

ORIGINAL

EX PARTE OR LATE FILED

DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP

2101 L Street NW • Washington, DC 20037-1526  
Tel (202) 785-9700 • Fax (202) 887-0689

Writer's Direct Dial: 202-828-2236  
16158.0023

RECEIVED

SEP 21 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

September 21, 2001

**NOTICE OF EX PARTE  
COMMUNICATION**

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
The Portals, TW-A325  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: CC Docket No. 96-128/Remand of Inmate Service Issues

Dear Ms. Salas:

Enclosed for filing with the Federal Communications Commission is a copy of an Ex Parte letter to Dorothy Attwood in CC Docket No. 96-128.

If you have any questions about this matter, please contact the undersigned.

Sincerely,



Robert F. Aldrich

RFA/nw

Enclosure

No. of Copies rec'd 051  
List ABCDE

DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP  
2101 L Street NW • Washington, DC 20037-1526  
Tel (202) 785-9700 • Fax (202) 887-0689  
Writer's Direct Dial: (202) 828-2236  
16158.0023

September 21, 2001

RECEIVED

SEP 21 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Dorothy Attwood  
Federal Communications Commission  
445 12<sup>th</sup> St., SW  
Room 5-A848  
Washington, D.C. 20554

Re: CC Docket No. 96-128 (remand of inmate service issues)

Dear Ms. Attwood:

The Inmate Calling Services Providers Coalition ("ICSPC") is writing to provide additional details regarding its proposal for addressing fair compensation for inmate calling service ("ICS") providers in the short-term. We begin by briefly summarizing the problem of ensuring fair compensation for ICS providers. We then provide a summary of ICSPC's proposal for addressing that problem in the short term. Finally, we discuss the legal basis for the proposal and explain why the court's decisions in *Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) ("IPTA") and *MCI Telecomms. Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998) ("MCP") are not a barrier to implementing the proposal.

### The Problem

Section 276 of the Communications Act of 1934, as amended ("Act"), directed the Commission to "ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone."<sup>1</sup> Such compensation must "promote competition among payphone service providers and promote the widespread deployment of payphone services. . . ."<sup>2</sup> The Act defines "payphone service" to include "the provision of inmate telephone service in correctional institutions . . . ."<sup>3</sup>

---

<sup>1</sup> 47 U.S.C. § 276(b)(1)(A).

<sup>2</sup> *Id.*, § 276(b)(1).

<sup>3</sup> *Id.*, § 276(d).

In the 1996 *Payphone Order*, The Commission determined that “fair compensation” means the level of compensation set by the market.<sup>4</sup> The Commission also made clear, however, that this is true only where the market is functioning properly: “where the market does not or cannot function properly . . . the Commission needs to take affirmative steps to ensure fair compensation.”<sup>5</sup> Specifically, the Commission has said it must address the issue of compensation where a “government-mandated rate . . . may not be high enough to be ‘fairly’ compensatory.”<sup>6</sup>

Local inmate calls are an instance where, in a significant number of states, a “government-mandated rate” has kept the market from functioning to ensure fair compensation. As ICSPC has previously demonstrated, the majority of state public utility commissions have set ceilings on the rates that ICS providers can charge for local inmate collect calls. In most states, those rate ceilings are based on the standard collect calling rates of the incumbent local exchange carrier (“LEC”). In other words, ICS providers are forced to charge the same rates for inmate collect calls as the LEC charges for a regular collect call from any business or residential phone. The ICS rates mandated by the states include no element to recover the unique extra costs of providing inmate service over and above the costs of providing regular collect service. In a number of states, the state-imposed rate ceiling for inmate local collect calls is actually *lower* than the incumbent LEC’s regular local collect call rate.<sup>7</sup> ICSPC has provided cost data showing that, in a significant number of states, state-imposed local collect call rate ceilings do not permit providers to recover the costs of local inmate collect calls.<sup>8</sup> As a result, the continuation of service to inmates of local jails is threatened in these states.

---

<sup>4</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541, ¶ 50 (1996) (“*Payphone Order*”).

<sup>5</sup> *Id.*, ¶ 49.

<sup>6</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 11 FCC Rcd 6716, ¶ 16, n.54 (1996).

<sup>7</sup> For example, the rate ceiling for local inmate service calls in Tennessee (\$.85) is lower than Tennessee’s rate ceiling for local collect calls from public payphones (\$1.35).

