

**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 CENTER FOR MEDIA JUSTICE, FREE PRESS,  
NATIONAL ORGANIZATION FOR WOMEN FOUNDATION, NATIONAL HISPANIC  
MEDIA COALITION, NEW AMERICA FOUNDATION'S OPEN TECHNOLOGY  
INSTITUTE, AND PUBLIC KNOWLEDGE**

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## INTRODUCTION AND SUMMARY

The Center for Media Justice, Free Press, National Organization for Women Foundation, National Hispanic Media Coalition, New America Foundation's Open Technology Institute, and Public Knowledge respectfully submit this reply in response to initial comments in the Federal Communications Commission's proceeding on rates for interstate interexchange inmate calling services (ICS). During the initial comment period, a host of interested parties, including incumbent and competitive local exchange carriers, civil rights groups, a former FCC Commissioner, and inmates themselves, weighed in to support the Wright Petitioners in their decade-long fight to end predatory prison phone practices.<sup>1</sup> These stakeholders often disagree on other media and telecommunications policy issues. However, this proceeding presents one issue on which we are in complete agreement: Interstate ICS rates are exorbitantly high, and the Commission must move to ensure just and reasonable rates going forward. In this Reply, we will respond to flawed arguments regarding the net benefit of eliminating commission payments and regarding the Commission's authority. We also will discuss the merits of eliminating commission payments to state prisons as a method for lowering rates. Finally, we again urge the Commission to cap interstate ICS rates at the lowest possible per-minute rate, to eliminate needless surcharges and per-call fees, and to do so without delay.

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<sup>1</sup> *See, e.g.*, Comments of Comments of Metro PCS at 2; Comments of Stonney Rivers at 1; Comments of Texas Civil Rights Project at 1; Comments of Tyrone Brown at 1; Comments of

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## **I. Ensuring Just and Reasonable Interstate ICS Rates Benefits the Public Interest and Protects Those Who Need It Most**

The initial comments showed broad consensus on the need for lower prison phone rates and the public interest benefits that would flow therefrom. With hundreds of comments filed, only a small handful opposed granting relief for inmates and their loved ones. The vast majority expressed clear support for the Wright Petitioners. Many of those commenters recognize that high prison phone rates disproportionately impact racial minorities, women, and children. Unlawful prison phone rates are more than a matter of telecommunications policy. They are a civil rights issue too. The Commission should move swiftly in this proceeding to promote the public interest and lift this burden from vulnerable communities.

This nation's mass incarceration epidemic has struck low-income African-American and Latino communities at alarmingly disproportionate rates. Even as violent crime has decreased over the last three decades, incarceration rates have continued to climb.<sup>2</sup> The prison phone industry is part of what some describe as a "prison-industrial complex" that profits from this trend, and high ICS rates add another layer of exploitation to the equation by taking advantage of populations with the scarcest resources and the least political power.<sup>3</sup> As the Phone Justice Commenters highlighted in initial comments, exorbitant prison phone rates amount to a regressive tax on the low-income communities that experience higher incarceration rates. Taxpayers already pay for prisons, but poor persons pay again when they shoulder the

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<sup>2</sup> See Comments of Tyrone Brown at 2.

<sup>3</sup> See, e.g., John W. Whitehead, "Jailing Americans for Profit: The Rise of the Prison Industrial Complex," Huff Post Crime (April, 10, 2012), [http://www.huffingtonpost.com/john-w-whitehead/prisonprivatization\\_b\\_1414467.html](http://www.huffingtonpost.com/john-w-whitehead/prisonprivatization_b_1414467.html) (last visited April 22, 2013); see also Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Color-Blindness*, The New Press (2010).

unreasonable costs of communicating with their loved ones who occupy the prisons their tax dollars built.<sup>4</sup>

Women also bear a disproportionately heavy burden of high ICS rates, even when they are not incarcerated themselves. Men are ten times more likely to go to prison than women.<sup>5</sup> But most incarcerated men leave behind daughters, mothers and partners, who are then left to provide singlehandedly for their families. Research shows that just over half of fathers in prison reported being the primary financial support for their children before being incarcerated.<sup>6</sup> What's more, the proportion of women earning income actually dropped after their partners had gone to prison because of childcare and other issues. As a result, many women find themselves on public assistance during the months and years after their spouses go to jail.<sup>7</sup> Given the limited incomes of these women, high prison phone rates force them to make difficult decisions about whether to call their loved one or feed their children.

