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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W., TW-A325
Washington, DC 20554

**Re: Implementation of the Pay Telephone Reclassification and
Compensation Provisions of the Telecommunications Act of 1996,
CC Docket No. 96-128**

Dear Ms. Dortch:

The Inmate Calling Service Providers Coalition is refiling herewith its petition for further reconsideration of the Commission's *Order on Remand* in this proceeding. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand and Notice of Proposed Rulemaking, FCC 02-39, released February 21, 2002 ("*Remand Order*").

The Coalition previously filed its petition for further reconsideration on March 25, 2002, within 30 days after the release date of the order. The Coalition filed on that date in case the public notice date of the *Remand Order* is deemed to be the release date of the order. The Coalition is refiling its petition today, within 30 days after the date of Federal Register publication of the *Remand Order* in case the date of public notice is deemed to be the date of Federal Register publication. See 47 CFR § 1.4(b)(1).

Sincerely,



Robert F. Aldrich

Enclosure

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

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In the Matter of)
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Implementation of the Pay Telephone)
Reclassification and Compensation)
Provisions of the Telecommunications)
Act of 1996)
_____)

CC Docket No. 96-128

PETITION FOR FURTHER RECONSIDERATION
OF THE INMATE CALLING SERVICE
PROVIDERS COALITION

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May 7, 2002

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PETITION FOR FURTHER RECONSIDERATION
OF THE INMATE CALLING SERVICE
PROVIDERS COALITION

The Inmate Calling Service Providers Coalition (“ICSPC,” or the “Coalition”) submits the following petition for further reconsideration of the Commission’s *Order on Remand* in this proceeding. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand and Notice of Proposed Rulemaking, FCC 02-39, released February 21, 2002, (“*Remand Order*”).

SUMMARY

The Coalition requests reconsideration of two determinations made in the Remand Order, in order to ensure meaningful evaluation, consistent with statutory requirements and the Commission’s own previous payphone orders, of the additional cost data that the Commission has invited parties to submit in the Notice of Proposed Rulemaking accompanying in the *Remand Order*.

First, the *Remand Order* states that in the inmate service context, Section 276(b)(1)(A) of the Communications Act, 47 U.S.C. § 276(b)(1)(A), does not require inmate service providers to be fairly compensated by the end users to whom they provide service. According to the *Remand Order*, it is only the internal compensation payment that the inmate service provider imputes as a commission paid to its “payphone service provider” side by its “operator service provider” side that must be fair. *Remand Order*, ¶¶ 33-35. This ruling is inconsistent with the integrated nature of inmate calling services, with the plain meaning of Section 276, and with prior Commission and court interpretations of Section 276. The Commission should reconsider and rule that Section 276 requires it to ensure that inmate service providers are fairly compensated for the service they provide to end users.

Second, the *Remand Order* rules that, unless inmate service providers individually demonstrate their unprofitability, compensation for a class of calls will only be adjusted if revenues collected under a state rate ceiling do not exceed the direct cost attributed to that class of calls. This standard is virtually impossible to meet because, as the *Remand Order* recognizes, the vast majority of costs in the inmate service context are fixed and common costs. In every previous payphone compensation order, the Commission rejected the type of cost standard adopted here, and the record of this proceeding does not reflect any material difference between inmate service providers and payphone service providers that would justify a change of course. Accordingly, the Commission should reconsider and rule that the cost standard applied in the *Third Payphone Order*,¹ under which fair compensation

¹ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Report and Order, 13 FCC Rcd 1778, ¶ 92; Third Report and Order and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545, ¶ 81 (1999) (“*Third Payphone Order*”).

requires that each class of calls makes a proportionate contribution to common costs, is applicable to inmate services as well as payphone services.

