

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Implementation of the Pay Telephone)	CC Docket No. 96-128
Reclassification and Compensation Provisions)	
of the Telecommunications Act of 1996)	

**RBOC PAYPHONE COALITION’S COMMENTS ON THE NOTICE OF PROPOSED
RULEMAKING REGARDING INMATE CALLING SERVICES**

The RBOC Payphone Coalition¹ files these comments in response to the petition² filed by Martha Wright and other prison inmate and non-inmate petitioners.³

INTRODUCTION AND SUMMARY

The Commission should deny petitioners’ request that the Commission regulate the manner in which prison administrators make telephone services available to inmates. The Commission should maintain its policy of refusing to interfere in the administration of correctional facilities – a core state police power function, whether the function is performed by the state directly or by a contractor. Nothing in the Communications Act provides the Commission jurisdiction to regulate prison administrators. In any event, the Commission has no record before it that would permit it to adopt any rules in this area: the Dawson Affidavit⁴

¹ The RBOC Payphone Coalition includes SBC Communications Inc. and the Verizon telephone companies.

² Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking (filed Oct. 31, 2003) (“Wright Petition”).

³ See Public Notice, *Petition for Rulemaking Filed Regarding Issues Related to Inmate Calling Services, Pleading Cycle Established*, DA 03-4027 (rel. Dec. 31, 2003).

⁴ Wright Petition Attach. A (Affidavit of Douglas A. Dawson (Oct. 29, 2003)) (“Dawson Affidavit”).

ignores a multitude of significant issues and provides no basis for adoption of a federal policy on provision of telecommunications services to inmates.

I. The Wright Petitioners argue that the Commission should “require all privately administered prison facilities to permit competition in the provision of interstate long distance inmate calling services.” Wright Petition at 8. But the Commission has consistently declined to regulate prison authorities, leaving matters of correction policies to responsible federal and state officials. Whether particular calling arrangements are consistent with “security, anti-fraud and other penological goals”(id.) is a matter that is outside the Commission’s area of expertise and authority and squarely within the domain of government correctional officials. The Commission should not attempt to second-guess those officials’ policy determinations. Moreover, state officials rely on a competitive bidding process to choose inmate calling service providers, and the criteria that such officials rely on in selecting such providers is likewise a matter beyond the appropriate domain of Commission action. Indeed, any effort to regulate prison administrators would be without statutory basis and would exceed this Commission’s ancillary jurisdiction under Title I of the United States Code.

II. The Dawson Affidavit does not support any regulatory action in this area, let alone the adoption of a radical new federal policy. Mr. Dawson claims no experience with or first-hand knowledge of inmate calling services aside from his examination of “data relating to” three correctional facilities and a single provider. See Dawson Aff. ¶ 3. There are a plethora of technical and business issues that his affidavit does not begin to address. And the technical solution that Mr. Dawson proposes to permit inmate choice is both untested and, as proposed, fails to address obvious security concerns. His cost estimate is based on unwarranted and

incorrect assumptions. Given the tremendous variety in correctional institutions and concomitant variations in costs, the Dawson Affidavit is an ill-supported and essentially hypothetical exercise.

DISCUSSION

I. THE FCC SHOULD NOT INTERFERE WITH CORRECTIONS POLICY AND LACKS JURISDICTION TO REGULATE PRISON ADMINISTRATORS

The Wright Petition implicates two separate facets of corrections policy. On the one hand, the petitioners would have this Commission make sensitive judgments about the types of inmate calling arrangements necessary to address security and inmate safety concerns. On the other hand, petitioners ask the Commission to determine the manner in which governmental authorities should be permitted to select inmate calling service providers at correctional institutions. With respect to both matters, the Wright Petition seeks to draw the Commission well outside the area of its expertise and beyond its statutory authority.

First, it is beyond dispute that “the provision of inmate calling services implicates important security concerns.” *Inmate NPRM*,⁵ 17 FCC Rcd at 3276, ¶ 72. The Commission has recognized some of the characteristics of inmate services:

First, virtually all inmate phone calls must be collect; there can be no coin calls or credit card calls. Second, prison security rules typically require that a special automated voice-processing system, rather than a pre-subscribed operator service provider (OSP), process inmate collect calls, in order to provide prison authorities with the ability to screen phone calls. Third, inmate calling services employ numerous blocking mechanisms to prevent inmates from making direct-dialed calls, access code calls, 800/900 calls, or calls to certain individuals like judges or witnesses. In fact, calls from confinement facilities often are limited to certain pre-approved numbers. Fourth, confinement facilities also require that phones be monitored for frequent calls to the same number, a sign of possible criminal activity or a scheme to evade calling restrictions via call-forwarding or three-way calling. Fifth, confinement facilities usually require periodic voice-overlays that identify the call as being placed from a confinement facility, as well as listening

⁵ See Order on Remand and Notice of Proposed Rulemaking, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 3248 (2002) (“*Inmate NPRM*”).

and recording capabilities for all calls. Finally, inmate calling systems generally must provide detailed, customized reports for confinement facility officials.

