

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

In the Matter of

**Implementation of the Pay Telephone
Reclassification and Compensation
Provisions of the Telecommunications
Act of 1996**

**Petition for Rulemaking or, in the
Alternative, Petition to Address Referral
Issues In Pending Rulemaking**

CC Docket No. 96-128

DA 03-4027

PETITIONERS' REPLY COMMENTS

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Petitioners Martha Wright, *et al.* (“Petitioners”) submit this reply to the comments filed in response to the above-captioned Petition For Rulemaking or, in the Alternative, Petition to Address Referral Issues In A Pending Rulemaking (“Wright Petition”).¹ The initial comments opposing the relief sought in the Wright Petition (“Oppositions”) raise legal issues that are irrelevant to this referral proceeding, and the technical assertions and cost information they present fail to grapple with the demonstration in the Wright Petition and supporting expert affidavit of Douglas A. Dawson (“Dawson Affidavit”) that the provision of competitive inmate calling services would be technically and economically feasible.

I. INTRODUCTION AND SUMMARY

The Wright Petition demonstrated that the high cost of inmate calling services at privately managed prisons is a direct result of exclusive service arrangements entered into by the prison administrators and providers of inmate calling services and certain restrictions on inmate calling options. These arrangements and restrictions can no longer be justified for security and

¹ FCC Public Notice, *Petition for Rulemaking Filed Regarding Issues Related to Inmate Calling Services; Pleading Cycle Established*, CC Docket No. 96-128, DA 03-4027 (Dec. 31, 2003).

other penological considerations. As shown in the Wright Petition and the Dawson Affidavit, it is both technologically and economically feasible for multiple carriers to offer long distance telephone services to inmates at a private prison facility and to offer debit card or account services as an alternative to collect calling while meeting all legitimate security and other penological needs. Accordingly, Petitioners requested that the Commission prohibit exclusive inmate service arrangements and collect call-only restrictions for interstate calls at privately administered prisons.

The Oppositions fail to provide any compelling reason why the Commission should not grant the relief sought in the Wright Petition. The Oppositions raise multiple legal arguments concerning state penal discretion and the Commission's proper role that are irrelevant to the Commission's review of the Wright Petition and wrong as a matter of law. The Wright Petition arises from a referral order in which the court determined that the Commission has the authority, and is in the best position, to rule on the technical and economic feasibility of alternative inmate telephone arrangements in privately administered facilities. Contrary to the arguments raised in the Oppositions, the Commission need not set correctional policies or pass on prison administrators' penological interests in order to grant the requested relief.

The Oppositions also mischaracterize Petitioners' competitive inmate calling proposal as requiring complex regulatory, interconnection and access regimes. Contrary to these assertions, however, these concerns can be easily addressed, as explained in the accompanying Reply Declaration of Douglas A. Dawson ("Dawson Reply"). Furthermore, under the proposed system, prison officials could continue to control calls made by prison inmates and prevent security breaches. As explained in the Dawson Reply, because competitive carriers would interconnect with the provider of the underlying prison calling system at a secure point, the system provider and prison administrator could retain control over each long distance call made over the interconnected competitive calling system. The long distance carriers that interconnect with the underlying system provider also can be required to satisfy all of the security obligations met by inmate calling service providers currently.

Contrary to the opponents' assertions, the Petitioners' proposal also takes into consideration the cost of administering such a system. The Oppositions, in fact, present inconsistent and misleading cost data by discussing costs that are irrelevant to the current inquiry. In addition, as explained in the Dawson Reply, the Oppositions fail to provide any credible estimates of the costs associated with providing inmate calling services. Many, if not all, of the cost issues raised in the Oppositions have long been solved and implemented throughout the telecommunications industry, and they therefore present no meaningful obstacle to providing competitive inmate calling services.

Opponents also fail to present any credible justification for the excessive commissions paid by inmate service providers to private prison administrators. In fact, the leading providers of inmate calling services recognize that these site commissions drive the rates for inmate calling services to unreasonably high levels. Moreover, inmate debit account services, which are criticized by the Oppositions as a high security risk because they constitute a "commodity" that could be extorted by inmates, are provided at many facilities managed and served by the opponents. The widespread use of debit account calling in prisons confirms that there are easily implemented mechanisms that can minimize the use of debit services as an extortable commodity.

The Oppositions are couched as selfless attempts to protect the public interest, the public welfare, and even the interests of inmates. In reality, they present numerous irrelevant or inaccurate arguments that are intended to delay Commission consideration of the issues referred to it by the court and to preserve their monopolistic practices. Accordingly, the Commission must act quickly to respond to the court's referral and grant the Petitioners' requested relief.

II. OPPONENTS' LEGAL ARGUMENTS ARE IRRELEVANT AND INCORRECT

A. Opponents' Legal Arguments Are Precluded By The Court's Referral

Opponents' first line of defense is that their unreasonable practices are clothed with state penal authority and thus untouchable, especially before this Commission. For example,

Corrections Corporation of America (“CCA”), various inmate calling service providers and state correctional authorities argue that courts and this Commission have traditionally deferred to prison administrators in the area of inmate telephone services and that the Commission also should continue to do so.² MCI and the RBOC Payphone Coalition go so far as to argue that the Communications Act (“the Act”) was never intended to apply to inmate calling services and that the Commission is prohibited from interfering with inmate payphone location providers’ (*i.e.*, prison administrators’) carrier choices.³ The opponents also assert that Section 201(b) of the Act does not authorize the Commission to provide the requested relief.⁴ They claim that private prison administrators under contract with state governments are “state actors,” as well as non-common carriers outside the jurisdiction of the Commission and that the Commission should not “nullify state corrections law” or “preempt” state correctional policies and the states’ exercise of “sovereign authority” under their “police power” to act through private prison administrators in the selection of inmate payphone systems.⁵ T-NETIX also argues that private prison operators, as state actors, are immune from civil suits.⁶ These arguments, however, are all irrelevant at this point, as well as incorrect.

In response to AT&T’s, MCI’s and CCA’s motions to dismiss Petitioners’ federal court complaint, *Wright, et al. v. Corrections Corporation of America, et al.* (“*Wright*”), the court referred the case to the Commission with the instruction that the parties “file the appropriate

² CCA Comments at 10-16; MCI Comments at 10-11, 14-16; AT&T Comments at 3-7; New York State DOCS Comments at 6-7. The initial comments on the Wright Petition will be cited in this abbreviated manner throughout.

³ MCI Comments at 11-14; RBOC Payphone Coalition Comments at 7-8.

⁴ T-NETIX Comments at 6, 11-13; MCI Comments at 12, 16.

⁵ *Id.* at 12-13, 16-17, 31-32; T-NETIX Comments at 7-10, 18-20; RBOC Payphone Coalition Comments at 3-10; Ohio DRC Comments at 5-8.