BACKGROUND

The *Remand Order* arises from the Coalition's court challenge to the Commission's 1996 *Payphone Orders*² as they related to inmate calling services ("ICS"). The Coalition sought appellate review of the Commission's 1996 rulings, on the grounds that they failed to ensure fair compensation of inmate service providers and failed to prevent discrimination and cross-subsidy of Bell Operating Companies' inmate services, as required by Section 276 of the Act. After the filing of the Coalition's initial brief, the Commission sought a voluntary remand of the case. In its request for remand, the Commission acknowledged that it had not adequately addressed the issues raised by the Coalition and asked the court to return the proceeding to the Commission so that it could provide further analysis, promising that it would act expeditiously. The court granted the Commission's request for remand on January 30, 1998.

More than a year later, on May 6, 1999, the Commission sought comments to "update and refresh" the record. "The Common Carrier Bureau Asks Parties to Update and Refresh Record for the Inmate Payphone Service Provider Proceeding," CC Docket No. 96-128, Public Notice, 14 FCC Rcd 7085 (1999) ("Public Notice"). On February 21, 2002, the Commission issued the *Remand Order* in which it declined to modify its rules on compensation and competitive safeguards to address the inmate service-specific concerns raised by the Coalition.

² *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 20541 (1996) ("*First Payphone Order*"), *recon.*, 11 FCC Rcd 21233 (1996) ("*First Payphone Reconsideration Order*").

DISCUSSION

This petition for reconsideration focuses narrowly on certain rulings in the *Remand Order* that set an unreasonably burdensome standard for evaluating the fairness of inmate service providers' compensation under Section 276.³ These rulings are inconsistent with the fair compensation requirements of Section 276, and with the Commission's own prior rulings on analogous compensation issues under Section 276. The *Remand Order* rulings must be reconsidered. In the Notice of Proposed Rulemaking accompanying the *Remand Order*, the Commission has commendably allowed an opportunity for inmate service providers to present additional cost information in support of a further evaluation of inmate service compensation under Section 276. *Remand Order*, ¶ 74. The Coalition is preparing to submit such additional information in a form that addresses several of the specific problems identified by the *Remand Order*. In order to ensure appropriate and meaningful evaluation of such cost data, however, the Commission must reassess certain cost evaluation principles articulated in the *Remand Order*.

Specifically, the Commission must reassess its rulings that: (1) in the inmate service context, Section 276(b)(1)(A) of the Communications Act, 47 U.S.C. § 276(b)(1)(A), does not require inmate service providers to be fairly compensated by the end users to whom they provide service; and (2) unless inmate service providers individually demonstrate their unprofitability, compensation for a class of calls will only be adjusted if revenues collected under a state rate ceiling do not exceed the direct cost attributed to that class of calls.

³ In petitioning for reconsideration, however, the Coalition does not waive its right to seek court review of other aspects of the order at a later time. 47 U.S.C. § 405.

I. THE COMMISSION'S DECISION TO DISREGARD END-USER REVENUES IN EVALUATING "FAIR COMPENSATION" IS INCONSISTENT WITH THE INTEGRATED NATURE OF INMATE SERVICE AND THE REQUIREMENTS OF THE ACT

In the *Remand Order*, the Commission indicates that the "fair compensation" to which inmate service providers are entitled under Section 276 does not include the payments collected from end users for local collect calls. According to the *Remand Order*, "fair compensation" only includes commission payments that inmate service providers receive from other service providers or from themselves pursuant to a *Remand-Order*-created artificial division of their inmate service operations between "payphone service provider" and "operator service provider" functions. *Remand Order*, ¶ 33-35. Such an artificial division of inmate service functions is inconsistent with the Commission's own findings in the *Remand Order* that inmate services are an integrated activity. Further, defining fair compensation to exclude payments collected from end users contravenes the rulings of the Commission and the court of appeals that fair compensation includes payments collected from end users of local coin service.