Id. at 3252, ¶ 9 (footnotes omitted). As the Commission has also recognized, a competitive industry of inmate calling service providers serves the needs of inmate institutions. Those providers may offer a variety of technical solutions to inmate institutions' security requirements. In adopting a particular service arrangement, correctional officials must ensure not only that criminal activity of inmates is curtailed, but also that safety of inmates and correctional personnel within the institution is preserved.

The Wright Petition seeks to require inmate institutions to abandon certain types of established calling arrangements, arguing that they "are not necessary in order to enforce prison security or to carry out related penological goals." Wright Petition at 11. But this is a matter well outside the Commission's area of expertise and responsibility: the Commission simply cannot override correctional officials' judgments about the sorts of arrangements that are required to maintain security and discipline. Because the particular calling service arrangements that inmate institutions adopt will have a significant impact on these matters, they are the responsibility of corrections officials, not of the Commission.

Second, even assuming, contrary to fact, that Commission action in this area would have no impact on security, such regulation would place inappropriate restrictions on governments' choices concerning the administration of correctional institutions. As the Commission has recognized in the past, inmate institutions award contracts to payphone or inmate service providers who offer the type of specialized equipment and services that corrections officials require. *See Inmate NPRM*, 17 FCC Rcd at 3252-53, ¶¶ 9-12. There is vibrant competition to win such contracts. *See Declaratory Ruling, Petition for Declaratory Ruling by the Inmate Calling Services Providers Task Force*, 11 FCC Rcd 7362, 7372-73, ¶ 25 (1996) ("the record

indicates that a *highly competitive prison payphone market* ensures the availability of prison payphone equipment”) (emphasis added). Such competition ensures that corrections officials can effectively set the terms for inmate calling services in the process of awarding contracts to competing providers. *Cf. Paddock Publ’ns, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 45 (7th Cir. 1996) (“Competition-for-the-contract is a form of competition that antitrust laws protect rather than proscribe.”).

To be sure, such competition may result in high commission payments and thus to higher rates for calls from inmate institutions, but only in those circumstances where inmate institutions and state and local government officials make that deliberate policy choice. Indeed, officials may choose to offer a contract to the company that can offer the lowest rates to the recipients of inmate calls, or to cap such rates in the parties’ agreement. As this Commission has noted, “prison authorities have considerable power to ensure that rates are just and reasonable by virtue of the monopoly contracts they confer, [and] they also have the power and the incentive to contract with [operator services providers] that will give them the largest revenues from inmate phones.” Second Report and Order and Order on Reconsideration, *Billed Party Preference for InterLATA 0+ Calls*, 13 FCC Rcd 6122, 6156, ¶ 59 (1998). In either case, the responsible authorities have made a deliberate policy choice, one with which this Commission should not interfere.

Whether inmate institutions will require inmate service providers to recover their costs from callers, accept lower commission payment, or defray some portion of the provider’s costs in order to keep rates as low as possible is, again, a choice that corrections officials can and do make based on security concerns, corrections policy, and other public policy considerations. State and local corrections officials should be permitted to balance those factors based on the

characteristics of the inmate population and the institution. Such determinations are the legitimate exercise of the police power of the state. “States and other public agencies do not violate the antitrust laws by charging fees or taxes that exploit the monopoly of force that is the definition of government. They have to get revenue somehow, and the ‘somehow’ is not the business of the federal courts unless a specific federal right is infringed.” *Arsberry v. Illinois*, 244 F.3d 558, 566 (7th Cir. 2001). As one court noted, the government, whether federal or state,

has exclusive control over its prison telephone system as much as it does over its buildings, its parks, and all other government property. If it chooses to contract out the operation of the phone system to a private party, that does not make it any less a phone system of the State itself. . . . This [particular choice to contract out telephone services] may not be the best thing for ‘consumers,’ or competing vendors who do not win the contracts, but it is part and parcel to the sovereign prerogative.

McGuire v. Ameritech Servs., Inc., 253 F. Supp. 2d 988, 1010 (S.D. Ohio 2003).