⁶ T-NETIX Comments at 7.

pleadings with the FCC”.⁷ The court explained that “Congress has given the FCC explicit statutory authority to regulate inmate payphone services in particular,” including the “authority to consider the reasonableness of Plaintiffs’ request to have access to other calling options.”⁸ “Accordingly, ... the FCC is clearly in the best position to resolve ... the feasibility of alternative telephone arrangements in CCA facilities.”⁹

Accordingly, prior judicial and Commission decisions, cited by opponents, to defer to prison administrators are of little weight in this proceeding. The Wright Petition was not filed in a vacuum, but, rather, to effectuate the court’s referral. The issues raised by the Wright Petition, such as the feasibility of competitive long distance telephone services in the prison environment, therefore cannot be analyzed on a stand-alone basis. Instead, the Commission must view every issue through the lens of the *Referral Order* and *Referral Opinion*. As the Supreme Court explained in *Far East Conference*,¹⁰

*court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the ... objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action.*¹¹

⁷ *Wright v. Corrections Corp. of America*, C.A. No. 00-293 (GK), Order, slip op. at 1 (D.D.C. Aug. 22, 2001) (“*Referral Order*”).

⁸ *Wright v. Corrections Corp. of America*, C.A. No. 00-293 (GK), Memorandum Opinion, slip op. at 8 (D.D.C. Aug. 22, 2001) (“*Referral Opinion*”).

⁹ *Id.* at 10-11.

¹⁰ *Far East Conference v. United States*, 342 U.S. 570 (1952) (“*Far East Conference*”).

¹¹ *Id.* at 575 (emphasis added) (quoting *United States v. Morgan*, 307 U.S. 183, 191 (1939)).

Having sought referral to the Commission,¹² AT&T, MCI and CCA cannot now attack the court's *Referral Order* by suggesting that the Commission "punt" the issues that the court directed it to resolve.¹³ The court was aware of arguments that prison administrators are not common carriers and are vested with state action and that courts generally defer to prison administrators. The court did not refer the matter to the Commission for resolution of these constitutional and jurisdictional issues. A deferral by the Commission to prison administrators' discretion on those grounds would be directly contrary to the "coordinated action" expected of an agency.

For example, the RBOC Payphone Coalition argues that the issue of whether particular calling arrangements are consistent with security, anti-fraud and other penological goals is outside the Commission's area of expertise and authority.¹⁴ The court found, however, that "whether the alternative telephone arrangements Plaintiffs seek are technologically feasible given the exigencies of the prison environment" is one of the "issues that have been and continue to be best addressed by the FCC."¹⁵ The court was quite detailed in its endorsement of Commission expertise and jurisdiction, finding that "Congress has given the FCC explicit statutory authority to regulate inmate payphone services in particular," including the "authority to consider the reasonableness of Plaintiffs' request to have access to other calling options"¹⁶ and that "the FCC is clearly in the best position to resolve ... the feasibility of alternative telephone arrangements in CCA facilities."¹⁷ The court also found that "whether the alternative telephone

¹² *Referral Opinion* at 4.

¹³ *Cf. United States Telecom Ass'n v. FCC*, No. 00-1012, slip op. at 16 (D.C. Cir. Mar. 2, 2004) (criticizing Commission's "attempted punt" of issues it delegated to state commissions).

¹⁴ RBOC Payphone Coalition Comments at 2.

¹⁵ *Referral Opinion* at 6.

¹⁶ *Id.* at 8.

¹⁷ *Id.* at 10-11.

arrangements Plaintiffs seek are technologically feasible given the exigencies of the prison environment” is one of the “issues that have been and continue to be best addressed by the FCC.”¹⁸

The Commission should not shy away from performing the mission assigned to it by the court, as the opponents urge. The advice requested by the court and the parallel relief requested by Petitioners do not involve penological judgments or “the setting of correctional policy” or “running the jails,” as opponents would have it.¹⁹ Rather, the Commission has been directed by the court to determine the “feasibility” of alternative calling arrangements in light of the penological interests presented by parties such as CCA. Only the Commission, and not the prison administrators, has the expertise to probe administrators’ claims to determine whether the “exigencies of the prison environment” actually preclude the competitive telephone system presented in the Wright Petition. As the court held:

The FCC ... has already developed the necessary specialized expertise on the underlying telephone technology, the telephone industry’s economics, practices and rates, *and the feasibility of alternative phone systems that provide adequate security measures.*²⁰

In effect, the “division of functions between court and agency” “dictate[d]” in any referral to an expert agency²¹ precludes the Commission from avoiding the “functions” assigned to it by the court. The effect of the court’s specific and detailed findings as to the Commission’s expertise and authority is very much like law of the case.²² The Commission should not act

¹⁸ *Id.* at 6.

¹⁹ T-NETIX Comments at 9; Evercom Comments at 10.

²⁰ *Referral Opinion* at 8 (emphasis added).

²¹ *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 498 (1958).

²² *Cf. United Gas Pipe Line Company*, 1985 FERC LEXIS 2521 at **19 (June 19, 1985) (court’s instructions to agency in remanding agency order constitute “law of this case”).

“without regard to”²³ those findings by following opponents’ jurisdictional advice. Similarly, opponents’ arguments that the Commission cannot regulate commissions paid by common carriers to private prison administrators²⁴ are precluded by the court’s findings that the FCC is authorized to regulate inmate payphone services and “to reject inclusion in Defendants’ cost-basis of the 25-50% commissions received by CCA.”²⁵

Even if the Commission were otherwise inclined to defer to private prison administrators in matters of inmate telephone services, it must still provide the expert advice requested by the court in any order it releases concerning these issues. Where a proceeding before the Commission “derives from a primary jurisdiction referral ... the Commission’s discretion is limited to some extent by the obligation to assist the court....”²⁶ Here, the court directed the Commission to “provide ... meaningful analysis and guidance” on the “reasonableness of the ... terms of the exclusive dealing contracts,”²⁷ which the court could then use in deciding whether these arrangements are “reasonably related to a legitimate penological interest.”²⁸ A failure to provide the requested advice would short-circuit the dialogue contemplated by the court’s referral. Under the opponents’ approach, the Commission would perform the evaluation of prison administrators’ “penological interest[s]” that the court envisioned for itself while denying

²³ *Far East Conference*, 342 U.S. at 575.

²⁴ *See* MCI Comments at 30-32.

²⁵ *Referral Opinion* at 7. Petitioners agree with MCI that any action to limit inmate service rates by restricting commission payments may only be ordered prospectively. *See* MCI Comments at 30.

²⁶ *Petition of Home Owners Long Distance, Inc. for a Declaratory Ruling*, 14 FCC Rcd 17139, 17145 (CCB 1999) (“*Home Owners*”).

²⁷ *Referral Opinion* at 13, 15.

