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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Rates for Interstate Inmate Calling Services) WC Docket No. 12-375
)
)

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

I. INTRODUCTION AND SUMMARY

The National Association of State Utility Consumer Advocates (“NASUCA”) offers these reply comments in response to certain of the initial comments filed on the Federal Communications Commission (“FCC” or “Commission”) Notice of Proposed Rulemaking.¹ The filed comments confirm and strengthen NASUCA’s view — as expressed in initial comments on the NPRM and in numerous previous comments in the Commission’s dockets on Inmate Calling Service (“ICS”)² — that:

- Current ICS rates are unjust and unreasonable and place an inequitable burden on the telephone consumers (both unincarcerated and incarcerated) who NASUCA’s members represent;

¹ Notice of Proposed Rulemaking, FCC 12-167 (Dec. 28, 2012). There were eighty-some comments, of varying length and substance, filed in response to the NPRM. Failure to address here any specific comment should not be deemed acquiescence in that comment. These reply comments were prepared with the assistance of David C. Bergmann of Telecom Policy Consulting for Consumers, Columbus, Ohio.

² See Comments dated March 10, 2004 (CC Docket No. 96-128), Reply Comments dated April 21, 2004 (CC Docket No. 96-128), Comments dated May 2, 2007 (CC Docket 96-128, DA 03-4027), Reply Comments dated June 20, 2007 (CC Docket 96-128, DA 03-4027), Ex Parte Comments dated January 20, 2009 (CC Docket No. 96-128, DA 03-4027).

- The FCC has jurisdiction to regulate the rates for all ICS services — for interstate and intrastate, for public and private institutions; and
- After more than a decade of inaction, now is the time for the FCC to act to correct the current unjust, unreasonable, and inequitable ICS regime.³

II. THE BENEFITS OF INMATE CALLING ARE UNCHALLENGED.

None of the commenters challenge the benefits to inmates, their families and friends, and society as a whole, that will accrue from reasonable ICS rates that facilitate communications with incarcerated persons.⁴ It is clear that reducing ICS rates will enhance inmate calling.⁵

III. THE FCC'S JURISDICTION OVER ICS IS CLEAR.

Similarly, none of the commenters seriously challenge the Commission's jurisdiction to regulate rates for ICS services. This applies to interstate calling.⁶ But it also applies to intrastate ICS calling.⁷ And it applies regardless of the technology used, whether wireline, wireless, or

³ In 2001, the US District Court directed the FCC to address the issues presented by the Petitioners "with dispatch." Comments of Martha Wright, et. al. ("Petitioners' Comments") at i.

⁴ Petitioners' Comments at 32-39; Comments of The Center on the Administration of Criminal Law ("CACL"); Comments of Human Rights Defense Center ("HRDC") at 1-2 ; Comments of Prison Legal Services of Massachusetts ("PLS") at 1-3; Comments of Michael Rogers ("Rogers") at 5-6. NASUCA acknowledges the specific concerns expressed in comments concerning inmates with communications disabilities (see American Civil Liberties Union Comment) and those with immigration issues. See American Immigration Lawyers Association ("AILA") Comments; New Jersey Advocates for Immigrant Detainees, et al ("NJAID") Comments at 4-5.

⁵ NJAID Comments at 3; PLS Comments at 17-18; Telmate Comments at 1213.

⁶ Petitioners' Comments at i, 7-12; HRDC Comments at 12-13; Rogers Comments at 7-8. CACL's Comments (at 2-3) note the extent to which states send their inmates to out-of-state facilities.

⁷ NASUCA Comments at 7-9; see Global Tel*Link Corporation ("GTL") Comments at 32; Comments of Pay Tel Communications Inc. ("Pay Tel") at 1-2, and n.17.; Comments of Stephen A. Raher ("Raher") at 4. The Louisiana Department of Public Safety & Corrections (La. DOC) notes that only 4% of the calls and minutes from Louisiana facilities are intrastate. Comments at 6 (La. DOC incorrectly asserts that these are the only calls that the FCC regulates). Telmate, LLC ("Telmate") asserts that "interstate traffic is a small percentage of ICS calling...." but also claims that "interstate ICS prices have for years, and increasingly so today, in effect cross-subsidized local ICS rates held below cost by state, county and municipal corrections officials." Telmate Comments at 3; see also id.

voice over Internet protocol (“VoIP”).⁸ And it applies to both publicly- and privately-administered incarceration facilities.⁹ Securus argues that the Commission can intervene only where a market failure is demonstrated.¹⁰ But the statutory grant of authority over ICS requires no such demonstration; even if it did, the fact that inmates and their families face monopoly conditions in making calls from inmates facilities is precisely the sort of market failure that requires regulatory intervention

Petitioners point out that 47 U.S.C. §276 requires payphone rates (which include ICS) to strike a balance between the interests of service providers and those parties who will ultimately pay for the calls.¹¹ This is similar to the Universal Service system’s required balance between the carriers (and customers) who benefit from Universal Service support, and those who must ultimately pay for that support.