<sup>8</sup> See “Inmate Service Fee – 12 Minute Local Call, Cost Analysis,” and “Rates for a 12 Minute Inmate Local Collect Call and State-Imposed Rate Ceilings, 25-June-01” both attached to Letter to Magalie Roman Salas from Robert F. Aldrich, June 29, 2001 (“June 29 Ex Parte”). The listing of state rates and rate ceilings amplifies, updates and in

The Commission has expressly stated its intent to treat inmate payphones the same as public payphones with respect to Section 276's mandate to ensure fair compensation.<sup>9</sup> Yet it has failed to do so. In both cases, a "government-mandated rate" was a barrier to fair compensation—for public payphones, the local coin rate and for inmate payphones, the state-imposed rate ceilings on inmate local collect calls. Yet, while the Commission has acted to free local coin calls from the "government-mandated rate" that was preventing public payphone providers from receiving fair compensation, it has done nothing to address the corresponding problem in the inmate payphone context. The Commission must end this disparate treatment of inmate payphone service providers and ensure fair compensation for inmate local collect calls, as it has for local coin calls.

ICSPC has provided the Commission with a number of alternatives for doing so. First, the Commission could opt to deregulate inmate calling rates. This is the path that the Commission chose to follow in the case of local coin rates. As a second alternative, the Commission could prescribe a federal rate element that may be added to existing below-cost state-approved rates to ensure that ICS providers are fairly compensated for the unique costs associated with inmate service, while leaving state rates in place. Third, ICSPC proposed an approach under which the Commission would authorize ICS providers to exceed a particular state's local collect call rate ceiling if the ICS provider (1) submits cost data showing that its per-call costs exceed the rate ceiling in a particular state and (2) commits to also charging cost-based long distance rates.

ICSPC continues to believe that these proposals represent the most effective options available to the Commission and that the Commission should ultimately address the problem of ensuring fair compensation for ICS providers by adopting one of the proposals. However, in the event that the Commission continues to be undecided as to how to address this compensation over the long term, there is a critical need for rate relief as soon as possible in order to preserve telephone service to inmates of local jails. Accordingly, if the Commission is not yet prepared to implement a long term solution, it must act to

---

some instances corrects earlier versions of the document previously submitted in this proceeding. ICSPC believes this information to be accurate, and is able to provide back-up documentation for particular states if requested.

<sup>9</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd 21233, ¶ 72 (1996) ("[i]n the [*Payphone Order*], we elected to treat inmate payphones in the same manner as all other payphones . . .").

provide immediate short term relief. ICPSC has submitted a proposal to provide such short-term partial relief.

### **Thirty States Have Provided Partial Relief**

In the *Payphone Order*, based on its belief that the best way to ensure the “fair compensation” mandated by Section 276 was to allow the market to set rates wherever possible, the Commission deregulated the local coin rate.<sup>10</sup> In the aftermath of the Commission’s deregulation of the local coin rate, the LECs in the majority of states (30 or more) revised their tariffs to provide that a payphone service provider (“PSP”) may set the local calling element of local collect calls (which include inmate collect calls) equal to its deregulated local coin rate. For example, BellSouth’s Florida tariff provides that the rate a PSP charges end users for a local collect call may not exceed “a rate equivalent to the local coin rate, plus a \$1.75 [operator service] charge.”<sup>11</sup> Alltel Georgia’s tariff provides that “service charges for operator assisted local calls apply in addition to the local dial rate applicable.”<sup>12</sup> In the case of payphones, the “local dial rate applicable” is a charge that is “in compliance with the Order of the Federal Communications Commission in Docket 96-128. . . .”<sup>13</sup>

This is relevant to the issue of fair compensation for ICS providers because the local coin calling rate is typically one of two rate elements that comprise the rate for local collect calling service, including local inmate calling service (the other rate element is a separate operator surcharge). Prior to 1997, in almost all states the local calling rate element was set equal to the LEC’s regulated local coin rate. That rate was typically \$.10 - \$.25 and in many cases had remained unchanged since it was initially set by the LEC 20 or more years ago. The revision of the local calling rate element to incorporate the deregulated local coin rate thus provided at least some relief to ICS providers. Rather than being forced to charge as little as \$.10 for the local calling rate element of an inmate local collect call, ICS providers may now charge the deregulated local coin calling rate.

---

<sup>10</sup> *Payphone Order*, ¶ 56.

<sup>11</sup> BellSouth Telecommunications, Inc., Florida, General Subscriber Service Tariff, § A7.4.5.A.B.1.f, issued June 21, 1999.