²⁸ *Id.* at 13 n.12.

the court the benefit of its expertise as to the “complex economic and technical issues” that the court needs from the Commission to make the ultimate decision.²⁹

Thus, whether or not the Commission ultimately decides to promulgate specific regulations establishing a competitive long distance telecommunications regime for private prison inmates, it has been ordered to provide to the court, at the very least, the benefit of its unique expertise as to whether such an approach is technically and economically feasible. The Wright Petition is simply a procedural vehicle for the Commission to address the court’s request. Once the Commission has made its findings as to technical and economic feasibility of alternative calling arrangements and their compatibility with legitimate security and other penological interests, the court can then decide whether the current arrangements are “reasonably related to a legitimate penological interest.”³⁰ Opponents may then raise their deference and related arguments in court.³¹

Equally foreclosed is MCI’s related objection that the regulation of common carriers’ commission payments to prison administrators is beyond this Commission’s authority because the funds generated by those payments are used to benefit inmates and thus supposedly “serve a valid penological purpose.”³² Questions as to prison administrators’ penological interests constitute the ultimate issue that the court has reserved for itself, once it has the benefit of the Commission’s expertise as to the economic and technical feasibility of the requested relief.³³ All that the Commission has to decide is whether such commissions unreasonably inflate inmate calling rates.

²⁹ *Id.* at 6.

³⁰ *Id.* at 13 n.12.

³¹ Thus, to the extent that MCI argues, *see* MCI Comments at 18, that it is not enough for Petitioners to show that their proposed competitive scheme would be feasible, MCI’s position is precluded by the referral.

³² MCI Comments at 32.

³³ *See Referral Opinion* at 13 n.12.

B. Opponents' Legal Arguments Are Incorrect

Opponents' responses to Petitioners' statutory authority argument are also incorrect on the merits. Section 201(b) of the Act authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."³⁴ Some of the opponents expressly concede that the Commission has authority under Section 201(b) to ensure reasonable inmate telephone rates.³⁵ That concession effectively ends the discussion, since Section 201(b) was held in the *Competitive Networks* proceeding to provide ample authority to ensure reasonable rates by means other than prescribing rates, including "undoubted power to regulate the contractual or other arrangements between common carriers and other entities, even those entities that are generally not subject to Commission regulation."³⁶

Opponents strain to distinguish the *Competitive Networks* proceeding.³⁷ There, the Commission, acting under Section 201(b), adopted various measures to promote competitive access to telecommunications services in multiple tenant environments ("MTEs") and to ensure reasonable rates and practices in such locations, including a prohibition against exclusive contracts between carriers and owners or managers of commercial MTEs for the provision of telecommunications services to the MTEs.³⁸ CCA argues that, in *Competitive Networks*, carriers had complained of exclusion from MTEs, whereas carriers realize that the inmate calling market

³⁴ 47 U.S.C. § 201(b).

³⁵ T-NETIX Comments at 10 & n.16, 20.

³⁶ *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983, 23000 n.85 (2000) ("*Competitive Networks*") (citation omitted). That decision thus answers T-NETIX's criticism that "Petitioners' proposal unavoidably interferes with contracts between carriers and correctional facilities...." T-NETIX Comments at 19. *See also TRAC Communications, Inc. v. Detroit Cellular Telephone Co.*, 4 FCC Rcd 3769 (CCB 1989), *aff'd*, 5 FCC Rcd 4647 (1990) (exclusivity provision in cellular service resale agreement impeded complainant from reselling services of other carriers and had anticompetitive effect, violating Section 201(b)).

³⁷ *See, e.g.*, CCA Comments at 25-27.

³⁸ *Competitive Networks*, 15 FCC Rcd at 22996-98, 23000.

might not support multiple providers.³⁹ It is not the purpose of the Communications Act or, more specifically, Section 201(b), however, to support carriers. Rather, it is to “make available ... to all the people of the United States, without discrimination ... a rapid, efficient, Nation-wide, and world-wide wire ... communication service with adequate facilities at reasonable charges....”⁴⁰ Moreover, carriers have complained of the current exclusionary practices.⁴¹

MCI notes that the prohibition against exclusive contracts exempts situations where the building owner or manager is authorized to act on behalf of its tenants.⁴² That begs the question presented here, since Petitioners are challenging administrators’ rights to contract on behalf of inmates and their families. The Commission exempted affiliated tenants and building owners from its ban on exclusive contracts because, in that situation, such a ban “would not be consistent with” the purpose of the prohibition, which is “to ensure consumer choice.”⁴³ In the case of prisons, however, exclusive service contracts deny consumer choice. Thus, the rationale for the exemption cited by MCI militates in favor of, not against, the relief requested by Petitioners. In any event, the exemption does not undercut the point that Section 201(b) provides ample authority to provide the requested relief.⁴⁴

³⁹ CCA Comments at 26.

⁴⁰ 47 U.S.C. § 151.

⁴¹ See FCC Public Notice, *Petition for Declaratory Ruling Filed by Outside Connection, Inc. Pleading Cycle Established*, 18 FCC Rcd 5535 (2003).

⁴² MCI Comments at 16, citing *Competitive Networks*, 15 FCC Rcd at 23002.

⁴³ *Competitive Networks*, 15 FCC Rcd at 23002.

⁴⁴ T-NETIX’s irrelevant challenge, see T-NETIX Comments at 13-15, 18-20, to other statutory provisions as possible bases for Commission action, on which Petitioners do not rely, does not undermine Section 201(b) as a valid basis for the requested relief.

AT&T argues that the Commission should not interfere with private contracts, citing *Atlantic City Electric*.⁴⁵ That case, however, clearly held that an agency “may abrogate or modify freely negotiated private contracts . . . if required by the public interest.”⁴⁶ T-NETIX argues that *Competitive Networks* did not require the unbundling of a proprietary network platform. Petitioners explained, however, that the Commission has required similarly costly restructuring under its Section 201(b) authority.⁴⁷ For example, the Commission required the provision of payphone call tracking by long distance carriers in order to ensure fair payphone compensation, in spite of their objections that the installation of tracking mechanisms would require significant expenditures.⁴⁸

The Commission’s Section 201(b) authority also includes the authority to restrict or prohibit common carriers’ payments of commissions to private prison administrators. T-NETIX’s thorough statutory analysis in its 2002 comments confirms the Commission’s authority to regulate or prohibit commission payments.⁴⁹

Opponents’ “state actor” immunity arguments are also unfounded. Section 276, which authorizes the Commission to regulate all payphone services, including “inmate telephone

⁴⁵ *Atlantic City Electric Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002) (“*Atlantic City Electric*”).

⁴⁶ *Id.* at 14 (citation omitted).

⁴⁷ To the extent that the Commission is concerned about its jurisdiction to prohibit private prison administrators from demanding or receiving commissions or to require them to allow the competitive provision of interstate inmate calling services, *see* RBOC Payphone Coalition Comments at 8-9, the Commission could limit its relief to a prohibition of commission payments by carriers serving private prisons and against the provision of inmate calling services to any private prisons failing to follow the standards specified by the Commission.