GTL asserts that the Commission’s rulings here must be consistent with the “current regulatory framework.”¹² NASUCA submits that FCC regulation of ICS rates would be entirely consistent with the law, especially in light of the Commission’s lack of action on these rates for the last ten years and more. GTL’s citation to the FCC’s holdings on “non-dominant” carriers¹³

at 10; Pay Tel Comments at 5. The economic illogic of these statements taken together support use of a uniform national benchmark for all ICS traffic, especially given Telmate’s failure to present cost data.

⁸ Petitioners’ Comments at 12-16.

⁹ See AILA Comments at 2-3; HRDC Comments at 13.

¹⁰ Comments of Securus Technologies, Inc. (“Securus”) at 14.

¹¹ Petitioners’ Comments at 6; see also *id.* at 7, noting Securus’s concession that §276 covers all inmate calls.

¹² GTL Comments at 14.

¹³ *Id.* at 15.

is unavailing, because ICS providers are in fact monopolies at each facility.¹⁴ (Thus Securus's description of the ICS market as "fiercely competitive"¹⁵ really misses the point.)

Commenters that argue that the FCC's regulation of ICS rates would interfere with state and local operation of inmate facilities¹⁶ are simply mistaken. The FCC's lawful assertion of its jurisdiction no more "interferes" with inmate facility operations than does state or federal regulation of the other utility rates (telephone or energy) paid by such institutions.¹⁷

IV. ICS PROVIDERS' FEW ASSERTIONS OF COST ARE UNPERSUASIVE.

Petitioners point out that the NPRM required ICS providers to submit relevant cost data.¹⁸ Such data is notably absent from the ICS' providers' comments¹⁹; there is even limited information provided about the providers' ICS rates. Telmate, for example, provides "cost" information that is actually the cost to the ICS caller (or friend or relative) rather than the cost to Telmate of providing the service.²⁰ And Pay Tel, while continually asserting that intrastate ICS

¹⁴ See Rogers Comments at 3-6. NASUCA does not dispute that such monopoly is not administratively appropriate for such facilities. See La. DOC Comments at 2-3; GTL Comments at 23; Telmate Comments at 5-6. Nonetheless, that monopoly characteristic requires rate regulation to ensure just and reasonable rates. As NJAID points out (at 4), a local official stated that "[a]ll detainees and inmates, as well as those outside the facility, are made aware of all costs associated with services provided at the facility and have free choice whether to avail themselves of these services." NJAID notes that "County officials clarified that this 'free choice' means that individuals are free not to call their loved ones." *Id.* at 4.

¹⁵ Securus Comments at i; but see Comments of T.W. Vending d/b/a Turnkey Corrections ("Turnkey") at 1-5.

¹⁶ NJAID Comments at 3, 33-35.

¹⁷ See Petitioners' Comments at 31-32; see Securus Comments at 8-10.

¹⁸ Petitioners' Comments at 2, citing NPRM, 27 FCC Rec 16,637.

¹⁹ E.g., GTL Comments at 26-29, which criticize others' cost estimates, but provide no "more accurate" estimates.

²⁰ Telmate Comments at 9.

rates do not “fairly compensate” ICS providers,²¹ gives no estimates of its actual costs.²²

The main exception appears to be Securus, which includes an “Expert Report” of Stephen E. Spiwek. Given the selective methodology used (see Report, p. 2), it is not clear that these cost figures are reliable.²³ It is clear that, as discussed frequently in this proceeding, site commissions are a major component of “costs.”²⁴

Information on rates can be found, however, in prisoner advocate comments.²⁵ The failure of the providers to come forth with cost information should be an additional impetus to reforming the current rates, being strong evidence that the current rates are unjust and unreasonable.²⁶

As Petitioners note, “the technology involved in providing ICS calls has led to enormous cost-savings for the ICS providers....”²⁷ Equally importantly,

while the Petitioners awaited FCC action, the state of the ICS industry has changed considerably. Only four ICS providers now account for nearly all telephone services provided to inmates, and two ICS providers, and Global Tel*Link Corporation (GTL) and Securus Technologies, control more [than] 70% of the market. The consolidation of the ICS providers has led to large, centralized ICS systems, whereby all calls leaving correctional and detention centers are routed first to the ICS providers’ call centers, where the applicable security safeguards are applied.²⁸

²¹ E.g., Pay Tel Comments at 5.