<sup>12</sup> ALLTEL Georgia, Inc., General Subscriber Services Tariff, § 10.3.C, issued April 12, 2000.

<sup>13</sup> *Id.*, § 7.1.10.C(1), issued May 12, 2000.

In the remaining states where the local call element is capped at the LEC's previously regulated local coin rates, however, no action has been taken to implement the deregulation of the local coin calling rate where it is a component of the local collect calling rate.<sup>14</sup> As a result, in many of those states, the rate ICS providers can charge is well below the cost of providing service, denying them the fair compensation mandated by Section 276.<sup>15</sup>

### **The Commission Can Provide Short Term Relief for Providers in Other States**

In order to at least begin to address fair compensation for ICS providers and to resolve the division among the states, the Commission should issue an order clarifying that the deregulation of the local coin calling rate extends to the local coin calling rate on which the local calling rate element of the inmate collect calling rate is based. Doing so would extend the correct interpretation of the *Payphone Order*, adopted by the 30 states that have already acted, to all states where local collect call rate elements have been set based on local coin rates, and would allow ICS in those states to at least come closer to achieving fair compensation. Under this proposal, consumer concerns would be addressed, because the operator surcharge rate element of inmate collect calling services could remain capped at

---

<sup>14</sup> ICSPC believes that the LEC's previously regulated local coin calling rate is a required component of a PSP's local collect calling rate in approximately 15 states. In about five states, the local calling element is set on a per-minute basis and would not be affected by this proposal.

<sup>15</sup> For example, the rate ceiling for a local collect call in Sprint territory in North Carolina is \$.85, including a \$.65 operator surcharge and a \$.20 local call element. This rate ceiling does not come near to recovering the cost of a local inmate call, particularly in light of the measured rate assessed by Sprint for local service to payphone service providers. Sprint's daytime (9 a.m. – 9 p.m.) measured rate for local service is \$.03 for the first minute and \$.02 for each additional minute, or \$.25 for an average 12-minute call – *more* than the \$.20 ceiling on the provider's local call element. If service providers could set their local call element equal to the local coin rate charged at their payphones, they could come substantially closer to recovering their costs for a local collect call. For example, if a service provider in Sprint territory had a local coin rate of \$.35 per 10-minute period, the service provider would be able to bill \$1.35 for a 12-minute local call (\$.65 service charge plus \$.35 for the first 10-minute period plus \$.35 for the next 10-minute period or fraction thereof). That \$1.35 would be significantly closer to the \$2.15 average per-call cost that ICSPC has estimated is incurred by service providers in providing local inmate service. *See* "Inmate Service Fee – 12 Minute Local Call, Cost Analysis," attached to June 29 Ex Parte.

current regulated levels, and the local calling rate element also would be effectively capped – at the market-determined local coin rate.

### ***IPTA* and *MCI* Are Not a Barrier to the Implementation of the Short Term Proposal**

The Commission has expressed the concern that the court of appeals decisions in *IPTA* and *MCI* present a potential barrier to the clarifying order proposed by ICSPC. In *IPTA*, the D.C. Circuit disapproved the Commission's decision in the *Payphone Order* to set compensation for "dial-around" long distance calls made from public payphones equal to the market-based local coin rate. On remand, the Commission again sought to base the dial-around compensation amount on the local coin rate, but with the costs peculiar to coin calls subtracted out. In *MCI*, this second attempt to use the local coin call rate as the basis for the dial-around compensation amount was also rejected by the court. Some might argue that *IPTA* and *MCI* would similarly prevent the Commission from tying the local calling element of the inmate collect call rate to the local coin rate.

The court's decisions, however, do not preclude the Commission from acting. As the *IPTA* court found, the Commission rested its conclusion in the *Payphone Order* "on one ground—that the *costs* of coin calls, 800 calls, and access code calls are all similar. . . ." No other justification was offered by the FCC for its conclusion.<sup>16</sup> Thus, when the court found that "the record in this case is replete with evidence that the costs of local coin and access code calls are not similar,"<sup>17</sup> it felt that it had no choice but to remand the decision as unjustified.<sup>18</sup> *IPTA* thus stands only for the narrow proposition that if the Commission is going to rely on cost similarities as the basis for its decision to base one rate on another, it must be able to show that the costs are, in fact, similar. *IPTA* does *not* say that the Commission must necessarily demonstrate that costs are similar as a prerequisite to basing one rate on another.

