

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition For Rulemaking by)	
Martha Wright, <i>et. al.</i>, on referral from)	DA 03-4027
<i>Wright v. Corrections Corporation of America,</i>)	
CA No 00-293 (GK) (D.D.C.))	
Implementation of the Pay Telephone)	
Reclassification and Compensation Provisions)	CC Docket No. 96-128
Of the Telecommunications Act of 1996)	

**COMMENTS
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March 10, 2004

*MCI Comments
Wright Petition*

*CC Docket No. 96-128, DA 03-4027
March 10, 2004*

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I. Executive Summary

On November 3, 2003, Martha Wright and other persons (*Petitioners*) filed a Petition For Rulemaking Or, In The Alternative, Petition To Address Referral Issues In A Pending Rulemaking (*Wright Petition*). The *Petition* claims that “exclusive dealing arrangements between inmate calling system (“ICS”) providers and departments of correction (“DOCS”) restrict telephone service choices for inmate calls and unreasonably increase rates. WorldCom Incl., d/b/a/ MCI, hereby submits its comments on the *Wright Petition*.

Petitioners would have the Commission limit exclusive contracts between ICS providers and DOCS to call validation, messaging, monitoring, routing, recording, and reporting functions. Next, they would prohibit collect calls in order to eliminate uncollectibles charges. Finally, they ask the Commission to allow multiple carriers to interconnect at the ICS provider’s platform at cost-based rates that limit DOCS’ commissions to costs incurred in connection with the provision of telecommunications services to inmates. The *Wright Petition* concludes that if the Commission were to take these actions, the average price of a toll call from a correctional facility would decline from approximately \$.82 per minute to approximately \$.09 per minute. The Commission should reject the Wright Petition *in toto* for the following reasons:

First, prison officials are owed great deference over all aspects of inmate calling service, including restrictions on number of calls, commission levels, and allowable billing methods. As a general matter, in the absence of constitutional concerns, federal courts have granted prison authorities broad discretion to establish telecommunications policies that comport with valid penological objectives, including the use of exclusive contracts with inmate calling service providers. The courts have recognized that balancing the public safety against the rights granted prisoners is a complex task. Neither Section 251 nor Section 276 of the Telecommunications

Act overturns these precedents. The *Wright Petition* recommends a prison payphone system very much like the system established under Section 251 of the 1996 Act where one provider installs and operates a telephone system and competing carriers interconnect with that incumbent provider to offer competing service. Petitioners do not propose applying Section 251 outright because Section 251 does not apply to the highly specialized inmate phone market. Petitioners can cite to no case where it was held that inmate payphones are subject to this section of the 1996 Act.

Nor does Section 276 grant the Commission authority to regulate site commissions or prohibit exclusive contracts. Although Section 276 gives the Commission general authority over payphone rates, Section 276(b)(1)(E) specifically authorizes a location provider to make its choice of carrier a condition for a PSP obtaining access to its location. Legislative history states that “[location] providers prospectively also have control over the ultimate choice of interLATA and intraLATA carriers in connection with their choice of payphone service providers.

Principles of statutory construction require that specific Congressional direction to or limitation on the Commission takes precedence over Commission decisions based on general, plenary, authority. Section 276 actually prohibits the Commission from banning exclusive ICS contracts

Moreover, commissions serve valid penological objectives. They have been used to fund the expansion of prison facilities, pay for inmate programs, and pay for more secure calling systems that have made greater extension of telephone privileges possible. A governmental entity would have authority to limit commissions found to serve no penological objective. But such a determination would involve complex determinations, would differ from state to state and institution to institution, and would involve examining state budgetary allocations, planned prison expansions, auditing the use of inmate funds, and other investigations. This task is

certainly not within the Commission's authority for non-federal institutions, and the Department of Justice or the federal courts are probably the appropriate governmental entities to ascertain whether commissions paid to the Federal Bureau of Prisons serve penological purposes.

The Commission has heretofore recognized the security concerns that justify exclusive contracts and the payment of site commissions. The Commission's *Billed Party Preference* and *Pay Telephone Orders* have recognized the unique character of the inmate payphone market. Neither does the *Competitive Networks Order* support banning exclusive contracts for providing telephone service to correctional facilities. The *Competitive Networks Order* prohibited exclusive contracts in commercial MTEs only where a building owner is not empowered to act on behalf of its tenants or on behalf of affiliated entities. In contrast, inmate telephone services are often purchased through a "general services administration," or through a state DOCS on behalf of state correctional facilities. The Commission should also not be led astray by suggestions that state security prerogatives do not come into play in this instance because a private prison administrator has been named as a defendant in a separate complaint. Private prisons are agents of the state, acting pursuant to contracts with state DOCS. These contracts transfer DOCS' police powers to the private prison administrator.

Second, the *Wright Petition* does not show that collect calling and single provider systems are unreasonable methods of achieving penological objectives. The *Wright Petition* argues that choice of carrier can be structured to accommodate security goals. While, this statement appears to validate the penological concerns a state may have, it is a much weaker acknowledgement of the scope of state police powers than has been established by court precedent. States are not limited to a single method of achieving crime deterrence, rehabilitation and institutional security. States are authorized to choose any method that does not involve an

irrational limitation on inmates. The *Wright Petition* fails to meet this burden of proof. Single ICS providers and collect-only billing are reasonable methods of maintaining prison security and preventing use of telephone facilities for fraudulent purposes. Relying on a single carrier makes it easier and less expensive for DOCS and the ICS provider to obtain billing reports, call flow reports, and audit trails of inmate calls; to detect and investigate fraudulent calls; to investigate potential criminal activity being committed from prison, and to handle customer service inquiries. Collect-only billing allows the ICS provider to rely on its already established and secure billing systems, and allows it to avoid building and testing multiple billing platforms. Single provider, collect-only systems, are not unreasonable limitations and do serve valid penological objectives. The *Wright Petition* has not met its burden of proof and must be rejected.

Third, the *Wright Petition's* recommendations would complicate security and would not realize promised cost reductions. The *Wright Petition* appears to propose a non-DOCS debit account managed by the ICS provider. This account would be separate from a DOCS commissary account, in order to address long-standing criticisms that debit cards and commissary debit accounts create a commodity that can be extorted, reduce prison security and undermine efforts to rehabilitate inmates. It provides few details how accounts would be established and maintained, but it is clear that administrative costs and customer confusion would substantially increase. ICS providers would need to obtain rating information for each carrier and update this information regularly in response to continuously changing federal and state mandates. Dispute resolution would become much more complicated too. It will be more difficult and expensive to determine whether DOCS, the ICS provider, or the interconnecting carrier is responsible for identifying and resolving customer inquiries, thereby undermining valid

penological objectives. It may also be more difficult for law enforcement agents to pull together the chain of evidence needed in a criminal proceeding in a multi-carrier environment. Because of its contractual relation with a single ICS provider, DOCS has the ability to obtain all needed information from the carrier without a formal subpoena if it suspects a crime is being planned or committed from within ICS facilities. This ability does not extend to carriers other than the ICS provider. Moreover, inmates who are intent on conducting criminal activity from prison will have their cohorts establish multiple accounts with multiple false identities involving multiple carriers. Law enforcement agents will need more subpoenas for call records, and will have a more difficult time piecing together the chain of evidence necessary for a conviction.