²² Apparently Pay Tel finds its emphasis on smaller local facilities — where more calls are local — to be adequately profitable. This contrasts with Pay Tel (at 5), which says that intrastate calls are provided below cost.

²³ See Raheer Comments at 5 for comment on industry cost-reporting.

²⁴ See Report at 5-7; see Section VIII., below.

²⁵ HRDC Comments at 11-12 and Exhibit B; NJAID Comments at 2-4.

²⁶ See, e.g., Network Communications International Corp. (“NCIC”) Comments at 2, 4-7, asserting increased costs.

²⁷ Petitioners’ Comments at i; see also *id.* at 5, 17-18; see also Telmate Comments at 2.

²⁸ Petitioners’ Comments at 2; see also *id.* at 18-19. See also GTL Comments at 19.

These trends are confirmed by the ICS providers themselves.²⁹

V. THE WIDE DISPARITY OF ICS RATES DEMONSTRATES THEIR UNREASONABLENESS.

The record is replete with evidence of the wide disparity of ICS rates around the country, within states, within regions, and within prison systems.³⁰ Although some variation among rates is understandable, given variations in costs and methods of rate regulation, two points are key here: First, as shown above, there does not seem to be any significant correlation between costs — especially in terms of the security features required³¹ — and the ICS rates being charged. And second, there *is* no regulation of these rates. That is one of the reasons why the FCC should step in and regulate the rates for ICS calls, which most often are paid by unincarcerated, but nonetheless disadvantaged, telephone customers.

It is also one of the reasons why the FCC cannot reasonably rely on the states in this case — states do not apply regulation even where institutions or their contractors directly sell retail telephone services to the public.³² Even where the states do act, the actions may be an improvement, but do not establish a reasonable rate.³³

Without singling out one state, it is notable that La. DOC states:

²⁹ GTL Comments at 3-5

³⁰ See Petitioners' Comments at 19-21; PLS Comments at 15-16 and attached Affidavit of Donald Dawson.

³¹ See GTL Comments at 2-3 and 6-10, which imply an essentially infinitely customizable system unique to each facility. Modern software capabilities of centralized switching facilities belie this notion: It may be a choice of "one from Column A and one from Column B," but the menu is national in scope.

³² NASUCA agrees with HRDC (at 10-11) that a system of "intrastate-interstate parity," where interstate rates are capped at intrastate levels, makes no sense. The FCC should establish a cap for all ICS calling — at the levels recommended here. If states are able to charge lower rates for intrastate or local calling, they should be encouraged to do so.

³³ See Comments of the Indiana Utility Regulatory Commission at 3 (state action produced a 24¢ per-minute rate, with no per-call charges, but collections were used to fund "state correctional institutions' recreational programs and technology programs). See also NCIC Comments at 2, noting a \$0.50 cents per minute charge, and asserting that its A+ BBB rating means that "the general population feels that the rates NCIC charges today are fair and justifiable." (On the other hand, NCIC acknowledges that its litigation cost is \$0.10 per call. *Id.* at 6.)

Offenders in the custody of La. DOC are currently charged an average of \$2.92 per minute for collect calls and \$1.83 for prepaid calls. There is no fixed rate call charge. The average telephone call length at La. DOC facilities is 13.09 minutes for collect calls and 13.82 minutes for prepaid calls.³⁴

This means that the average collect phone call costs the inmate's family or friend more than \$40.00. On the other hand, if a cost-based rate such as proposed by Petitioners or HRDC were mandated, the cost of the same call would be **between 65¢ and 92¢**. No clearer example of monopoly abuse should be needed to justify FCC regulation. La. DOC asserts that "[t]his proposed rate reduction [based on a 20¢ per-minute rate] is draconian, will eliminate all commissions, will force the discontinuance of some, if not all, offender programming and will probably drive telephone providers out of the market."³⁵ The record shows this to be untrue (apart from eliminating commissions); any telecom provider that is dependent on \$2.92 per-minute rates to be in a market should not be in that market.

VI. OTHER FORMS OF CALLING SHOULD BE MADE AVAILABLE, BUT THE FUNDAMENTAL GOAL SHOULD BE TO LOWER ICS RATES.

Obviously, increased calling choices for incarcerated persons — such as debit calling and prepaid calling — will enhance communication with families and friends “on the outside.”³⁶ Yet especially given the FCC's inaction in this area, the fundamental object should be to reduce costs for the method most used by most inmates, i.e., collect calling.³⁷ Rates for debit calling and prepaid calling should also be concomitantly reduced. States that do not yet have these options available should be encouraged to adopt them, however.

