

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

**IN THE MATTER OF** )  
**RATES FOR INTERSTATE INMATE CALLING** ) **WC DOCKET NO. 12-375**  
**SERVICES** )

**COMMENTS OF MICHAEL S. HAMDEN REGARDING ICS ANCILLARY FEES**

The following comments are submitted in response to the Public Notice filed 26 June 2013 in which the FCC requested additional information regarding fees charged by ICS providers that are ancillary to calling costs, “such as account setup fees, account replenishment fees, account refund fees, and account inactivity fees.”<sup>1</sup>

In this proceeding, the record conclusively establishes that ICS industry practices effectively exclude customers from reaping any benefit from competition, resulting in unconscionably exorbitant calling rates and unjustifiable, exploitative fees. Still, some have argued that the regulation of “commissions,” ancillary fees, and even intrastate ICS rates, should be left to state regulators. Because New Mexico authorities have sought to reign in some of the more egregious abuses of the ICS industry, an examination of the results of that initiative reveal that a patchwork approach to a national industry is simply untenable. The submission of these comments, though delayed by responses to FOIA requests served on every county in New Mexico, will demonstrate that the only prospect for meaningful reform and consumer protection rests with the FCC and the hope that it will adopt a comprehensive regulatory approach to ICS that governs not only per minute rates and prohibits commissions, but one that also proscribes baseless ancillary fees.

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<sup>1</sup> *More Data Sought on Extra Fees Levied on Inmate Calling Services*, ¶1, Public Notice, WC Dkt. 12-375, DA 13-1445 (June 16, 2013).

## NEW MEXICO'S BAN OF "COMMISSIONS"

As has been amply demonstrated in this proceeding, payments from ICS providers to contracting authorities have driven unjustifiably excessive and ever-escalating calling rates billed to prisoners and their families. And when commissions as high as 85% of call revenue can be paid at the expense of customers, there can be no serious question that profits far exceed costs. Arguments that the elimination of that pernicious practice will compromise security (a legitimate component of cost), compromise facility operations (a public expense), or result in a contraction in the availability of service (despite the potential to earn substantial profits in the ICS market, even in the absence of kickbacks), are all diaphanous casuistry that fail to obscure the naked truth: the practice of paying "commissions" permits and encourages the exploitation of a powerless group of customers for the financial advantage of ICS providers and the correctional authorities with whom they contract.

After extensive regulatory investigations, public hearings, and legislative inquiries, New Mexico banned "commissions" in 2001.<sup>2</sup> Before the legislation, families there were burdened with a 48.25% commission and intrastate calling rates of \$1.80 plus 22¢ per minute for collect calls.<sup>3</sup> The New Mexico statute prohibits "a commission or other payment to the operator of the correctional facility or jail based upon amounts billed by the telecommunications provider for telephone calls made by inmates in the correctional facility or jail."<sup>4</sup> Moreover, the legislation expressly provides that ICS contracts must be awarded to the provider that meets the facility's

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<sup>2</sup> NMSA § 33-14.1 (2001), <http://public.nmcompcomm.us/NMPublic/gateway.dll/?f=templates&fn=default.htm> (last accessed 29 July 2013).

<sup>3</sup> *Nationwide PLN Survey Examines Prison Phone Contracts, Kickbacks*, Prison Legal News, pp. 9 – 10, Vol. 22, No. 4 (April 2011).

<sup>4</sup> NMSA § 33-14.1 (B)(2001).

“technical and functional requirements . . . and that provides the lowest cost of service to inmates or any person who pays for inmate telecommunication services.”<sup>5</sup>

Regrettably, that action was inadequate to put a stop to predatory pricing practices by the ICS industry. Although intrastate rates have decreased modestly, “New Mexico still has high phone rates in comparison with other states that no longer accept commission payments . . .”<sup>6</sup> “New Mexico’s in-state long-distance rates are 65 percent higher than those in New York, 140 percent higher than in Missouri and 471 percent higher than in Rhode Island [all states which prohibit ICS ‘commissions.’]”<sup>7</sup> Indeed, as a former Commissioner of the New Mexico Public Regulation Commission recently observed:

[Banning commissions] really ha[s] not solved the problem. And what we saw were workarounds. . . . [Y]ou can eliminate the cash commissions, and companies and the facilities will come up with things like charging rent for the wall space for the equipment, discounted calling cards that they give to the facilities that then resell them, and get the money that way, computer equipment that appears to be part of the contract because these are IT services, but they’ll get a bunch of PCs for the offices, and things like that as part of the [ICS] contracts as well.<sup>8</sup>

A review of current ICS contracts in New Mexico illustrates the accuracy of these comments:

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<sup>5</sup> *Id.*, § 33-14.1 (A)(2001).

