

Exhibit A

FCC Docket # 96-128

In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets

29 OCTOBER 2008 PROPOSAL: COMPREHENSIVE RESOLUTION OF ICS ABUSES

Problem: Anti-consumer practices have developed in connection with prison pay-phone services that include charging extraordinarily high calling rates for both inter- and intra-state calls, as well as the imposition of exorbitant extraneous charges.

Solution: The problem can be solved only with a comprehensive, national regulatory approach that:

- (1) *Establishes cost-based benchmark rates* for all types of prisoner calls (intrastate and interstate), subject to state authority to address requested rate adjustments based on actual costs at the state level;
- (2) *Prohibits “commission” arrangements* of all kinds (since they unjustifiably drive up the cost of prisoner calls);
- (3) *Prohibits other charges* that unjustifiably increase the cost of prisoner-initiated phone calls; and
- (4) *Requires the provision of a broad range of calling options* that includes, at a minimum, collect, debit, and pre-paid options.

Authority: *In the public interest* - Under the Communications Act, the FCC has the duty to regulate utilities in the public interest. 47 U.S.C. § 201(b).

Fair compensation - Section 276 of the Act requires the FCC “to ensure that all payphone service providers [including inmate phone service providers] are *fairly compensated* for each and every completed intrastate and interstate call . . .” [Emphasis added.]

Responsibility to Regulate Prison Payphone Service Providers – Section 276 of the act defines “payphone service” to include inmate telephone service, as well as explicit authority to regulate intrastate payphone rates. The FCC’s exercise of that authority has been affirmed by the courts.

Federal prohibition of commissions – Congress has authorized the FCC to take such actions as may be necessary to effectuate purposes of the Act – protection of the public and fair compensation to service providers. 47 U.S.C. § 154(i). Toward these ends, the scope of the Commission’s authority should be broadly construed. 47 U.S.C. § 151.

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Precedent – Unitary Jurisdiction: *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167-68 (1968); Benchmark Rates: *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999); Regulation of Contracts: *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, FCC 08-87, ¶ 15 & n.48 (Mar. 21, 2008).

FCC PRIORITIES

Under the leadership of Chairman Genachowski, the FCC has identified its priorities as: (A) the promotion of competition; (B) the protection and empowerment of consumers and families; and (C) “fact-based and data-driven” decisions.

JURISDICTION (generally)

In *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (fn omitted)(1968), the Court defined the authority of the FCC in terms of whether regulations were “reasonably ancillary to the effective performance of the Commission’s various responsibilities . . .” The Court affirmed that holding in *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979)(FCC authority extends to regulation “necessary to ensure the achievement of the Commission’s statutory responsibilities”). Thus, the FCC’s regulatory authority encompasses regulations reasonably necessary to ensure that the Commission performs its congressionally mandated duty to promote competition in the public interest. 47 U.S.C. § 151, *et seq.*

AUTHORITY TO REGULATE WITHIN THE STATES

The FCC’s responsibilities are defined by statute. 42 U.S.C. § 706(a) expressly charges the Commission to “promote competition in the local telecommunications market.” Pub. L. No. 104-104, 110 Stat. 56 (1996). Section 276 (b)(1)(A) requires the Commission to establish rates that provides fair compensation for “each and every completed intrastate and interstate call using their payphone.” The term “compensation” means the rates paid by consumers. *See Illinois Pub. Telecommunications Ass’n v. FCC*, 117 F.3d 555, 562 (D.C. Cir. 1997), *cert. denied sub nom. Virginia State Corp. Comm’n v. FCC*, 423 U.S. 1046 (1998). The statute explicitly references “inmate telephone service” in the definition of “payphone services.” § 276 (d). To meet these requirements, the Commission must promulgate regulations that govern both interstate and intrastate prisoner phone calls.

In this very proceeding inmate payphone service providers have implicitly acknowledged the FCC’s authority in this regard. *ICSPC Initial Comments & Petition for Partial Reconsideration and Clarification of the First Report and Order* (seeking \$0.90 federally-tariffed inmate calling surcharge on local calls because state-imposed rate ceilings were purportedly inadequate . . .”) *See also, Inmate Calling Services Providers Coalition, Petition for Partial Reconsideration and Clarification* (seeking reconsideration of the *Order on Reconsideration*), at 6-11, 14-19 (filed Oct. 21, 1996)

