

**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	)	CC Docket 96-128
	)	
Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking.	)	DA 03-4027
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**REPLY COMMENTS OF THE  
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

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The National Association of State Utility Consumer Advocates (“NASUCA”)<sup>1</sup> submits these reply comments to the Federal Communications Commission (“FCC” or “Commission”) responding to comments that oppose the “Alternative Rulemaking Proposal” (“ARP”) filed by Martha Wright, et. al. (“Petitioners”). In the ARP, Petitioners requested that the Commission set a benchmark rate of \$0.20-\$0.25 for interexchange debit and collect calling from correctional facilities, to make the rates for

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<sup>1</sup> NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio. Rev. Code Chapter 4911; 71 Pa.Cons.Stat. Ann. § 309-4(a); Md. Pub.Util.Code Ann. § 2-205; Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

such calls reasonable and thus to ease the burden on the inmates' families and friends, who bear the burden of the current unreasonable rates.

NASUCA filed comments supporting Petitioners' original filing with the Commission, made in 2003.<sup>2</sup> In the original Petition, it was demonstrated that interstate interexchange collect calling rates from prison facilities were excessive, in part as a result of the monopolization of the service. Petitioners proposed that the Commission order this market opened to competition. The Commission still has not acted on the original Petition. On February 28, 2007, Petitioners filed the ARP. NASUCA then filed comments in support of the ARP.

In those initial comments, NASUCA stated:

It is high time for the Commission to do something to reduce the current excessive rates for this service, which are not paid by the incarcerated inmates, but by their family and friends on the "outside." It is these people who are unreasonably burdened by these high rates.<sup>3</sup>

This remains true today. Other comments supporting the ARP were filed by: Ad Hoc Coalition for the Right to Communicate; American Bar Association; Citizens United for the Reform of Errants; Innocence Project and the Incarcerated Mothers Program; Legal Services for Prisoners with Children; North Carolina Prisoner Legal Services; Office of the Peoples Counsel, District of Columbia<sup>4</sup>; Our Place DC and Hope House DC; The Sentencing Project, et al.; and individual consumers.

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<sup>2</sup> Petition for Rulemaking, or in the alternative, Petition to Address Referral Issues in Pending Rulemaking (November 3, 2003). The Petition was filed at the direction of a 2001 order of the federal District Court for the District of Columbia. *Wright v. Corrections Corp. of America*, CA No. 00-293 (GK), Memorandum Opinion (D.D.C. August 22, 2001) ("Referral Order").

<sup>3</sup> NASUCA Comments (May 2, 2007) at 2.

<sup>4</sup> The D.C. Peoples Counsel is a member of NASUCA.

Opposition to the ARP came from corrections agencies and groups<sup>5</sup> and from providers of inmate calling services.<sup>6</sup> The oppositions have some common themes:

- Capping calling charges -- and thereby limiting the commissions paid to corrections authorities -- would impact programs currently funded by those commissions.<sup>7</sup>
- The costs of inmate calling are high.<sup>8</sup>
- “The market is taking care of itself.”<sup>9</sup>

Let us take this last point first. SPCA states, “Many facilities have already begun to accept lower or no commissions in order to offer lower rates.”<sup>10</sup> The key question, then, is if lower rates are possible, why not make them mandatory? And the fact that rates are possible with low or no commissions weakens the argument that the commissions are required to fund other programs.

Likewise, CCA asserts that inmate telephone service providers (“ITSPs”):

are offering more alternative calling options. ... Based upon the availability of these additional calling options and the downward trend in collect and prisoner debit calling rates, there is no need for the Commission to regulate or set “benchmark rates” for inmate calling services. As the Commission previously stated, benchmark rates would not be the best alternative, benchmark rates would be

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<sup>5</sup> Association of Private Correctional and Treatment Organizations (“APCTO”); Corrections Corporation of America (“CCA”); The GEO Group, Inc. (“GEO”); Virginia Department of Corrections (“VaDoC”). A one-page opposing comment was also submitted by Jesse Griggs.