⁴⁸ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541, 20588, 20590-91 (1996) (subsequent history omitted).

⁴⁹ Initial Comments of T-NETIX, Inc. at 5-6 (May 24, 2002) (“2002 T-NETIX Comments”).

service in correctional institutions,”⁵⁰ contains an express preemption clause covering all “inconsistent” “state requirements,” with no exception for inmate telephone service.⁵¹ In any event, with the exception of two states, opponents have not pointed to any state statute or regulation that prohibits long distance inmate telephone service competition in privately administered prisons operating under state contracts or requires such services to be provided in a specified manner at privately administered prisons.⁵² Thus, any Commission action with regard to inmate telephone services in privately administered prisons would have a relatively insignificant impact on state correctional policies and rules, especially as to the CCA facilities at issue in the *Wright* litigation.⁵³ T-NETIX’s civil suit immunity argument apparently also is incorrect, since CCA has not been dismissed from the *Wright* case. In any event, such arguments should be raised with the *Wright* court, not this Commission.

It may be that the state contracts with private prison entities to fulfill state functions, but that does not magically insulate such entities and their common carriers from the sweep of the Communications Act, any more than such entities are exempt from a wide variety of federal regulatory requirements, from environmental to labor to civil rights laws and regulations.

⁵⁰ 47 U.S.C. § 276(d).

⁵¹ *Id.* § 276(c).

⁵² See Ohio Rev. Code Ann. § 9.06(C)(7) (2004) (no contract with private prison entity housing Ohio inmates may authorize contracting for local or long distance telephone services for inmates or receiving commission from those services); Okla. DOC Policy OP-030119, Inmate Telephone Privileges, at I.A (Feb. 20, 2004) (requiring all inmate telephone calls to be made collect and prohibiting credit card and third-party billing calls); Okla. DOC Policy OP-030401, Private Prison Monitoring Requirements, at V (July 18, 2003) (requiring private prison facilities under contract with Oklahoma Department of Corrections (“ODOC”) to comply with ODOC procedures “as specified in the contract and as updated annually in the contract renewal”).

⁵³ As the Ohio Department of Rehabilitation and Correction points out, the one CCA facility involved in the *Wright* case that is located in Ohio houses out-of-state prisoners and thus is covered by Ohio Rev. Code Ann. § 9.07, not Section 9.06. Ohio DRC Comments at 7. Section 9.07 contains no restrictions at all on the provision of inmate telephone services at privately administered prisons.

Similarly, the states and their contractors cannot nullify federal telecommunications requirements, including any restriction or prohibition against the payment of commissions to administrators that ultimately is promulgated in this proceeding.

MCI and the RBOC Payphone Coalition assert that Section 276(b)(1) of the Act authorizes a payphone location provider (in this case, the prison administrator) to select the carrier serving the payphone.⁵⁴ Section 276(b)(1)(E), however, cited by MCI, is expressly limited to intraLATA calls, which are not the subject of the Wright Petition. MCI quotes a conference report to the effect that location providers have similar authority as to the choice of interLATA carriers,⁵⁵ but legislative history cannot override the plain words of a statute.⁵⁶ Section 276(b)(1)(D), cited by the RBOC Payphone Coalition, provides that Bell operating company payphone service providers (“PSPs”) have the same right as independent PSPs to negotiate with location providers as to the selection of interLATA carriers, but that provision is qualified by the phrase “unless the Commission determines ... that it is not in the public interest.”⁵⁷ Thus, Section 276(b)(1)(D) is an additional grant of authority to the Commission to regulate private prison payphone service arrangements with interstate interLATA inmate service providers “in the public interest.”

Some of the opponents argue that the Commission cannot impose rules for privately administered prisons that are different from the rules governing publicly administered prisons and that any such distinctions would be discriminatory.⁵⁸ The scope of the issues to be reviewed

⁵⁴ MCI Comments at 13-14; RBOC Payphone Coalition Comments at 7-8.

⁵⁵ MCI Comments at 13-14.

⁵⁶ *See Bedroc Limited, LLC v. U.S.*, 2004 U.S. LEXIS 2549 at *20-21 & n.8 (2004) (Court would not consider House Committee Report in interpreting “plain meaning” of “unambiguous statutory text”).

⁵⁷ 47 U.S.C. § 276(b)(1)(D).

⁵⁸ *See, e.g.*, CCA Comments at 6-8.

in a referral proceeding, however, is determined by the case being referred.⁵⁹ The *Wright* case involved only prisoners housed at facilities managed by CCA, a private prison operator. The court's referral explicitly referred to "the feasibility of alternative telephone arrangements in CCA facilities."⁶⁰ It is therefore appropriate to limit the scope of the relief sought in this proceeding to long distance inmate calling services in private prison facilities.⁶¹ Because not all states use private firms to house any of their prisoners, it is not clear that all of the state correctional comments are relevant to the Wright Petition.⁶²

In any event, even assuming that there is any legal or other obstacle to Commission mandated relief, the Commission nevertheless is obligated to provide the court with the requested advice as to the technical and economic feasibility of the competitive regime proposed in the Wright Petition and Dawson Affidavit. To the extent that there is not now a sufficient record on which the Commission could base such guidance, it should take steps to secure the necessary data from all interested parties.

⁵⁹ See *Curt Himmelman v. MCI*, 17 FCC Rcd 5504, 5505-06 (2002) (Commission would not address issue not referred by court); *Home Owners*, 14 FCC Rcd at 17145-47 (where court no longer needed Commission to resolve issues, Commission dismissed referral proceeding).

⁶⁰ *Referral Opinion* at 11.

⁶¹ Thus, to the extent state correctional objections to the Wright Petition are predicated on circumstances unique to governmentally operated facilities, they are irrelevant. See, e.g., Letter from Roger Werholtz, Secretary, Kansas Department of Corrections, to Marlene Dortch, Secretary, FCC (Feb. 4, 2004) ("Werholtz Letter") (noting that there was only one bidder for inmate telephone services at state-operated prisons).

⁶² For example, although the New York State DOCS does not address the issue directly, it does not appear that the DOCS contracts for the housing of any of its prisoners with private entities. See New York State DOCS Comments at 2-3 (describing New York DOCS facilities with no mention of privately administered facilities).