Here, there are justifications other than cost similarities on which the Commission can rely. First, a clarifying order along the lines proposed by ICSPC would be well within the original analytical framework of the *Payphone Order*. There, the Commission found that "once competitive conditions exist, the most appropriate way to ensure that PSPs receive fair compensation for each call is to let the market set the price for individual calls

---

<sup>16</sup> *IPTA*, 117 F.3d at 563.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 564.

originated on payphones.”<sup>19</sup> The Commission went on to say that “[i]t is only in cases the market does not or cannot function properly that the Commission needs to take affirmative steps to ensure fair compensation . . . .”<sup>20</sup> The Commission was thus clear that, wherever possible, the market should be allowed to function to set rates for payphone calls and thereby to ensure fair compensation for those calls. With respect to local coin calls, the Commission found that the market for those calls was sufficiently competitive for the Commission to deregulate local coin rates and to allow the market to function to ensure fair compensation. By extending the deregulation of the local coin rate to the local calling component of the inmate collect calling rate, the Commission will be fulfilling its goal of allowing the market to set rates wherever possible.

Second, the Commission need not claim that the costs underlying the two rates are the *same*, as it did in *IPTA*, in order to make the ruling discussed here. The cost data in the record clearly demonstrates that local collect inmate rates in most of the states in question are substantially—and in several cases, dramatically—below costs today. The relatively minor upward rate adjustment proposed here would thus move inmate local collect rates closer to costs, but would not cause them to exceed costs. This is clearly an improvement over the status quo. Therefore, it is unnecessary for the Commission to make a vulnerable claim of cost equivalency as it did in *IPTA*.

Third, in approximately 30 states, ILECs have already taken the step that the Commission would take here. Those ILECs have revised their tariffs, under the supervision of state *public* service commissions, to provide that providers may set the local calling rate element of local collect calls at the level of the market-based local coin rate. Therefore, the Commission would be following the precedent of 30 states that have already deemed the deregulated local coin rate to be an appropriate proxy for the local calling element of local collect rates. These state decisions reflect an implicit determination that the ratemaking efficiencies involved in tying the local call element to a market-driven rate justify the use of the local coin rate as a proxy despite any differences in the costs of the respective calls. The Commission would be allowing service providers in the remaining states to use the same market-based approach approved for equivalent rates of other providers in 30 states – a procedure well within the bounds of the Commission’s ratemaking discretion.<sup>21</sup>

---

<sup>19</sup> *Payphone Order*, ¶ 49.

<sup>20</sup> *Id.*

<sup>21</sup> See e.g., *AT&T v. Business Telecom, Inc.*, EB-01-MD-001, FCC 01-185 (May 30, 2001), ¶¶ 28-30 (rates charged by other carriers for comparable services are relevant to reasonableness of rates). Even in other states, the local call element of the local collect call

The Commission thus need not rely on cost similarities as the basis for its clarifying order. However, even if the Commission does choose to rely on cost similarities for support, the clarifying order would present a very different situation than the one before the court in *IPTA*.

Unlike long distance dial-around calls, inmate local collect calls use the same local network as local coin calls. As a result, the costs of the local calling element portion of a local inmate collect call are very similar to the costs of a local coin call. In fact, as shown in the chart below, the two types of calls share in common nearly every category of cost. Both types of calls are subject to the same local usage rates from the serving LEC; both incur the cost of equipment depreciation; both incur maintenance costs; and both incur sales, general and administrative (“SG&A”) expenses.

---

rate usually has been set based on the proxy of the local coin rate – only that element has not been updated to reflect the deregulation of the local coin rate. The following is an example of the rationale given by state commissions for using the local coin rate as a proxy:

As with local exchange carrier coin telephones, consumers using COCOTs are offered the opportunity to charge the cost of placing a local call, usually a quarter, on credit. This service is designed to allow customers who do not have a quarter to place a local call and can be an important service in emergency situations. In addition to the \$.25 usage charge, the operator surcharge assessed for these operator services is typically identical to the charge for operator service provided in conjunction with placing an interexchange call on credit. . . .

Pennsylvania Public Utility Commission, Declaratory Order Regarding Interpretation of Regulations Governing Interexchange Resellers, Docket No. M-00930494, 1993 Pa. PUC LEXIS 169, \*6-\*7, December 28, 1993.