Many women make the hard choice to forgo regular contact with their families and friends, to the detriment of themselves, their children and their incarcerated loved ones. Regular contact is critical to managing the mental health of inmates and their families, facilitating re-entry and promoting healthy parent-child relationships.<sup>8</sup> Lack of regular contact with incarcerated parents has been linked to truancy, homelessness, depression, aggression, and poor

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<sup>4</sup> See Comments of Phone Justice Commenters at 7.

<sup>5</sup> See James C. Thomas (PhD, MPH) & Elizabeth Torrone (MSPH) "Incarceration as Forced Migration: Effects on Selected Community Health Outcomes," 96 Am. J. Pub. Health 1762, 1762 (2006).

<sup>6</sup> See Mindy Herman-Stahl, Marni L. Kan, and Tasseli McKay, "Incarceration and the Family: A Review of Research and Promising Approaches for Serving Fathers and Families," U.S. Department of Health and Human Services (Sept. 2008)

<sup>7</sup> See Comments of MMTC at 12.

<sup>8</sup> See Comments of the Vera Institute for Justice at 2.

classroom performance in children.<sup>9</sup> These effects are significant because half of incarcerated men and three-quarters of incarcerated women are parents to children under the age of 18.<sup>10</sup> Moreover, mothers are incarcerated an average of 160 miles from their last home, so in-person visits are difficult for family members on the outside to manage.<sup>11</sup> The initial comments demonstrate conclusively that phone calls are the most meaningful way for families to stay connected. Promoting regular phone contact and facilitating re-entry for incarcerated parents directly impacts these children's futures.

## **II. The FCC Has Statutory Authority to Require Just and Reasonable Interstate ICS Rates**

### **A. Section 201(b) and Section 205 Grant the Commission Broad Authority to Cap Interstate ICS Rates.**

Section 201(b) of the Communications Act grants the Commission broad authority to regulate interstate ICS rates. This fact was uncontested in the initial comments. Pursuant to Section 201(b), the FCC may promulgate rules to ensure just and reasonable rates and practices concerning interstate communications.<sup>12</sup> As articulated by the Wright Petitioners, the Commission has the authority in the instant proceeding to prohibit unjust or unreasonable rates, needless call set-up fees, and other ancillary fees such as those charged for depositing money into or closing a pre-paid ICS account.<sup>13</sup> This authority also extends to prohibiting excessive

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<sup>9</sup> See The Sentencing Project, *Women in the Criminal Justice System: Briefing Sheets* (May 2007).

<sup>10</sup> *Id.*

<sup>11</sup> Jeremy Travis, *et al.*, *Families Left Behind, the Hidden Costs of Incarceration and Reentry* (Urban Institute, 2005), [http://www.urban.org/UploadedPDF/310882\\_families\\_left\\_behind.pdf](http://www.urban.org/UploadedPDF/310882_families_left_behind.pdf).

<sup>12</sup> 47 U.S.C. § 201(b).

<sup>13</sup> See Comments of Martha Wright *et al.* at 21.

commission payments. Moreover, under Section 205(a) of the Act, the Commission has specific authority to cap interstate ICS rates at the lowest possible per minute rate.

The scope of the Commission's authority exceeds what the major ICS providers portray it to be. Of the three dominant prison payphone providers, Global Tel Link, Securus, and Century Link, only Global Tel Link includes a discussion, albeit brief, of Section 201(b) in its initial comments.<sup>14</sup> It concedes that the Commission's authority under Section 201(b) is broad, but goes on to mistakenly characterize that authority as limited by Section 276 (discussed in Section II (B) below) when applied to interstate ICS.

Similarly, Securus notes that the Commission's mandate is "limited to 'the purpose of regulating interstate and foreign commerce in communication by wire and radio[.]'"<sup>15</sup> Yet it goes on to suggest that the Commission's authority may be limited by states' discretion in administering correctional policy. However, Securus prefaced this argument by conceding that the Commission "does not appear to be attempting to regulate the operations of any correctional facility." Therefore, that there may be case law indicating that the Commission would exceed its authority *if* it were attempting to regulate state prison operations is wholly irrelevant.

