

PRISON POLICY INITIATIVE

(413) 527-0845

69 Garfield Ave Floor 1,
Easthampton, Mass. 01027
www.prisonpolicy.org
www.prisonersofthecensus.org

February 8, 2016

Marlene H. Dortch, Secretary
Federal Communications Commissions
445 – 12th St. SW
Washington, DC 20554

Re: WC Docket No. 12-375
Reply Comment (Third FNPRM)

Dear Secretary Dortch:

On January 19, 2016, the Prison Policy Initiative submitted *You've Got Mail: The promise of cyber communication in prisons and the need for regulation* for inclusion in the record of the above-referenced proceeding. *You've Got Mail* was submitted in response to the Commission's request for information concerning advanced inmate communications services (ICS).¹

The purpose of this filing is to address the Commission's jurisdiction over electronic messaging. As part of the first round of comments filed in response to the Second Report and Order ("Second R&O"), several ICS providers argue that the Commission lacks jurisdiction over advanced ICS.² In fact, the Commission's ability to regulate advanced services, including electronic messaging, is clear under the Open Internet Order³ as well as older legal precedent.

I. Electronic Messaging Should be Regulated under Section 706

The Commission has determined that sections 706(a) and (b)⁴ of the Communications Act (the "Act") provide "an affirmative grant of authority."⁵ This reading has been upheld by the United States Court of Appeals.⁶ In the Open Internet Order, the Commission used this authority to regulate internet access as an advanced telecommunications capability. Because ICS providers offer electronic messaging as part of a bundle of services that fall within the

¹ *In the Matter of Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Report and Order and Third Further Notice of Proposed Rulemaking, 63 Commc'ns Reg. 1081 (2015) ¶¶ 296-307.

² Telmate argues against regulation of any type of advanced ICS. [Telmate Comments](#) (Jan. 19, 2016) at 7-14. GTL and Securus argue against regulation of video visitation, yet given their opposition to Commission action regarding video technology, it is likely that these providers also oppose oversight of electronic messaging. [Global Tel*Link Comments](#) (Jan. 19, 2016) at 2-5; [Securus Comments](#) (Jan. 19, 2016) at 6-8.

³ *See In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015) [hereinafter "Open Internet Order"].

⁴ 47 U.S.C. §§ 1302(a) and (b).

⁵ Open Internet Order, *supra* note 3, at ¶ 275.

⁶ *Id.* ¶ 276.

definition of advanced telecommunications capability, the Commission should impose price caps and ensure that providers do not evade the provisions of section 706.

A. ICS Providers Sell Advanced Telecommunications Capability

Section 706 defines “advanced telecommunications capability” as “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”⁷ Many ICS providers sell bundled service that includes voice, video, and data (including electronic messaging).⁸ The fact that these services are offered inside correctional institutions does not negate their status as telecommunications services. Congress has already defined electronic messaging as an “advanced communications service” for purposes of the Act⁹ and the Commission should regulate it under section 706.

B. Oversight of Electronic Messaging Would Advance the Policy Objectives of Section 706

As further explained in the Open Internet Order, the Commission has taken steps to regulate internet access under section 706(a)’s grant of authority to “utilize[e], in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”¹⁰ *You’ve Got Mail* asks the Commission to ensure reasonable rates for electronic messaging, and section 706(a)’s price-cap authorization provides one potential avenue for implementation.

The Commission has also based regulation of broadband internet on section 706(b)’s inquiry provision, which directs the Commission to take action “to accelerate deployment of [advanced telecommunications] capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”¹¹ ICS providers who are not dominant in the advanced ICS market have already indicated the anti-competitive dangers of only regulating part of the industry. For example, Pay Tel states that the Commission should regulate “video calling, video visitation, and other advanced ICS (including email and voice and text messaging).”¹² Additional detail is provided by iWebVisit.com, which cites difficulties in trying to compete with ICS providers who bundle regulated and unregulated

⁷ 47 U.S.C. § 1302(d)(1).

⁸ *You’ve Got Mail* at 8-9; [Wright Petitioners, et al. Comments](#) (Jan. 19, 2016), at 7; [Electronic Frontier Foundation Comments](#) (Jan. 19, 2016), at 8-9; [iWebVisit.com, LLC Comments](#) (Jan. 19, 2016) at 2-4.

⁹ 47 U.S.C. § 153(1)(C).

¹⁰ 47 U.S.C. § 1302(a); *see also* Open Internet Order, *supra* note 3, ¶ 275.

¹¹ 47 U.S.C. § 1302(b); *see also* Open Internet Order, *supra* note 3, ¶ 277.

