

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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

COMMENTS OF THE ELECTRONIC FRONTIER FOUNDATION

The Electronic Frontier Foundation (EFF) submits these comments in response to the Third Further Notice of Proposed Rulemaking in the above captioned proceeding.¹ EFF is a non-profit, member-supported civil liberties organization working to protect digital rights. With more than 26,000 active donors and dues-paying members, EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law in the digital age. EFF provides these comments in response to the narrow set of issues raised by the increased offering of video calling and other Internet-based services within prisons and jails.²

Specifically, EFF’s comments argue that (1) the use of video calling and other communications services in prisons and jails should increase, not reduce, contact between prisoners and their families, (2) the Commission must protect the privacy of ICS customers, (3) prisoners’ use of certain online services should not, by themselves, result in punishment, (4) ICS providers should not abuse their position to subject their customers to onerous contractual terms, and (5) charges for video calling and other communications services must be cost-based.

¹ *Second Report and Order and Third Notice of Proposed Rulemaking, Rates for Interstate Inmate Calling Services*, Dkt. No. 12-375, FCC 15-136 (Nov. 5, 2015) (*Third FNPRM*).

² See *Third FNPRM* ¶¶ 296-307.

I. Advances in video calling and other electronic communication services should increase, not reduce, contact between prisoners and their families.

Video calling and other electronic communications services in prisons and jails should increase the ability of prisoners and their families to communicate with one another. In the *Third FNPRM*, the Commission states that video calling and other electronic communications services are becoming prevalent within jails and prisons and sometimes competing with the traditional telephone services of Inmate Calling Services (ICS) providers.³ The Commission specifically seeks comment on the benefits of these alternative communication technologies as well as “the impact video calling has on inmate connectivity with friends and family.”⁴

Society has benefited from a rapidly growing number of digital communications platforms that provide alternatives and improvements to traditional mediums such as telephone service or speaking face to face.⁵ EFF was in part founded on the belief that advances in technology could expand opportunities for everyone by lowering physical and financial barriers for people to communicate, organize, and express themselves.⁶ Thus, communications technology enables people to supplement and increase their non-digital communications at little to no additional cost.

When it comes to prisons and jails, however, video and other electronic communications services are all too often being used to restrict, and in some cases, replace, in-person visits.⁷ As the Prison Policy Initiative’s (PPI) report on video calling in prisons and jails describes, these services are often supplanting face-to-face visits by either replacing visiting hours entirely or

³ *Id.* at ¶ 298.

⁴ *Id.* at ¶ 302.

⁵ The ubiquity of services such as Microsoft’s Skype and Apple’s FaceTime underscore how prevalent video calling has become.

⁶ See About EFF, available at <https://www.eff.org/about>.

⁷ See Bernadette Rabuy and Peter Wagner, *Screening Out Family Time: The For-Profit Video Industry in Prisons and Jails*, Prison Policy Initiative 11-14 (January 2015) available at http://static.prisonpolicy.org/visitation/ScreeningOutFamilyTime_January2015.pdf (PPI Report).

requiring prison visitors to use on-site video chat terminals.⁸ Providers of video calling services, jails, and prisons are thus using new technology to create new and substantial barriers between prisoners and their families, flipping the promise of new communications technology on its head. Moreover, PPI’s report on current video calling systems in prisons and jails demonstrates that current video calling services suffer from poor video quality and delay, further demonstrating that the services are not an actual substitute for in-person conversations.⁹

Not only do the current practices undermine the promise of alternative communications services, they also run counter to the Commission’s long-stated goal of increasing the frequency with which inmates and their families communicate.¹⁰ As the Commission has repeatedly found, there are numerous concrete benefits to prisoners being able to communicate with their friends and family more often, including increasing social and community bonds and reducing the rate of recidivism once prisoners are released.¹¹

To that end, the Commission should ensure that video communications and other advanced communications services are viable additions—and not replacements—to existing communications between prisoners and their families. Families should be able to choose whether to visit their loved ones in person, call them on the phone, initiate a video chat, or send them an email message. On a special family occasion, a spouse and child might want to visit a prisoner in person – and that opportunity should not be reduced. On another occasion, a spouse and child

⁸ *Id.*

⁹ *Id.* at p. 7-9.

¹⁰ *Third FNPRM* at ¶ 296; *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 14107, 14109 (2013) (“This Order will promote the general welfare of our nation by making it easier for inmates to stay connected to their families and friends while taking full account of the security needs of correctional facilities. Studies have shown that family contact during incarceration is associated with lower recidivism rates.”).

