

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

IN THE MATTER OF)

RATES FOR INTERSTATE INMATE CALLING)
SERVICES)

WC Docket No. 12-375

***EX PARTE* PRESENTATION OF MICHAEL S. HAMDEN¹**

INTRODUCTION

Given the lengthy pendency of this Docket, the extraordinary solicitation of information and input from all stakeholders, the voluminous record, the documented failure of authorities governing ICS to demand (or even *to allow*) the lowest available end-user rates, and the astounding avoidance machinations of ICS industry and correctional professionals to circumvent modest interim regulations, it is clear that the only prospect of meaningful reform of the ICS industry is through comprehensive regulation of national scope.²

The widespread abuses in the nationwide ICS industry have been well documented in this proceeding, as has the abject failure of competition to correct the exploitive practices of the industry. But despite obvious and well known egregious ICS practices designed to exploit prisoners and their families, the overwhelming majority of state utilities commissions have shirked responsibility even to address the issue. And the National Association of Regulatory Utility Commissioners (NARUC) audaciously asserts that federal regulation of intrastate ICS

¹ An attorney with decades of experience in representing inmates in a variety of matters, including issues pertaining to inmate calling services, Hamden has previously participated in this proceeding, as well as its predecessor, CC Docket No. 96-128.

² See generally, *Second Further Notice of Proposed Rulemaking*, WC Docket No. 12-375, 29 FCC Rcd 13170, FCC 14-158 (22 Oct. 2014)[hereafter, *Second Further Notice*].

rates would improvidently impinge upon the prerogatives of state utilities commissions, and that the FCC lacks legal authority to regulate ICS intrastate rates.³

The jurisdiction and legal authority of the FCC over the ICS industry have been extensively addressed in multiple filings.⁴ A fair reading of governing law shows that the FCC has a clear and compelling mandate to regulate the ICS industry in its entirety, including interstate and intrastate rates and all practices related to the provision of such services.⁵

But rather than rehash that analysis, the purpose of this submission is to demonstrate that the striking ambivalence of most state utilities agencies to the ICS industry and the impotence of others, combined with the extraordinary complexity of the ICS industry, leaves no alternative to comprehensive FCC regulation if meaningful reform is to be achieved for “the benefit of the general public.”⁶

³ Comments of the National Association of Regulatory Utility Commissioners, p. 7 (9 Jan. 2015).

⁴ Legal analysis of the FCC’s authority to regulate both interstate and intrastate ICS rates appears in numerous submissions. *See, e.g.*, Comments of Michael S. Hamden, pp. 3-7 (12 Jan. 2015)(concluding that the FCC has authority to regulate intrastate rates and that a general proscription to the contrary contained in 47 U.S.C. § 152 cannot be given application to the ICS industry consistently with the broader purposes of the Telecommunications Act of 1996).

Other support for the legal authority of the FCC to regulate intrastate ICS rates appears elsewhere in the record. *See, e.g.*, Comments of Andrew D. Lipman, pp. 2-6 (12 Jan. 2015)(FCC has statutory authority to regulate intrastate ICS rates); *and* Reply Comments of Andrew D. Lipman, pp. 1-5 (27 Jan. 2015) (specifically refuting contention that FCC may not preempt state regulation under § 601(c)(1) of the Telecommunications Act of 1996; and correcting mischaracterization of the stated purpose of § 276). *See also, Ex Parte* Communication from Charles A. Acquard, Executive Director, National Association of State Utility Consumer Advocates, p. 2 (27 Mar. 2015)(arguing that “the FCC has jurisdiction over ICS rates both interstate and intrastate”). *Accord*, Reply Comments, National Association of State Utility Consumer Advocates, pp. 4-6 (10 Apr. 2013)(FCC has jurisdiction over both interstate and intrastate ICS rates). *And see*, Reply Comments of Martha Wright, *et al.*, pp. 7-10 (27 Jan. 2015)(refuting notion that state utilities commissions can or will effectively regulate ICS industry and noting specific preemption authority of § 276(c)). *Accord*, Comments of Martha Wright, *et al.*, pp. 11-18 (12 Jan. 2015)(FCC has authority to regulate intrastate ICS rates).

⁵ 47 U.S.C. § 154(i) empowers the Commission to make “such rules and regulations and issue such orders . . .” as may be necessary to carry out the provisions of the Act.

