

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

In the Matter of

Rates for Interstate Inmate Calling Services

WC Docket No. 12-375

REPLY COMMENTS OF TELMATE, LLC

Brita D. Strandberg
Susannah J. Larson
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, N.W.
Eighth Floor
Washington, D.C. 20036

Counsel for Telmate, LLC

8 February 2016

Table of Contents

| | | |
|------|--|----|
| I. | Introduction..... | 1 |
| II. | Commenters Agree That Video and Advanced Services Benefit the Public Interest..... | 2 |
| A. | The Record Confirms that Video Visitation and Advanced Services Can Help Inmates, Their Loved Ones, and the Public Interest..... | 2 |
| B. | The Record Confirms that Video Services Present Different Costs and Security Challenges From ICS..... | 5 |
| III. | There is No Policy Basis To Regulate Video Visitation, Email, or Other Advanced Services..... | 7 |
| A. | The Economics of Video Visitation Show That it Will Not Displace ICS..... | 7 |
| B. | The Advantages of VVS Will Not Be Realized If Advanced Services Are Heavily Regulated. | 8 |
| IV. | The Record Confirms That the Commission Does Not Have Jurisdiction over Video Visitation and Other Advanced Services. | 8 |
| V. | The Commission Should Not Impose Mandatory Contract Filings or Continuing Data Collection..... | 9 |
| VI. | Facilities Should be Permitted to Contract Freely with ICS Providers. | 11 |

REPLY COMMENTS OF TELMATE, LLC

I. INTRODUCTION

In its initial Comments, Telmate urged the Commission to proceed with care as it considers regulation of video visitation, email and other advanced services. In Telmate's view, the Commission's recent attempts to regulate inmate calling services are flawed,¹ and achieve neither the Commission's nor Congress' goals. Telmate therefore urges the Commission not to expand its existing regulatory approach to new services, but rather to adopt policies that encourage investment and innovation so that inmates and the public can benefit from new services and technology.

The record in this proceeding confirms the wisdom of that approach. Many commenters detail the current benefits and future promise of advanced services. The record likewise demonstrates that these services do not have the power to displace ICS at this time, much less allow providers to evade ICS regulation. For these reasons, there is no policy justification for regulatory intervention. Even if there were, the record is clear that Section 276 does not reach these non-payphone services.

Telmate also urged the Commission to move away from its burdensome data collection requirements. That conclusion, too, is confirmed by the record, as commenters have shown that the design of the collection and the Commission's analysis were both flawed, and led to unreliable conclusions. Finally, the Commission should refrain from regulating facilities' ability to seek bundled services, because the Commission's jurisdiction extends only to payphones, and

¹ See Petition of Telmate, LLC for Stay Pending Judicial Review at 6-15, WC Docket No. 12-375 (filed Jan. 6, 2016).

such regulation would impermissibly interfere with facilities' discretion and with state and local authority.

II. COMMENTERS AGREE THAT VIDEO AND ADVANCED SERVICES BENEFIT THE PUBLIC INTEREST.

Commenters across the board agree that video visitation service (“VVS”) and advanced services in prisons and jails can benefit the public interest. Technology that increases inmates’ social support and ties to the outside world helps to reduce recidivism.² But deployment of advanced services presents unique challenges and costs different from ICS. For advanced services to effectively benefit the public interest, companies must continue to invest in research and development. This likely won’t happen if the Commission imposes heavy-handed regulation.

A. The Record Confirms that Video Visitation and Advanced Services Can Help Inmates, Their Loved Ones, and the Public Interest.

Industry, nonprofit organizations, and sheriff departments alike confirm the vast potential of video visitation and advanced services technology, highlighting many of the same benefits Telmate presented in its comments.³ iWebVisit.com, LLC emphasizes that video visitation makes possible a level of family connection that traditional ICS phone calls do not, reminding the Commission that it is “common to see multiple family members gather around a computer

² See Comments of Prison Policy Initiative re Video Visitation, Exhibit 1 at 1-2, WC Docket No. 12-375 (filed Jan. 19, 2016) (“PPI Video Visitation Comments”) (“Family contact is one of the surest ways to reduce the likelihood that an individual will re-offend after release. . . . More contact between incarcerated people and their loved ones—whether in-person, by phone, by correspondence, or via video visitation—is clearly better for individuals, better for society, and even better for the facilities.”).