Furthermore, the Commission made clear in the matter of *Promotion of Competitive Networks in Local Telecommunications Markets*<sup>16</sup> that it has the "undoubted power to regulate the contractual or other arrangements between common carriers and other entities, even those entities that are

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<sup>14</sup> See Comments of Global Tel Link at 31-32.

<sup>15</sup> See Comments of Securus Technologies, Inc. at 8 (quoting 47 U.S.C. § 151).

<sup>16</sup> *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983, 23000 n.85 (2000); see also *TRAC Communications Inc. v. Detroit Cellular Telephone Co.*, 4 FCC Rcd 3769 (1989), *aff'd* 5 FCC Rcd 4647 (1990) (invalidating an exclusivity provision in a cellular resale agreement); *Western Union Telegraph Co. v. FCC*, 815 F. 2d 1495, 1501 (D.C. Cir. 1987) (finding that the Commission has the power to modify private contracts when it is necessary to serve the public interest).

generally not subject to Commission regulation.”<sup>17</sup> As the Court of Appeals for the D.C. Circuit confirmed in *Cable & Wireless P.L.C. v. FCC*, the Commission is within the scope of its authority even when its rules have “extraterritorial consequences.”<sup>18</sup> It follows that the FCC has the jurisdiction to prohibit any and *all* unjust practices related to interstate or foreign communications, including interstate ICS.

Furthermore, the Commission may go beyond merely prohibiting unjust rates, and may set a benchmark ICS rate pursuant to Section 205(a) of the Act.<sup>19</sup> The Commission has carefully considered the parameters of its ratemaking authority and has recognized its broad authority to evaluate the reasonableness of rates and establish benchmarks.<sup>20</sup> Securus also recognizes that the Commission may step in to set just and reasonable rates when a market failure occurs, but denies that a market failure exists here.<sup>21</sup> The prison payphone provider, along with Global Tel Link, misguidedly relies on the Commission’s *1996 Detariffing Order*<sup>22</sup> to defend this premise. That *Order* states:

We find it is highly unlikely that interexchange carriers that lack market power could successfully charge rates ... for interstate, domestic, interexchange services that violate Section 201 or 202 of the Communications Acts, because any attempt to do so would cause their customers to switch to different carriers.

The Commission’s reasoning there obviously does not apply in the instant proceeding because interstate ICS customers *cannot* switch to a different carrier. The Wright Petitioners

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<sup>17</sup> See Comments of Phone Justice Commenters at 4; Comments of Michael Hamden at 6.

<sup>18</sup> See Comments of Michael S. Hamden at 6 (quoting *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

<sup>19</sup> See Comments of Martha Wright et al. at 10-12.

<sup>20</sup> *Id.* (citing *AT&T Corp v. Business Telecom, Inc.*, 16 FCC Rcd 12312, 12324 (2001) recon. denied, 16 FCC Rcd 21750 (2001)); see also *Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9940-41; *Beehive Tel. Co., Inc.* 13 FCC Rcd 12275, 12285-87 (1998).

<sup>21</sup> See Comments of Securus Technologies at 14.

<sup>22</sup> *Policy and Rules Concerning the Interstate Interexchange Marketplace*, Second Report and Order, 11 FCC Rcd. At 20743 ¶ 21 (*1996 Detariffing Order*”).



were correct to note that “the party paying the rate is not the party choosing the carrier” and therefore the market cannot control ICS rates.<sup>23</sup> Moreover, the interstate ICS market hardly encompasses carriers that “lack market power” or are “non-dominant” to borrow Global Tel Link’s initial comment language. Together, Global Tel Link, Securus, and Century Link have exclusive control over ICS in state prisons in states where 90% of incarcerated persons live.<sup>24</sup> Global Tel Link alone serves 1.11 million inmates (about half of the U.S. prison population) and contracts with facilities in 30 states, including 12 of the 20 largest systems.<sup>25</sup> At least one smaller prison payphone provider attested to the unfair advantage enjoyed by the major providers. According to Turnkey Corrections, larger ICS providers have been able to “control and monopolize” the market and drive up prices through exclusive contracts and artful provisions therein.<sup>26</sup> Also, in its discussion of commission payments, Global Tel Link admitted that smaller companies due to their size cannot afford to offer high commissions.<sup>27</sup> This means that Global Tel Link and other major providers have a marked advantage in securing contracts and the bidding market is not as “fiercely competitive” as they describe. Given these obvious market failures, the Commission should exercise its authority and cap interstate ICS rates.