<sup>6</sup> Consolidated Communications Public Services (“CCPS”); Embarq; Global Tel\*Link Corporation (“GTC”); Pay Tel Communications, Inc. (“PTC”); Public Communications Services, Inc. (“PCS”); Southern Public Communications Association (“SPCA”); T-Netix, Inc. and Evercom Systems, Inc. (“T&E”).

<sup>7</sup> See, e.g., VaDoC Comments at [1]; Embarq Comments at 3-4; GEO Comments at 4-5; PCS Comments at 6. CCPS asserts that placing a cap on calling charges requires the FCC to regulate those commissions. CCPS Comments at 3. In this respect, the commissions are no different from any cost element that carriers use to determine their overall price. See *id.* at 4.

<sup>8</sup> See, e.g., Griggs Comments at [1]; SPCA Comments at 2.

<sup>9</sup> *Id.* at 2-3; CCA Comments at 10-11; PCS Comments at 4.

<sup>10</sup> SPCA Comments at 2-3.

overly regulatory, and such regulation could stifle rate competition.<sup>11</sup>

The Commission did so state, **in 1998**. Nine years later, it is time for the Commission to reconsider this view. The sporadic appearance of “additional calling options” and lower calling rates do not justify maintaining a policy that allows the current high rates and lack of options elsewhere.<sup>12</sup>

In terms of the cost of inmate calling, CCPS asserts that the “unique costs” of inmate calling include “costs for hardened CPE, frequent repair, the various pre-connection validations than must occur, high uncollectibles, extraordinary fraud prevention measures, and increased billing and collection costs.”<sup>13</sup> Presumably these costs are universal regardless of the state. Therefore, CCPS’s (and others’) concerns do not hold up when the actual rates used in a number of states are looked at: from the federal system to Colorado, Indiana, Maryland, Missouri, Nebraska, and Vermont, with rates from \$0.10 - \$0.25 per minute, with commissions excluded.<sup>14</sup>

On a more micro level, CCPS attacks Petitioners’ estimate of call duration by comparing its own estimate of calling from state correctional facilities (15-20 minutes) with that from county jails (four minutes), and attributes the difference to the lack of a per-call charge in the jails.<sup>15</sup> Clearly, the comparison is inapt: The average prisoner in a county jail is either in pretrial detention or serving a relatively short sentence, and is more

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<sup>11</sup> CCA Comments at 11, citing *Billed Party Preference for InterLATA 0+ Calls*, Second Report and Order and Order on Reconsideration, 13 FCC Rcd 6122, 6141 (1998).

<sup>12</sup> Further, the existence of ITSPs that expressly focus on “lower rates for lower commissions” (PCS Comments at 2) shows that the ARP is workable.

<sup>13</sup> CCPS Comments at 14; see also Embarq Comments at 2; GEO Comments at 5-6, 8-9; PTC Comments at 17-27.

<sup>14</sup> ARP at 19.

<sup>15</sup> CCPS Comments at 14.

likely to be from the local area, reducing the need for lengthy calls. By contrast, inmates in state correctional facilities have been convicted of crimes, serving sentences measured in years; and such facilities are often located in remote rural areas. Taken together these factors increase the need for longer calls.

GEO submits that, in order to set a benchmark rate, the Commission would be required:

to determine for every correctional facility across the country how much it costs to provide inmate telephone service at the facility, and what rates should be charged for interstate telephone services available to the inmates housed at the facility. Not only would this impose upon the Commission the wholly untenable task of conducting a multitude of inmate telephone rate cases, it would place the Commission in the inappropriate position of making judgments about the operation or management of correctional facilities....<sup>16</sup>

GEO cites neither statute nor regulation that would impose such requirements on the Commission. Indeed, GEO's position mistakes the fundamental purpose of establishing a benchmark, which is to avoid precisely the individualized inquiry that GEO posits.

With regard to the "other" programs funded through commissions,<sup>17</sup> it is not necessary to doubt the value of these programs in order to question whether the programs should be funded -- exclusively or for the most part -- by the friends and relatives of inmates.<sup>18</sup> The fact that a number of states are moving to reduce the commissions paid to inmate calling service providers does cast doubt on whether the commissions are truly necessary.