The Commission should also be aware that the Wright Petition's prediction of the elimination of uncollectibles is dependent on a complete ban on collect calling. Nearly all DOCS will want to retain the option of collect calling. A debit-only system can be restrictive, for it limits calling to funds available in the prepaid account. Collect calling does not require the called or calling party to make any prior contribution, and can result in a broader array of persons being called. The inevitable downside of collect calling, of course, is the high amount of associated uncollectibles. Once collect calling is an option though, those inmates and families able and willing to pay for telephone calls will switch to debit calling, while those unable and unwilling to pay will gravitate towards collect calling, where they can avoid payments through a variety of fraudulent schemes. Uncollectibles percentages will increase for collect calls, but remain relatively constant for the ICS provider.

The attraction of the *Wright Petition* is its promise of reducing the average cost of an inmate call from \$.82 per minute to an average of \$.09 per minute. However, significant portions of its calculations are either incorrect or ignore legitimate costs. It excludes profits; it

does not include intrastate calls in its calculations; it excludes commissions, a legitimate cost of doing business; it bans collect calling in order to eliminate uncollectibles; it underestimates long distance transport costs and overhead costs by a factor of three; it ignores the increase in costs associated with multiple carriers; it fails to account for unbillables; fails to account for the annual expense of storing and backing up data; fails to include the costs of inside wiring, as well as other costs.

Most of the cost savings are due to the ban on collect calling and the elimination of site commissions. None of the supposed cost differences are attributable to the introduction of carrier of choice. As argued above, banning collect calling would undermine the legitimate penological objective of making telecommunications widely available to inmates. And as argued above, the Commission has limited authority to regulate the level of site commissions. MCI's Comments also show that many states and departments of corrections are reducing rates, reducing commissions and introducing direct dialing as an option along with collect calling. Not all states are taking these steps, but as a matter of federalism, these are matters that are best left to each state.

II. Introduction

On November 3, 2003, Martha Wright and other persons (*Petitioners*) filed a Petition For Rulemaking Or, In The Alternative, Petition To Address Referral Issues In A Pending Rulemaking (*Wright Petition*)¹ with the Federal Communications Commission (“Commission”). The Commission chose to consider the *Wright Petition* as an *ex parte* submission into the record of its *Inmate Payphone Rulemaking*.² In Comments to the Commission’s *Inmate Payphone Rulemaking*, parties addressed issues concerning the desirability and jurisdiction of the Commission to set rates, commission levels, alternatives to collect calling, and service quality for inmate calling services (“ICS”).³ In comments filed in response to Outside Connection’s Petition For A Declaratory Ruling,⁴ parties also addressed the desirability and jurisdiction of the Commission to prohibit departments of correction (“DOCS”) from entering into exclusive agreements with a single ICS provider to offer telecommunications services to inmates.⁵ The *Wright Petition* raises issues that straddle both proceedings.

The heart of the *Wright Petition* is its claim that “exclusive dealing arrangements (between ICS providers and DOCS) restrict telephone service choices for inmate calls, resulting in substantially increased rates for such services, thereby violating various constitutional and

¹ *Wright v. Corrections Corp. of America*, C.A. No. 00-293 (GK) (D.D.C. Aug. 22, 2001), Order, slip op. at 1.

² Public Notice, Petition For Rulemaking Or, In The Alternative, Petition To Address Referral Issues In A Pending Rulemaking (*Notice*); Implementation of Pay Telephone Reclassification and Compensation provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Order on Remand and Notice of Proposed Rulemaking, 17 FCC Rcd 3248 (2002) (*Inmate Payphone Rate Proceeding*).

³ *Inmate Payphone Rate Proceeding*, Comments of WorldCom, T-Netix, ISPC, CURE, and RBOC Coalition, filed May 24, 2002; Reply Comments filed June 24, 2002

⁴ Outside Connection’s Petition For A Declaratory Ruling (*OC PDR*), filed March 19, 2003.

⁵ In the Matter of Petition for Declaratory Ruling Filed by Outside Connection, Inc, DA 03-874, WCB/Pricing 03-14, Comments of WorldCom, T-Netix, CURE, and others. Comment of WorldCom, T-Netix, CURE, and others, filed April 16, 2003; and Reply Comments of WorldCom, T-Netix, CURE, and others, filed April 28, 2003.

statutory rights, including Section 201(b) of the Communications act of 1934....”⁶ *Petitioners* contend that exclusive arrangements between ICS providers and DOCS are not the only means of satisfying governmental penological objectives, and contend it is economically and technically feasible to establish a configuration by which multiple carriers interconnect to an inmate calling platform and then allow inmates’ families to choose the carrier who will transport calls from that platform.

Petitioners would have the Commission limit exclusive contracts between ICS providers and DOCS to call validation, messaging, monitoring, routing, recording, and reporting functions.⁷ Next, they would have the Commission prohibit collect calls as the sole billing method,⁸ arguing that the establishment of a debit account *funded by each called party* will eliminate billing costs and uncollectibles charges.⁹ Finally, they ask the Commission to allow multiple carriers to interconnect at the ICS provider’s platform at cost-based rates that limit DOCS’ commissions to costs incurred by DOCS in connection with the provision of

⁶ *Wright Petition* at 6.

⁷ *Id.*, at 18. The *Wright Petition* refers to this as a “partial monopoly,” but in fact its proposal is premised on an exclusive arrangement between the ICS provider and DOCS. As will be shown below, the only probable rate reductions would be achieved through the reduction in commission levels via Commission regulation of interconnection rates, and possibly reductions in uncollectibles, rather than through the introduction of carrier choice. In itself, the proposed carrier of choice mechanism turns out to be an elaborate method of justifying rate regulation of commissions under the guise of competitive choice, while reducing security, with no cost reduction due to competitive choice. As will be shown below, significant investment and additional recurring costs would be imposed on consumers were a competitive carrier to implement a debit billing system, and the *Wright Petition* ignores these costs. It also fails to account for major cost causers such as the cost of installing payphones and the cost of storing and backing up call data. The policy goal of reduced inmate calling rates sought by the *Wright Petition* would be more directly and efficiently achieved through reduction in commission levels, and reductions in uncollectibles. However, as MCI has discussed in the *Inmate Coalition Pricing Proceeding*, commissions have been used to fund and staff the expansion of correctional facilities to accommodate growing inmate populations, and fund more secure calling systems that have allowed increased communication with persons outside the correctional facility because security features have been improved. Reducing commissions therefore has the potential to reduce security within correctional facilities, and within the state at large. Each state must therefore be left to decide whether and how much to reduce commissions.

⁸ *Id.*, at 8.

⁹ *Id.*, at 13.

telecommunications services to inmates.¹⁰ The *Wright Petition* concludes that if the Commission were to take these actions, the average price of a toll call from a correctional facility would decline from approximately \$.82 per minute¹¹ to approximately \$.08 or \$.10 per minute.¹²

MCI's comments will show that Congress and the Courts have consistently limited the Commission's authority to regulate the terms and conditions under which telephone service is provided to inmates; that the Commission has consistently recognized those limitations; that the *Wright Petition's* proposal for multiple carriers to interconnect at the ICS provider's platform increases security risks; that it significantly understates the cost of providing a secure calling platform providing both collect and debit billing, that its hoped for cost savings from adopting debit accounts will not materialize; and that rate reductions would be achieved solely through regulation of commission levels, rather than choice of carrier. Finally, MCI will show that some states are adopting debit accounts, are according less weight to commissions and greater weight to affordable rates; while others are not. In either case, states and departments of correction are the appropriate governmental entities to balance the security needs of inmates, the public at large, commission levels and the intrastate cost of inmate telephone service for state and local correctional facilities, while the FCC's jurisdiction is limited to reviewing interstate rates exclusive of commissions.