#### **B. The Commission’s Authority is Consistent with Section 276 of the Communications Act**

Section 276 directs the Commission to ensure that payphone providers are fairly compensated for “each and every completed intrastate and interstate call.”<sup>28</sup> In their initial comments, the major ICS providers erroneously construe this provision as a one-way ratchet

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<sup>23</sup> See Comments of Martha Wright *et al.* at 12 (citing *Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9935).

<sup>24</sup> See Comments of Phone Justice Commenters at 9.

<sup>25</sup> See Comments of Global Tel Link at 4.

<sup>26</sup> See Comments of TurnKey Corrections at 2-3.

<sup>27</sup> See Comments of Global Tel Link at 13.

<sup>28</sup> 47 U.S.C. § 276(b)(1)(A).

allowing them to charge whatever rate they see fit. In reality, Section 276 strikes a balance between the interests of providers and consumers.<sup>29</sup> With respect to this balance, the Commission concluded that a payphone that “earns just enough revenue to warrant its placement, but not enough to pay anything to the premises owner” is “a viable payphone...because the payphone provides increased value to the premises.”<sup>30</sup> Global Tel Link disputes the applicability of the Commission’s finding to today’s ICS market because inmate telephony has become more sophisticated and payphones are nearly obsolete. However, payphones are obsolete in civil society only because they have been displaced by cellphones, which are not allowed in prisons. Therefore, the inherent value the Commission located in payphones still applies to those within correctional facilities. The Commission should keep this value in mind when determining what is “fair” for providers and their consumers.

### **III. Commission Payments Are Profits And Their Elimination Would Serve to Drive Down Prison Payphone Rates**

Several commenters identified eliminating commission payments as a vehicle for lowering interstate ICS rates.<sup>31</sup> The Commission proposed in the NPRM that commission payments were the single largest component affecting interstate ICS rates.<sup>32</sup> The Human Rights Defense Center (HRDC) has refreshed the record with data on commission payments for fiscal year 2012. HRDC found that state commission payments totaled \$100.7 million last year<sup>33</sup> and Federal Bureau of Prison commissions totaled \$3.2 million. As a percentage of revenue,

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<sup>29</sup> See Comments of Martha Wright *et al.* at 6; Comments of Michael Hamden at 4.

<sup>30</sup> See Comments of Global Tel Link at 12.

<sup>31</sup> See Comments of Tech Freedom at 2-3 ; Comments of Human Rights Defense Center at 2.

<sup>32</sup> *Rates for Inmate Calling Services*, Notice of Proposed Rulemaking, 27 FCC Rcd 16629 ¶ 37 (2013).

<sup>33</sup> This total is based on the 44 states for which HRDC could find commission data.

commission payments accounted for as much as 76.6% of gross revenue and topped 40% of gross revenue in at least twenty-six states.<sup>34</sup>

Commission payments remain the greatest factor in determining prison phone rates. Even Global Tel Link agrees with this assertion and observes that when lawmakers disallow commissions, rates go down. Century Link made a similar observation and cited lower rates in South Carolina and Michigan as evidence of the effectiveness of disallowing commission payments, stating “[t]he reason for these outcomes is straightforward. In order to cover the significant ongoing fixed costs incurred in these contracts, higher calling rates were necessary when the payment of site commissions was required by the facilities.”<sup>35</sup> What is not straightforward, though, is how Century Link and its major provider peers characterize site commissions as a cost instead of the pure profit they are.

The Commission has repeatedly stressed that site commissions, or location rents, are profits. The amount of commission payments and how they are to be paid are agreed upon through contract negotiations that are entirely voluntary.<sup>36</sup> The Commission has consistently said that commission payments “represent an apportionment of profits between the facility owners and the providers of the inmate payphone service.”<sup>37</sup> That payphone providers agree to hand over a portion of their profits up front does not magically transform those profits into costs. Put plainly, commission payments do not impact providers’ ability to install and operate payphone service. Moreover, if ICS providers really believe commissions are costs that higher rates only seek to recover, one must ask why they would not advocate for eliminating those costs

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<sup>34</sup> See Comments of HRDC at 4.