<sup>6</sup> *Nationwide PLN Survey Examines Prison Phone Contracts, Kickbacks*, Prison Legal News, pp. 9 – 10, Vol. 22, No. 4 (April 2011).

<sup>7</sup> David Maass, *Report Says New Mexico Prison Companies Still Gouging Families*, Prison Legal News (29 July 2013), <https://www.prisonlegalnews.org/displayArticle.aspx?articleid=21368&AspxAutoDetectCookieSupport=1> (last accessed 29 July 2013).

<sup>8</sup> Jason Marks, former two-term Commissioner, New Mexico Public Regulation Commission, at the 10 July 2013 FCC Workshop, *Reforming Inmate Calling Services*, transcript at pp. 184 – 185. <http://apps.fcc.gov/ecfs/document/view?id=7520930723> (last accessed 29 July 2013).

<b>Entity</b>	<b>Vendor</b>	<b>Contract Date</b>	<b>Contract Term</b>	<b>Payments</b>	<b>Technology</b>
Otero Co. Prison	Securus	Aug. 2011	48 Months	\$10,000/yr. technology grant (page 5 of 8) \$4,000/mo. space rental fee (page 5 of 8)	
Rio Arriba Co. Detention	Securus	Jan. 2012	5 yrs (auto-renew for 3 successive 5-yr terms)	\$4,330 technology grant (First Amendment page 1 of 2) \$3,540/mo. space rental fee (First Amendment page 1 of 2)	
San Juan Co. Detention	Securus	Jul. 2013	1 yr (auto-renew for 3 successive 1-yr terms)		Video Visitation System (\$559,570.00) (page 12 of 13)
Sandoval Co. Detention	Securus	Apr. 2012	3 years	\$6,647/mo. space rental fee (page 6 of 10)	Archonix JMS (\$182,385*); Guardian RFID (\$16,163) (page 6 of 10)

See Exhibits 1 - 5, selected New Mexico ICS contracts, attached. (\* The Archonix Jail Management System (JMS) is software for which a price is quoted in the 12 June 2012 Curry County contract with Securus Technologies, attached as Exhibit 5, at p. 8).

In addition to these alternative revenue-sharing methods, ICS providers also impose unjustifiable fees that include surcharges and miscellaneous ancillary fees as the following charts show.

**TABLE 2 - ICS SURCHARGES - NEW MEXICO EXAMPLES<sup>9</sup>**

<b>Otero County Prison</b>			
<b>Call Type</b>	<b>Surcharge</b>	<b>Per Minute</b>	<b>Total for 15-Min. Call</b>
<b>Local</b>	\$2.30	-	\$2.30
<b>Intrastate Long Distance</b>	\$2.00	\$0.25	\$5.75
<b>Interstate</b>	\$2.95	\$0.80	\$14.95
<b>Rio Arriba County Detention Center</b>			
<b>Call Type</b>	<b>Surcharge</b>	<b>Per Minute</b>	<b>Total for 15-Min. Call</b>
<b>Local</b>	\$2.30	-	\$2.30

<sup>9</sup> Rates obtained at <https://securustech.net/call-rate-calculator>

<b>Intrastate Long Distance</b>	\$2.25	\$0.25	\$6.00
<b>Interstate</b>	\$3.95	\$0.89	\$17.30
<b>Sandoval County Detention Center</b>			
<b>Call Type</b>	<b>Surcharge</b>	<b>Per Minute</b>	<b>Total for 15-Min. Call</b>
<b>Local</b>	\$2.30	-	\$2.30
<b>Intrastate Long Distance</b>	\$2.25	\$0.25	\$6.00
<b>Interstate</b>	\$3.95	\$0.89	\$17.30
<b>San Juan County Detention Center</b>			
<b>Call Type</b>	<b>Surcharge</b>	<b>Per Minute</b>	<b>Total for 15-Min. Call</b>
<b>Local</b>	\$2.18	-	\$2.18
<b>Intrastate Long Distance</b>	\$2.25	\$0.25	\$6.00
<b>Interstate</b>	\$4.21	\$0.95	\$18.46

New Mexico ICS providers also generate revenue through imposing a wide variety of charges to establish pre-paid accounts and to maintain those accounts, as exemplified by one of the largest, Securus Technologies, Inc.