A. The *Remand Order* Artificially Bifurcates a Service That Is Provided as an Integrated Whole

In ruling that, to qualify for fair compensation, inmate service providers must artificially bifurcate their operations between "payphone service" and "operator service" functions, the Commission disregards the unitary, integrated nature of inmate telephone service as normally offered.⁴

⁴ LEC-affiliated service providers may be required to bifurcate their operations in order to comply with other statutory or regulatory requirements. Such artificial regulatory divisions should not be imposed on other PSPs when they needlessly complicate the process of determining fair compensation.

In the *Remand Order*, the Commission takes notice of the fact that inmate service providers usually offer only one type of service – collect calling – to their customers, and that they typically require dedicated facilities that integrate the functions of collect call processing and inmate call monitoring and restriction. *Id.*, ¶ 9. Such dedicated, integrated facilities are essential to addressing the security and fraud control problems that are endemic to the inmate service environment. See Comments of the Inmate Calling Service Providers Coalition, filed June 21, 1999, at 5-10.

The Commission recognizes that in these and other respects, there are significant differences between inmate telephone service and public payphone service. As the *Remand Order* itself states:

Although Section 276 classifies inmate calling service as a payphone service, inmate calling services, largely for security reasons, are quite different from the public payphone services that non-incarcerated individuals use.

Id., ¶ 9.

But no sooner does the Commission acknowledge these differences than it disregards them, proceeding to address fair compensation for inmate services using a paradigm that applies only to public payphone service.

When the Commission deregulated payphones, it created a market-based mechanism to ensure that PSPs receive fair compensation for each and every collect call. Collect calls are handled by a payphone's presubscribed OSP with which the payphone's PSP has a contractual relationship. Typically, the OSP collects the revenue for the collect call, which, as noted, for intrastate calls is often capped by state regulation, and returns to the PSP a per call commission payment. The PSP can negotiate, therefore, in its contract with OSPs a per call commission payment.

Id., ¶ 33. The Commission thus imposes on inmate service providers a bifurcation between “payphone service” and “operator service” functions, with only the “payphone service” functions subject to compensation. Whatever the merits of this approach in the payphone context, it is clearly irrational as applied to the highly integrated operations that characterize inmate service.⁵

In attempting to apply the bifurcated model utilized in the public payphone context, the Commission resorts to the fiction of imputing a commission payment from the provider’s “operator service” side to its “payphone service” side. Such a fiction is necessary because of the simple fact that, as typically provided today, there is no market for competitive OSP service in the inmate setting and, therefore, ICS providers generally do not actually receive commissions from OSP providers. To the contrary, because of the integrated nature of their service, the equipment utilized by ICS providers typically provides the operator function in inmate calling. But, even if some fictional commission is to be imputed with regard to the OSP-functions performed by the same equipment which is generating the underlying call, the Commission’s *Remand Order* provides no meaningful guidance on how the revenues of an inmate service provider’s integrated operations should be allocated between “OSP” and “PSP” functions, stating merely that the inmate service provider “is free to impute whatever price [*i.e.*, commission payment], it so desires to its PSP operations. *Remand Order*, ¶ 33. As to allocation of *costs*, the FCC provides no guidance at all as to how such an imputation should be performed. Moreover, although the Commission relies entirely on the existence of this bifurcated fiction to justify its

⁵ Significantly, as the *Remand Order* acknowledges (¶ 56), inmate calling services are not defined as “operator services” in the Communications Act. See 47 U.S.C. § 226(a)(7); *Policies and Rules Concerning Operator Service Providers*, Report and Order, 6 FCC Rcd 2744, 2752 n.30 (1991).

inaction with respect to fair compensation for inmate service, the Commission itself does not purport to undertake the imputation analysis. As is discussed in the accompanying Declaration of Don Wood (“Wood Dec.”), such a hypothetical imputation would be “almost impossible” given that the same equipment is being used to provide the “OSP” and “PSP” functions. *See* Wood Dec., ¶ 10.

