

This comment addresses the Commission's authority to regulate interstate interexchange ICS rates under section 201(b) of the Communications Act of 1934 (Act). 47 U.S.C. § 201(b). This question is posed in paragraph 49 of the Federal Register Notice. I believe the Commission has the authority and jurisdiction to regulate interstate ICS rates and that this regulation is necessary to ensure "just and reasonable" rates under section 201(b) of the Act. *Id.*

The Act's text, structure, and purpose grant the Commission jurisdiction under section 201(b) to promulgate *substantive* rules. Section 201(b) provides that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter." In *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), the D.C. Circuit found that almost-identical language in the Trade Commission Act, along with the description of the FTC's duties, provided the FTC with authority to make substantive—and not simply interpretive—rules. This and other cases support the Commission's authority to promulgate the present rule.

It is also clear that this substantive rulemaking power would include the authority to regulate interstate interexchange ICS rates in particular. "[P]rovisions of this chapter" refers in part to ensuring that "[a]ll charges [and] practices . . . in connection with [common carrier[s] engaged in interstate communication]" are "just and reasonable." § 201(a)-(b). This language includes regulating the rates ICS providers charge customers as "common carriers." 47 U.S.C. § 153. This interpretation of section 201(a)-(b) is further supported by the Act's general purpose to "make available so far as possible, to all the people of the United States . . . communication service[s] . . . at reasonable charges." 47 U.S.C. § 151. The Commission's findings thus far regarding the importance of telecommunications to prisoners, their families, and communities also demonstrate these rules are "necessary in the public interest." § 201(b).

Lastly, there do not appear to be external factors weighing against the Commission's jurisdiction. The Supreme Court in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), found the FDA did not have jurisdiction to regulate tobacco because this would conflict with the FDCA, other statutes specific to the tobacco industry, and the fact that Congress would not *implicitly* grant such important power to the FDA. These concerns are not present here. As described above, the Communication Act's text and structure clearly support the Commission's jurisdiction. The Commission's enabling statute specifically states that its purpose is to "centralize authority" to regulate interstate communication in the Commission, § 151, and the only federal actor currently setting ICS rates is the Federal Bureau of Prisons. Furthermore, unlike the FDA's newly asserted jurisdiction in *Brown* over the entire tobacco industry, the Commission's new assertion of jurisdiction in this case would only affect a small portion of an industry it is already regulating in other areas. I therefore believe section 201(b) of the Act provides the Commission with authority to regulate ICS rates.