³ See Comments of Telmate, LLC at 10, WC Docket No. 12-375 (filed Jan. 19, 2016) (“Telmate Comments”).

and uplift their incarcerated loved one . . . sometimes hundreds of miles away.”⁴ CuWAV explains that “[v]ideo visitation, in its best use, can build on the benefits of onsite and in-person visiting by increasing the frequency and consistency of reconnecting with family and supportive friends.”⁵ Specifically, video visitation (i) allows families to visit from their homes without having to endure long waits or security searches; (ii) “allows facilities more flexibility in designating visiting hours;” and (iii) allows children to have “an easier experience” visiting with incarcerated parents.⁶ CuWAV also explains that personal communication devices can be “specifically designed for the security needs of correctional facilities” and “configured to offer life enhancement opportunities such as continuing education and GED support, job skills training, and alcohol and drug counseling programs.”⁷ GTL notes that advanced services “offer significantly more to inmates and their friends and families than ICS payphone service,” something that the Prison Policy Initiative has acknowledged in previous comments.⁸ Indeed, the Prison Policy Initiative notes in this comment round that “[v]ideo visitation has powerful potential to keep families connected despite the isolation and extreme distances of modern incarceration.”⁹

⁴ Comments of iWebVisit.com, LLC at 7, WC Docket No. 12-375 (filed Jan. 19, 2016) (“iWebVisit Comments”).

⁵ Comments of CuWAV, LLC at 2, WC Docket No. 12-375 (filed Jan. 19, 2016) (“CuWAV Comments”).

⁶ *Id.*

⁷ *Id.* at 5.

⁸ Comments of Global Tel*Link Corporation at 2, WC Docket No. 12-375 (filed Jan. 19, 2016) (“GTL Comments”) (*citing* Comments of Prison Policy Initiative January 2015 Advanced Services Comments at 1).

⁹ PPI Video Visitation Comments at 5; *see also id.* at Exhibit 1 at 2 (“Without a doubt, video visitation has some benefits.”).

Local sheriff departments have also weighed in on the improvements they have seen after implementing video visits. The Los Angeles County Sheriff’s Department (“LASD”) explains that remote video visitation “provides multiple security benefits that include less inmate movement inside facilities and increases safety for the inmate population and staff.”¹⁰ Specifically, LASD describes the security concerns “[w]hen the family and friends of 18,000 inmates visit Los Angeles County facilities”¹¹—concerns that can be relieved in part by remote video visits. These services also have positive benefits for inmates and loved ones: they can offer “inmates, families, and friends a convenient opportunity to have frequent contact beyond traditional ICS and mail.”¹² They can also save visitors money spent on “parking fees, sustenance, and transportation cost to the jails.”¹³ Likewise, the California State Sheriffs’ Association (“CSSA”) notes that video visitation “offers security enhancements over in-person visiting and often increases the frequency with which inmates may enjoy visitation privileges.”¹⁴ The CSSA also notes that “[v]ideo calling may provide even further benefit than audio-only calls as video permits the visualization of communication partners.”¹⁵ For these reasons, the CSSA urges the Commission to move cautiously: “[t]his new technology should not be impeded or disadvantaged by unwieldy regulation and facilities should be given a meaningful chance to

¹⁰ Comments of Los Angeles Sheriff’s Department at 3, WC Docket No. 12-375 (filed Jan. 19, 2016) (“LASD Comments”).

¹¹ *Id.*

¹² *Id.* at 2.

¹³ *Id.* at 3.

¹⁴ Comments of California State Sheriffs’ Association at 1, WC Docket No. 12-375 (filed Jan. 19, 2016) (“CSSA Comments”).