B. The Commission’s Bifurcation of Inmate Service Contravenes the Plain Meaning of Section 276

The *Remand Order* also conflicts with the plain meaning of Section 276. The compensation provision of Section 276 directs the Commission to “ensure that all payphone *service* providers are fairly compensated for each and every completed intrastate and interstate call using their payphone.” 47 U.S.C. § 276(b)(1)(A)(emphasis added). Section 276 further defines “payphone service” to include “the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.” *Id.*, § 276(d). While “the provision of public or semi-public pay telephones” arguably might be read to include only the provision of equipment,⁶ “inmate telephone service” and “ancillary services” cannot possibly be read as limited to the provision of equipment.

In the vast majority of confinement facilities, the only telephone service offered to inmates is collect calling service. Therefore, if collect calling service is not included in “inmate telephone service,”⁷ then the term “inmate telephone service” has no meaning in

⁶ Despite the arguable limitations of the definition with respect to *public* payphones, the Commission determined that local coin service, as well as public payphone equipment, is subject to compensation.

⁷ The terms “inmate calling services” and “inmate services” are used throughout these comments synonymously with “inmate telephone services.”

Section 276. The Commission may not adopt an interpretation of the Act that is contrary to the plain meaning of the Act.⁸

C. Section 276 “Compensation” Includes Payments Collected from End User Customers for Services Provided to End Users

By limiting fair compensation in the inmate context to payments received from other service providers (or imputed as internal transfer payments within the service provider itself), the Commission fails to follow its own interpretation of the Section 276 compensation provision – an interpretation that has been upheld by U.S. Court of Appeals for the D.C. Circuit. In the *First Payphone Order*, the Commission construed Section 276 “compensation” to include payments by end user customers for local coin service provided by the PSP. In *Illinois Public Telecommunications Ass’n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *cert. denied sub nom. Virginia State Corp. Comm’n v. FCC*, 523 U.S. 1046 (1998)(“*IPTA*”), the court considered the closely related issue of whether payments collected by payphone service providers from customers for local coin service are included in “compensation” under Section 276. Noting that “[i]t is undisputed that local coin calls are among the intrastate calls for which payphone operators must be “fairly compensated”, the court focused on whether “Congress gave the Commission the authority to set local coin call rates in order to achieve that goal.” *Id.* at 562. The Court concluded that the “fairly compensated” requirement applies to payments made to PSPs by customers, because the same term is used elsewhere in the Act to include payments by customers, and because

⁸ The issue of whether or not inmate collect calling services are included in “payphone service” as defined by Section 276(d) was squarely presented to the Commission in the Remand proceeding, but the Commission chose not to decide it. *Remand Order*, ¶¶ 57-58.

“the only compensation that a PSP receives for a local call . . . is in the form of coins deposited into the phone by the caller.” *Id.* at 562.

The Commission must interpret its Section 276 obligations consistently. There is no rational basis for concluding that the “fairly compensated” requirement applies to payments by customers for local coin calls, but not to payments by customers for local inmate collect calls.

In fact, there are strong similarities and no material distinctions between local coin service and inmate local collect calling service for purposes of determining the applicability of the compensation provision to end user payments for those services. In the case of local coin calling service, the Commission was faced with the insufficient compensation provided by government-mandated rate ceilings for local coin calling *service*.⁹ The Commission determined that it had a duty to take direct action to ensure compensation notwithstanding state regulation of existing service rates. The Commission stated its intent to treat inmate payphones the same as public payphones with respect to Section 276’s mandate to ensure fair compensation. *First Payphone Reconsideration Order*, ¶ 72. Yet, confronted with similarly “government-mandated rate[s]” that preclude inmate telephone service providers from receiving fair compensation for local collect calls,¹⁰ the Commission has resorted to

⁹ The Commission said it must address the issue of compensation where a “government-mandated rate . . . may not be high enough to be ‘fairly’ compensatory.” *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).