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Jurisdiction has been extended judiciously elsewhere by the Commission. *Competitive Networks in Local Telecommunications Markets, First Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22983, 22996-97, ¶ 14 (2000)(citation omitted)(promulgating rules prohibiting exclusive contracts to promote competition). *Accord, Implementations of the Cable Television Consumer Protection & Competition Act of 1992: Development of Competition & Diversity in Video Programming Distribution & Carriage, Memorandum Opinion & Order on Reconsideration of the First Report & Order*, 10 FCC Rcd 1902, 1941, ¶ 88 (1994); *First Report & Order* (“Section 628 Report & Order”), 8 FCC Rcd 3359, 3364, ¶ 16; *id.* at 3424-25, ¶¶ 120-21 (1993)(prohibiting enforcement of exclusivity agreements in delivery of satellite-delivered programming); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, FCC 07-189, ¶¶ 26 & 31fn omitted)(31 October 2007)(“We conclude that exclusivity clauses cause significant harm to competition and consumers . . . inhibit competition . . . [and deny consumers] the benefits of increased competition, including lower prices . . .”). The Commission declared that exclusivity clauses in cable TV contracts at Multiple Dwelling Units are null and void). *See also, In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, FCC 08-87, ¶ 15 & n.48 (Mar. 21, 2008), and 47 C.F.R. § 64.2500, *et seq.* (prohibiting multiple tenant environments (MTEs) from entering into exclusive contracts for the provision of telephone services).

“COMMISSIONS” MUST BE ELIMINATED (Together with all other Practices that Unjustifiably Inflate the Cost of Prisoner Calls)

The record in this proceeding clearly establishes that ordinarily, “the commission is the single largest component affecting the rates for inmate calling service.” 17 FCC Rcd 3248, 10 (Feb. 21, 2002). “Commissions” are an allocation of profits between prisoner payphone service providers and facility owners. *Order on Remand & Notice of Proposed Rulemaking*, FCC 02-39, CC Docket No. 96-128 at ¶ 38 (released 21 February 2002). *See also, Second Report and Order*, FCC 97-371, CC Docket No. 96-128 at §§ 47 & 62 (released 9 October 1997); and *Third Report and Order* FCC 99-7, CC Docket No. 96-128 at ¶ 156 (released 4 February 1999). Clearly, they are not an element of legitimate costs.

In addition to prohibiting the payment of commissions, the FCC must also foreclose all other practices that unjustifiably increase the cost of prisoner calls. For instance, set-up charges, account fees, and billing practices must be set at actual cost, since profit will be taken into account in setting benchmark rates. These services should be provided to the consumer at cost.

ANTI-COMPETITIVE INDUSTRY PRACTICES ARE WELL KNOWN

The FCC has recognized that the practices of payphone service providers in the correctional setting are anti-competitive. 17 FCC Rcd 3248, ¶ 10 (Feb. 21, 2002)(noting that a confinement

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facility typically awards a contract to provide inmate calling services “by competitive bidding and grants the winning provider a monopoly on all inmate calling services”). *See U.S. v. Radio Corp. of America*, 358 U.S. 334, 351 (1959)(the Commission may consider antitrust policies in “determining whether the ‘public interest, convenience, and necessity’ will be served by proposed action . . .”).

Thus, the FCC should require prison phone providers to provide a broad range of calling options, including collect, pre-paid, and debit calls, as well as other options consistent with the safe and secure operation of the correctional facility. (Security requirements vary widely by facility type and mission.)

COST-BASED BENCHMARK RATES ARE EQUITABLE AND UNOBTRUSIVE

Requiring prisoner payphone service providers to show audited costs was the first necessary step to ensure that the public is treated fairly and service providers earn a reasonable profit. With this information and the cost analysis prepared by industry expert Don J. Wood, “Inmate Calling Services – Interstate Call Cost Study” (filed 15 August 2008), the FCC has before it the information it needs to establish such a rate which could apply to all calls, or to all calls within a class (interstate, intrastate long-distance, and local), or to various calling options. *See Cable & Wireless P.L.C. v. FCC*, (D.C. Cir. 1999).

Step two of such a regulatory methodology would serve the interests of comity, administrative efficiency, and it would appropriately defer to the state regulatory bodies. Should a service provider or a consumer believe that a benchmarked rate is inapposite, the matter could be addressed to the state utility commission or public services commission responsible for regulating the area in question. Thus, consistent with the principles of limited federalism and comity, local knowledge and expertise could be brought to bear, and well reasoned determinations could be expected.

CONCLUSION

An outcome that fails to proscribe commissions, prohibit extraneous charges, or regulate the prison phone industry across the country simply will not resolve the egregious practices of ICS or the onerous costs imposed on consumers. By prohibiting commissions and “tack-on” charges, and by promulgating nationally applicable, cost-based benchmarked rates, the FCC can bring a just and fair resolution to all parties in this 14-year old case.

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