¹⁵ *Id.* at 1-2.

adjust to pending orders. Capping rates on video calling services could stop this promising new technology in its tracks to the detriment of facilities and inmates.”¹⁶

B. The Record Confirms that Video Services Present Different Costs and Security Challenges From ICS.

While the majority of commenters recognize the benefits of developing and offering video visitation and advanced services technology in facilities, they also recognize the unique challenges of deploying advanced services. Some commenters—those not responsible for deploying the technology—incorrectly suggest that video visitation is as simple as other video applications like Skype,¹⁷ or that they pose no security concerns.¹⁸ But commenters that are currently investing in research and development of advanced services—and that are therefore closest to these issues—persuasively demonstrate that this is simply not the case.

Industry commenters make clear that video visitation deployment is far more complicated than ICS because of the unique technology and security concerns. CenturyLink explains that “[t]he addition of real-time video to the audio stream requires different software, different concerns related to security, different devices both at the site and for the end-user and entails very different costs to provide.”¹⁹ In addition, costs of video visitation services vary between

¹⁶ *Id.* at 2.

¹⁷ Comments of Human Rights Defense Center at 5, WC Docket No. 12-375 (filed Jan. 19, 2016) (“HRDC Comments”) (“Currently people around the world use Skype and other video platforms at no or low cost – including, it is critical to note, prisoners in other countries that are not serviced by an exploitive ICS industry, such as the United Kingdom, India and even the Philippines.”).

¹⁸ Comments of Legal Services for Prisoners with Children at 3, WC Docket No. 12-375 (filed Jan. 19, 2016) (“LSPC Comments”) (“Because off-site video calls do not present any of the potential security issues present for in-person visits, there should be no age restrictions placed or background checks required”).

¹⁹ Comments of CenturyLink at 5, WC Docket No. 12-375 (filed Jan. 19, 2016) (“CenturyLink Comments”).

facilities because “VVS deployments are much more customized than ICS due to security issues and the significant extra cost of providing a video channel.”²⁰ This need for customization means that “the cost of providing VVS varies even more significantly from one correctional facility to another than does the cost of providing ICS.”²¹ CuWAV also acknowledges that “significant security issues” arise “when placing computing devices in a correctional facility environment.”²²

GTL reminds the Commission of the delicate balance that must be struck with this technology: “[i]nmates should not be denied the benefits of advancements in technology, except to the extent necessary to ensure public safety and security, and to address the needs of law enforcement authorities.”²³ GTL then correctly notes that “[t]his can best be achieved by allowing the continued development of these types of innovative services in the correctional setting with minimal regulation.”²⁴ CuWAV agrees that “[t]here must be an incentive for providers to build robust video solutions that can be converted to fair and reasonable profits in order to encourage competition and continue technological growth.”²⁵ The Commission should instead preserve incentives to invest in research and development so that prisoners and the public continue to benefit from the innovation that such investment will bring.²⁶

²⁰ *Id.* at 7.

²¹ *Id.*

²² CuWAV Comments at 6.

²³ GTL Comments at 5.

²⁴ *Id.*

²⁵ CuWAV Comments at 7.

²⁶ *See* CenturyLink Comments at 8 (“VVS must be allowed to develop through adoption of technology by end-users, cost efficiency by providers, and improvement in the user experience. Regulation at this time would only stifle this development.”).

III. THERE IS NO POLICY BASIS TO REGULATE VIDEO VISITATION, EMAIL, OR OTHER ADVANCED SERVICES.

A. The Economics of Video Visitation Show That it Will Not Displace ICS.

The record confirms that the current economics of video visitation do not enable it to displace ICS. Video visitation and advanced services—by nature of the specific security and technology concerns discussed above—stand apart from ICS as a separate function for prisons and jails. CenturyLink notes that “VVS is a premium service (audio plus video) that must be priced at rates above ICS rates.”²⁷ The combination of those high prices “coupled with technological constraints of family members” negatively impacts demand for video visitation: “demand for remote (paid) VVS is much lower than the demand for ICS, which makes it far more difficult to pay back the up-front investment to deploy VVS.”²⁸ This means that “VVS is not even remotely a substitute for phone revenues as some suggest.”²⁹ Because video visitation service is currently so much more expensive than ICS, and “usage volumes are so low,” video visitation “cannot possibly be effectively used to circumvent the Commission’s ICS rate caps.”³⁰ Even the Prison Policy Initiative agrees that “it appears that video visitation usage, and therefore commissions and revenue, continue to be low.”³¹ In short, because of the unique economic concerns of video visitation and other advanced services at this time, the suggestion that providers can and will somehow use them to cover their ICS costs is unfounded.