**TABLE 3 - SECURUS PAYMENT PROCESSING FEES<sup>10</sup>**

<b><i>Funding Method</i></b>	<b><i>Minimum Funding Amount</i></b>	<b><i>Payment Address</i></b>	<b><i>Payment Processing Fee*</i></b>
Web	Up to \$25.00	<a href="http://www.securustech.net">www.securustech.net</a>	Up to \$7.95 - Visa and MasterCard
IVR	Up to \$25.00	1-800-844-6591	Up to \$7.95 Visa and MasterCard
CSR	Up to \$25.00	1-800-844-6591	Up to \$7.95 Visa and MasterCard
Postal Mail	None	Securus Correctional Billing Services PO Box 650757	\$0

<sup>10</sup> See <https://securustech.net/web/securus/ac-terms-and-conditions> (last accessed 29 July 2013).

		Dallas, TX 75265-0757	
Kiosk	Varies	Select facilities	\$4.95 cash; \$7.95 credit/debit card
MoneyGram	None	Express Payment blue form or FormFree®	\$10.99 (MoneyGram fee can vary; direct customer to MoneyGram)
Western Union	None	Quick collect blue form	\$11.95 (WU fee can vary; direct customer to WU)

Additional ancillary fees charged by Securus include a “wireless administration fee of up to \$2.99 per month, and a Federal Universal Service Fund (“USF”) charge of up to \$3.49 per month.<sup>11</sup> Finally, refunds of unused account balances may be requested within 180 days of the last call received and may take up to four weeks to process.

Having learned through experience that simply banning “commissions” is not an effective means of bringing an end to abusive ICS charges, the New Mexico Public Regulation Commission has moved toward the adoption of rate and fee caps.<sup>12</sup> Still, more than a decade after “commissions” were proscribed by the state legislature, New Mexico has yet to effectively reign-in practices that exploit prisoners and their families.<sup>13</sup> Perhaps that is one reason the PRC unanimously resolved to urge “the FCC to act on the “Wright Petition” (CC Docket No. 96-128)

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<sup>11</sup> *Id.*

<sup>12</sup> *Notice of Proposed Rulemaking for the Purpose of Establishing a Rule for Institutional Operator Service Providers and Proposed Rule* attached thereto at Exhibit 1, Case No. 10-00198-UT (19 January 2012). Pursuant to the Proposed Rule, calling fees are to be capped at \$2.25 for a 15 minute prepaid call, \$3.25 for a 15 minute collect call, and a per minute charges of 15¢ per call. A \$3.00 convenience charge is to be allowed for funding a prepaid account, but no other fees or service charges are to be permitted. New Mexico Public Regulation Commission News Release (9 November 2012), <http://www.nmprc.state.nm.us/administrative-services/docs/press-releases/2012-11-09-PrisonPhones.pdf> (last accessed 29 July 2013).

<sup>13</sup> It seems that the regulations that will ultimately cap New Mexico’s ICS rates and fees are still being contested with respect to a provision that would make the imposition of per call charges billable only to be assessed in the second minute of the call, apparently to address the “dropped call” issue. Telephone conversation of 29 July 2013 with New Mexico Public Regulation Commission Utility Analyst John J Reynolds.

and set standards to ensure that families of those who are either incarcerated or detained . . . are provided affordable options to remain connected.”<sup>14</sup>

**A COMPREHENSIVE ICS REGULATORY REGIMEN OF NATIONAL SCOPE  
IS ESSENTIAL TO MEANINGFUL REFORM**

An excruciatingly long, thorough proceeding in this docket has explored every aspect of ICS services through the solicitation of detailed information from all key stakeholders and interested parties, including legislators, regulatory officials, industry representatives, correctional professionals, prisoners, their families, and others. For more than a decade, the FCC has welcomed in-person presentations and electronic communications including email, correspondence, and formal comments. Countless telephone calls have been logged and FCC staff have had innumerable interactions with virtually everyone who has wished to voice an opinion, extending even to a commitment of time and resources that involved the Acting Chairwoman and many staff members, dignitaries, regulatory officials, experts, and members of the public to conduct a day-long workshop, *Reforming Inmate Calling Services* (10 July 2013).