³⁴ La. DOC Comments at 6.

³⁵ Id.

³⁶ HRDC Comments at 7-9; see also Telmate Comments at 11-12.

³⁷ See GTL Comments at 20-23.

VII. WHAT RATES SHOULD BE USED AS A BENCHMARK? AND SHOULD “ANCILLARY FEES” BE PROHIBITED OR REGULATED?

Petitioners assert that

[t]he Alternative Wright Petition sought the establishment of benchmark ICS rates of \$0.20 per minute for debit calls, and \$0.25 per minute for collect calls, with no per-call charge. The Alternative Wright Petition demonstrated that these benchmark ICS rates were just and reasonable, and still would have delivered a fair return to the ICS providers.³⁸

That was then, this is now.

Given the changes in the industry noted above, Petitioners now state that

it is now incumbent upon the FCC to establish a benchmark ICS rate cap at \$0.07 per minute, for debit, pre-paid, and collect calls, with no per-call rate, and no other ancillary fees or taxes, from all private, public, state, county and local correctional and detention facilities. Any justification for rates above the proposed \$0.07 per minute benchmark ICS rate has evaporated during this long-pending proceeding. Moreover, this proposed rate will continue to provide the ICS providers a **fair** profit for their services, regardless of the size of the institution or the volume of originating calls from any given facility.³⁹

HRDC proposes a \$0.05 per-minute rate for ICS calling, also without “per-call” charges.⁴⁰

HRDC provides data on states that have already eliminated “per-call” charges,⁴¹ showing that flat rate structures are feasible. Further, typical costs for a reasonable amount of “no-cost” calling should be built into the per-call charges under an FCC cap.⁴²

The comments are also replete with accounts of the levels of and variability of “ancillary fees,” such as account-opening charges, balance-adding charges, wireless-number charges, call

³⁸ Petitioners’ Comments at 2.

³⁹ Petitioners’ Comments at 3 (emphasis added). These benchmark rates are supported by Petitioners’ Exhibit C, the Declaration of Coleman Bazelon.

⁴⁰ HRDC Comments at 6; see also PLS Comments at 12-15.

⁴¹ HRDC Comments at 5.

⁴² See GTL Comments at 24; HRDC Comments at 10; Pay Tel Comments at 10-11. Securus argues (at 20-21) against the imposition of a “free call” requirement, apparently not understanding that many of its colleagues in the industry are required by the facilities they serve to provide such calls.

re-setup charges, and so forth.⁴³ NCIC, for example, touts the following “extremely low” fees: \$4.95 for prepaid account set-up and recharge fees of \$1.50-\$2.50.⁴⁴ These are clearly functions that accompany virtually all calls, and should not be separately billed (particularly at the levels reported⁴⁵). NASUCA agrees that the FCC should require that the costs of these functions be built in to the per-call charge, or should require detailed cost support from ICS providers that insist on imposing such charges.⁴⁶

Indeed, Telmate asserts that there is a growing conflict among interstate and intrastate rates, given the “explosive growth in non-geographic numbers....”⁴⁷ This actually provides support for a uniform national ICS rate benchmark that is not dependent on geography or jurisdiction, given the FCC’s authority over all ICS rates.⁴⁸

Rogers proposes that the Commission not adopt a benchmark rate, instead adopting a competitive bidding process.⁴⁹ NASUCA disagrees. Adopting — and monitoring — a competitive bidding process will be far more complicated — and onerous — than adopting a reasonable benchmark rate to cover all ICS calling. This will be especially true if the Commission also adopts a follow-on process for ICS providers with legitimate cost-based reasons why the benchmark is too low.⁵⁰

⁴³ Petitioners’ Comments at 24-25; see also HRDC Comments at 11-12; PLS Comments at 18; PAY Tel Comments at 14-16.

⁴⁴ NCIC Comments at 9.

⁴⁵ Id.

⁴⁶ NASUCA agrees with HRDC (at 13) that periodic audits of ICS rates by the FCC would be appropriate.

⁴⁷ Telmate Comments at 8.

⁴⁸ Which is, of course, not an argument for FCC assertion of jurisdiction where the statutory basis is unclear.

⁴⁹ Rogers Comments at 11-14.

⁵⁰ As the FCC has done for Universal Service Fund contributions for wireless and VoIP providers. *Universal Service Contribution Methodology*, 21 FCC Rcd 7518 (2006). See also Rader Comments at 6-7; Securus Comments at 18-19.