III. Prison Officials Are Owed Great Deference Over All Aspects of Inmate Calling Service, Including Restrictions on Number of Calls, Commission Levels, And Allowable Billing Methods

Decisions such as inmate telephone privileges are a matter best left to state prison authorities. MCI has always maintained that the courts and the Commission have long

¹⁰ *Id.*, at 9.

¹¹ *Id.*, Attachment A (*Dawson Affidavit or Dawson*) at 32.

¹² *Id.*, at 38, 43. Dawson reduces the revenues per minute needed from \$.155 or \$.139 by \$.06.

recognized that security concerns limit the authority of either of these agents to require prison authorities to offer choice of carriers to inmates or their families.

A. Federal Courts Grant Prison Officials Great Deference In The Implementation of Inmate Telecommunications Policy

As a general matter, in the absence of constitutional concerns, federal courts have granted prison authorities broad discretion to establish telecommunications policies that comport with valid penological objectives, including the use of exclusive contracts with inmate calling service providers. The courts have recognized that balancing the public safety against the rights granted prisoners is a complex task. As the Supreme Court has recognized “limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives—including deterrence of crime, rehabilitation of prisoners, and institutional security.”¹³ Federal courts have therefore deferred to prison officials’ implementation of these goals. One court noted that it was “keenly aware that federal courts owe great deference to the expertise of the officials who perform the ‘always difficult and often thankless task of running a prison.’”¹⁴

This deference extends to the telecommunications access policies adopted by a prison authority. As an initial matter, an inmate “...has no right to unlimited telephone use.” Instead, a prisoner’s right to use a telephone is “subject to rational limitations in the face of legitimate security interests of the penal institution.”¹⁵ Similarly, the “exact nature of telephone service to

¹³ *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 107 S. Ct. 2400, 2404, 96 L. Ed. 2d 282 (1987).

¹⁴ *Salaam v. Lockhart*, 856 F.2d 1120, 1122 (8th Cir. 1988).

¹⁵ *Strandberg v. City of Helena*, 791 F. 2d 744, 747 (9th Cir. 1986). Indeed, not all states grant inmates the right to use a telephone system. In Texas, for example, the Texas Department of Criminal Justice has never competitively bid for the installation of an inmate telephone system for use in state-managed facilities. In general, inmates do not have phone privileges. Inmates may however, be allowed to make periodic collect calls using the state’s administration phone system.

be provided to inmates is generally to be determined by prison administrators, subject to court scrutiny for unreasonable restrictions.”¹⁶

Federal courts have granted discretion to prison authorities to receive commissions and to grant exclusive contracts to inmate telephone service providers. “By what combination of taxes and user charges the state covers the expense of prisons is hardly an issue for the federal courts to resolve....State 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.”¹⁷

B. Congress Did Not Grant The Commission Authority To Prohibit Exclusive Contracts Between ICS Providers And DOCS

1. Section 251 Does Not Apply to Inmate Payphone Systems

MCI agrees with *Petitioners* that one of the principle goals of the Act was to promote competition and bring about better service to consumers at lower rates.¹⁸ MCI disagrees, however, that the Act’s schema was ever intended to apply to prison payphone systems. Neither Congress nor this Commission has ever claimed that opening the inmate prison payphone arena to competition was a goal of the 1996 Act.

It bears repeating that the provision of telephone service to inmates is quite distinct from traditional telephone service. Unlike the traditional telecommunications marketplace, the inmate prison telephone system is not an arena in which the kind of competition contemplated by the 1996 Act is expected to flourish. The Wright Petition recommends a prison payphone system very much like the system established under section 251 of the 1996 Act where one provider

¹⁶ *Fillmore v. Ordonez*, 829 F. Supp. 1544, 1563-64 (D. Kan 1993), aff’d, 17 F.3d 1436 (10th Cir. 1994).

¹⁷ *Arsberry v. Illinois*, 244 F. 3d 558, 564-66.

¹⁸ *Wright Petition* at 15.

installs and operates a telephone system and competing carriers interconnect with that incumbent provider to offer competing service.¹⁹ No carrier is required to perform any duty akin to what is required under section 251. Of course, the Wright Petition does not propose applying section 251 outright because section 251 does not apply to the highly specialized inmate phone market. Petitioners can cite to no case where it was held that inmate payphones are subject to this section of the 1996 Act.

Instead, the *Wright Petition*²⁰ asserts that the Commission should find exclusive arrangements and restrictions that limit inmate payphone service to collect calling as a violation of section 201(b) of the Communications Act of 1934, as amended.²¹ In support of its argument that the Commission does not like exclusive dealing arrangements, petitioners principally rely on an instance where the Commission has expressed an intention to promote competition, such as in multiple tenant environments (“MTEs”), which is discussed immediately below. This is a very different situation from the inmate payphone environment where the Commission has never intended to require prison officials to use multiple carriers.

As much as the *Petitioners* try to deny the recognized authority and legitimate concerns of prison officials, it is undeniable that they have the power to rule in this area. As demonstrated above, federal courts have granted discretion to prison authorities to govern inmate telephone systems, including the ability to grant exclusive contracts to certain providers.²² The courts have recognized that rights or privileges granted inmates must be balanced with the public safety. Furthermore, the Commission has also recognized that the availability of inmate payphone

¹⁹ *Wright Petition* at 11-12.

²⁰ *Id.* at 15-18.

²¹ 47 U.S.C. § 201(b).

²² MCI Comments at Section III. B. 1.

service is determined by the institutional concerns of prison officials, which are different from issues arising from the provision of basic public payphone service.

Courts have repeatedly sustained prison telephone systems that require inmates to place collect calls through one service provider.²³ What *Petitioners* are asking here is for the Commission to preempt the states' right to select and manage payphone systems for their own prisons. Commission preemption of any form here would seriously impact prison officials' ability to maintain a secure inmate telephone system. Prisons systems should not be forced to deal with multiple entities in delivering telephone service to inmates. If the costs proved too great, prison systems could decide not to grant prisoners telephone privileges at all.

2. Section 276 Prohibits The Commission From Interfering With Exclusive Contracts Negotiated By ICS Providers and DOCS

The *Wright Petition* would divide the provision of ICS into two components: the provision of a secure inmate calling platform, and the provision of local or long distance transport from the platform to the called party by multiple carriers. It cites Section 201(b) as providing the Commission general, plenary, authority to prohibit exclusive contracts between ICS providers and DOCS to make its plan possible.²⁴ However, the Congressional directive found in Section 276(b)(1)(E) specifically authorizes a location provider to make its choice of carrier a condition for a PSP obtaining access to its location.²⁵ Legislative history states that “[location] providers prospectively also have control over the ultimate choice of interLATA and

²³ See *Carter v. O'Sullivan*, 924 F. Supp. 903 (C.D. Ill 1996), *aff'd*, 1997 U.S. App., Lexis 16386 (7th Cir. 1997)(“Prisoners are not entitled to the long distance carrier of their choice....The courts generally do not interfere with such prison administrative matters in the absence of constitutional concerns.”); *Jeffries v. Reed*, 631 F. Supp. 1212 (U.S. Dist. 1986)(stating that in analyzing claims concerning inmate telephone privileges, courts look at whether institutions provide reasonable accommodations for inmates' use of telephones, but that the exact formulation of such service must remain with prison administrators).

²⁴ *Wright Petition*, at 15.