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<sup>16</sup> GEO Comments at 10-11.

<sup>17</sup> See footnote 7, *supra*.

<sup>18</sup> GTC says that "authorities have determined that the funding should come from levies on discretionary services purchased by the beneficiaries of such programs," comparing this system to the federal universal service fund. GTC Comments at 7. The purchasers of inmate calling, however, are not the inmates who might benefit from the programs, but rather the persons who the inmates are calling.

GEO argues that the Commission cannot impose rate benchmarks because to do so would be inconsistent with the classification of ITSPs as “non-dominant” carriers.<sup>19</sup> GEO overlooks the simple fact that the “market” in this instance must be viewed as each individual facility, since an inmate can be housed in only one facility at a time. Thus, regardless of the number of ITSPs nationwide and whether any particular ITSP is dominant in the national market, **for each facility**, and for the customers who receive collect calls from inmates in that facility, the ITSP selected by the facility’s management is a monopoly service provider.<sup>20</sup>

SPCA states that “[i]f the Petitioner’s [sic] proposal would be adopted by the Commission, it would put most of the small to medium size inmate phone companies the SPCA represents out of business.”<sup>21</sup> NASUCA submits that requiring families and friends of inmates to pay inflated rates to receive calls from correctional facilities is too high a price to justify subsidizing these phone companies.

In the initial comments on this round, NASUCA stressed the limitation of the Commission’s authority over intrastate calling.<sup>22</sup> Upon further review, it appears that 47 U.S.C. § 276(d) gives the Commission plenary authority over inmate calling.<sup>23</sup> In this context, CCPS notes that Commission action could cause “extremely disparate intrastate and interstate rates....”<sup>24</sup> Yet that situation will continue only so long as individual states

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<sup>19</sup> GEO Comments at 12-13.

<sup>20</sup> See T&E Comments at 4.

<sup>21</sup> SPCA Comments at 3.

<sup>22</sup> NASUCA Comments (May 2, 2007) at 3.

<sup>23</sup> Section 276 gives the Commission authority over payphone services, and § 276(d) includes inmate calling services in the definition of payphone service.

<sup>24</sup> CCPS Comments at 2; see also *id.* at 3, 7. By contrast, PTC implies that the current high rates for interstate calling subsidize the cost of capped local calling. PTC Comments at 7.

retain their excessive intrastate rates.<sup>25</sup> NASUCA submits that the possibility of arbitrage<sup>26</sup> does not require this Commission to refrain from acting to prevent unreasonable rates for interstate inmate calling. And the Commission also has the authority to impose caps on intrastate inmate calling.<sup>27</sup>

In conclusion, NASUCA urges the Commission to consider that the opponents of the ARP do not demonstrate concern about the broader public policy implications associated with excessive inmate calling rates, which discourage the socializing benefits that accrue to inmates who are able to maintain substantial contacts with family, friends, and helping professionals. That contact with family and friends can facilitate rehabilitation, an historic purpose of incarceration in this country. Further, current inmate calling rates effectively create a hidden tax on -- often low-income persons -- who need to communicate with inmates. In many cases, these costs effectively deprive such persons of the ability to communicate with inmates by telephone. While the Commission's primary concern should be the unreasonableness of the rates charged to inmates who take service in the context of a monopoly market, it should also consider the broader public interest in moving to reform the prices, terms and conditions for inmate calling.

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<sup>25</sup> PTC says that the Commission "could not even begin to consider imposing price caps on interstate calls without also reviewing the current cost and revenue structure of intrastate calls..." Id.

<sup>26</sup> CCPS Comments at 2.

<sup>27</sup> See PTC Comments at 7-8.

WHEREFORE, for the reasons cited in the ARP, in NASUCA's initial comments and here, Petitioners' Alternative Ratemaking Proposal should be adopted.<sup>28</sup>

Respectfully submitted,

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<sup>28</sup> If the Commission does not adopt the ARP, the Commission should not allow these issues to lie fallow for another period of years. At the very least, the Commission should open a rulemaking as recommended by PTC. Id. at 3.