From this exhaustive process, several facts have emerged with clarity. Broadly speaking, the costs of ICS services are neither just nor reasonable. There are widely divergent practices and price structures across the United States, and even within individual jurisdictions, with a patchwork of regulations that have been largely inadequate to create a viable, competitive market for the protection of consumers. Wildly excessive charges (both in the form of calling costs and ancillary fees) have been imposed on customers who have no realistic recourse and no practical alternative to the monopolistic telecommunications services made available through collusive and mutually profitable contracts between ICS providers and correctional authorities.

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<sup>14</sup> Resolution 12-0925, New Mexico Public Regulation Commission (25 September 2012).

The ever escalating cost of communicating by phone with someone who is incarcerated was at first driven by ICS providers that competed to offer the largest possible “commission” to correctional and governmental authorities, and by those authorities that insisted upon the most lucrative contract possible. As the process evolved, much of the revenue that was initially used to offset the cost of inmate services was diverted at first to meet operational costs of correctional facilities, but now is also siphoned off to meet general demands of the public fisc. And in those relatively few jurisdictions which have attempted to curb the payment of “commissions,” the industry has responded by imposing a host of ancillary charges which maintain the cost of calls placed from a correctional facility at artificially high prices. Some of these charges fund the payment of signing bonuses, “technology grants,” in-kind donations of technological software and equipment, “rental” for space to locate institutional telephones, and other forms of compensation to those entities that award contracts. The remainder merely supplies an embarrassment of riches to pad the bottom-line of industry powerhouses, all at the expense of a vulnerable population.

**THE COMMISSION HAS CLEAR AUTHORITY TO REGULATE ALL ASPECTS OF ICS,  
INCLUDING “COMMISSIONS” AND ANCILLARY FEES**

It is clear, and by now, even axiomatic, that the FCC has plenary power to regulate all aspects of the ICS industry, particularly including both interstate and intrastate calls, as well as “commissions” and ancillary fees.

Title 47 U.S.C. Section 276 directs the Commission to (1) “establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone,” *Id.*, § 276(b)(1)(A). The Commission is further duty-bound to (2) ensure that “[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable”

*Id.*, at § 201(b). *See also, e.g.*, 47 U.S.C. § 151 (conferring upon the Commission broad regulatory jurisdiction), 47 U.S.C. § 154(i) (empowering the to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.” *and* 47 U.S.C. § 303(r)(authorizing the Commission to make “such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this Act”).

Consistent with this broad authority, the courts have expressly upheld the extension of Section 276 to intrastate rates based on a literal reading of the statute itself. *See, e.g., 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)(affirming Commission’s deregulation of local payphone rates and rejecting argument that Section 276’s reference to “compensation” implied lack of jurisdiction over “rates”). To this point, six of the eight substantive provisions of Section 276 either explicitly or implicitly grant jurisdiction to the Commission over intrastate matters. *See* Section 276, subsections (b)(1)(A), (b)(1)(B), (b)(1)(D), (b)(1)(E), (b)(1)(C), and (c). Viewed as a whole, and as affirmed by the courts, Section 276 grants comprehensive authority to the Commission over ICS, including over intrastate matters.

The Commission has previously determined that “commissions” are not a part of legitimate costs, but rather negotiable allocations of profits between the correctional facility (or “site locations”) and the ICS provider. *See Order on Remand & Notice of Proposed Rulemaking*, FCC 02-39, ¶ 15, p. 8, and ¶ 38, p. 15 (CC Docket No. 96-128, 21 February 2002). *See also, Second Report & Order*, FCC 97-371 (CC Docket No. 96-128, 9 October 1999); *Third Report & Order*, FCC 99-7, ¶ 156 (CC Docket No. 96-128, 4 February 1999).

Consistent with this finding, in other analogous contexts, the Commission has found that it has authority to “regulate the contractual or other arrangements between common carriers and other entities, even those entities that are generally not subject to Commission regulation.” *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, FCC 08-87, ¶ 15 & n.48 (Mar. 21, 2008). In reaching this conclusion, the Commission relied on the Court of Appeals for the District of Columbia’s opinion in *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999). In that case, the court determined that the Commission did not exceed its authority in promulgating a rule that prevented domestic carriers from paying more than certain, settled rates for termination services provided by foreign telecommunications companies in order to complete long-distance calls. The court explained that the Commission “does not exceed its authority simply because a regulatory action has extraterritorial consequences. . . . Indeed, no canon of administrative law requires us to view the regulatory scope of agency actions in terms of their practical or even foreseeable effects.” *Id.* at 1230.

