



**THE FCC SHOULD PROTECT THE MOST TRULY
"CAPTIVE AUDIENCE" FOR TELECOM SERVICES: PRISONERS**

Comments of

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In the Matter of the Rates for Interstate Inmate Calling Services

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Berin Szoka | TechFreedom¹

Introduction

While the tech policy community debates Susan Crawford's new book *Captive Audience*, her plea for sweeping regulation to avert a cable monopoly,² a truly “captive audience” suffers: Inmates in state prisons across the country are paying exorbitant rates for telephone calls. While a fifteen minute local call (generally the maximum permitted length) might cost as little as \$.50 in some states or \$.90 in Federal prisons,³ it could cost \$15 or more in others.⁴ This means a prisoner and his family might spend \$240 per month just for him to call home an hour a week⁵—not counting fees charged to prisoners for depositing money into calling cards or the cost to the family of setting up a separate number so the prisoner can make local calls from the prison, which is often far enough away for normal calls to be long-distance.

As the Commission notes, this is a true monopoly: State prison systems eager for revenue collude with the limited number of carriers that serve the Inmate Calling Service (ICS) market to award exclusive contracts to serve a prison not to the carrier that offers the lowest per minute rates or the best services, but to the carrier that offers the largest profit-sharing to the state prison system.⁶ Essentially, this is a way of sharing monopoly rents between the grantor of the monopoly (the state) and the recipient of the exclusive privilege (the carrier). The resulting rates, including an average “commission” of 43%⁷ and up to 65% of gross revenues,⁸ far exceed the cost of providing service to prisoners, even when considering the additional features required for ICS to maintain prison security, such as monitoring calls and identifying which prisoner is making the call.

The best place for the FCC to start remedying this problem would be, as Verizon proposes, to focus on the “commissions” paid by ICS carriers to state prison systems in exchange for

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² See Susan P. Crawford, *Captive Audience: The Telecom Industry and Monopoly Power in the New Gilded Age* (2012). Cf. Berin Szoka & Geoff Manne, “10 Reasons To Be More Optimistic About Broadband Than Susan Crawford Is,” <http://www.forbes.com/sites/beltway/2013/03/02/10-reasons-to-be-more-optimistic-about-broadband-than-susan-crawford-is>

³ General Accounting Office, *Improved Evaluations and Increased Coordination Could Improve Cell Phone Detection* (September 2011) at 13, <http://www.gao.gov/assets/330/322805.pdf> (“GAO Report”).

⁴ Comments of the Phone Justice Commenters at 6.

⁵ *Id.*

⁶ NPRM ¶ 5.

⁷ *Id.*

⁸ NPRM ¶ 37.

exclusive contracts.⁹ No level of government should profit off gouging captive consumers—be they prisoners or otherwise. Banning exclusivity would be an excellent start, but we see no reason not to ban commissions, too. We agree with Verizon that “forcing inmates’ families to fund [beneficial inmate service] programs through their calling rates is not the answer”¹⁰—so what justification can there be for paying a kick-back to the government for the privilege of serving prisoners? Even if exclusivity were banned, such commissions could continue to distort competition to service prisons. Banning both practices would be the best way to ensure that ICS rates are “just and reasonable,” consistent with Section 201(b), because it would remove the incentive for prisons to impose a “prison payphone tax” through carriers.

Even if such reforms were made, it is conceivable that competition might fail to exert effective discipline on ICS rates, given the unique and special nature of the ICS market. The best way to determine whether further intervention is necessary would be for the Commission to swiftly ban exclusivity and commissions, and revisit the question within a specified period of time. If rates have not fallen to levels that more closely resemble costs, we would support the request made by the Phone Justice Commenters that the FCC use its authority under Section 201(b) to limit the rates charged by ICS providers as common carriers:

the Commission should cap ICS rates at the lowest possible per minute rate that is justified by providers’ costs. Furthermore, the Commission should eliminate needless per-call fees and other unjustifiable fees, such as fees to deposit money into an account.¹¹

Price controls may be justified in areas where government plays a unique role in setting prices, but they should always be a last resort, because they are self-fulfilling prophecies: they tend to perpetuate monopolies and discourage innovation. It is telling that this debate focuses on voice telephony at a time when competitive markets have brought consumers a wide variety of other media with which to communicate. Only recently, for example, has the Federal Bureau of Prisons made available an email service for inmates’ use.¹² There are, of course, good reasons why the prison calling market has been slow to evolve: maintaining security is, and should be, the top concern of prison systems. (Although we believe that lower calling rates would actually promote security.) A more competitive ICS market would see innovative services like text and video offered to prisoners—in ways consistent with the unique security needs of prisons.

Our general preference for introducing competition before defaulting to price controls is, unfortunately, not the only reason we are unable to join directly onto the comment filed by the Phone Justice Commenters. The primary reason is that that Comment contains this utterly

⁹ See generally, Comments of Verizon, <http://apps.fcc.gov/ecfs/document/view?id=7022134584>

¹⁰ Verizon Comments at 3.