¹¹ *Id.* at 14130 (finding that reducing rates increases communication between families and result in less recidivism).

might be unable to make the long trip to visit a prisoner – and they should be able instead to talk to a prisoner through new communications technologies. Although prisons and jails’ inherent security interests often give them authority to determine when and how prisoners communicate with their loved ones, those concerns do not override the Commission’s authority to ensure that the market for ICS services serves the public interest.¹²

II. The Commission must protect the privacy of prisoners, their families, and anyone else who uses ICS.

As the Commission considers adopting rules for other ICS communications technologies that are used in prisons and jails, it must ensure that providers and correctional facilities protect users’ privacy. Because the Commission has previously found that its rules around ICS are technology neutral, the same privacy provisions of the Communications Act and related rules should apply to all communications services offered to prisoners and their families.¹³

The recent leak of more than 70 million phone call records by ICS provider Securus underscores the need for greater data security and privacy rules to protect ICS customers.¹⁴ EFF agrees with Public Knowledge that the FCC must investigate this particular breach to determine whether Securus violated any agency rules and/or the Communication Act’s protections for Consumer Proprietary Network Information (CPNI) and restrictions on disclosure of the contents

¹² As the Commission has previously found, Section 276 of the Communications Act grants the Commission authority over “the provision of inmate telephone service in correctional institutions, and any ancillary services.” 47 U.S.C. § 276; *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd at 14156-59. Ancillary services are therefore subject to the Communication Act’s requirements that all practices be just and reasonable. 47 U.S.C. § 201(b).

¹³ *Third FNPRM* at ¶ 304; 47 U.S.C. § 222.

¹⁴ Jordan Smith and Micah Lee, *Not So Securus: Massive Hack of 70 Million Prisoner Phone Calls Indicates Violations of Attorney-Client Privilege*, *The Intercept* (Nov. 11, 2015) available at <https://theintercept.com/2015/11/11/securus-hack-prison-phone-company-exposes-thousands-of-calls-lawyers-and-clients/>.

of recorded conversations.¹⁵

At the same time, the Commission should use this rulemaking to establish better policies governing the collection and storage of ICS call records and the contents of those communications, including phone calls, video calls, and other communications services provided to prisoners. EFF recognizes that prisons, jails, and ICS companies might often have an interest in monitoring and storing the communications of detainees and prisoners for legitimate security purposes. Prisons, jails, and ICS companies, however, have no legitimate need nor the legal authority to store *all* prisoner communications permanently, and are not categorically exempt from the Fourth Amendment’s guarantee against unreasonable searches.

Although prisoners have diminished Fourth Amendment protections in certain circumstances, they do not lose their constitutional right to privacy or the related protections of the Communications Act governing call records and contents.¹⁶ Prisoners’ family members and all other ICS customers also enjoy statutory protections and the Fourth Amendment’s expectation of privacy in their communications. Additionally, communications between prisoners and their attorneys are privileged.¹⁷ Finally, although ICS customers have a strong privacy interest in the contents of all of their ICS communications, the nature of video calling—including the providers’ recording of individuals’ biometric markers, such as faces and expressions that by themselves are inherently personal—presents acute privacy concerns that the

¹⁵ Kerry Maeve Sheehan, *Securus Leak of Prison Call Records Underscores Importance of FCC Oversight*, Public Knowledge (Dec. 8, 2015) available at <https://www.publicknowledge.org/news-blog/blogs/securus-leak-of-prison-call-records-underscores-importance-of-fcc-oversight>; 47 U.S.C. §§ 222, 605.

¹⁶ See *Hudson v. Palmer*, 468 U.S. 517 (1984); 47 U.S.C. §§ 222, 605.

¹⁷ *Nordstrom v. Ryan*, 762 F.3d 903 (9th Cir. 2014) (holding that a prisoner stated a claim by alleging that a guard read their legal mail, because “an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him”); *Jones v. Brown*, 461 F.3d 353 (3rd Cir. 2006) (striking down a prison policy of opening prisoners’ legal mail outside the prisoners’ presence).

Commission must take into account.

Given the constitutional privacy interests and statutory protections afforded to ICS customers, the Commission should limit the collection and storage of call records and the contents of all ICS communications to only what is demonstrably necessary to meet correctional institutions' security needs. The policy would require ICS providers to limit the records they initially collect and also require periodic data purging when it is no longer needed. The policies would prevent the creation of massive databases of ICS phone or video calls in the first place and would also encourage institutions to store only the data they need. Additionally, judicious enforcement of the Commission's current and future rules would ensure that ICS providers adopt data security practices that prevent unauthorized access and breaches similar to Securus.

The Commission should also make clear that ICS providers cannot profit from their collection and storage of customer data in ways that run counter to the intent of the Communications Act's CPNI protections, even where the Act is ambiguous. Subject to certain exceptions, section 222(c) prevents disclosure of a customer's phone records without the customer's affirmative consent. Section 222(c)'s provisions run counter to business models of some ICS providers. Securus, for example, offers a service to prisons and jails called the Secure Call Platform that allows remote access to its ICS customers' call records.¹⁸ The feature appears to leverage ICS customers' data—which Securus only has access to by virtue of providing the service—into a feature that is sold to prisons and jails. One of Section 222's purposes, however, is to prevent telecommunications carriers from using their position as a service provider to further profit from the collection of customer call records.