⁶ 47 U.S.C. § 276.

**THE RECORD BELIES THE PROVINCIAL VIEW THAT STATE UTILITIES COMMISSIONS
CAN OR WILL REIN IN ABUSIVE ICS INDUSTRY PRACTICES**

The National Association of Regulatory Utility Commissioners (NARUC) is an organization that represents the interests of state utilities commissions. As such, NARUC can be expected to jealously guard and seek to perpetuate the prerogatives of its members.

Although NARUC has been supportive of the FCC's regulation of interstate ICS calls,⁷ it strenuously objects to federal regulation of intrastate ICS on the grounds that it would "interfere with existing State programs and undermine State jurisdiction to handle related complaints and revise programs."⁸ NARUC asserts that "individual States remain in the best position to oversee and investigate matters relating to ICS INTRASTATE rates and service quality."⁹ But the problems with NARUC's position are several and are fatal to their arguments.

Distinguished public servants from public utilities commissions across the nation comprise NARUC's leadership at all levels throughout the organization. Yet, that leadership has provided few examples of ICS reform to the field. A comprehensive review of the regulatory schemes governing ICS in the states where NARUC's Officers, Board Members and Telecommunications Committee Members work shows that there are precious few examples of action even intended to effect meaningful ICS reform.¹⁰ And no memorandum, resolution, or

⁷ See, e.g., Reply Comments of the National Association of Regulatory Utility Commissioners, p. 4 (22 Apr. 2013). See also, NARUC Federalism Task Force Report, p. 13 (Nov. 2013), accessible at: <http://www.naruc.org/Publications/Federalism-task-force-report-November-20131.pdf> ("States, the FCC, and industry should work collaboratively to ensure that consumers are protected from unfair practices regardless of the technology used to provide those services.").

⁸ Comments of the National Association of Regulatory Utility Commissioners, p. 5 (9 Jan. 2015).

⁹ *Id.* at p. 4.

¹⁰ See Exhibit 1, attached: Intrastate Long Distance Inmate Collect Call Rate Comparison – 15-Minute Calls: State PSC/PUC Rate Regulation with LEC, AT&T and Securus Rates.

any other publicly accessible communication could be located in which NARUC encouraged its members to so much as consider remedial action to address abusive ICS practices.¹¹

Moreover, the states represented by NARUC's leadership have done astonishingly little to implement meaningful ICS reform or regulation. For example, as set forth in Exhibit 1, a review of the ICS schemes in the states that NARUC's Officers, Board Members, and Telecommunications Committee Members represent reveals that:

- **NARUC's Officers** hail from four states, three of which have no intrastate ICS rate caps (Florida, Pennsylvania, and Indiana). Indeed, in two of those states (Florida and Indiana), the state legislature has deregulated ICS, and the respective public service commissions entirely lack authority to regulate ICS.

- **NARUC's Board Members** represent 24 jurisdictions, 17 of which have no intrastate ICS rate caps. And as to long-distance (interLATA) calls, rates vary wildly. For a 15-minute call, Massachusetts has the lowest rate at \$4.00. Three states have rates less than \$7.00. The rate climbs to more than \$10.00 in 15 of these jurisdictions, soaring to more than \$20.00 in 12 of these states. In 8 states, the rate is even higher: an outlandish \$29.34 in Pennsylvania, Indiana, Connecticut, Maryland, Virginia, California, and Rhode Island; and an absurd \$29.49 in Wisconsin. (In jurisdictions where there are no rate caps, the long distance rates listed in Exhibit 1 are LEC and AT&T rates.)

¹¹ *But see*, NARUC Resolution of 14 November 2012, "Resolution Urging the FCC to take Action to Ensure Fair and Reasonable Telephone Rates from Correctional and Detention Facilities," accessible at: <http://www.naruc.org/Resolutions/Resolution%20Urging%20the%20FCC%20to%20take%20Action%20to%20Ensure%20Fair%20and%20Reasonable%20Telephone%20Rates%20from%20Correctional%20and%20Detention%20Facilities.pdf> (urging *FCC* to "prohibit[] unreasonable *interstate* rates and charges for inmate telephone services . . .") [emphasis added].

- In all jurisdictions from which **NARUC’s Board Members** hail except Hawaii and Rhode Island, Securus’ single-call, “premium,” “convenience” options are permitted.