Third, the Wright Petition threatens no lesser interference with government prerogatives because it seeks to bind (for now) only private prison administrators. The fact that state correctional policy is executed by private contractors rather than by government employees does not alter the fact that correctional policy remains a matter within the control of responsible government corrections officials. The state does not abandon responsibility for correctional policy by contracting out certain functions. *See generally Evans v. Newton*, 382 U.S. 296, 299 (1966) (“[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State.”); *Dellis v. Corrections Corp. of Am.*, 257 F.3d 508, 512 (6th Cir. 2001) (private prisons and personnel employed there act under color of state law). By the same token, regulation of private prison administrators unquestionably interferes with state correctional policy.

Moreover, the potential interference with the states’ judgments about how best to fund inmate institutions is equally direct. Even if the private prison administrator, rather than the

government itself, receives commissions from inmate calling, those commissions will unquestionably affect the ultimate cost to the state of the services the administrator provides. The government may choose to have commissions from inmate calls offset the cost of other inmate services, whether the prison administrator is public or private.

Fourth, in light of these considerations, the Commission would exceed its jurisdiction if it purported to adopt regulations to govern the provision of inmate calling services by prison administrators, whether private or public. Although the Wright Petition alludes to section 201(b) (*see* Wright Petition at 15), that provision does not provide any basis for Commission action. Section 201(b) applies only to “common carriers,” and prison administrators are not common carriers: they do not “make[] a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing.” *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) (internal quotation marks omitted). To the contrary, the “prison telephone system” is a “phone system of the State itself,” made available for inmates’ use only subject to the terms and conditions of the prison administrators. *McGuire*, 253 F. Supp. 2d at 1010. Section 201(b) accordingly does not speak to the rates for such services.

Nor do section 226 or section 276 grant the Commission any such authority. Section 226 applies to “aggregators,” and, again, prison administrators are not “aggregators” – they do not “make[] telephones available to the public or to transient users of [their] premises.” 47 U.S.C. § 226(a)(2). And while section 276 includes “provision of inmate telephone service” within the definition of “payphone service,” 47 U.S.C. § 276(d), section 276 itself places no restriction on the ability of location providers (here, prison administrators) to enter into whatever arrangements they choose with both payphone service providers or telecommunications providers. To the

contrary, section 276 reaffirms that location providers may “select[] and contract[] with . . . carriers” to carry interLATA (and intraLATA) calls. 47 U.S.C. § 276(b)(1)(D), (E).

Furthermore, the Commission cannot regulate prison administrators as an exercise of ancillary jurisdiction under section 2 of the Communications Act. *See generally United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). Such an assertion of authority must be “reasonably ancillary to the effective performance of the Commission’s various responsibilities” – that is, it must be related to a subject that the Commission *does* have statutory authority to regulate. *Id.* at 178; *see also* Report and Order and Further Notice of Proposed Rulemaking, *Digital Broadcast Content Protection*, 18 FCC Rcd 23550, 23563-64, ¶ 29 (2003). Petitioners apparently claim that the FCC may regulate prison administrators to ensure that rates for interstate calls are just and reasonable – in other words, they would argue that the assertion of authority is ancillary to the Commission’s jurisdiction under section 201(b). But it is perfectly just and reasonable for common carriers to charge rates that reflect commissions paid to location providers – such rates have been in place for decades, and the Communications Act specifically guarantees that location providers may enter into such commission arrangements with carriers. Commissions paid to location providers are a cost of doing business, like the purchase of equipment. Such costs undoubtedly affect the *level* of rates that carriers charge, but they do not affect carriers’ ability to charge *just and reasonable* rates. The Commission can no more derive jurisdiction from section 201(b) over prison administrators than it can over the prices that equipment vendors charge.

The Commission’s decision in *Competitive Networks*⁶ supports this analysis. The rules that the Commission adopted in that proceeding applied only to carriers – not to “owners and managers of commercial MTEs.” *Competitive Networks*, 15 FCC Rcd at 22985, 91. By contrast, the Wright Petition asks the Commission to regulate private prison administrators directly. The Commission has no authority to do so. Moreover, the situation in the *Competitive Networks* case provides no analogy for the present circumstances. In that case, the Commission intended to preserve competitive options for building tenants; by contrast, choices about telecommunications service providers for inmates is a determination that must remain with correctional authorities. There is nothing in the MTE environment that can be compared to the call control functions that inmate service providers must arrange to provide on *all* calls. Placing any restrictions on the types of agreements that service providers and prison administrators can enter into would go far beyond any assertion of authority by the Commission, and would be equivalent to dictating to an individual business or residential customer the type of service plan they are permitted to buy. The Commission has never done anything like that.