²⁷ *Id.* at 7.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 8.

³¹ PPI Video Visitation Comments at 4.

B. The Advantages of VVS Will Not Be Realized If Advanced Services Are Heavily Regulated.

Currently, technology and costs prevent video visitation service from displacing ICS, notwithstanding the additional benefits that video visitation offers. This may change if video visitation as technology continues to improve, costs come down, and demand increases, but premature regulation will almost certainly foreclose these developments as improvements in video visitation and advanced services depend on continued investment and innovation. Moving to regulate these services before they have matured and costs have fallen will prevent them from becoming a meaningful alternative to traditional ICS, and will deprive inmates and their families of their benefits. For now, the Commission need not and should not regulate these services.

IV. THE RECORD CONFIRMS THAT THE COMMISSION DOES NOT HAVE JURISDICTION OVER VIDEO VISITATION AND OTHER ADVANCED SERVICES.

The record confirms that the Commission does not have jurisdiction to regulate video visitation or other advanced services. GTL reminds the Commission that Section 276 applies only to payphone service,³² and that payphone service is defined to include “the provision of inmate *telephone service* in correctional institutions.”³³ Accordingly, “[n]ew technologies and advanced services are not subject to Commission regulation under Section 276 of the Communications Act of 1934.”³⁴ Securus agrees that the FCC lacks authority to regulate video services because Congress has not conferred such power on it³⁵ and the FCC does not have ancillary authority over the technology: “the Commission’s authority over inmate calling rates

³² GTL Comments at 3 (quoting Commissioner Michael O’Rielly).

³³ *Id.* (quoting 47 U.S.C. § 276(d) (emphasis added)).

³⁴ *Id.*

³⁵ Comments of Securus Technologies, Inc. at 6, WC Docket No. 12-375 (filed Jan. 19, 2016) (“Securus Comments”) (citing *American Library Ass’n v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005)).

does not entitle it to regulate ‘all aspects’ of inmate service.”³⁶ Because video services are information services, which the Commission does not regulate, video visitation and other advanced services are not under the Commission’s jurisdiction.³⁷ Similarly, LASD notes that the FCC should not be regulating intra-institution video visitation or inmate email because they do not meet the definition of ICS.³⁸

Even if the Commission did have jurisdiction over advanced services, regulating this developing technology would contravene Congress’s statutory mandate. Commenters like GTL agree with Telmate³⁹ that “[t]he Commission should encourage the development and distribution of [advanced services] to inmates” in keeping with its statutory mandate to “encourage the deployment of broadband technology and advanced services to all Americans.”⁴⁰

V. THE COMMISSION SHOULD NOT IMPOSE MANDATORY CONTRACT FILINGS OR CONTINUING DATA COLLECTION.

The record confirms that there is no need for mandatory contract filings or continued data collection, and the burden of these requirements would outweigh the public benefit.⁴¹ Pay Tel’s detailed critique of the Commission’s previous mandatory data filing illustrates the pitfalls of using data collection to understand the ICS marketplace.⁴² While Pay Tel suggests the Commission can remedy the flaws in its previous data collection, it would be far simpler for the

³⁶ *Id.* at 7.

³⁷ *Id.*

³⁸ LASD Comments at 2.

³⁹ *See* Telmate Comments at 13.

⁴⁰ GTL Comments at 4-5 and n.22 (*citing* 47 U.S.C. § 157(a) (“It shall be the policy of the United States to encourage the provision of new technologies and services to the public.”)).

⁴¹ *See, e.g.*, Securus Comments at 8-9.

⁴² Comments of Pay Tel Communications, Inc. at 9-13, WC Docket No. 12-375 (filed Jan. 19, 2016) (“Pay Tel Comments”).