<sup>35</sup> See Comments of Century Link at 15.

<sup>36</sup> See Comments of Martha Wright *et al.* at 22.

<sup>37</sup> See *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand, 17 FCC Rcd 3248, 3262 (2002).

altogether. Common sense suggests that it is likely not in ICS providers' business interests to eliminate commissions because they actually generate profit for both the carrier and the state.

Commenters from state departments of corrections largely oppose the elimination of commission payments.<sup>38</sup> The root of states' opposition is obvious: the elimination of commission payments means losing millions of dollars from their budgets. The FCC may accept states' cited justification for requiring high commission payments: Those dollars fund inmate rehabilitation and education programs. Still, that does not permit ICS providers to charge unreasonable rates to pay those commissions. Carriers cannot lawfully charge unjust rates even if the profits from those rates are put towards productive use.<sup>39</sup> The Commission took up this very issue with respect to shared access revenues in the *USF-ICC Transformation Order*.<sup>40</sup> There, when parties argued that rates were justified because they offered economic development benefits, the Commission said "how access revenues are used is not relevant in determining whether switched access rates are just and reasonable in accordance with section 201(b)."<sup>41</sup> Similarly, beneficial rehabilitation programming cannot justify charging inmates and their families unlawful phone rates to stay in touch. If the Commission were to reach such a conclusion, it would be in the position of weighing the most effective means of rehabilitation, rather than simply determining reasonableness in the context of rates.

The Louisiana Department of Safety and Corrections posited an additional justification for using prison phone rates to collect \$3,817,051 in commission payments last year. With respect to special inmate programming, it stated:

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<sup>38</sup> See Comments of Louisiana Department of public Safety and Corrections at 3; Comments of Mississippi Department of Corrections at 1.

<sup>39</sup> See Comments of Prison Phone Justice Commenters at 10; Comments of Verizon at 3.

<sup>40</sup> See *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 666 (2011).

<sup>41</sup> *Id.*

As the offenders and their families benefit by the provision of these services and as it was the actions of the offenders that caused their incarceration, it is only fair that the cost of providing telephone services to offenders be borne by the offenders and their families and not the tax payers at large.<sup>42</sup>

This rhetoric is deeply problematic. Even if we ignore the systematic injustices inherent in the prison industrial complex, it is troubling to suggest that inmates and their families deserve to pay whatever unjust rate upon which ICS providers and the states agree. First, inmates' loved ones overwhelmingly absorb the cost of phone calls from prisons, and they have committed no crimes. Practically speaking, inmates could not afford to pay for one hour of phone time a month if they wanted. States pay prisoners an average wage of \$4.73 per day.<sup>43</sup> Second, as stated in Section I above, inmates' friends and family members are taxpayers in the first place and unjust prison phone rates merely tax them *again*. Third, that one has committed a crime does not warrant the imposition of discriminatory and unjust rate practices on top of the sentence already determined. The 475 inmates who submitted comments in the docket would likely agree. Contrary to the view of the Louisiana Department of Public Safety and Corrections, an inmate is protected by Section 201(b) just as is any other American.

#### **IV. Conclusion**

The initial comments in this proceeding demonstrate broad support for formal FCC action and consensus around effective means to lower the cost of prison phone rates. The public interest suffers when inmates and their families cannot maintain regular contact. Under the Communications Act, Congress granted the Commission broad authority to prohibit all unjust and unreasonable practices pertaining to communications by wire or radio as well as to set benchmark rates. Accordingly, at a bare minimum, we urge the Commission to cap interstate ICS

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<sup>42</sup> See Comments of Louisiana Department of Public Safety and Corrections at 3.

<sup>43</sup> Peter Wagner, *The Prison Index: Taking the pulse of the Crime Control Industry* (2003), <http://www.prisonpolicy.org/prisonindex/prisonlabor.html>.

rates at the lowest per-minute rate possible and to eliminate needless fees and charges. Additionally, we encourage the Commission to eliminate commissions as public interest advocates and interstate ICS providers alike agree that they are the driving force behind unjust and unreasonable rates.

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