¹² [Pay Tel Commc’ns, Inc. Comments](#) (Jan. 19, 2016) at 7-8 (In making this argument, Pay Tel urges the Commission “to learn from its experience with traditional ICS phone calling over the past fifteen years and recognize that the ‘same perverse incentives’ that have harmed the traditional ICS market exist and will infect the video visitation and other advanced ICS markets if left unchecked.”).

services.¹³ Based on such comments, it is apparent that bundling impairs competition in the advanced ICS market.

It is also important to note that sections 706(a) and (b) both establish a policy of making advanced telecommunications capability available to “all Americans.” The phrase “all Americans” does not differentiate between incarcerated people and free-world telecom customers. Likewise, it is notable that section 706 was enacted as part the Telecommunications Act of 1996 (the “1996 Act”), which is the same legislation that defined “inmate telephone service in correctional institutions” as payphone service.¹⁴ Accordingly, when Congress enacted section 706, it had incarcerated people in mind as users of telecommunications services. For obvious legal, practical, and political reasons, the decision of whether to introduce advanced technologies in correctional facilities has been left to prison administrators; however, once advanced services do enter a facility, the 1996 Act gives the Commission the same regulatory powers that it has over free-world service, most notably the power to ensure that advanced capabilities are reasonably deployed.

C. There is Dramatically Less Cause for Forbearance in the ICS Industry Than in the Broadband Internet Market

In the Open Internet Order, the Commission explained in detail that it would forbear imposing many regulatory provisions on broadband internet access providers.¹⁵ The Commission decided to exercise its forbearance authority after determining that application of certain provisions of Act were not necessary to achieve the goals of section 706.¹⁶

While broad forbearance may be warranted in the broadband internet market, it is substantially less warranted in the ICS market. There is still a modicum of competition among broadband internet providers, whereas the ICS market is so dysfunctional that it “has left the Commission with no choice but to intervene to correct the existing market failure.”¹⁷ Although the Commission did not impose direct price regulation as part of the Open Internet Order, the market failure in the ICS industry makes price caps necessary in the context of electronic messaging.

II. The Commission May Also Regulate Electronic Messaging as a Title II Communications Service

The Commission was careful to explain that the rules enacted in the Open Internet Order were authorized under both section 706 and title II of the Act.¹⁸ The same can be said for regulation of electronic messaging. Although some providers have argued that advanced ICS offerings are information services beyond the reach of title II, this argument is not persuasive.

¹³ [iWebVisit.com, LLC Comments](#) (Jan. 19, 2016) at 2-4.

¹⁴ Telecommunications Act of 1996, Pub. L. No. 104-104 §§ 706 and 276, 110 Stat. 56 (1996).

¹⁵ Open Internet Order, *supra* note 3, ¶¶ 51-59.

¹⁶ *Id.* ¶ 437.

¹⁷ *In the Matter of Rates of Interstate Inmate Calling Services*, WC Docket No. 12-375, Order Denying Stay Petitions (Jan. 22, 2016) ¶ 6.

¹⁸ Open Internet Order, *supra* note 3, ¶ 283.

A. Advanced ICS Technologies Are Not Information Services

Telmate, GTL, and Securus have all argued that advanced ICS technologies are information services.¹⁹ This argument is in the financial interests of such providers, because information services are subject to lighter regulation than telecommunications services. But the relevant statutory text and the historical roots of the information services classification both contradict the providers' position.

The concept of information service exists as a contrast to telecommunications service, both of which are statutorily defined. "Information service" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."²⁰ Telecommunications service is defined as offering "telecommunications for a fee,"²¹ and "telecommunications," is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."²² Because information services necessarily depend on telecommunications networks for the transmission of information, there is frequently a blurred line between the two categories. ICS providers can be expected to blur the line in their favor; but, the Commission must keep in mind that the relevant inquiry is how the *end user* perceives the service.

More colloquially, information service involves the manipulation of data. In contrast, telecommunications service "'transparently' . . . transmit[s] and receive[s] ordinary-language messages without computer processing or storage of the message."²³ The concept of transparent transmission is quite telling in relation to electronic messaging: the end user pays for transmission of a message of his or her choosing. A correctional facility may have access to data storage, processing, and retrieval functions, but end users cannot access these features and are simply purchasing transmission.²⁴

Classification of advanced ICS as a telecommunications service is also supported by the history underlying the definition of information services. The telecommunications/information services dichotomy was statutorily enacted as part of the 1996 Act, but the terms have their roots in the basic/enhanced services classifications that arose from the Commission's *Computer Inquiries*.²⁵ Under the pre-1996 classifications, the Commission concluded that database functionality and other advanced data services did *not* make telephone ICS an enhanced service because such advanced services were

¹⁹ [Telmate Comments](#) (Jan. 19, 2016) at 5; [Global Tel*Link Comments](#) (Jan. 19, 2016) at 4; [Securus Comments](#) (Jan. 19, 2016) at 7.