²⁵ 47 U.S.C. § 276(b)(1)(E)

intraLATA carriers in connection with their choice of payphone service providers.²⁶ Principles of statutory construction require that specific Congressional direction to or limitation on the Commission takes precedence over Commission decisions based on general, plenary, authority.²⁷

Because Section 276 has specifically empowered location owners to choose the carrier utilized by a payphone service provider (PSP) as a condition of granting PSP access to their locations, the Commission may not use its Section 201(b) authority to overturn the carrier chosen by a DOCS to carry calls from the ICS platform. DOCS, the location owners in this case, may choose multiple carriers if they desire, but the Commission may not require them to do so.

C. The Commission Has Consistently Deferred to Prison Authorities Regarding Inmate Telephone System Policies

1. The *Billed Party Preference* and *Pay Telephone* Orders Have Consistently Recognized The Commission's Limited Authority Regarding Inmate Telephone Systems

Petitioners suggest that the Commission's "assumptions" about security concerns are the chief reason that exclusive service arrangements are accorded different treatment from other competitive telecommunications services.²⁸ To the contrary, security concerns are but one set of justifications for maintaining a hands-off approach when it comes to inmate payphone systems. The Commission has followed the courts in recognizing that prison authorities properly handle the complex task of balancing communications needs of inmates against prison security.

"Inmate-only payphone service is not a service that must be offered on a regulated basis to ensure its availability. Availability is determined by the institutional concerns of prison authorities. . . . Additionally, the record here demonstrates that while one function of the service is to provide communications service to the inmate population, the concerns and requirements of corrections

²⁶ *House Conference Report* 104-458, January 31, 1996, at 159.

²⁷ *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 347 (1987) ("a specific statute will not be controlled or nullified by a general one."); *Busic v. United States*, 446 U.S. 398 (1980) ("a more specific statute will be given precedence over a more general one").

²⁸ *Wright Petition* at 9.

authorities are different and often in conflict with those associated with the provision of basic public payphone service. These facts distinguish inmates from the ‘general public.’”²⁹

Moreover, following the courts, the Commission has specifically recognized that security concerns grant prison authorities the right to enter into exclusive contracts to provide telecommunications for inmates and their families.

We are persuaded by comments of the United States Attorney General, other federal officials, and nearly all who have commented on this issue that implementation of BPP (billed party preference) for outgoing calls by prison inmates should not be adopted. With regard to such calls, it has generally been the practice of prison authorities at both the federal and state levels, including state political subdivisions, to grant an outbound calling monopoly to a single IXC serving the particular prison. This approach appears to recognize the special security requirements applicable to inmate calls.³⁰

The Commission’s acceptance of the exclusive contracts that departments of corrections award to inmate calling service providers was not primarily based on a concern for the high cost of implementing billed party preference (BPP). Nor did it depend on whether the inmate or the called party might exercise choice of carriers. The Commission’s primary reason for not adopting BPP was the recognition that special security requirements justified the use of exclusive contracts to provide inmate calling services, as the above quote makes clear. Moreover, the Commission has affirmed this understanding just recently, making clear that legitimate security interests continue to justify the awarding of exclusive contracts by departments of corrections to inmate calling service providers.)“For this reason, most prisons and jails contract with a single carrier to provide payphone service and perform associated security functions. Thus, legitimate

²⁹ See Petition for Declaratory Ruling by the Inmate Calling Services Providers Task Force, Declaratory Ruling, RM-8181, 11 FCC Rcd 7362 (1996) at 25.

³⁰ See *Billed Party Preference for InterLATA O+ Calls*, 13 FCC Rcd 6122, (1998) at 57.

security considerations preclude reliance on competitive choices, and the resulting market forces, to constrain rates for inmate calling.”)³¹

2. The *Competitive Networks Order* Does Not Support A Ban On Exclusive Contracts For ICS

The *Wright Petition* seeks to justify having the Commission prohibit exclusive contracts between ICS providers and DOCS in the inmate context by referring to the Commission’s ban on exclusive contracts between owners of MTEs and communications carriers.³² However, the Commission’s *Competitive Networks Order* does not apply to exclusive contracts made between ICS providers and DOCS. The *Competitive Networks Order* prohibited exclusive contracts in commercial MTEs only where a building owner is not empowered to act on behalf of its tenants or on behalf of affiliated entities (“...we recognize that certain state governments develop and administer exclusive contracts for the public agencies or offices under their jurisdiction”)³³ This is often the case with state procurement of telecommunications services. The state, either through a “general services administration,” or through DOCS is authorized to purchase telecommunications services on behalf of state correctional facilities. The Commission expressly exempted statewide, governmental, purchasers of telecommunications services, such as DOCS, from its ban on entering into exclusive contracts.

D. Private Prisons Are Agents of the State

At several places the *Wright Petition* assumes that because its petition is limited to a private prison, CCA, the Commission may adopt the Petitioners’ proposals without hesitation.³⁴

³¹ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order on Remand and Notice of Proposed Rulemaking*, 17 FCC Rcd 3248 (2002) at 72.

³² *Id.*, at 16.

³³ *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983 (2000), & 34.

³⁴ *Wright Petition* at 3-4, n. 4 and 8.

The Wright Petition offers no justification for its assumption that the operation, management or security at a private prison is in any way different than at a public prison.

While CCA is a private corporation that runs prisons, it only does so pursuant to contracts with state DOCS.³⁵ These contracts make CCA an agent of DOCS and therefore, transfer DOCS' police powers to CCA. Private administrators do not have broad discretion over key matters concerning inmates. A prisoner of the state, for example, remains a prisoner of the state whether or not he or she is in a private or public correctional facility.³⁶

While the *Wright Petition* questions prison officials' security concerns, it does not dispute that the Commission historically has recognized that security concerns differentiate inmate calling services from other types of telecommunications services.³⁷ The administrators of private and public prisons have the same concerns, including security concerns. The administration of prisons is a matter clearly within the state's powers. The states' rules govern, even where prison administration is contracted out to private parties. The Commission should not, as a matter of federalism, tell the states what kind of prison telephone service best meets the needs for security and the state's needs to reduce total costs of prison administration.

³⁵ See, e.g., OHIO REV. CODE § 5120.03(C) (stating that the director of corrections can contract out for the private operation and management of a facility under the control of the department of corrections); VA. CODE ANN. § 53.1-266 (authorizing director of corrections to enter into contracts with private contractors and setting forth requirements that the private contractors must meet); FLA STAT.CH. 957.03, *et. seq.* (stating that the Correctional Privatization Commission was created to enter into contracts with private correctional facilities and setting forth general requirements and limitations of private contractors).

³⁶ See, e.g., OHIO REV. CODE § 5120.03(C) (“[a]ll inmates assigned to a facility operated and managed by a private contract remain inmates in the care and custody of the department.”); S.C. CODE REGS, § 24-3-20(A) (“[a] person convicted of an offense against this State and sentenced to imprisonment for more than three months is in the custody of the South Carolina Department of Corrections and the department shall designate the place of confinement where the sentence must be served...whether maintained by the department or otherwise.”).

³⁷ *Wright Petition* at 9-10.

IV. The *Wright Petition* Does Not Show That Collect-Only And Single Provider Systems Are Unreasonable Methods Of Achieving Penological Objectives

A. The *Wright Petition*'s Standard For Prohibiting Exclusive Contracts Is Inconsistent With Court Precedent

The *Wright Petition*'s argument in support of a Commission ban on exclusive contracts between ICS providers and DOCS rests on its claim that “competition in long distance inmate services can be structured to accommodate those (security) goals....”³⁸ At first glance, this statement appears to validate the penological concerns a state may have. But, in fact, it is a much weaker acknowledgement of the scope of state police powers than has been established by court precedent.