III. OPPONENTS HAVE FAILED TO REBUT PETITIONERS' POLICY ARGUMENTS ON THE MERITS

A. The Competitive System Outlined In The Petition And Dawson Affidavit For Privately Administered Prisons Is Technically And Economically Feasible And Safeguards All Security And Other Penological Goals

Opponents' arguments that the competitive system envisioned in the Wright Petition and Dawson Affidavit would not meet security and other penological goals and would not be technically or economically feasible depend on multiple mischaracterizations of the suggested approach. The oppositions are largely premised on the notion that the competitive system proposed in the Wright Petition would constitute a radical re-engineering, or "unbundling," of private prison inmate telephone systems, which, in turn, would undermine security and increase costs. As explained in the Dawson Reply, however, nothing could be further from the truth. As some of the oppositions concede, the proposed competitive system could build on the systems already in place. The underlying carrier would continue to handle all security functions, just as service providers like Evercom do today, prior to handing off long distance calls to one of the interconnected carriers.⁶³ Opponents have not explained why the single underlying system provider, by maintaining control over each call through its switch, would not be able to provide all of the security functions that exclusive service providers do today.⁶⁴

Mr. Dawson also explains that prison administrators would have just as much control over the interconnected carriers as they do now over the exclusive provider under the current system. The opponents' use of other carriers to complete their inmate calls today also demonstrates that the use of interconnected long distance carriers in the secure manner proposed

⁶³ Thus, private prison administrators could continue to award contracts on an exclusive basis to providers of the underlying inmate telephone system in each prison. *See* T-NETIX Comments at 8. Because inmates and/or bill payers would choose and pay the companies carrying each long distance call, the long distance portion of such calls would not be included in the system contract award, nor would the individual selection of a long distance carrier constitute the "subcontracting" or "assigning" of the obligations of the underlying system provider. *See id.* at 8 n.12.

⁶⁴ Dawson Reply at ¶¶ 5, 45.

in the Dawson Affidavit is perfectly consistent with the maintaining of security functions. If Evercom's or T-NETIX's hand-off of its inmate traffic to a variety of other interexchange carriers does not undermine security now, it is clearly feasible to hand off long distance inmate calls over a secure interconnection without breaching security.⁶⁵

There is no reason to assume that the interconnected carriers could not be required to meet all of the security obligations required of the terminating carriers that the exclusive providers use under the current regime and to commit to such obligations in a written contract with the underlying provider and prison administrator. Private prison administrators thus could have "privity of contract" with the underlying system provider and each of the interconnected carriers, and security functions could be carried out, with all of the current information gathering and coordination that takes place between prison administrators and inmate service providers, and problems investigated as readily as under the current system. The interconnected carriers' commitments could include the sharing of billing information and the ability to track calls as required for end-to-end security. Because the competitive carriers would interconnect directly with the underlying system provider at a secure interconnection point, either within the prison facility or at a location under the control of the underlying provider, the underlying provider -- and, through the system provider, the private prison administrator -- would be able to maintain complete control over every interconnected call.

The proposed system, like the current exclusive provider system, and unlike a billed party preference ("BPP") system, thus would "expressly prevent[] inmates from reaching alternative service providers that necessarily fall outside the primary carrier's secure platform."⁶⁶ Inmates would not be able to access other carriers' platforms not under the control of the secure interconnection, and interconnecting carriers could be required to ascertain and provide

⁶⁵ *Id.* at ¶ 6.

⁶⁶ T-NETIX Comments at 9 (characterizing the current exclusive provider system) (citation omitted).

information about the termination location of every call. Petitioners' proposal thus recognizes and accommodates the unique security needs of prison facilities at least as well as the current system.⁶⁷

It must be kept in mind that any rational analysis of service providers' ability to meet security goals under the approach proposed in the Dawson Affidavit should be measured against the admittedly imperfect current system, not perfection. Moreover, in the early stages of any competitive system, the roughly 20 current inmate service providers would be likely to predominate among the carriers seeking to interconnect with underlying prison service providers, thus providing additional assurance of the necessary qualifications.⁶⁸

Rather than the complex "TELRIC for prisons" unbundling or BPP depicted by some opponents,⁶⁹ Petitioners have proposed a much simpler equal access interconnection regime, allowing inmates to choose their long distance carrier, for privately managed prisons above a threshold size. As discussed below and in the Dawson Reply, it should not be difficult to arrive at an appropriate benchmark charge to be imposed on the interconnected long distance carriers by the underlying system providers. If a particular provider could demonstrate higher costs, it could charge a higher rate. Because of the limited scope of telecommunications services made available to inmates, the equal access rules necessary to ensure nondiscriminatory interconnection of competitive long distance carriers would be relatively simple and straightforward.

Those rules essentially would require an underlying inmate telephone system provider also carrying long distance inmate calls to offer other long distance carriers the same interconnection with the underlying system as provided to its own long distance network. Such

⁶⁷ Dawson Reply at ¶¶ 7-10.

⁶⁸ Dawson Reply at ¶ 11.

⁶⁹ T-NETIX Comments at 33-34 and attachment, CapAnalysis Paper at 15; Evercom Comments at 5.

an equal access interconnection regime would be far simpler and less costly than either the unbundling or BPP regimes imagined by opponents.⁷⁰ If there is another way to introduce competition into the inmate calling market, opponents should suggest it. Based on the comments filed to date in this docket, however, there does not seem to be any way to allow the competitive provision of long distance inmate calling services while having an underlying inmate telephone system at each prison without regulating the underlying system in some manner.

Evercom and other parties also complain that the relief sought in the Wright Petition for privately administered prisons would result in a “bifurcated” system, for only a small portion of all inmate calls at those facilities, and that such a limited market would not be economically viable.⁷¹ Other opponents also complain that Petitioners did not address local and intrastate toll calls.⁷² The same telephone system, however, would be used for all calls from any given facility. The only implementation issue would be whether the underlying system provider or the interconnecting carriers would handle local, intraLATA and intrastate interLATA calls. Petitioners confined their presentation to interstate debit and collect calls because that is the segment directly under Commission jurisdiction, and they are agnostic on the issue of how other categories of calls should be handled.⁷³ If the Commission determines that certain categories of inmate calls, in addition to interstate calls, should be open to the interconnecting carriers in order

⁷⁰ Dawson Reply at ¶¶ 19, 45-46.

⁷¹ Evercom Comments at 9; New York State DOCS Comments at 8.

⁷² *See, e.g.*, T-NETIX Comments at 25; CCA Comments at 31 and Att. A, Bohacek and Kickler Decl. at ¶ 15.