The broad scope of regulatory authority recognized in *Cable & Wireless* and confirmed by the Commission in the MTE Order is consistent with the Commission’s prior assertion of regulatory authority over other contractual relationships that involve entities otherwise outside of its jurisdictional reach. For instance, the Commission regulates contracts between broadcast stations—which clearly are subject to the Commission’s regulatory authority—and non-regulated entities such as television networks and non-network suppliers of programming. 47 C.F.R. § 73.658. Similarly, the Commission regulates newspaper and broadcasting cross-ownership. 47 C.F.R. § 73.3555(d).

In each of these settings, the Commission has express jurisdiction over one of the parties (broadcast stations, video programming providers, and inmate phone service providers) but not over the other (broadcast networks, newspapers, or correctional facilities). The Commission's jurisdiction over one of the parties involved in the regulated transaction or relationship, and the nexus between those transactions or relationships and the Commission's express statutory responsibilities, supports FCC's exercise of regulatory authority over the other to the extent necessary to fulfill its statutory obligations.

The proposal that the Commission regulate arrangements between ICS providers and facilities is indistinguishable from these earlier cases. The Commission plainly has jurisdiction over ICS providers, 47 U.S.C. § 276(d), and thus has authority to promulgate rules that would govern arrangements between ICS providers and correctional facilities. As in the above-mentioned examples, the "tangential effect" of such regulation on correctional facilities (that are engaged in activity not otherwise subject to FCC regulation) does not diminish or limit the Commission's regulatory authority. Nor does regulation of ICS contracts improperly intrude into the operation of correctional facilities. It remains the responsibility of correctional administrators to ensure the safety and security of staff, prisoners, and the general public. The broad discretion they exercise over those matters does not extend to dictating commerce within the ICS market.

Similarly, prohibition or regulation of ancillary fees related to ICS services are also plainly within FCC jurisdiction, especially under circumstances that unambiguously present the potential to thwart an otherwise effective regulatory approach (as the New Mexico experience bears out). The U.S. Supreme Court has long recognized that the Commission's authority encompasses the regulation of issues and matters "reasonably ancillary to the effective

performance of its regulatory duties.” *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *see also, FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979)(approving Commission’s regulatory actions where such actions are “necessary to ensure the achievement of the Commission’s statutory responsibilities”).

### **UNIFORM NATIONAL STANDARDS ARE ESSENTIAL TO REFORM OF ICS**

The overwhelming technological complexity of the ICS industry, a morass of almost incomprehensible industry terms and acronyms, and the monopolistic character of ICS contracts are all beyond the ken of practically all prisoners and their families.

State regulatory commissions have expertise and may be familiar with ICS issues that arise in their jurisdictions, but they have neither the responsibility nor the capacity to regulate a nationwide industry. Widely divergent regulations, items of call billing that are not tariffed, and broad discrepancies in calling rates that can only be characterized as arbitrary, all demonstrate that regulation at the state level has been ineffectual. Nor do state commissions have legal authority to regulate interstate calling rates, a dominant component of the ICS market. In the absence of federal regulation, meaningful reform of the nationwide ICS industry simply cannot be achieved.

If abusive ICS practices that exploit prisoners and their families are to be brought to an end, a comprehensive regulatory regimen must be implemented at the federal level. And of course, that can be done only by the Federal Communications Commission.

The Federal Communications Commission should immediately act to:

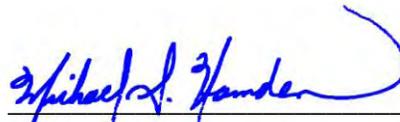
- (1) Establish a single fair rate for **all** intrastate and interstate prisoner phone calls while allowing legitimate costs and fair compensation at just and reasonable rates, irrespective of the origination of the call;
- (2) Foreclose all opportunities to circumvent the established fair rate by prohibiting

“commissions,” surcharges, and other ancillary fees imposed by prison phone service providers or their subsidiaries, ensuring that third party payment fees are passed through to families at cost with no mark-up or profit for ICS providers;

(3) Require calling options, including pre-paid, debit, and collect calls consistent with sound correctional practices and security concerns; and

(4) Leave it to state utilities commissions to address any purported need for cost increases associated with the provision of services to a particular locale.

Respectfully submitted this 31<sup>st</sup> day of July, 2013.



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