States are not limited to a single method of achieving crime deterrence, rehabilitation and institutional security. They are authorized to choose any method that does not involve an irrational limitation on inmates. The *Wright Petition* must therefore go beyond showing that multiple carriers and debit-only billing might be consistent with penological objectives, it must also show that the telecommunications policies and practices currently chosen by DOCS impose irrational and unreasonable limitations on inmates. The *Wright Petition* fails to meet this burden of proof.

B. Single ICS Providers And Collect-Only Billing Are Reasonable Methods Of Maintaining Prison Security And Preventing Use Of Telephone Facilities For Fraudulent Purposes

Correctional facilities, ranging from county jails, state prisons, federal prisons, to Immigration and Naturalization Service detention facilities, uniformly rely on a single ICS provider because doing so gives them the greatest ability to maintain prison security and protect the public. Relying on a single provider maximizes the extent to which the call remains within the control of a single provider. This makes it easier and less expensive for DOCS and the ICS

³⁸ *Id.*, at 6.

provider to obtain billing reports, call flow reports, and audit trails of inmate calls; to detect and investigate fraudulent calls; and to investigate potential criminal activity being committed from prison. Thus, for example in Ohio, where MCI is under contractual obligations to provide Ohio DOCS billing information pertaining to inmate calls, it is able to obtain this information without having to resort to a formal subpoena if it suspects a crime is being committed within a state correctional facility. In addition, by relying on a single carrier, DOCS are able to contractually bind carriers to perform tasks that limit or correct security flaws. DOCS are able to make single carriers contractually liable for security breaches under the carrier's control. Relying on a single carrier also reduces the number of DOCS' staff required to interface with the provider of telephone services, reserving staff for more pressing security tasks.

Another advantage of a single source contract is that the rates and practices of the end-to-end ICS provider are determined and explicitly required by DOCS. Consequently, the ICS provider's customer service department is able to centralize inquiries across facilities controlled by a single DOCS, and more efficiently handle disputes. Many DOCS also rely on collect-only billing for similar reasons. Collect-only billing allows the carrier to rely on its already established and secure billing systems, and allows them to avoid building and testing multiple billing platforms. Collect-only billing is also a simple way to limit harassment of witnesses by requiring the called party to affirmatively accept a call.

The Commission should therefore reject the *Wright Petition in toto* for failing to meet its burden of proof. The record shows that single provider, collect-only systems are not unreasonable limitations and do serve valid penological objectives. Moreover, not only has the *Wright Petition* failed to show that collect-only, single provider systems are unreasonable methods of providing a secure inmate calling system, its recommendations would actually reduce security and increase costs.

V. The *Wright Petition's* Recommendations Would Complicate Security And Would Not Realize Promised Cost Reductions

The *Dawson Affidavit* proposes allowing every called party to establish a pre-funded debit account with any interstate carrier of their choosing. This is not usual method of establishing debit accounts.³⁹ Direct dial calling is typically established via a DOCS-managed commissary account to which the ICS provider builds a back-end interface that determines if there is sufficient money in the account to make a debit call, allows a caller the option of switching to collect calling, deducts from the account as the call progresses, triggers voice interrupts if account balances drop below a certain minimum level, and produces billing information reports that are delivered to DOCS.

Dawson relies upon a non-DOCS debit account, apparently managed by the ICS provider, that would be separate from a DOCS commissary account, in order to address long-standing criticisms that debit cards and commissary debit accounts create a commodity that can be extorted, reduce prison security and undermine efforts to rehabilitate inmates – all valid penological concerns. (“Removing the cash from prisoner control will remove most of the penological concern and eliminate any additional administrative costs for the prison in handling debit accounts.”)⁴⁰ The Commission should reject mandating this version of a debit proposal for several reasons.

A. Multiple Carriers Present Complications That Will Negatively Impact Penological Objectives

Dawson provides few details regarding the manner in which accounts would be established and maintained under its proposal. Once a family member has established an account with an interconnecting carrier, s/he or the chosen connecting carrier would need to

³⁹ *Wright Petition*, Attachment A, Affidavit of Douglas Dawson, (*Dawson Affidavit*) at 16

⁴⁰ *Id.*, at 16.

submit evidence to the ICS provider they have an account with their chosen long distance carrier. The ICS provider would have to obtain rating information for local, intrastate intraLATA, intrastate interLATA and interstate interLATA and possibly international calls for each interconnecting carrier and link accounts with specific inmates. The ICS provider would need to establish a rate table for each interconnecting carrier, and receive timely updates as soon as taxes, universal service contributions, 911 fees, and other mandated fees change. This account would presumably be segregated from existing commissary accounts, and in those instances where an ICS provider already built an interface to a DOCS-based commissary account, it would need to establish a separate interface/system for a telecommunications account. Since collect calling will almost certainly be required by the DOCS as well, the ICS provider would need to perform additional development to switch billing back to itself, otherwise the ICS provider could lose call control.

If an inmate transfers to another correctional institution and the ICS provider does not provide ICS service to that facility, the account would need to be closed out and refunded. If the ICS provider does serve this facility, it would need to find out whether the carrier of choice is available at the transferred location. If not, the account would need to be closed out and refunded.

Dispute resolution is another aspect of customer service that would become much more complicated. At times, an inmate may be disconnected from a call or s/he may claim to have been disconnected. This may occur because account levels fall below the required minimum, monitoring of the call detected a security breach that required disconnection, failure of some feature of the secure calling platform occurs, failure of some aspect of the connecting carrier's service occurs, or the inmate hangs up during a disagreement. There may also be disputes involving quality of service or billing.

Inmates and their families complain when these events occur and expect credits. It will be more difficult and expensive to determine who was responsible for the problem, whether a problem in fact occurred, whether a credit should be issued, and which party should issue the credit in a multi-carrier environment. It may not be clear if the source of the issue concerns a carrier practice, an ICS practice, or a legitimate DOCS requirement. In a multiple carrier environment there are different rate structures, different carrier billing practices, and different policies. Increased confusion around billing and the increased difficulty resolving questions and complaints can negatively impact the rehabilitative goals of a correctional facility. All these functions are not currently required under existing direct dialing arrangements. They would add cost, complexity and unnecessary customer confusion, thereby undermining valid penological objectives.

In addition, it may be more difficult for law enforcement agents to pull together the chain of evidence needed in a criminal proceeding in a multi-carrier environment. Law enforcement agents may require interconnecting carriers to validate that a call routed to that carrier was actually carried. Law enforcement agents may also need the interconnecting carrier to validate start and stop times, call forwarding attempts, attempts to establish 3-way calling and other call features separately from the ICS provider in order to properly prosecute a case.

Because of its contractual relation with a single ICS provider, DOCS has the ability to obtain all needed information from the carrier without a formal subpoena if it suspects a crime is being planned or committed from within ICS facilities, and can quickly obtain this information from an ICS provider once a subpoena is obtained. This ability does not extend to carriers other than the ICS provider, currently local exchange carriers. Ohio DOCS has attempted to obtain this sort of information from other carriers who were not under contract, but only one-half have voluntarily complied.