¹⁸ *See supra*, n. 15.

III. Prisoners' use of online services should not, by themselves, form the basis of any punishment.

The Commission should ensure that service providers, prisons, and jails do not set up their communication systems in ways that violate the rights of prisoners. EFF has been critical of jail and prison policies that punish prisoners for accessing online services such as Facebook.¹⁹ The mere use of online services should not, by itself, be a crime or result in punishment of prisoners. Services such as Facebook enable greater communications between prisoners, their families, and friends, a goal the Commission has explicitly endorsed in this rulemaking.²⁰ Violations of a website's terms of service or other agreement should not automatically be elevated into punishment within a facility.²¹ Rather, violations of a contract, such as Facebook's rule against third parties using another's profile, should ordinarily be dealt with between the service and its users.

IV. Prisoners and their families should not be subjected to onerous terms for using ICS.

ICS providers offering video calling and other electronic communications services within prisons and jails often subject their customers to onerous terms and conditions. Apart from the high financial costs of ICS, which this Commission has previously found unjust and unreasonable, providers of new services in jails and prisons sometimes abuse their position as the exclusive provider of inmate communications to extract unfair contract terms from their users. For example, ICS provider JPay previously included a clause in its Terms of Service that granted it ownership in "all of the content, including any text, data, information, images, or other

¹⁹ Dave Maass, *Facebook Overhauls its Inmate Account Takedown Process*, Electronic Frontier Foundation (June 4, 2015), available at <https://www.eff.org/deeplinks/2015/06/facebook-reforms-inmate-account-takedown-process>.

²⁰ *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd at 14130.

²¹ *United States v. Valle*, 807 F.3d 508 (2nd Cir. 2015) (holding that violation of a computer use policy does not comprise a violation of the Computer Fraud and Abuse Act).

material, that you transmit through the Service.”²² If found to be enforceable, this would give the company ownership, for example, of any poems that prisoners wrote for their families and transmitted over a company channel. Although JPay later removed this provision from its Terms of Service, it is yet another example of the inherently imbalanced power dynamic between ICS customers and providers, most of which are prisoners’ sole means of communicating with family by phone or online.

V. Charges for video calling and other advanced communication services should be cost-based.

The Commission’s previous conclusion that charges to ICS phone customers must be based on the cost of the service should apply with equal force to video calls and other advanced communications services offered in prisons and jails.²³ Just as it costs almost nothing for a non-prisoner to make a phone call, the cost of using a video calling service such as Apple FaceTime or sending an email are similarly minimal. ICS providers use the same underlying technology and infrastructure that the general public relies on to make video calls or send emails.²⁴ Thus, the actual costs of the communications is likely to be low, subject to the initial costs involved in installing video calling terminals and other devices within a facility and ongoing costs of running a network.

Moreover, the costs of ICS video calls and other electronic communications are likely to be lower than ICS phone calls for at least two reasons.

First, because most ICS phone providers rely on Voice Over IP to complete their calls,

²² Dave Maass, *The Hidden Cost of JPay’s Prison Email Service*, Electronic Frontier Foundation (May 5, 2015), available at <https://www.eff.org/deeplinks/2015/05/hidden-cost-jpays-prison-email-system>.

²³ *Third FNPRM* at ¶ 303.

²⁴ There are, for example, free open source software programs that allow anyone to set up video calling services. See RVC Video Chat, available at <http://videosoftware.pro/rvc/> (last visited Jan. 13, 2015).

the facilities already have much of the infrastructure necessary to make video calls and send email messages.²⁵ Put simply, the same lines can be used for phone calls, video calls, and other electronic communications.²⁶

Second, because video calls and other electronic communications are not subject to any tariff regimes like ICS phone calls are, there are actual cost savings in completing non-phone communications via ICS. The decreased costs should be passed along to ICS customers.

By requiring charges for video calling and other advanced communications services to be based on their actual costs, the Commission will ensure that prisoners and their families are able to use the new services and increase their communications with one another without having to pay unjust and unreasonable costs prohibited by the Communications Act.

Respectfully submitted,

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²⁵ *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd at 14122 (discussing how ICS providers centralize their services through VOIP and IP packet-based networks).

²⁶ This is already happening as ICS providers are bundling phone, video, and email services into one overall service they provide to prisons and jails. *See* PPI Report at 12 (“Video visitation is rarely a stand-alone service, and 84% of the video contracts we gathered were bundled with phones, commissary, or email.”).