Customers pay either \$9.99 or \$14.99 for a single call, whether local or long distance.

- Similarly, 20 of the 28 jurisdictions from which **NARUC’s Telecommunications Committee Members** hail do not have intrastate ICS rate caps. Again, long-distance rates (interLATA) are unaccountably disparate. For a 15-minute call in these jurisdictions, the low is \$3.25. In all but three states, that rate is at least \$8.00. In 23 of these jurisdictions, the rate is above \$10.00, and in 21 the rate is above \$20.00. Fourteen states inexplicably permit a rate of \$29.34.

- And *all* of the jurisdictions that **NARUC’s Telecommunications Committee Members** represent permit Securus’ single-call, “premium,” “convenience” options—for which customers are charged either \$9.99 or \$14.99 for one local or long distance call.

In summary, there is no reason to credit NARUC’s arguments that the Commission should leave regulation of intrastate ICS to the states. There seem to be very few “programs” at the state level with which federal regulation could possibly “interfere.”¹² Consequently, although consumer comments in this proceeding have been numerous and overwhelmingly supportive of comprehensive reform, it seems that comparatively few consumer ICS complaints could have been substantively addressed at the state level. And of course, in the absence of a meaningful ICS reform initiative at the state level, there can be no “program” to be revised. NARUC’s position that “individual States remain in the best position to oversee and investigate

¹² In fact, in four states (Florida, Indiana, Colorado, and Kentucky), ICS has been deregulated or otherwise placed beyond the jurisdiction of the state utilities regulatory agency.

matters relating to ICS INTRAsate rates and service quality”¹³ is rendered largely meaningless by the states’ general failure to do so. That failure underscores the imperative for FCC action.

The woeful inaction reflected by an analysis of jurisdictions represented by NARUC’s leadership is emblematic of the nationwide indifference to the exploitive practices of the ICS industry. In its *Second Further Notice*, the FCC announced that it is considering far-reaching reform of a broad range of ICS issues.¹⁴ Since then, *only three* state public utilities commissions have filed responsive comments.¹⁵ As helpful as that input may be, it is hard to imagine a more damning expression of the ambivalence of the remainder of state utility regulatory agencies to the blatant, abusive practices prevalent in the ICS industry.

¹³ *Supra* n. 8, at p. 4.

¹⁴ *See generally*, *Second Further Notice*, WC Docket No. 12-375 (22 October 2014).

¹⁵ *See* Comments of Arizona Corporation Commission, (12 Jan. 2015); Reply Comments of Pennsylvania Public Utility Commission, (27 Jan. 2015); and the Alabama Public Service Commission, (multiple filings).

In its filing, the Arizona Corporation Commission took the position that the FCC ought to defer to states and state correctional facilities regarding ICS, in part because the “unique expertise” of correctional officials best equips them to make decisions regarding corrections issues. *See generally*, Arizona Corporation Commission, Comments, (12 Jan. 2015); *see also*, Letter from Charles L. Ryan, Director, Arizona Department of Corrections, to Marlene H. Dortch, Secretary, FCC, (31 Dec. 2014) (“[T]he FCC does not have the authority to usurp the State’s regulatory authority over intrastate telecommunication.”).

Remarkably, the Arizona Corporation Commission articulated that position just months after the Arizona DOC awarded a new ICS contract to CenturyLink in September 2014, which featured a whopping 93.9% commission! *See, e.g.*, A. Philip, “Phone call rates squeeze inmate families, boost state revenues,” Cronkite News (28 April 2015)(attached as Exhibit 2), accessible at: <http://cronkitenewsonline.com/2015/04/phone-call-rates-squeeze-inmate-families-boost-state-prison-revenues/>. Worse, the related RFP advised that an ICS provider’s proposed site commission percentages would account for up to 1500 of the 1800 total points that a bidder could possibly “score” on its bid. *See* Arizona DOC RFP #ADOC14-00003887/14-006-24 (6 Mar. 2015), accessible at <https://procure.az.gov/bs0/external/bidDetail.sdo?docId=ADOC14-00003887&external=true&parentUrl=bid>. (The relevant section, 3.1.1. at p. 55 of the RFP, is attached as Exhibit 3; and the “Inmate Telephone System (IPS) Evaluation Summary and Scoring Solicitation No. ADOC14-00003887 / ADC No. 14-066-24, is attached as Exhibit 4). Furthermore, the Arizona RFP required that ICS providers bidding on the contract had to commit to fixed ICS rates set by the Arizona DOC—apparently meaning that the DOC would not even entertain a bid with lower rates. *Id.*, Arizona DOC RFP at ¶ 3.1.1 (Exhibit 3). That is hardly an approach protective of consumers.