With multiple carriers interconnected at the ICS provider's platform, the ability of DOCS to obtain validation information that could assist in the monitoring and investigation of possible criminal activity from within correctional facilities would be even further frustrated. Inmates who are intent on conducting criminal activity from prison will have their cohorts establish multiple accounts with multiple false identities involving multiple carriers. Law enforcement agents will need more subpoenas for call records, and will have a more difficult time piecing together the chain of evidence necessary for a conviction.

B. Direct Dialing Will Not Reduce Bad Debt Unless Collect Calling Is Prohibited

Direct dialing will not reduce bad debt unless collect calling is prohibited. Many DOCS have direct dial, debit systems, but nearly all allow collect calling as well. A debit-only system can be restrictive, for it limits calling to funds available in the commissary account. The California DOCS reports that 29 percent of inmates are so poor, neither they nor their families have money to deposit into commissary accounts in order to make debit calls. California DOCS suggests that a debit-only system may not be appropriate for this reason.⁴¹ Dawson's called-party-funded debit system is even more restrictive than commissary systems, for it would not allow an inmate to simply call persons on their call list. The called party would have to go through prior effort establishing a special inmate account in order for an inmate to place a call.

Prisoner advocates have objected to debit-only systems for restricting calls, especially those that might be made by the poorest inmates. For example, when Iowa DOCS switched to a debit-only billing system in order to reduce uncollectibles, inmate families objected that the system would restrict calling rights. ("Corrections officials acknowledged the switch to a prepaid program might mean inmates make fewer and shorter calls to their families.... Inmate

⁴¹ Attachment to *Dawson Affidavit, Analysis of the Federal Bureau of Prisons Inmate telephone System and Applicability to the California Department of Corrections*, at 13.

rights groups said the switch to prepaid inmate phone service contradicts rehabilitation efforts by making it harder for inmates to maintain connections with their families.”⁴² Similarly, when the Federal Bureau of Prisons (FBOP) proposed altering its ICS to a debit-only system, inmate families complained that a debit-only system would discriminate against the indigent. Subsequently, the FBOP allowed inmates at least one collect call a month and authorized wardens to increase collect calling in response to demand for collect calling and other factors.

(In response to concerns raised regarding potential discrimination against indigent inmates in the operation of the direct-dial system, the Bureau's new rule also provides that a minimum of one collect call per month (exclusive of legal calls to an attorney) may be made by inmates without funds. n6 59 Fed. Reg. 15824 (Apr. 4, 1994); 28 CFR § 540.105(b). Additionally, the wardens of the federal institutions are authorized by the new rule to increase the number of collect calls available to such indigent inmates "based upon local institution conditions (e.g., institution population, staff resources, and usage demand)." 59 Fed. Reg. 15824 (Apr. 4, 1994); 28 CFR § 540.105(b).)⁴³

Collect calling does not require either the called or calling party to make any prior contribution, which can result in a broader array of persons being called, and allow calls to be made to persons recently placed on a call list. Inmates and DOCS will almost always want collect calling to be an option to ensure telecommunications availability for all inmates regardless of income. In mixed debit-collect systems, collect calling remains a significantly utilized option. Dawson reports 29 percent of calls are collect in combined systems.⁴⁴ MCI's experience validates this ratio of collect calling when both debit and collect calling are options. The settlement achieved in *Washington v. Reno* allowed inmates to make up to 120 minutes of collect calls a month.⁴⁵ Collect calling will almost always remain a desired option. The

⁴² Iowa. Inmate Payphones Go Prepaid, *State Telephone Regulation Report*, June 22, 2001.

⁴³ *Washington v. Reno*, U.S. Ct. Appeals, 35 F.3d 1093 (1994) (6th Cir.)

⁴⁴ *Dawson Affidavit*, Exhibit 15, Traffic Volume Estimates.

⁴⁵ *Criminal Calls: A Review of the Bureau of Prisons' Management of Inmate Telephone Privileges*, Executive Summary, August, 1999, at 5, <http://www.usdoj.gov/oig/special/99-08/exec.htm>.

Commission certainly should not mandate debit-only systems for every correctional facility in the nation as the *Wright Petition* invites it to do at times.

The inevitable downside of collect calling, of course, is the high amount of associated uncollectibles. Once collect calling is an option, those inmates and families able and willing to pay for telephone calls will switch to debit calling, while those unable and unwilling to pay will gravitate towards collect calling, where they can avoid payments through a variety of fraudulent schemes. Uncollectible percentages will increase for collect calls, but remain relatively constant for the ICS provider. *Dawson* cites uncollectibles as accounting for between 14-23 percent of revenues.⁴⁶ Even though MCI provides mixed debit-collect calling in a number of correctional facilities, it has found that its average uncollectibles has remained in this range. Thus, while debit-only systems can eliminate uncollectibles, this goal conflicts with the goal of ensuring the availability of telecommunications access to the widest array of inmates across all income levels. Court precedents have given states, through the exercise of their police powers, the authority to determine whether to choose debit-only, collect-only or both billing methods. Nearly all states with debit calling have chosen to make it an option, rather than the only billing method. In short, introducing debit calling as an option will not significantly reduce the level of uncollectibles.

C. Single Carrier, Direct Dial Systems Are Expensive To Establish And Maintain. Multiple Carrier Debit Systems Will Be Even More Expensive

Relying upon carrier-based debit accounts allows *Dawson* to perform a sleight of hand that transfers debit account management from DOCS to the ICS provider and the interconnecting carriers. *Dawson* claims multiple carriers will incur the cost of establishing separate account, billing and reporting systems. (“As long as the service provider is responsible for the cost of maintaining external family debit systems, there should be no additional cost or burdens for the

⁴⁶ *Dawson Affidavit*, at 33.

prisons.”⁴⁷ But its final cost calculations do not include these expenses into the final estimates of calling charges. *Dawson* maintains that “the only billing cost required for a debit call is the cost of electronically extracting revenues from the pre-paid debit account, an insignificant expense per transaction,”⁴⁸ but completely ignores the additional customer service costs identified above, the cost of resolving more complicated customer disputes, and the additional interfaces that would need to be built to accounts separated from existing commissary accounts.⁴⁹ There is no reason to believe that carriers will be able to build and maintain a multi-carrier debit system more cheaply than Evercom’s current billing expenses. Yet *Dawson*’s final cost estimates completely exclude billing costs.

D. *Dawson*’s Carrier of Choice Proposal Would Not Realize Any Cost Savings

Dawson concludes that the average cost of a toll call, not including profit, from a correctional facility would decline from approximately \$.82 per minute⁵⁰ to an average of \$.09 per minute.⁵¹ *Dawson* first models the per-minute revenue needed to recover the depreciated investments and then recurring maintenance, billing, uncollectibles, billing and general overhead expenses necessary for a single ICS provider to serve a correctional facility with 70 telephone sets, plus purchase long distance transport and termination on a wholesale basis. *Dawson* calculates that even though an ICS provider, such as Evercom, earns \$.82 per minute, it only costs an average of \$.15 per minute, not including profit, to provide service.⁵² *Dawson* then

⁴⁷ *Id.*, at 17.

⁴⁸ *Id.*, at 31.

⁴⁹ This description appears to only consider the marginal cost of billing a debit call.

⁵⁰ *Id.*, Attachment A (*Dawson Affidavit or Dawson*) at 32.

⁵¹ *Id.*, at 38, 43. *Dawson* reduces the revenues per minute needed from \$.155 or \$.139 by \$.06, for an average of \$.09.