¹⁰ 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”). The ICS rates mandated by the states generally do not include an element to recover the unique extra costs of providing inmate service over and above the costs of providing regular collect service. “Rates for a 12

fictions such as imputed commission payments in an effort to avoid addressing the problem.

Just as local coin calling is the primary telephone service that public payphone service providers offer to end users at public payphones, collect calling service is the primary – and in most cases the *only* – telephone service offered to inmates of correctional facilities.¹¹ To exclude either service would defeat the whole purpose of Section 276 with respect to the affected segment of the industry, and would hinder the emergence of the service competition mandated by Section 276. In short, there is no material difference between local coin service and local inmate collect calling service for purposes of eligibility for compensation under Section 276.

D. Excluding Collect Calling from Inmate Telephone Service Does Not Eliminate the Need for Compensation under Section 276, but Only Complicates the Determination of the Amount

Even if it were theoretically appropriate, which it is not, to limit fair compensation for inmate services to commission payments, requiring such a bifurcation of inmate service provider costs and revenues greatly complicates the compensation process as a practical matter.¹² Moreover, such complication is unnecessary. Appropriate application of such a bifurcation requirement, if it could be done, should not affect the outcome in any event.

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”).

¹¹ As previously submitted by ICSPC, collect calling represents 100% of call volume at most inmate facilities. Local and intraLATA collect calls represent some 90% of average call volume at jail facilities.

¹² Elsewhere in the *Remand Order* the Commission holds that LEC-affiliated inmate service providers should not be subjected to “extensive and burdensome accounting requirements” that are unnecessary to achieve regulatory ends. *Remand Order*, ¶ 54.

The Commission has recognized that inmate service providers offer an integrated package of equipment and services for which their only compensation is collect call charges assessed on end user customers. In order to reconcile this fact with its preconceived paradigm of separation between “payphone service” and “operator service” functions, the FCC is forced into the fiction that “fair” compensation will be determined by artificially attributing a portion of the service provider’s collect call revenues as a commission payment to the service provider’s “PSP” side. Thus, inmate service providers would have to collect compensation for their equipment by paying their “payphone service” side a commission from the revenues collected by their “operator service” side.

Even though, under this view, government-mandated rate ceilings would not directly restrict the payment of such compensation, they would still restrict the available pool of revenues from which such compensation could be paid. Whether the restriction is direct or indirect does not change the fact that, as the Commission stated, “where the market does not or cannot function properly . . . the Commission needs to take affirmative steps to ensure fair compensation.” *First Payphone Order*, ¶ 49. Where a government-mandated rate ceiling precludes total cost recovery, the need for such “affirmative steps” remains, regardless of whether the inmate telephone service is defined as the total calling service or only a portion of it.

Assuming that the costs of “payphone service” can be identified and segregated from the costs of “operator service,” revenues must also be segregated between “operator service” revenues and “commission” revenues. Since the only revenues received by inmate service providers are those collected from billed parties for calls (usually collect, as noted above) placed by inmates, and since those revenues would be classified as “operator service” revenues, the only available source of “fair compensation” for the “payphone service”

portion of the inmate service provider's operation would be commission payments made by transferring a portion of operator service revenues from the provider's "operator service" accounts to its "inmate telephone service" accounts. Such an artificial division, which has nothing to do with the manner in which inmate telephone service providers actually operate, would greatly and unnecessarily complicate the process of determining fair compensation for inmate telephone calls. *See Wood Dec.*, ¶ 10.

If done with theoretical consistency, such an artificial division of costs and revenues would not materially change the result. The "payphone service" side could only obtain an adequate commission from the "operator service" side if the "operator service" side could recover enough revenue to cover the costs of the entire operation. If the "operator service" side is constrained by a rate ceiling that prevents it from recovering total costs, then the "payphone service" side cannot be fairly compensated no matter how those costs are divided. The operator service side could fully compensate the payphone side for its costs only by shortchanging itself and failing to recover its own share of the costs – something that no service provider would rationally do. *Wood Dec.*, ¶¶ 7-8. As the record in this proceeding makes clear, the government-mandated ceilings on inmate collect calling service rates in many states are too low to cover the total costs of the equipment and service operation. Obviously, such non-compensatory rate ceilings equally prevent an inmate service provider from paying its equipment side an adequate commission to cover whatever portion of the total costs is allocated to the equipment side.