²⁰ 47 U.S.C. § 153(24).

²¹ 47 U.S.C. § 153(53).

²² 47 U.S.C. § 153(50).

²³ *Nat'l Cable & Telecomm'ns Assn. v. Brand X Internet Servs.*, 125 S.Ct. 2688, 2703-2704 (2005).

²⁴ With regards to message storage, end users of electronic messaging can store messages for some period of time; however, a reading of messaging providers' terms of service reveals that no provider is contractually obligated to provide storage for a defined period of time. In other words, storage may be available incidentally, but the terms of such storage are not articulated and are entirely in the discretion of the provider. Accordingly, it cannot reasonably be said that the end user purchases data storage when they access electronic messaging service.

²⁵ See *Brand X*, 125 S.Ct. at 2696-2697.

merely used by correctional facilities to fulfill security goals and approve or reject specific calls.²⁶ The proceeding that resulted in this determination was initiated long before the drafting of the 1996 Act, and the Commission's ruling was issued prior to enactment of the 1996 law. Accordingly, when Congress codified the distinction between telecommunications and information services, the Commission had already clarified that, in the context of ICS, the relevant inquiry was what types of functions were actually used by the end user. In the case of electronic messaging, the end user has access to a simple method for transparent transmission of a basic written message. This is a telecommunications service subject to the Commission's title II jurisdiction.

B. Regulation of Advanced ICS under Title II Is Necessary to Protect Consumers

Title II requires “every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor.”²⁷ The “charges, practices, classifications, and regulations” of carriers “shall be just and reasonable.”²⁸ Providers of electronic messaging are engaged in interstate communication by wire; and, as noted previously, Congress has expressly classified electronic messaging as an advanced communications service.²⁹

Electronic messaging providers opposing regulation may argue that they are not common carriers because they offer specialized service to a select (although not insignificant) customer base (i.e., incarcerated people and those who correspond with them). Such specialization is legally irrelevant to providers' status as common carriers. The D.C. Circuit's oft-cited definition of a common carrier establishes two elements, of which the “primary *sine qua non*” is:

a quasi-public character, which arises out of the undertaking ‘to carry for all people indifferently . . .’ This does not mean that the particular services offered must practically be available to the entire public; a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to service indifferently all potential users.³⁰

This language absolutely encompasses prison-based electronic messaging: although the service is of use to a fraction of the general population, most providers have structured their systems so that free-world users must become end-users of the proprietary system; accordingly, these systems are held out indifferently to all potential users.³¹

²⁶ *In the Matter of Petition for Declaratory Ruling by the Inmate Calling Services Providers Task Force*, Declaratory Ruling, 11 FCC Rcd. 7362 (1996) ¶¶ 28-32.

²⁷ 47 U.S.C. § 201(a).

²⁸ 47 U.S.C. § 201(b).

²⁹ *Supra*, note 9 and accompanying text.

³⁰ *Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C.*, 533 F.2d 601, 608 (D.C. Cir. 1976) (footnote omitted; ellipsis in original).

³¹ [You've Got Mail](#) at 24.

The second element of the D.C. Circuit’s common carrier test is that a system must be “such that customers ‘transmit intelligence of their own design and choosing.’”³² Once again, electronic messaging services meet this requirement. Facilities may be able to block ultimate delivery of a message due to security concerns, but users have unfettered freedom to send messages with contents of their choosing (subject to character limits).

Notably, although the Commission exercised its forbearance authority in the Open Internet Order with respect to many provisions of title II, it reiterated that application of sections 201 and 202 is “necessary to ensure just and reasonable conduct by broadband providers and necessary to protect consumers.”³³ Additionally, the Commission was careful to note that its forbearance with regard to broadband internet access service did not lessen its ability to regulate ICS.³⁴ The evidence introduced in the above-captioned proceeding has shown that ICS consumers need the protections of the Act even more acutely than do consumers of broadband internet access.

ICS providers and other entities that sell access to electronic messaging are in the business of transmitting data over broadband infrastructure.³⁵ They offer this service to anyone willing to pay the fees and accept the often oppressive terms of service. They are thus subject to the Commission’s title II jurisdiction.

III. Electronic Messaging Provided by Non-Carriers is Subject to the Commission’s Ancillary Jurisdiction

As discussed in *You’ve Got Mail*, some electronic messaging providers are non-communications companies.³⁶ To the extent that the Commission bases regulation on a statutory provision that applies to communications carriers, electronic messaging offered by non-carriers can and should be subject to the same rules, by virtue of the Commission’s ancillary jurisdiction.