⁷³ Dawson Reply at ¶¶ 13. The RBOC Payphone Coalition, *see* RBOC Payphone Coalition Comments at 11, mistakenly assumes that the competitive approach proposed in the Dawson Affidavit covers only debit calling. The proposal set forth in the Wright Petition and Dawson Affidavit requested that the Commission “require all privately administered prison facilities to permit competition in the provision of interstate long distance inmate calling services” and “allow inmates a choice between collect calling and debit card or debit account services” for such calls. Wright Petition at 8.

for a competitive system to be viable, it could impose such a requirement to prevent frustration of its regulation of interstate inmate services.⁷⁴

Opponents also complain about the costs of administering such a system, including interconnection costs, especially for small prisons.⁷⁵ They also argue that the interconnected carriers will not be able to realize the same cost savings they do now because they will be handling interconnected calls only from some of the inmates at any given facility.⁷⁶ As discussed in the Dawson Reply, local jails and prisons under a certain threshold number of inmates -- perhaps 50, based on Evercom's Comments -- would be exempt from the proposed system. Moreover, as is the case now, service providers would compete to provide the underlying inmate telephone systems in multiple prisons operated by each private prison entity, and a few providers would emerge with large shares of the total private prison market. Thus, under the proposed competitive scheme, each carrier could continue to compete for the same volume of traffic as it serves now, except that it would compete to provide the underlying system, rather than all inmate traffic, at each facility and for each inmate's long distance business at every facility. The providers serving many facilities would experience many of the same cost savings that opponents describe for the exclusive inmate service providers under the current system.⁷⁷

A long distance carrier serving multiple facilities operated by a private prison entity would not necessarily have to interconnect at every prison managed by that entity, but instead could interconnect with the underlying system provider serving those facilities at a single point

⁷⁴ See, e.g., *California v. FCC*, 39 F.3d 919, 931 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995). Neither Evercom nor any other opponent offered any economic data to support the claim that Petitioners' proposal would result in a non-viable market.

⁷⁵ See, e.g., T-NETIX Comments at 25-26; CCA Comments at 31; Bohacek and Kickler Decl. at ¶ 16.

⁷⁶ See, e.g., Bohacek and Kickler Decl. at ¶ 25.

⁷⁷ Dawson Reply at ¶ 16.

of presence (“POP”) subject to contracted security requirements imposed by the prison administrator and the underlying provider. This approach would avoid the problem of duplicative trunking, provisioning and interconnection costs raised by Evercom,⁷⁸ and, for most privately administered prisons over the threshold size, the interconnection process thus would not be a burden for the facilities administrators.⁷⁹ Moreover, as explained in the Dawson Reply, the adoption of the competitive approach proposed in the Wright Petition and the Dawson Affidavit would not create significant burdens for private prison facilities.⁸⁰

Moreover, as suggested in the Wright Petition, if a system provider could show that its costs were greater than the benchmark access charge, it could file cost support demonstrating those costs. Thus, as a practical matter, the regulation that would be required would be much less burdensome than opponents suggest. For those providers that did not want to take on the administrative burden of regulatory filings, consultants could provide the necessary services efficiently.⁸¹

Various opponents challenge the cost analysis in the Dawson Affidavit as based on a narrow, unrepresentative sample of prisons and financial data for one service provider.⁸² As noted in the Dawson Reply, the opponents’ contentions are inconsistent, and some of their estimates for certain cost elements are higher than the estimates presented in the initial Dawson

⁷⁸ Evercom Comments, Exh. 1, Rae Decl. at ¶¶ 9-12, 14-15.

⁷⁹ Dawson Reply at ¶ 50.

⁸⁰ *Id.* at ¶¶ 14-15.

⁸¹ T-NETIX’s comment, *see* T-NETIX Comments at 28, that the *CLEC Access Charge Order* is under reconsideration and subject to appeal is irrelevant. *See Access Charge Reform, Seventh Report and Order, 16 FCC Rcd 9923 (2001)*. Petitioners cited that order only as an analogy to a possible benchmark mechanism that might be used to ensure a reasonable underlying system rate. Reversal, particularly as to particularized cost issues, would not affect its value as an illustrative benchmark mechanism.

⁸² *See, e.g.*, T-NETIX Comments at 28-32; Rae Decl. at ¶¶ 8-24, 34-39; CCA Comments at 33.

Affidavit. In some cases, opponents discuss costs that will be the same under any inmate telephone system and thus are irrelevant to this inquiry.⁸³ As pointed out in the Dawson Reply, opponents' quibbles cannot be taken seriously, as they fail to present alternative credible estimates, even though they are in a position to do so. As the parties in sole possession of all of the relevant data -- *i.e.*, their own costs -- it was incumbent on service providers such as Evercom and T-NETIX to offer more than hints and conclusory assertions that Petitioners' cost analysis was incorrect.⁸⁴

The Dawson Reply discusses several cost issues raised in the opponents' initial comments and rebuts MCI's cost analysis by adjusting MCI's faulty cost estimates and recalculating MCI's estimate of the cost of providing inmate service under more realistic assumptions. As Mr. Dawson explains, MCI's estimates are not credible, and half of its estimated costs are accounted for by commissions, which are not a legitimate cost element⁸⁵ and would be eliminated under Petitioners' proposal. He also cites three examples of recent T-NETIX and MCI inmate service contracts at rates that, once commissions are backed out, strongly support Mr. Dawson's cost analysis and are vastly inconsistent with the service providers' assertions as to costs. The Dawson Reply explains that the criticisms of the usage estimates in the previous Dawson Affidavit do not take account of the different characteristics of the various types of prisons. It also points out that the opponents' concern over the cost and complexity of implementing the necessary interoperability between the underlying system provider and interconnected carriers is misplaced because similar interconnections are already in place. Call validation and billing might be handled in a variety of ways, and the service

⁸³ See, e.g., APCTO Comments at 15-16 (costs incurred in monitoring inmate calls, providing tables and chairs for telephone use, and hiring foreign language speakers to investigate criminal activity involving telephone use).

⁸⁴ Dawson Reply at ¶¶ 24-25.

⁸⁵ *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, 3255 & n.49 (2002) ("*Inmate Payphone Order and NPRM*").

providers could agree among themselves how to do so. For example, it might be simpler and cheaper at the outset for an interconnected long distance carrier to agree to have the underlying service provider handle validation and billing for it, simplifying the interface between the underlying provider and the carrier. The service providers could decide to allocate these functions, and the costs attendant thereto, in various ways, depending on their relative capabilities and other factors.⁸⁶

In short, despite opponents' efforts to depict the inmate service market as unique, the most difficult technical problems described by opponents have long since been solved and implemented throughout the industry, requiring only the replication of the same software applications for additional interconnections. Moreover, because the typical underlying provider and the typical interconnected carrier will be serving multiple facilities, and because the interconnection of different networks is essentially a matter of software applications, the cost of implementing the interconnection between an underlying service provider and an interconnected carrier -- even the "several million dollars" hypothesized by Evercom⁸⁷ -- appropriately depreciated over a period of years, is extremely inexpensive per minute of use.

Furthermore, this is not a rate case. All that Petitioners attempted to demonstrate, and all that Petitioners need demonstrate, is that their competitive inmate service proposal is technically and economically feasible. Petitioners' proposal would be economically feasible if the costs that would be incurred in establishing such an interconnection regime allowed service providers to set rates below current inmate service rates profitably. The service providers' current inmate long distance rates are now so exorbitant that the actual costs of a competitive system could be way above Petitioners' cost estimates and still justify rates substantially below the current rates.⁸⁸

⁸⁶ Dawson Reply at ¶¶17, 22-23, 26-42, 46-48.

⁸⁷ Rae Decl. at ¶ 16.