Moreover, any reading of the Communications Act that would authorize the Commission to interfere with state authority over corrections policy would be particularly suspect in light of 70 years of non-regulation by the Commission in this area. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Federal law reflects pervasive deference to responsible government officials on matters that implicate corrections policy. *See generally Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989) (noting that the judiciary is “ill equipped to deal with the difficult and delicate problems of prison management”) (internal quotation marks omitted);

⁶ First Report and Order and Further Notice of Proposed Rulemaking, *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983 (2000) (“*Competitive Networks*”).

Turner v. Safley, 482 U.S. 78, 89 (1987) (holding that administrator’s policy choice will survive constitutional challenge so long as it is “reasonably related to legitimate penological interests”). Had Congress intended to authorize the Commission to intrude on this sensitive area, it would have made that intention clear.

II. THE DAWSON AFFIDAVIT PROVIDES NO BASIS FOR COMMISSION ACTION

Because the Commission should not act in this area at all, it need not consider the factual claims in the Dawson Affidavit, but, in any event, that affidavit provides no basis for Commission action. Mr. Dawson does not establish any expertise in inmate calling services or correctional issues generally, and his judgments about the types of communications services that are most consistent with penological concerns are without foundation. Moreover, his analysis of the costs associated with such services is not based on reasonable data and omits obvious categories of costs.

First, although Mr. Dawson claims “specific experience and expertise relevant to the issues in this proceeding,” he is careful to *avoid* claiming that he has any experience or expertise with provision of inmate calling services. *See* Dawson Aff. ¶ 2 (claiming to “have done virtually everything associated with . . . long distance businesses” but identifying nothing associated with inmate calling services). Mr. Dawson does not claim that he has ever spoken with corrections officials, reviewed the relevant literature, or undertaken any comprehensive study of the industry. Instead, Mr. Dawson states that he relied on data related to *three* inmate facilities and one inmate calling service provider (Evercom Systems, Inc.) to draw conclusions that he asserts “would apply to *all* prison calling systems.” *Id.* ¶ 3 (emphasis added). In the absence of any indication that Mr. Dawson has *examined* a broad variety of calling environments, his insistence that “inmate service competition is a generic question” is utterly without foundation. *See id.*

And in the absence of any indication that Mr. Dawson's conclusions apply "generically," his affidavit provides no basis for any "generic" rule.

Second, Mr. Dawson's conclusion that the introduction of competition among carriers and debit card calling in all inmate institutions would pose no security concerns ignores several obvious objections. For example: unlike collect calling, not all debit/prepaid platforms are able to provide the option that permits the recipients of the inmates' calls to decline the call if they so choose. Moreover, Mr. Dawson does not explain how, in a multi-carrier environment, prison officials will be able to ensure that *each* carrier has arrangements in place to prevent three-way calls, call forwarding, and other techniques for evading limitations on inmate calling.

Third, there is no reason to believe that Mr. Dawson's proposal makes sense as a business matter. As an initial matter, Mr. Dawson assumes that half of all calls will be debit calls and half will be collect. *id.* ¶ 61. But Mr. Dawson provides no basis for this assumption, and the experience of prisons where prepaid calling is an option suggests that prepaid calling will in fact account for a much lower percentage of calls. (And Mr. Dawson does not claim that collect calls should be carried by multiple carriers.) It is far from clear that multiple carriers would choose to deploy facilities, simply to have the opportunity to carry a small fraction of the calls generated by a particular institution.

Fourth, Mr. Dawson's cost study – which cannot be accepted as representative of industry costs in any event – is plainly flawed. For example, his proposal would require new personnel to manage prepaid and debit services, and he does not account for this new expense. He proposes a multiple-provider debit program without accounting for the incremental expense of multiple databases, multiple processes, and segmented providers. Mr. Dawson also neglects to account for the costs of reconfiguring voice prompts to accommodate all potential providers;

of programming multiple carriers and providing FCC mandated rate quotes; of determining the correct sizing for “transporting” traffic for each carrier; of accommodating different LIDB validation plans and cache blocks for each carrier; or, of providing administrative and financial reports based on multiple data streams and processes. Mr. Dawson fails to consider the additional potential for fraud resulting from call handoffs to multiple vendors, or the additional transport protocol necessitated by validation requirements from the inmate platform to and from each carrier. He never indicates how the per-call transaction fees charged by inmate service providers are to be recovered.

Finally, Mr. Dawson entirely excludes commissions from his cost study. But inmate institutions are statutorily entitled to require commissions from inmate service providers who may, in turn, require commissions from carriers – even in a multi-carrier environment.

CONCLUSION

The Commission should decline to regulate inmate calling services.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of March 2004, I caused copies of the RBOC Payphone Coalition's Comments on the Notice of Proposed Rulemaking Regarding Inmate Calling Services to be served by first-class mail on the following:

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