The Commission has determined that it may employ “[a]ncillary jurisdiction . . . where the Commission has subject matter jurisdiction over the communications at issue and the assertion of jurisdiction is reasonably required to perform an express statutory obligation.”³⁷ This conclusion has been repeatedly upheld by the Court of Appeals.³⁸

As discussed below, both elements of the test are met, and there is ample reason for the Commission to exercise jurisdiction in this area. The

³² *NARUC*, 533 F.2d at 609 (footnote omitted).

³³ Open Internet Order, *supra* note 3, ¶ 440.

³⁴ *Id.* ¶ 521.

³⁵ See [Electronic Frontier Foundation Comments](#) (Jan. 19, 2016), at 8-9 (“[B]ecause most ICS phone providers rely on Voice Over IP to complete their calls, the facilities already have much of the infrastructure necessary to make video calls and send email messages. Put simply, the same lines can be used for phone calls, video calls, and other electronic communications.” (footnotes omitted)).

³⁶ *You’ve Got Mail* at 8-10.

³⁷ *In the Matter of Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd. 6417 (1999) [hereinafter “Accessibility Order”] ¶ 95.

³⁸ *E.g.*, *Verizon v. F.C.C.*, 740 F.3d 623, 632 (D.C. Cir. 2014) (“We have held that the Commission may exercise such ancillary jurisdiction where two conditions are met: ‘(1) the Commission’s general jurisdictional grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.’” (*quoting Am. Library Ass’n v. F.C.C.*, 406 F.3d 689, 691-692 (D.C. Cir. 2005)).

Commission has used ancillary jurisdiction in the past to regulate non-carriers' provision of services that fall under the Commission's subject-matter jurisdiction.³⁹

A. The Commission Has Subject Matter Jurisdiction over Electronic Messaging

The Commission's grant of authority under title I of the Act covers electronic messaging service. Congress established the Commission to "regulat[e] interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . wire and radio communication service with adequate facilities at reasonable charges."⁴⁰ The Act expressly gives the Commission jurisdiction over "all interstate and foreign communications by wire or radio."⁴¹ The Act defines "communication by wire" as:

the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.⁴²

Electronic messaging is "communication by wire" and regulation of the service is consistent with the public policy underlying the Act, which "was implemented for the purpose of consolidating federal authority over communications in a single agency to assure 'an adequate *communication system* for this country.'"⁴³ Electronic messaging is one channel that makes up the communication system used by incarcerated people and should be regulated accordingly.

B. Regulation of Electronic Messaging is Reasonably Required to Perform an Express Statutory Obligation

As noted previously, section 706 and title II both provide statutory bases for the regulation of electronic messaging. In addition, Congress has expressly granted the Commission jurisdiction to ensure fair compensation for "inmate telephone service in correctional institutions, and any ancillary services."⁴⁴ The Commission has correctly concluded that its regulatory power under section 276 applies "to ICS regardless of the technology used to deliver the service."⁴⁵

³⁹ *E.g.*, Accessibility Order, *supra* note 37, ¶ 98.

⁴⁰ Act § 1, 47 U.S.C. § 151.

⁴¹ Act § 2, 47 U.S.C. § 152(a).

⁴² Act § 3, 47 U.S.C. § 153(59).

⁴³ *Motion Picture Ass'n of Am. v. F.C.C.*, 309 F.3d 796, 804 (D.C. Cir. 2002) (*quoting* S. Rep. No. 73-830, at 3 (1934)(emphasis added)).

⁴⁴ 47 U.S.C. § 276(d).

⁴⁵ Second R&O, *supra* note 1, ¶ 250.

While electronic messaging is not “telephone service” within the scope of section 276, it is so closely related to telephone ICS that regulation is reasonably necessary to carry out the Commission’s obligations under section 276. Electronic messaging is offered as a bundled service⁴⁶ and the Commission has already expressed concern that emerging technology products “that do not meet the definition of ICS could be used as a way to allow ICS providers to recover decreased rates as a result of the reforms adopted [in the Second Report and Order].”⁴⁷

Any regulatory scheme will be subject to gaming and arbitrage if it only applies to entities that qualify as communications carriers. Thus, if a non-carrier (such as a financial services company) sells electronic messaging service to end users, that provider should be subject to the same rules applicable to carriers who offer substantially the same service.

IV. Conclusion

You’ve Got Mail discusses the benefits and drawbacks of electronic messaging and illustrates the importance of subjecting advanced ICS to the same rules that apply to telephone ICS. As shown above, the Commission has the legal authority to extend current regulations to advanced ICS. Prison Policy Initiative urges the Commission to act now and ensure that ICS users are protected from predatory and unfair practices.

Respectfully submitted,



Stephen Raher, Esq.

Pro Bono Legal Analyst

⁴⁶ *Supra* note 8.

⁴⁷ *Id.* ¶ 296 (footnote omitted).