⁸⁸ Dawson Reply at ¶¶ 24, 34.

B. Commission Payments To Private Prison Administrators Should Be Prohibited

The Commission has recognized that service providers' commission payments to prison operators are driving up inmate service rates,⁸⁹ and T-NETIX, the leading provider of inmate services in the United States, confirmed this fact in its 2002 comments in this docket.⁹⁰ T-NETIX's expert witness explained that site commissions are a significant reason that "the benefits of competition do not presently reach those who pay for inmate calling."⁹¹ The RBOC Payphone Coalition also admits that the current competition to secure exclusive inmate service contracts "may result in high commission payments and thus to [sic] higher rates for calls from inmate institutions...."⁹² As concluded in a study commissioned by T-NETIX, "[i]n principle, commissions could be capped or eliminated altogether, and doing so would be a relatively simple matter."⁹³

Opponents warn of dire consequences for prison inmates and state budgets if commissions are prohibited.⁹⁴ They have not made it clear, however, whether commissions paid by carriers serving private prisons are treated the same way as commissions paid by carriers serving publicly administered prisons. CCA, for example, states that "[a] substantial number of states ... require payment of commissions directly to the state," but does not specify whether that is the case for commissions paid by service providers at any CCA or other privately administered

⁸⁹ *Inmate Payphone Order and NPRM*, 17 FCC Rcd at 3252-53, 3260. *See also id.* at 3260 n.74.

⁹⁰ 2002 T-NETIX Comments at 3-5.

⁹¹ 2002 T-NETIX Comments, App. A, Declaration of Richard Cabe at ¶ 6 (May 22, 2002).

⁹² RBOC Payphone Coalition Comments at 5.

⁹³ CapAnalysis Paper at 14.

⁹⁴ *See* MCI Comments at 32; Evercom Comments at 8-9; CCA Comments at 34-37.

prisons.⁹⁵ With the exception of Ohio, opponents have not explicitly mentioned any state where commissions are paid by carriers serving private prisons directly to the state,⁹⁶ and the one CCA facility in Ohio that is involved in the *Wright* case is not governed by the Ohio statute requiring payment of commissions directly to the state.⁹⁷ CCA appears to back away from an inference that carriers serving private prisons generally have to pay commissions to the state in adding that “[a]s a practical and logical matter, the state and local authorities have the ability to mandate how inmate calling service commissions are used, and where they are paid, because private correctional facility operators ... must obtain contracts for their services in a competitive manner.”⁹⁸ In other words, at CCA prisons, the commissions are paid to CCA, which, as an economic matter, may be constrained in how to use them under its contract with the government contracting authority.

It may be that if inmate service providers are prohibited from paying commissions to private prison administrators, states will have to pay private prisons more to make up for the loss of commissions. There is nothing sacrosanct, however, about state contracts with private prisons or the amounts that states have to pay for such services. States no doubt have to pay more for private prison services on account of a wide variety of federal regulatory requirements, from environmental to labor to civil rights laws and regulations. That is simply a cost of doing the state’s business. Similarly, the states and their contractors cannot nullify federal telecommunications requirements on the basis of the ultimate cost to the state. Although forcing state governments to fund correctional facilities and services “through proper appropriations

⁹⁵ CCA Comments at 34.

⁹⁶ Ohio Rev. Code Ann. § 9.06(C)(7) (2004).

⁹⁷ See n. 53, *supra*.

⁹⁸ CCA Comments at 35.

channels may result in a greater drain on the government's finances, the responsibility for such [functions] does in fact rest with the government."⁹⁹

C. Debit Card Or Debit Account Calling Should Be A Required Inmate Calling Option In Privately Administered Prisons

Several of the opponents take issue with Petitioners' request that debit card or debit account calling be made available at privately administered prison facilities. Their chief concerns appear to be the possibility that such cards or accounts would constitute a "commodity" that could be the subject of extortion by other inmates and the lesser degree of security that can be imposed on debit calls, relative to collect calls.¹⁰⁰ One way that administrators defeat those problems is to give every inmate a personal identification number ("PIN") that has to be dialed before every call, debit or collect, and to restrict inmates to a limited set of designated telephone numbers that they may call. Each PIN is accordingly matched with a particular inmate's list of numbers in the underlying system provider's database. In that way, the PIN is useless to any other inmate. MCI's scenario of inmates establishing "multiple accounts with multiple false identities involving multiple carriers"¹⁰¹ thus is no more likely than it is right now. Each prisoner has to establish his account with the single underlying service provider, coordinating with the prison administration. The choice of which interconnected carrier to use comes later in

⁹⁹ *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994) (enjoining the use of commissary funds to finance monitoring of inmate telephone calls). Evercom suggests that some commission payments reimburse prison administrators for inmate telephone service-related costs. Rae Decl. at ¶ 32. Under Petitioners' proposal, such payments could be allowed to the extent that administrators could show that they cover direct telephone service costs, as opposed to security-related functions. Thus, a certain fixed percentage of revenue could never serve as the measure of an appropriate reimbursement of facilities' inmate telephone service costs.

¹⁰⁰ See Evercom Comments at 11; CCA Comments at 17-18.

¹⁰¹ MCI Comments at 23.

the telephone calling sequence and therefore cannot affect or disrupt the PIN validation process.¹⁰²

Some of the opponents' security concerns with debit calling also have nothing to do with debit card or debit account calling and would be accommodated under the proposed system. For example, CCA and the Commissioner of the New Jersey Department of Corrections express concern that debit calling would allow inmates to conduct illegal businesses, bypass blocked numbers, make harassing calls or use the prison telephones for other illegitimate purposes.¹⁰³ By using a PIN validation system and a list of pre-approved numbers, however, together with all of the other security functions to be performed by the underlying system provider for every inmate call, none of these concerns would be a factor, either with debit or collect calling.

Opponents' security-related concerns as to debit cards or accounts are not credible. A majority of the 2,000 facilities served by Evercom allows some form of prepaid calling services.¹⁰⁴ MCI discusses examples of correctional agencies that have tried to establish debit-only inmate calling systems, apparently because of the administrative advantages of debit card or debit account calling over collect calling.¹⁰⁵ Apparently, those entities have found that they can overcome whatever security issues might arise with prepaid or debit calling. In fact, the Federal Bureau of Prisons ("FBOP") tried to switch from a collect inmate calling system to a debit-only

¹⁰² Dawson Reply at ¶ 12. Another variation was described in the Dawson Affidavit, at ¶ 35, in which a prisoner's family establishes the account, removing the prisoner from direct control over the funding of the account. Contrary to T-NETIX's misinterpretation, *see* T-NETIX Comments at 32-33, the prisoner could use the account to make any long distance call, not just calls to the family member setting up the account.

¹⁰³ Letter from Devon Brown, Commissioner, New Jersey Dep't of Corrections, to Marlene Dortch, Secretary, FCC, at 3 (Feb. 6, 2004); CCA Comments at 17-18; Bohacek and Kickler Decl. at ¶ 21.