⁵² *Id.*, at 38.

removes the uncollectibles cost and billing costs that would be avoided under its description of a debit-only billing proposal. *Dawson* calculates that eliminating the last two items would reduce costs by approximately \$.06 per minute.⁵³ Were *Dawson*'s calculations accurate, end-to-end inmate calling service could be provided for at \$.09 per minute rather than the \$.82 per minute it estimates is charged by Evercom.

However, significant portions of *Dawson*'s calculations are either incorrect or ignore legitimate costs, at least for companies such as MCI that provide ICS service to state prison systems:

- *Dawson* excludes profits in its most extreme example;
- *Dawson* maintains that the typical per-minute rate for an average length call is \$.82 per minute, but this calculation is based only on Evercom's interstate rate. Using *Dawson*'s network elements, but substituting more accurate assumptions based on MCI's experience would require an ICS provider to earn approximately \$.65 per minute in order to cover its costs and earn profit. *Dawson*'s purported benefit is \$.17 per-minute less for this reason.
- *Dawson* excludes commissions, but commissions are a legitimate cost of doing business, and outside the purview of the Commission's jurisdiction. MCI's pays an average of 50% of revenues in the form of commissions. *Dawson*'s purported benefit is \$.33 per-minute less for this reason.
- *Dawson* uses an uncollectibles rate of 7.5% of revenues, but as discussed above, the uncollectibles rates would remain constant at the 15-20% range identified by *Dawson*. MCI used an average of 17.5%. *Dawson*'s purported benefit is \$.11 per-minute less for this reason.
- *Dawson* underestimates long distance costs per-facility by a factor of three for a statewide provider of ICS such as MCI. For example, the testimony of Richard Cabe, submitted T-Netix in its *Inmate Calling Service Proceeding*, Comments, shows long distance costs of Gateway, another ICS provider at 19% of revenues, rather than the 3% used by *Dawson*.⁵⁴ *Dawson*'s purported benefit is \$.05 per-minute less for this reason.

⁵³ *Id.*, at 43.

⁵⁴ Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, (*Inmate Calling Services Price Proceeding*), CC Docket No. 96-128, T-Netix Comments, filed May 24, 2002, Exhibit 2 at 11.

- *Dawson* calculates overhead as a percent of maintenance (2.6 times maintenance cost), or only 3 percent of revenues. But overhead bears no relation to maintenance costs. A more accurate figure for an ICS provider who provides statewide service such as MCI is three times that of *Dawson*'s estimate (7.8 times maintenance), which is approximately 10% of revenues.⁵⁵ *Dawson*'s purported benefit is \$.04 less for this reason.⁵⁶
- *Dawson* assumes that billing charges will disappear under a debit-only system, but it fails to include the cost each alternative carrier would incur to build, maintain, and deal with complaints associated with a debit system. These expenses would be as large if not larger than Evercom's existing billing charges. They should not have been excluded. *Dawson*'s purported benefit is \$.02 per-minute less for this reason.
- *Dawson* fails to include unbillables, which occur when a called party uses a LEC with whom the ICS provider does not have a billing and collection agreement. MCI loses approximately 2.5% of its revenues from unbillable calls. *Dawson*'s purported benefit is \$.02 per-minute less for this reason.
- *Dawson* fails to account for the annual expense of storing and backing up data. Its purported benefit is \$.01 per-minute less for this reason.⁵⁷

Table 1 compares *Dawson*'s calculations to calculations based on more reasonable assumptions, at least for a company such as MCI who typically provides service to many correctional facilities in a state. *Dawson* estimates that rates could be reduced from \$.82 to \$.10 per-minute, a \$.72 per minute reduction, if the Commission were to adopt its recommendations to eliminate collect

⁵⁵ By comparison, ICSPC data shows SGA running approximately 30% of revenues. See, Comments of the Inmate Calling Service Provider's Coalition, *Inmate Calling Services Price Proceeding*, Attachment A.

⁵⁶ MCI based this estimate on overheads as a percent of revenues and then converted this to a figure based on a percent of maintenance in order to perform an "apples-to-apples" comparison with *Dawson*.

⁵⁷ Other costs are excluded as well. For example, extra line cards will need to be added to the ICS provider's switch to accommodate the additional trunks each carrier will require. Additional processing capacity will also be required. *Dawson* also fails to account for inside wire costs, as well as LEC ingress/egress fees.

Table 1
Comparative Cost of Providing Inmate Calling Service

	Dawson Average	MCI Average
Annual Minutes	6,797,500.00	6,797,500.00
Revenue per min required	0.82	0.65
Equipment Costs		
PBX	350,000.00	350,000.00
Phones	28,000.00	15,750.00
Phone Installation	0.00	11,250.00
Recording Space And Backup	0.00	18,000.00
Total	378,000.00	395,000.00
Annual Depreciation (5.5 years)	68,727.27	71,818.18
Annual Taxes Plus Profit	88,367.50	88,367.50
Depreciation, Tax, Profit	157,094.77	160,185.68
Expenses		
Maintenance	49,896.00	52,140.00
Billing	139,348.75	110,459.38
Uncollectibles	418,046.25	773,215.63
Unbillables	0.00	110,459.38
GSA	129,729.60	406,692.00
LD Termination	169,937.50	509,812.50
Annual Storage Expense		69,000.00
T-1 (3)	14,400.00	14,400.00
Commissions	0	2,209,187.50
<i>Total Expenses</i>	921,358.10	4,255,366.38
Total Costs	1,078,452.87	4,415,552.06
Rev/Min Needed	0.16	0.65
Remove Profits	0.15	
Remove Uncollectibles & Billing	0.09	

calling, eliminate commissions, and allow multiple carriers to interconnect at the ICS provider's platform. MCI's calculations first show that 24% of this reduction comes from using only an interstate rate; that 19% of the reduction comes from either ignoring or underestimating billing, unbillables, long distance expenses, overhead, and data storage expenses; and approximately 60% of the reduction is achieved by ignoring commissions and ignoring uncollectibles charges. None of the cost differences are attributable to the introduction of carrier of choice.

VI. The Commission Should Not Take Any Action In This Proceeding To Limit Or Abolish Site Commissions

A. The Commission Has Limited Authority To Regulate The Level Of Site Commissions Paid By ICS Providers

The previous discussion points to the undisputed fact that commissions often constitute a major component of the cost of providing a secure inmate calling system. MCI has never disputed this. MCI agrees with T-Netix that while commissions appear as a rent to the location provider, they are a legitimate cost to the ICS provider.⁵⁸ Therefore any action to limit interstate rates must be done only on a prospective basis subsequent to the expiration of existing contracts. Otherwise, ICS providers may not be able to recover their costs.⁵⁹ MCI also agrees with T-Netix that it would be difficult, if not impossible, to reduce commissions indirectly, by mandating lower interstate rates.⁶⁰

T-Netix and consumer groups have argued in this proceeding that increasing commission levels have been responsible for increasing ICS rates.⁶¹ MCI agrees that rates have increased

⁵⁸ Reply Comments of T-Netix, *Inmate Calling Service Price Proceeding* Reply Comments at ii, filed June 24, 2002.

⁵⁹ Commissions paid by lump sum payments, in-kind services, etc., have already been provided and require maintenance of existing rates in order for cost recovery to occur.

⁶⁰ T-Netix Comments, *Inmate Calling Rate Service Price Proceeding at 10*; MCI Reply Comments, *Inmate Calling Rate Proceeding* at 4.