Therefore, even if the required bifurcation were otherwise permissible, which it is not, such a bifurcation unnecessarily complicates the process of determining "fair compensation."

II. THE COMMISSION'S NEW COST STANDARD IS INCONSISTENT WITH THAT REQUIRED BY SECTION 276 AND REPRESENTS AN UNJUSTIFIED DEPARTURE FROM THE THIRD REPORT AND ORDER

In the *Remand Order*, the Commission applied the following criteria for determining “fair compensation” of inmate service providers:

Unless an ICS provider can show that (i) revenue from its interstate or intrastate calls fails to recover, for each of these services, both its direct costs and some contribution to common costs, or (ii) the overall profitability of its payphone operations is deficient because the provider fails to recover its total costs from its aggregate revenues (including both revenues from interstate and intrastate calls), then we would see no reason to conclude that the provider has not been “fairly compensated.”

Remand Order, ¶ 23. In other words, providers seeking compensation for local collect calls must show either (1) that they are individually unprofitable (and therefore, in all likelihood, will have gone out of business by the time they are able to begin collecting “fair” compensation), or (2) that their revenue from local collect calls does not exceed the direct costs attributable solely to that class of calls (plus “some” contribution to common costs, *i.e.*, any contribution greater than zero).

On its face, this new standard is inconsistent with the mandate of Section 276(b)(1)(A) to “establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone.” Clearly, in enacting Section 276, Congress envisioned that the Commission would ensure that ICS providers receive fair compensation on an individual call basis, not on an aggregate, “firm-wide” basis. Therefore, the Commission’s new standard which places the burden on ICS providers to show that they are losing money in the aggregate, *i.e.*, across all calls, cannot be squared with the plain meaning of Section

276.¹³ The Commission itself, with the exception of this new standard articulated for the first time in the *Remand Order*, has consistently recognized that Section 276(b)(1)(A) requires a call-by-call analysis of “fair compensation.” *See, e.g., First Payphone Order*, ¶ 48.

Moreover, the Commission’s newly articulated requirement that inmate calls only recover “some” contribution to common costs imposes a hurdle that is irrational, impractical and, in the end, inconsistent with the intent of Section 276. As “the vast majority of payphone costs are fixed and common, even costs for operator assisted calls,” the “direct” costs as defined by the Commission will be extremely low. *Id.*, ¶ 15. Application of this standard means, therefore, that virtually any rate greater than zero could be deemed “fair compensation.” Application of this standard also means that, in the jail environment where Coalition members provide service and for which they have sought compensation relief, the standard would permit 99.9% of the common costs – which, again, the Commission has found to represent the vast bulk of the costs of inmate telephone service – to be loaded on less than 20% of the calls. *See, e.g., “County Jail Type of Call Distribution,”* appended to Letter to Magalie Roman Salas from Robert F. Aldrich, December 6, 2001 (showing that non-local calls average less than 20% of total calls made from county jails). Moreover, as intrastate long distance collect calls are subject to rate ceilings in many states, the common costs loaded onto toll calls will be disproportionately loaded onto deregulated interstate collect calls. As interstate calls average only about 5% of the traffic at a county jail, it is clearly unrealistic (as well as unfair to interstate callers) to

¹³ As the Coalition’s economic consultant, Don Wood, explains in the Declaration appended to this Petition, individualized costs showings are highly problematic when an industry is in precarious financial circumstances. Service providers must succeed in “demonstrat[ing] to the Commission the particulars of their pending bankruptcy before that bankruptcy actually takes place.” Wood Dec., ¶ 19.

rely on interstate calls to recover all residual common costs. *See, e.g.*, “NC, SC & TN County Jail Inmate Calling Service Profitability Analysis,” appended to Letter to Magalie Roman Salas from Robert F. Aldrich, May 9, 2000 (showing the average impact of rate ceilings in three states on the recovery of inmate service costs from different classes of calls, and estimating that even with a more than 100% markup on interstate calls, revenue would be far from sufficient to offset the loss sustained on each local call).