¹¹ *Id.* at 2.

¹² GAO Report at 7.

irrelevant, and utterly indefensible assertion:

The prison phone market is merely a microcosm of this country's greater telecommunications market. However, anticompetitive practices have been allowed to proliferate and prices have been allowed to skyrocket within the prison phone market at a rate that far outpaces that in the nationwide market.

These commenters offer no support for this claim because none can be found. In the prison phone market, customers (prisoners) are a truly "captive audience", at the mercy of the prison system to pick a calling system provider for them—a decision that, again, is often made with more regard to the prison's bottom line than the cost to prisoners or their families. The result is that the Americans who can least afford it pay the most for the most archaic, "plain vanilla" form of telecommunications: voice calls.

The "country's greater telecommunications market" looks nothing at all like the bizarre niche market for Inmate Calling Services. Again, prisoners in some states might spend \$240 per month just to call home an hour a week. Just a third of Americans still subscribe to a landline telephone service that can be compared to ICS service in terms of its back-end.¹³ Even accounting for the additional security services required for ICS (costs we believe ICS carriers *should* be able to recover), prisoners are being gouged compared to the rest of the country.

AT&T, for example, charges 5¢/minute for nationwide calling on top of a \$25/month plan for 250 minutes (10¢/minute)—or just \$35/month for unlimited nationwide calling.¹⁴ Another third of Americans have simply switched to a VoIP provider,¹⁵ offering even lower rates, such as Comcast's offer of unlimited nationwide calling for \$29.99/month (for the first six months and \$39.95 - \$44.95 thereafter).¹⁶ Or, if you have basic broadband (say, \$35/month),¹⁷ you can get unlimited global calling through Skype for just \$2.99/month.¹⁸ Lastly, the final third of Americans have "cut the cord completely," switching to a mobile provider.¹⁹ Unlimited nationwide talk and texting plans start at \$30/month on Verizon or \$40/month for a smartphone (plus data) or just \$50/month on T-Mobile (including 500mb of data service). More importantly, Americans are increasingly moving away from traditional telephone services to communicating through a combination of texting, email, and using innovative platforms that

¹³ See USTelecom Petition for Ruling that Incumbent Local Exchange Carriers Are Non-Dominant in Switched Voice Services (filed Dec. 19, 2012), *available* at <http://www.ustelecom.org/news/filings/ustelecom-petition-ruling-ilecs-are-non-dominant-switched-voice-services> ("USTelecom Petition").

¹⁴ <http://www.att.com/u-verse/explore/voice-plans.jsp>

¹⁵ See USTelecom Petition.

¹⁶ <http://wwwb.comcast.com/home-phone-service.html>

¹⁷ See, e.g., <http://wwwb.comcast.com/internet-service.html>

¹⁸ <http://www.skype.com/en/rates/>

¹⁹ Centers for Disease Control, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January-June 2012*, Dec. 2012, *available* at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201212.pdf>.

offer a combination of email-like messaging, instant messaging and voice and video chat—generally for free. In short, “this country’s greater telecommunications market” is characterized by robust competition, dynamism and innovation. It looks nothing like the rigid, monopolistic and un-innovative ICS market. It could perhaps be argued that most of these competitive alternatives to traditional Public Switched Telephone Network (PSTN) carriers simply are not viable in the ICS market. But without letting competition work, which means banning exclusivity and commissions, there is simply no way to tell.

But regardless, only the most hardened anti-capitalist ideologue could seriously compare the ICS market with the larger telecommunications market, let alone equate them. Doing so in this proceeding only muddles the issue and serves to alienate those who should agree that the FCC must intervene to protect prisoners as a truly captive audience in the unique market for ICS, where market forces have been deliberately suppressed. While we tend to believe that competition can work in the ICS market, just as it does in other markets, both to lower rates and to promote innovations that could bring prisoners closer to their families (like appropriately monitored video chat), we are willing to concede the possibility that the unique limitations imposed by government on the market may prevent competition from effectively disciplining ICS rates. Again, in that event, we would support the kind of price controls proposed by the Phone Justice Commenters.

But for all their talk of “social justice,” the Phone Justice Commenters are, unfortunately, using this proceeding as yet another bully pulpit for their ideological agenda. “Prison phone justice”²⁰ should not be a partisan or ideologically charged issue. All Americans should be able to agree that, whatever crime a prisoner might have committed, it is both counter-productive and unjust to tax their communications with their family and communities. Those that truly care about making progress on this reform should agree that the issue should be de-politicized and understood as a unique problem that has little, if anything, to do with larger debates about telecom policy or the appropriate scope of common carrier price-control regulation.

²⁰ <http://prisonphonejustice.org/>