Cost	Payphone Local Coin Calls	Inmate Local Collect Calls
Local service	√	√
Equipment <sup>22</sup>	√	√
Maintenance	√	√
SG&A	√	√
Coin mechanism	√	
Call security equip.		√

The only category of cost incurred by a local coin call and not shared by an inmate local collect call is the cost of the coin mechanism, and there is a direct analog for that cost in the cost of the call security equipment installed as part of an inmate calling system. In any case, the cost of the coin mechanism, which the Commission has found to be \$.054 per call,<sup>23</sup> is a small fraction of the overall cost of the call. Thus, any variance between the costs associated with a coin mechanism and the call security equipment installed in inmate phone systems is insignificant.

As for the decision in *MCI*, the court's concern there was that the Commission had failed to articulate one of the key premises underlying its decision, i.e. "that the market rate for coin calls generally reflects the costs of those calls."<sup>24</sup> Significantly, however, the court did not reject that premise<sup>25</sup>—it simply faulted the Commission for skipping a step in its chain of reasoning. So long as the Commission explicitly finds that "costs and rates do in

<sup>22</sup> Excluding the costs of the coin mechanism.

<sup>23</sup> *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 FCC Rcd 2545, ¶ 193 (1999).

<sup>24</sup> *MCI*, 143 F.3d at 608.

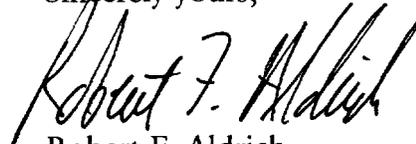
<sup>25</sup> The court did observe that "the Commission itself has suggested that the assumption may not be accurate," in that "the Commission acknowledged in the [*Payphone Order*] that "because of locational monopolies and incomplete information endemic to the payphone market, the coin call rate may potentially diverge from coin call cost." *Id.* at 608. Given, however, that *Payphone Order*'s deregulation of the local coin rate, which was upheld by the court, rests on the fundamental premise that the local coin market is competitive, it would not appear difficult to satisfy the court that, as in competitive markets generally, rates and costs do converge.

fact converge in the coin call market,"<sup>26</sup> *MCI* is not a barrier to ICSPC's proposed clarifying order.

### Conclusion

It has now been five years since the *Payphone Order* was released, and ICS providers still are not receiving the fair compensation for local collect calls that they are guaranteed by Section 276. As a result, competition in the inmate market, particular for service to jails, is disappearing, contrary to the federal mandate.<sup>27</sup> It is thus critical that the Commission act, and act quickly. While not a long term solution, ICSPC's proposal will provide at least some relief while the Commission considers a permanent solution to the problem.<sup>28</sup>

Sincerely yours,



Robert F. Aldrich

cc: Jeff Carlisle  
Glenn Reynolds  
John Rogovin  
Deborah Weiner  
Linda Kinney  
Paula Silberthau

---

<sup>26</sup> *Id.*

<sup>27</sup> See "Independent Inmate Phone Service Providers (as of June, 2001)," attached to the June 29 Ex Parte (and attached to this letter).

<sup>28</sup> If the Commission does not believe that it can adopt the short term proposal then it must adopt a permanent solution such as one of the alternatives discussed on p. 3 above.

## INDEPENDENT INMATE PHONE SERVICE PROVIDERS

<u>Previous Providers</u>	<u>Status</u>	<u>Current Coalition Providers</u>
AmeriTel Pay Phones, Inc.	Sold	Evercom
Blair Communications	Sold	Global Telink
Coin Telephone, Inc.	Sold	Pay Tel Communications, Inc.
Consolidated Communications, Inc.	Sold	Public Communications Services, Inc
Correctional Communications Corp	Sold	
DGI Communications	Out of Business	
Executone Corrections Division	Sold	
Harris Corp	Sold	
Intellicall, Inc.	Out of Inmate Business	
InVision Telecom, Inc.	Sold	
Kantel	Sold	
KR&K	Sold	
London Communications, Inc.	Sold	
M.O.G. Communications, Inc.	Sold	
North American Communications	Out of Business	
North American Intelecom	Sold	
OPUS	Declare Bankruptcy 2000	
PayCom	Out of Business	
Payphone Systems	Sold	
Paytel of America	Sold	
Peoples Telephone, Inc.	Sold	
Robert Cefale & Associates	Sold	
Saratoga Telephone	Sold	
Security Telecom	Sold	
Talton Communications	Sold	
Tataka	Sold	
Tel America	Sold	
Tele-Quip Labs Inc.	Sold	
Teltrust	Declared Bankruptcy 2001	
OAN - Billing and Collection Services For Inmate Industry Phone Service	Declared Bankruptcy June 2001	