VIII. THE FCC WAS CORRECT TO REJECT COMMISSIONS AS A LEGITIMATE COST OF SERVICE.

To begin on this point, there should be no dispute that some amounts of the commissions paid to some facilities are used for services that benefit the inmates of those facilities.⁵¹ None of the comments, however, assert that **all** of the commissions are used for such purposes, or, more importantly, that the commissions — typically passed on to the families and friends of the inmates based on the calls made by the inmates— are the appropriate means by which to fund these other services.⁵²

Further, the disparity among commissions — ranging from zero for those states that have banned commissions, to 70.6%⁵³ — is another basis for rejecting them as a cost basis for ICS rates. Just as the overall disparity among ICS rates itself is not a legitimate representation of costs (as discussed in Section IV., above), so the unsupported variability of commissions is an indicator that they do not provide a reasonable basis for rates.⁵⁴

As shown in the comments, a number of states have eliminated commissions as a basis for ICS rates,⁵⁵ apparently without harm to inmates, the prison system and its various programs, or the state as a whole. And ICS rates in those states have significantly declined.⁵⁶

Thus NASUCA supports those comments that affirm the FCC's rejection of commissions

⁵¹ La. DOC Comments at 3, 5. This includes use of the commissions — as in California (see Comments of State of California Department of Corrections and Rehabilitation) to support programs to limit unauthorized use of cellphones within inmate facilities. See CACL Comments at 12-13 (lowering ICS rates will reduce inmates' incentives to acquire cellphones).

⁵² PLS Comments at 4-12; Rogers Comments at 8; Raheer Comments at 7-9; see Verizon Comments at 2-3.

⁵³ Petitioners' Comments at 21.

⁵⁴ See Telmate Comments at 4.

⁵⁵ HRDC Comments at 2-4.

⁵⁶ *Id.*

as a reasonable cost for ICS rates,⁵⁷ and rejects the comments that claim commissions to be a legitimate cost.⁵⁸ Although ICS providers and inmate facilities may be able to enter into contracts that provide for commissions,⁵⁹ this need not and should not be considered by the FCC in setting rate caps for ICS services.⁶⁰

IX. A FRESH LOOK FOR ICS CONTRACTS IS APPROPRIATE.

Clearly, most of the current contracts in effect between inmate facilities and ICS providers do not comply with the recommended benchmark. The FCC has the authority to impose such a benchmark.⁶¹ But to allow the various high-rate contracts to continue once the benchmark has been adopted would only exacerbate the harm that is currently being done to inmates and their friends and relatives.⁶² Thus, as Petitioners recommend, a fresh look period must be adopted that requires revision of contracts.⁶³

X. THE MARGINAL LOCATION METHODOLOGY SHOULD BE REJECTED FOR ICS CALLING.

It does not appear that any of the current commenters believe that the marginal location methodology is appropriate for use in determining rates for ICS calling.⁶⁴ NASUCA agrees that

⁵⁷ Petitioners' Comments at 21-23; CACL Comments at 6; NJAID Comments at 4.

⁵⁸ GTL Comments at 10-14, 35; Telmate Comments at 16.

⁵⁹ Including where such commissions are required under state law. See Telmate Comments at 3.

⁶⁰ See Telmate Comments at 7.

⁶¹ Petitioners' Comments at 29; Telmate Comments at 16-17.

⁶² See Securus Comments at 3.

⁶³ Id.; see also HRDC Comments at 14; TurnKey Comments at 5. GTL's arguments otherwise (GTL Comments at 29-30) are completely self-interested.

⁶⁴ Petitioners' Comments at 27-28; GTL Comments at 17; PLS Comments at 16-17.

this methodology, which may have been appropriate to use with stand-alone payphones, is not appropriate for addressing rates charged to literally captive customers in a monopoly provider environment.

XI. CONCLUSION

ICS rates need to be regulated, and need to be lowered.⁶⁵ As HRDC states,

it is reasonable to look to the states that have the lowest ICS rates as examples of best practices in the prison phone industry. Those states, including New York and New Mexico, provide a roadmap on how to create a system in which prisoners and their families are able to access affordable calling services – and a number of states have demonstrated that this is entirely possible, primarily through the elimination of commissions with a resultant lowering of ICS phone rates.⁶⁶

NASUCA urges the adoption of the policies set forth in these reply comments, and in NASUCA's initial comments, in order to establish a just, reasonable and equitable structure for ICS calling.

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⁶⁵ Thus NASUCA opposes CenturyLink's proposal for establishment of a Federal Advisory Committee ("FAC") on ICS. That will only further delay FCC action on an issue on which action has already been delayed far too long.

⁶⁶ HRDC Comments at 12; see also Verizon Comments at 4.