Cost standards that provide for minimal contribution to common costs have been rejected by the Commission in every previous payphone compensation determination under Section 276. *See First Payphone Order*, 11 FCC Rcd at 20576, ¶ 68; *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Report and Order, 13 FCC Rcd 1778, ¶¶ 92-96 (1997); *Third Payphone Order*, 14 FCC Rcd at ¶ 81. In the *Third Payphone Order*, the Commission applied a quite different cost-based standard of fair compensation for public payphone service providers.

In setting the rate of “dial-around” compensation for calls made from payphones using access codes or toll-free 800 numbers, the Commission defined “fair compensation” to include proportionate contributions to common costs from each class of calls. *Third Payphone Order*, ¶¶ 59, 78. The Commission did so in order to “ensure that the [dial-around] compensation amount is sufficient to support the continued widespread availability of payphones”. *Id.*, ¶ 55. Recognizing that the dial-around compensation rate “will have a very real impact on the deployment of payphones” and especially “the deployment of payphones in locations with comparatively lower volumes of traffic,” the Commission sought to set the rate high enough “to ensure that the current number of payphones is maintained.” *Id.*, ¶ 58 (footnotes omitted). In the case of local inmate collect calls, the impact of the common cost standard on widespread deployment is even greater: While less

than one-third of public payphone calls are “dial-around” calls (“*Third Payphone Order*, ¶ 151), the record indicates that more than 80% of the calls made from county jails are local collect calls.

In the *Remand Order*, the Commission fails to justify its dramatic deviation from the fair compensation standard of the *Third Payphone Order*. While the *Remand Order* proposes or suggests a number of explanations for applying a far more strict standard of fair compensation, none of those explanations establishes a valid distinction between the two contexts that would justify the application of such disparate standards of fair compensation. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970).

For example, the *Remand Order* points out that the problem of allocating costs is “intractable” (*Id.*, ¶ 17), and adds:

[G]iven the de-regulatory aims of the 1996 Act, the critical factor is that the costs must ultimately be recovered, but we will not mandate a particular method of cost recovery.

Remand Order, ¶ 23. But the compensation rates in question have *not* been deregulated, and PSPs are consequently restricted as to their choice of methods of cost recovery. In the *Remand Order* itself the Commission declines to deregulate inmate local collect calls by preempting state rate caps. *Remand Order*, ¶ 3. If the compensation rates for inmate services are going to remain regulated, then it is incumbent on the regulator – in this case, the Commission, by virtue of Section 276 – to decide how costs should be recovered.

The Commission states that different policy goals should apply in the public payphone and inmate contexts. However, the Commission fails to identify alternative goals that it wishes to pursue in the inmate context. Moreover, its justification for ignoring the statutory goal of widespread deployment holds no water. In fact, the record showed that

service to inmates of county jails in marginal locations is endangered in a significant number of states, as a result of unreasonably low state rate ceilings on local collect calls.¹⁴

The Commission disregarded this evidence, concluding instead that the statutory goal of promoting widespread deployment of payphone services need not be pursued in the inmate service context “because, considering that ICS providers offer commissions, prison payphones are already profitable.” *Id.*, ¶ 19. This statement appears to be based on a misconception of the *Third Payphone Order*. In that order the Commission expressly acknowledged that commissions are offered by public payphone service providers at many locations (*Third Payphone Order*, ¶¶ 37-38); however, the Commission also recognized that the payphone compensation rate should support continued deployment of public payphone locations, where no commissions are paid. Accordingly, the Commission prescribed a dial-around compensation rate for all public payphones (including those for which commission are paid) that includes an proportionate per-call contribution to common costs. In the jail context, as well, there are locations where commissions are paid, and other locations where no commissions are paid. *Wood Dec.*, ¶ 24.

