different approaches to the issues raised, and one solution may not be the best approach for all of the states. In fact a one size fits all approach achieved through preemption would “discourage [S]tates from devising innovative solutions to ensure that intrastate inmate calling rates are just, reasonable and fair.”<sup>37</sup>

**IV. THE FCC SHOULD WORK WITH THE PARTIES ON A COLLABORATIVE BASIS WHICH WILL ACHIEVE A MUCH BETTER BALANCE BETWEEN THE COMPETING INTERESTS IN THIS DOCKET THAN WOULD THE HIGHLY PREEMPTIVE APPROACH CONTEMPLATED IN THE FNPRM.**

At least one party has suggested that the FCC work with the parties on a collaborative basis to attempt to resolve some of these difficult issues.<sup>38</sup> The ACC would encourage the FCC to take this approach with representatives from the state correctional facilities rather than preempting states and imposing an intrastate regime which may not be in the best interest of the states or the inmates. Achieving the lowest rate possible is not always in the public interest. Further, a higher rate may also be just and reasonable and more appropriate given the unique concerns at play in the correctional setting and the need to balance competing interests. Finally, the ultimate goal should be to “get this right” rather than to get it done fast.

...  
...  
...  
...  
...  
...

---

<sup>37</sup> *See* December 2013 Comments of NARUC citing to the Comments of the Public Service Commission of the District of Columbia filed on December 11, 2013.  
<sup>38</sup> *See* Comments of Verizon and Verizon Wireless filed on March 25, 2013.

**V. CONCLUSION.**

The FCC should not preempt state authority over ICS as outlined in the Second FNPRM. States are in the best position to oversee and investigate matters relating to intrastate ICS rates and service quality. The FCC should work with the states on a collaborative basis to achieve any reforms deemed necessary. Finally, as the record demonstrates, a one-size-fits-all approach is not appropriate in this context.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of January, 2015.

//s// Maureen A. Scott  
Maureen A. Scott, Senior Staff Counsel  
Robert Geake, Attorney  
Legal Division  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007  
(602) 542-3402