**LIMITED SUCCESS CHARACTERIZES THE EFFORTS OF EVEN THOSE
FEW JURISDICTIONS THAT HAVE ACTED TO PROTECT ICS CONSUMERS**

A few states have undertaken ICS reform through deliberation of policy considerations, through regulation, or by state statute.¹⁶ Two of these states deserve recognition for their efforts to implement comprehensive reform, and a third deserves mention.

New Mexico. New Mexico banned the payment of commissions in 2001.¹⁷ Unfortunately, that action did not solve all problems, as ICS providers and facilities crafted workarounds to defeat the legislation's purpose by entering into agreements containing revenue generation mechanisms unrelated to telephone calls. For example, ICS providers and facilities concocted a scheme to designate as "rental space" the area on facility walls where payphones were located. The New Mexico experience demonstrates the lengths to which stakeholders will go to evade or circumvent a conservative, narrow regulatory approach.

More than a decade later, New Mexico returned to the issue and adopted rules capping rates and fees. Even then, however, several ICS providers and correctional administrators took advantage of the delay between the announcement of the new rules and their effective date many months later to re-work contracts, sidestepping certain rules and taking advantage of language which "grandfathered" existing contracts.¹⁸ These actions stunted reform efforts. Thus, some fourteen years after prohibiting commissions, and after an additional six years of proceedings to further tighten regulations, ICS consumers are still waiting for meaningful relief from abusive

¹⁶ See *Second Further Notice*, at ¶ 117 and related footnotes. See also, generally, Pay Tel Communications, *Ex Parte* Presentation, "The 'Competitive Market' is Not Responsible for Low ICS Rates in DOCs in States That Have Eliminated Commissions; Regulatory Action is Responsible for Decreased Rates," (7 Jan. 2015)(identifying 10 states where commissions have been capped or eliminated).

¹⁷ See N.M. Stat. Ann. § 33-14.1.

¹⁸ In light of the New Mexico experience, it seems advisable that any "grandfathering" provision that appears in new regulations should apply only to contracts then in effect, and only as they are constituted on the date of the rule's promulgation, rather than on the rule's effective date. Only in that way can subversion of the process be minimized.

ICS practices in New Mexico. Indeed, as a former member of NARUC and Commissioner for the New Mexico Public Regulation Commission observed: “I would urge the FCC to take a broad look at its jurisdiction . . . [F]airness in human rights has to take precedence over states’ rights.”¹⁹

Alabama. In December 2014, the Alabama Public Service Commission enacted sweeping intrastate reform which, among other things, sets rate caps, limited and capped ancillary charges and fees (including third-party money transfer fees), and regulated single-call “convenience” programs. The regulatory scheme fails to regulate site commissions at all, but the Alabama PSC’s efforts represent a reasonably comprehensive approach to ICS regulation which deserves consideration by other utility regulatory agencies. Indeed, to the extent that such reforms are “consistent with the regulations that the Commission ultimately adopts[,]” they will not be preempted by federal regulation.²⁰ In this way, state utility regulatory agencies that engage in proactive and substantive regulation of the ICS industry (as has Alabama’s PSC) may retain regulatory authority without “interference” or disruption to effective state programs.²¹

Of course, industry giants Securus and GTL can be counted on to resist any such efforts. As they did with the FCC’s ICS Order, the two dominant ICS providers immediately appealed the Alabama PSC’s Order, which has since been stayed.

Louisiana. A 2013 vote of the Louisiana PSC delayed a ban on ancillary fees. Although that proceeding is still pending, remarkably candid and insightful comments have been voiced recently by Louisiana Public Service Commissioner Foster Campbell, who called the ICS

¹⁹ Comments of Jason Marks, Reforming Inmate Calling Services Rates Workshop, Transcript at pp. 185 – 186 (10 July 2013). Mr. Marks is a knowledgeable and experienced state commissioner formerly with the New Mexico Public Regulation Commission Commissioner who also served as a member of NARUC.

²⁰ *Second Further Notice*, at ¶ 117.