⁶¹ See e.g., T-Netix Reply Comments, *Inmate Calling Rate Service Price Proceeding* at 4.

since states and DOCS began charging commissions, but disputes assertions that increasing commissions do not serve a valid penological objective. Commissions have been used by states and DOCS to build new facilities; to accommodate growing prison populations; to fund inmate programs; and to provide enhanced telecommunications services that have been secure for the first time. This, in turn, has allowed inmates to receive increased telecommunications privileges.

MCI agrees with T-Netix that Section 276 grants the Commission powers over interstate ICS rates, but disagrees that the Commission's authority extends to the regulation of commissions, a location rent charged by a governmental entity that is neither a PSP nor an interstate telecommunications carrier.⁶² The proper entity to investigate the use or misuse of commissions would be a state governmental entity such as a state legislature, the executive branch of the state, or a state court of law.⁶³

Court precedent allowing states to exercise their policy powers to the extent they serve valid penological objectives provides sound practical reasons for locating the review of commission levels to a state governmental entity. Except where constitutional issues are involved, penological objectives can be very broad, including not only the installation and maintenance of a secure calling system, but also including the construction of correctional facilities, and revenues that go towards any program serving inmates.⁶⁴ To the extent commissions go directly to, and are used solely by the DOCS, they almost certainly involve a valid penological objective. T-Netix recognizes this point.⁶⁵

⁶² T-Netix Comments, *Inmate Calling Rate Service Price Proceeding*, at 4..

⁶³ The only exception would involve commissions received by the FBOP.

⁶⁴ See, e.g., *O'Lone v. Estate of Shabazz*, 482 U.S. at 349.

⁶⁵ T-Netix Reply Comments, *Inmate Calling Rate Service Price Proceeding*, at 4.

When commissions are paid to the state, the matter is more complex. Some states earmark these same funds for DOCS. For example, although commissions are controlled by the state of Ohio, state law prohibits these funds from being used for any purpose other than a penological purpose.⁶⁶ The Kansas DOCS also states that commissions are deposited in an Inmate Benefit Fund, and are subject to the state's appropriate process.⁶⁷

Therefore, if an entity were to regulate commissions, it would be able to do so only to the extent it could be shown that commissions do not serve a valid penological purpose. Such an entity would have to perform this examination on a case-by-case basis. ICS providers serving a single correctional facility incur different costs than providers serving entire states, or the entire federal government.⁶⁸ Any entity seeking to regulate commissions, or their impact on rates would be required to examine state budgets to determine the extent to which commissions paid into general revenue funds are returned to state correctional facilities. It would have to audit the expansion plans of state correctional facilities, and it would have to audit the penological purposes to which commissions may or may not have been devoted. Undertaking this task in a general policy proceeding, such as this one, is obviously beyond the scope of the Commission's resources, even if the Commission were to have such authority, which it does not.⁶⁹

⁶⁶ Ohio Revised Code, § 5120.132

⁶⁷ Letter of Roger Werholtz, Secretary, Kansas Department of Corrections, CC Docket No. 96-128, February 4, 2004.

⁶⁸ Contrary to common belief that debit calling has reduced commissions at the Federal Bureau of Prisons (FBOP), due to the high preponderance of debit calling, telephone service provides FBOP 100% earnings over the cost of providing service. These earnings are deposited in inmates' commissary funds and therefore serve valid penological objectives. See *Dawson Affidavit Attachment: Analysis of the Federal Bureau of Prisons Inmate Telephone System and Applicability to the California Department of Corrections*, at 2.

⁶⁹ MCI believes the Department of Justice or the federal courts are the appropriate federal entities to examine the scope and exercise of federal police powers in federal correctional facilities.

B. Many DOCS Are Reducing Rates, Reducing Commissions, And Introducing Direct Dialing As An Option Along With Collect Dialing

A number of DOCS and states recognize the impact commissions, and to a lesser extent, uncollectibles, play to elevate the required level of ICS rates. In 1998, Virginia awarded an ICS contract based on reduced rates and lower commissions. The most recent Florida contract required the ICS provider to offer rates lower than the previous contract. The Kentucky Public Service Commission has capped collect calling rates, and the Ohio DOCS' most recent ICS contract was awarded on the basis of lower rates. In 2000, the Missouri legislature consulted with the state contracting agency to limit commissions to a maximum of approximately \$160,000 a month, and to rank lower ICS rates and fees more highly in the evaluation of competing bids. In 2001, the California Department of General Services consulted with the prison authority to reduce commission payments by approximately \$10 million a year, a 30% reduction. In 2001, the Maryland Board of Public Works accepted a new contract with Verizon and T-Netix that reduced collect call rates 15 percent, but raised commissions on intrastate revenues from 28 percent to 40 percent.⁷⁰ The Oregon PUC reduced ICS surcharges by 30%, as well as usage rates in 2000.⁷¹ In 2002, The Georgia Public Service Commission (PSC) capped inmate collect call surcharges at \$2.20, capped rates for interLATA calls at \$.34 per minute, and intraLATA calls at \$.24 per minute during the week and \$.19 per minute at night.⁷²

State legislatures have also taken up these issues. In 2002, the Indiana Senate (SB-136) voted to direct counties to make reasonable rates a priority in DOCS request for proposals, and a House Bill (HB-1225) passed reducing state and county commissions from 50 percent to 33

⁷⁰ *Communications Daily*, June 1, 2001.

⁷¹ Relatives of Prison Inmates Protest Collect Call Contracts with Jails, *The Register Guard*, July 31, 2000.

⁷² *Communications Daily*, February 21, 2002.

percent.⁷³ The legislation passed in March of that year. New Mexico limits site commissions to levels needed to defray the cost of correctional facility administration.⁷⁴ Last year a California bill (AB-230) was introduced into the Assembly that would limit commissions to levels necessary to establish and maintain a secure ICS system plus reasonable profit and DOCS expenses related to the administration of ICS services. It also directed DOCS to give priority to reasonable rates in awarding contracts, as did a Missouri House Bill (HB-1691).⁷⁵ This year the California House introduced a bill that would prohibit the DOCS from awarding contracts that maximize the state's revenue and direct DOCS to require contracts to be awarded based on providing the lowest reasonable rate for inmates and their families.⁷⁶ Connecticut passed a law in 2002 (HB-5672) establishing a pilot program for prepaid services that if successful would be adopted throughout the state.⁷⁷

VII. Conclusion

Many states and DOCS have taken or are considering limits on inmate rates or commissions. Others, have found that existing rates and commissions strike the right balance between inmate access to telecommunications and valid penological objectives such as inmate rehabilitation, prison security and the welfare of the general public. The Commission does not have authority to limit commissions, and should not impose rate caps on interstate inmate rates that would not allow full recovery of costs and payment of commissions required in contracts. Neither should the Commission require DOCS to allow multiple carriers to interconnect at the

⁷³ *Communications Daily*, February 21, 2002.

⁷⁴ T-Netix Comments, *Inmate Calling Price Proceeding*, at 3.

⁷⁵ *Communications Daily*, February 21, 2002.

⁷⁶ *Communications Daily*, January 11, 2004.

⁷⁷ *Communications Daily*, June 19, 2002

ICS provider's platform. The Commission neither has the authority to order this, nor is there any evidence this proposal would reduce inmate calling rates separate from the elimination or limitation of commission levels, an action the Commission does not have authority to take. In short, the proposals contained in the Wright Affidavit should be rejected *in toto*.

Respectfully submitted,

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Statement of Verification

I have read the foregoing, and to the best of my knowledge, information, and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct.

Executed on May 10, 2004

Larry Fenster

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