¹⁴ See “Failure to Deliver on Section 276 Mandates Has Killed Competition,” attached to Letter to Magalie Roman Salas from Robert F. Aldrich, July 17, 2001 (“July 17, 2001 Ex Parte”) (showing that the number of independent service providers declined from 29 in 1995 to four in 2001); e-mails to V. Townsend, Pay-Tel Communications, from Mary Erickson, July 3, 2001, attached to the July 17, 2001 Ex Parte (showing that the number of independent inmate service providers serving county jails in North Carolina declined from eight in 1995 to two in 2001 and the number in South Carolina declined from nine in 1995 to two in 2001); Letter to FCC Chairman Michael Powell from Wayne V. Gay, Sheriff of Wilson County, North Carolina, and 38 other sheriffs of counties in North Carolina, dated September 12, 2001 (stating concern that, with BellSouth’s withdrawal from the inmate service business and the decline in independent providers, telephone service to North Carolina county jails is in jeopardy); “Rates for a 12 Minute Collect Call and State-Inmate Local Imposed Rate Ceilings,” Letter to Magalie Roman Salas from Robert F. Aldrich, June 29, 2001 (showing that local collect call rates in six states are less than half the national average).

The Coalition is not here contending that the Commission must allow commissions as costs. In the *Third Payphone Order*, the Commission decided to utilize a “marginal location” cost analysis in which it set the rate equal to the per-call costs incurred in maintaining a payphone at a location where no commissions are paid. The Commission could adopt a similar approach here, and in fact the cost analysis that the Coalition is preparing will utilize the marginal location approach that excludes commissions. But the mere fact that commissions are often paid by inmate service providers does not justify requiring individualized showings of unprofitability, or excluding any significant contribution to common costs from the definition of “fair compensation”. Wood Dec., ¶ 24.

For similar reasons, the *Remand Order* does not justify treating inmate service differently from payphone service on the grounds that “any increase in inmate calling services’ revenue to permit a larger contribution to common costs will not encourage it to provide more payphones but will only encourage higher location commissions.” *Remand Order*, ¶ 19. In the *Third Payphone Order*, the Commission recognized that prescribing compensation could result in higher profits for many locations such as airports, where there are unusually high per-phone call volumes. However, the Commission considered it to be more important to ensure that marginal locations were served, than to eliminate airports’ profits. As noted above, the record in the inmate proceeding showed that service to many locations is endangered because of the very low rate ceilings for local collect calls imposed in some states.¹⁵ The policy goal of promoting widespread deployment of payphone

¹⁵ A reduction in inmate telephone service not only harms the welfare of inmates and their families, but also hinders law enforcement objective such as crime and fraud prevention, which depend on the inmate call monitoring and screening offered by inmate telephone service providers.

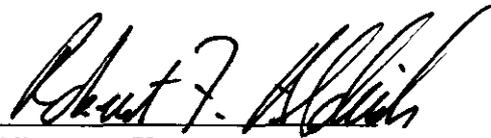
services by maintaining service to marginal locations is just as applicable to inmate telephone service as it is to public payphone service.

CONCLUSION

The Commission should reconsider and rule that (1) Section 276 requires the FCC to ensure that inmate service providers are fairly compensated for the service they provide to end users, and (2) the cost standard of the *Third Report and Order*, which defines fair compensation to include proportionate contribution to fixed and common costs by each class of calls, is applicable to inmate service compensation.

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Respectfully submitted,



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