²¹ *But cf.*, Comments of the National Association of Regulatory Utility Commissioners, pp. 4-5 (9 Jan. 2015).

industry “worse than any payday loan scheme.”²² Speaking to a local television news station, Campbell recently stated: “We ought to be regulating [ICS rates], but we don’t want to regulate them because the politics there’s a little hot. Nobody wants to buck the sheriffs.”²³

CONCLUSION

The state of ICS in this country is rife with greed, shameless profiteering, and the exploitation of vulnerable consumers. Industry executives have colluded with correctional professionals to bilk millions of dollars from prisoners and their families while public utility regulatory bodies have by-and-large closed their eyes to the self-perpetuating scheme which has, after more than a decade, spiraled out of control, even for the participant-beneficiaries.

Protestations that regulation of a nationwide and an obscenely profitable industry should be left to the exclusive control of the states is little more than a fig leaf intended to cover overwhelming inaction and indifference in order to preserve provincial prerogatives. Even in states that have taken the lead and enacted good faith efforts at meaningful reform, those efforts have been met with workarounds that shift ICS practices to more obscure, convoluted, and unregulated revenue generation mechanisms and “services,” the renegotiation of contracts to circumvent new regulations, and a bevy of legal challenges to even the most moderate and conservative regulatory measures. Armed with deep pockets and teams of lawyers, the ICS industry has shown obstinacy in resisting all efforts at real reform by every available means. That can hardly be surprising – even the fees of an army of top-notch lawyers and associated

²² See Heather Parker, KTVE 10 News, “PSC Commissioner Slams Prison Phone Company Payments,” (18 May 2015), accessible at: <http://www.myarklamiss.com/story/d/story/psc-commissioner-slams-prison-phone-company-paymen/14503/PBg72k18J0-hhfDa4KztLg>.

²³ *Id.*

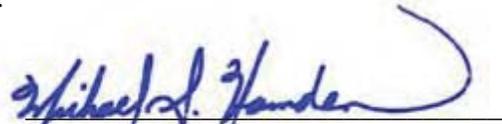
legal costs pale in comparison to the vast profits generated by exploitive ICS practices.²⁴ But how can state utilities commissions be expected to bring comparable resources to bear in defense of responsible regulatory action? Prisoners and their families should not be made to wait any longer for genuine reform. And they certainly should not be made to await years of protracted litigation and the patchwork results that could be expected from the courts in 50 states.

If a rational, consistent approach to ICS regulation is to emerge, it can come only from the Federal Communications Commission. The FCC must at last enact comprehensive regulations that: (1) rein in site commissions, including in-kind payments, exchanges, allowances, and all other arrangements designed to return a profit to correctional agencies or institutions of government; (2) limit the rates charged for interstate and intrastate calls of all kinds (including debit, prepaid, and collect calls) to levels which do not exceed the actual, reasonable cost of ICS services in the correctional setting, plus a reasonable return; (3) prescribe service charges (permitting a modest fee to defray the actual cost of debit and credit card transactions, as well as those involving a live operator); (4) closely scrutinize fees charged by third-party payment processing companies, permitting no fee that exceeds actual, reasonable costs with no profit to ICS vendors; (5) eliminate all other ancillary fees; (6) require that tariffs be filed for additional charges to recover the actual cost of security features employed at each facility where such service is in place and the charge is being assessed; and (7) prohibit per-

²⁴ The Huffington Post recently reported that the ICS industry generated “\$404.6 million last year alone” notwithstanding rate caps imposed by the FCC in February 2014. According to the article, Securus, which controls 20% of the market, “made \$114.6 million in profit on that revenue . . . [and the] gross profit margin -- a measure of the difference between the cost to provide its services, and what it charges for them -- was a whopping 51 percent.” B. Walsh, *Prisoners Pay Millions To Call Loved Ones Every Year. Now This Company Wants Even More*, Huffington Post (10 June 2015), accessible at: http://www.huffingtonpost.com/2015/06/10/prison-phone-profits_n_7552464.html. See also, T. Williams, *The High Cost of Calling the Imprisoned*, NY Times (30 Mar. 2015), accessible at: <http://nyti.ms/1F8OJ4j>.

call/per-connection charges, “convenience” payment fees, and all other mechanisms that result in charges that exceed the established rate caps.

Respectfully submitted this 24th day of June, 2015.



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