Commission to move towards reforms that do not depend on massive data collection and analysis. The proposed oversight imposes substantial burdens on both the industry and the Commission and, as Pay Tel and others demonstrate, will likely yield data that is vulnerable to misinterpretation. Indeed, Custom Teleconnect recently explained that the Commission’s reliance on Custom Teleconnect’s data is “in error and misconstrues” that data because “Custom Teleconnect does not provide end-to-end service” and, as a result its data—“while accurate and provided pursuant to the Commission’s instructions—does not reflect the full cost to provide ICS.”⁴³

Mandatory contract filing is likewise unnecessary. As GTL notes, requiring ICS providers to file copies of their ICS contracts “is not necessary to address the transparency in rates and fees issue raised by the Commission,” because “the information sought will be reported elsewhere” under the *Second ICS Order*.⁴⁴ Moreover, disclosure may conflict with federal and state disclosure statutes.⁴⁵ Because the Commission’s goal of ensuring ICS providers’ compliance with regulations is already achieved by other means, the Commission need not and should not require contract filing or an additional data collection.⁴⁶ Likewise, without demonstrated need and jurisdiction, the White House Office of Management and Budget should

⁴³ Letter from William L. Perna, General Manager of Custom Teleconnect, Inc. at 1, WC Docket No. 12-375 (filed Jan. 27, 2016); *id.* at 2 (“To the extent that the Order purports to rely on the cost data submitted by Custom Teleconnect as an example of an ‘efficient provider’ of a complete Inmate Calling Service, the Order is in error and misconstrues Custom Teleconnect’s data.”).

⁴⁴ GTL Comments at 6.

⁴⁵ CenturyLink Comments at 10.

⁴⁶ *Id.* at 9.

not allow mandatory data collection or contract filing under the Paperwork Reduction Act of 1995.⁴⁷

VI. FACILITIES SHOULD BE PERMITTED TO CONTRACT FREELY WITH ICS PROVIDERS.

The Commission has asked whether it should restrict facilities' freedom to seek bundles of service from ICS providers. As a threshold matter, the Commission cannot take this step, as its jurisdiction extends only to payphone services.⁴⁸ Because Congress has not conferred jurisdiction on the Commission to regulate advanced services, the Commission cannot attempt to reach those services by regulating how facilities and ICS providers contract over those advanced services, whether they are bundled or not.

Even if the Commission were free to regulate non-ICS services in this way, it should not, as doing so would impermissibly interfere with facilities' discretion and with state and local authority. Because prisoner punishment—including administration and policies—has traditionally been reserved to the states, federal government interference with those policies raises potential Tenth Amendment concerns.⁴⁹ Similarly, federal restrictions on the contracting process interfere with state and local procurement law, inhibit the states' ability to set their own policies and budgets, and arguably force states and localities to enforce federal policies.⁵⁰ For all

⁴⁷ See 44 U.S.C. §§ 3501-22.

⁴⁸ See discussion *supra* Section IV pp. 8-9.

⁴⁹ See, e.g., *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973) (“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, or procedures, than the administration of its prisons”); *In re Wilkinson*, 137 F.3d 911, 914 (6th Cir. 1998) (“We also recognize that the administration of state prisons is a matter consigned to the states as part of their sovereign power to enforce the criminal law.”); see also U.S. CONST. amend. X.

⁵⁰ See, e.g., *New York v. United States*, 505 U.S. 144, 166 (1992) (“[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.”).

of these reasons, the Commission should not attempt to regulate the state and local procurement process.

CONCLUSION

Like the Commission, Telmate seeks a competitive ICS market that meets the needs of prisoners, their families, and correctional facilities. Telmate likewise seeks to ensure that facilities and inmates can benefit from advances in technology that make it possible to deliver advanced services that meet the security and other needs of correctional facilities. But these and future services could easily be delayed or derailed entirely by regulatory obligations that introduce uncertainty and discourage investment. The Commission should therefore refrain from regulating video visitation and other advanced services.

Respectfully submitted,



Brita D. Strandberg
Susannah J. Larson
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, N.W.
Eighth Floor
Washington, D.C. 20036

Counsel for Telmate, LLC

8 February 2016