¹⁰⁴ Evercom Comments at 10-11.

¹⁰⁵ MCI Comments at 23-25. MCI even goes so far as to suggest that Petitioners would do away with collect calling options for inmates. *See id.* Petitioners do not advocate debit-only calling systems, but only that debit calling be an option. *See* Dawson Reply at ¶ 43.

inmate calling system and defended its decision as “‘reasonably related’ to legitimate penological interests.”¹⁰⁶ Similarly, an analysis of the FBOP inmate telephone system conducted by the California Department of Corrections (“CDOC”) recommended that the implementation by the CDOC of a debit account system using PIN validation should be examined “*as a prison management, security and investigative tool,*” as well as “a long-term solution to the high cost of collect calls.”¹⁰⁷ Opponents need to explain why such a large sample of prisons and correctional authorities either allows or endorses an option that supposedly presents such a security risk.

Some of the opponents, including state correctional authorities, stress the supposed burden on prison staff of administering a debit card or debit account system.¹⁰⁸ Application of Petitioners’ proposed approach to privately administered prisons, however, would not impinge on state correctional staff. Private prison corporations, such as CCA, administer debit accounts now through the commissaries at many of their facilities. They also might choose to contract that function out to the inmate telephone system operators, depending on which approach proves most efficient. The Maryland Department of Budget and Management Action Agenda attached as Exhibit B to the Dawson Reply indicates that the new inmate debit/prepaid calling service to be provided by T-NETIX will be handled through the correctional facility commissary system. It is totally automated through the pay station equipment system and “*will not require staff time, maintenance or cost from*” the Department of Public Safety and Correctional Services.¹⁰⁹ The Commission need not concern itself with the details of the inmate debit accounts or which of the

¹⁰⁶ *Washington v. Reno*, 35 F.3d at 1099.

¹⁰⁷ Div. of Communs., Virginia State Corp. Comm’n, Report on Rates Charged to Recipients of Inmate Long Distance Calls (2000), attachment, Analysis of the Federal Bureau of Prisons Inmate Telephone System and Applicability to the California Department of Corrections at 14 (attached as Exhibit 8 to the Dawson Affidavit) (emphasis added).

¹⁰⁸ Ohio DRC Comments at 3; T-NETIX Comments at 32; CCA Comments at 19-22; Bohacek and Kickler Decl. at ¶¶ 21-22.

¹⁰⁹ Maryland Department of Budget and Management Action Agenda, Information Technology Contract, Item 3-IT, at 26B (Dec. 17, 2003) (emphasis added).

private parties involved in the process -- private prison administrators or underlying system providers -- should handle the accounts, as long as debit card or debit account calling is an option.¹¹⁰ Moreover, the supposed additional database and customer service costs for service providers of implementing debit card or account calling¹¹¹ would be negligible per minute of usage.¹¹²

Some of the opponents also challenge the cost benefits of debit cards or accounts. As Evercom concedes, however, use of a debit account or prepaid calling option does reduce the significant cost of uncollectibles associated with collect calling and results in lower rates.¹¹³ The Kansas Department of Corrections provides direct billing and prepaid inmate services “as a means of providing payment options for call recipients, at a lower cost than for collect calls.”¹¹⁴ MCI presents a novel theory that the introduction of debit card or debit account calling would not reduce the total amount of uncollectibles, but would simply cause all of the irreducible uncollectible traffic to remain with collect calling.¹¹⁵ As a practical matter, however, in many cases, different parties would be paying for a call, depending on whether it is a debit or collect call. As a result, an inmate will make a debit account call, which is paid, instead of a collect call to someone who ultimately cannot pay for it. Evercom’s experience certainly disproves MCI’s theory, since Evercom “encourages this shift [from collect to prepaid] to reduce bad debt.”¹¹⁶

¹¹⁰ Any division of functions, and the costs incurred thereby, between the prison administrator and underlying system provider can be accommodated in their contract terms so that there is no net effect on the underlying provider’s costs of providing service.

¹¹¹ T-NETIX Comments at 33; CCA Comments at 20.

¹¹² Dawson Reply at ¶¶ 44, 49.

¹¹³ Evercom Comments at 10-11.

¹¹⁴ Werholtz Letter at 1.

¹¹⁵ MCI Comments at 25.

¹¹⁶ Rae Decl. at ¶ 25. CCA also suggests, *see* CCA Comments at 16-17, that the FCC lacks authority to require that debit calling options be offered at privately administered prisons.

D. The Requested Relief Is Necessary Now

Finally, opponents present a variety of excuses to postpone any action by the Commission. Evercom and T-NETIX insist, against all of the available evidence, that there is no need for the Commission to take action because there is already vigorous competition in the provision of inmate calling services that benefits inmates. As explained in the Dawson Reply, however, the marketplace competition works against the users of those services.¹¹⁷

MCI and other parties also point to actions taken by a wide variety of state correctional authorities to reduce commission and inmate calling rates and allow more calling options.¹¹⁸ Those reforms, however, simply confirm the feasibility of the requested relief and raise the burden on the opponents to explain why the Commission should not prohibit non-telecommunications based commission payments and require private prison administrators to allow competition in the provision of inmate long distance services and debit calling as an alternative to collect calling.

IV. CONCLUSION

For the reasons set forth above and in the Dawson Reply, as well as in the Petitioners' initial submissions, Petitioners request that the Commission provide the relief requested in the Wright Petition. If the Commission determines that the record is not sufficient to order such relief, Petitioners request that the Commission take whatever steps are necessary to create a sufficient record, including the release of a further notice of proposed rulemaking requesting comments on the issues that the Commission believes have been inadequately explored. In the alternative, if the Commission determines that it cannot or will not order the requested relief, it should, at the very least, provide the advice requested by the *Wright* referral as to the technical

Competitive Networks and the other cases ordering structural and other relief demonstrate that the Commission has more than sufficient authority under Section 201(b) of the Act to mandate the offering of debit card or debit account calling.

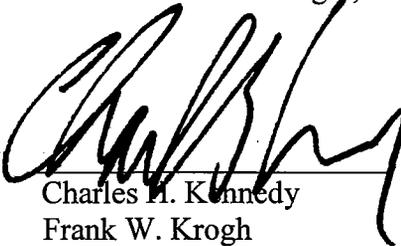
¹¹⁷ Dawson Reply at ¶¶ 20-21, 51.

¹¹⁸ See, e.g., MCI Comments at 33-34; CCA Comments at 36-37.

and economic feasibility of the competitive inmate service regime proposed in the Wright
Petition.

Respectfully submitted,

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I, Theresa Rollins, hereby certify on this 21st day of April, 2004, a copy of the foregoing Petitioners' Reply Comments has been served via electronic mail (*) or first class mail, postage pre-paid, to the following:

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