

# PRISON POLICY INITIATIVE

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January 13, 2014

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

Re: Reply Comment on WC 12-375

Dear Ms. Dortch:

In the Report and Order and Further Notice of Proposed Rulemaking,<sup>1</sup> you ask several questions about whether you should distinguish between different correctional facilities by size or by purpose, including whether you should make a distinction between prisons and jails.<sup>2</sup> In this letter, we wanted to address three issues:

1. Whether size of facility is relevant to the maximum rates that can be charged for phone calls.
2. Whether the fact that the jail population turns over more frequently than in prisons is relevant to setting a maximum rate.
3. Which data sources should be used to evaluate the size of correctional facilities.

### **Facility size is not relevant.**

We note that you received a number of letters critical of the Report and Order and Further Notice of Proposed Rulemaking from people and companies associated with the telephone industry in jails that were quite consistent in their insistence that “one

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<sup>1</sup> *In re Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 (Adopted August 9, 2013), available at <http://apps.fcc.gov/ecfs/document/view?id=7520945713>.

<sup>2</sup> Report and Order and Further Notice of Proposed Rulemaking, *In re Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 at ¶¶ 152-160 (Adopted August 9, 2013).

size” does not “fit all” and equally consistent in their complete failure to propose an appropriate distinction between jails of various sizes.

Notably, some of the letters you received that used this slogan were written by people who administer massive jails. For example, the letter from the California State Sheriffs’ Association was written by Gregory J. Ahern, Sheriff of Alameda County. We note that not only is the Alameda County Jail the 14th largest jail system in the country<sup>3</sup>, and its Santa Rita Jail facility is larger than 98% of *state prisons*<sup>4</sup> and is itself larger than the entire state prison systems of 8 states.<sup>5</sup> Further, we think it relevant to point out at this juncture that Alameda County receives a commission of 70.5% (or \$1,500,000 annually, whichever is greater), and charges up to \$12.75 for a 15 minute in-state call making it one of the highest in-state rates in the country.

More evidence that officials base their opposition on self interest rather than on sound policy considerations is that the American Correctional Association (ACA) recently joined a letter with the National Sheriffs’ Association and the Major County Sheriffs’ Association to claim that “[t]he Commission’s ‘one-size-fits-all’ approach is especially harmful for inmate calling services in jails.”<sup>6</sup> The membership of the ACA, however, has passed three resolutions calling for rate reductions (in 2001, 2006, and 2011). The ACA’s sudden opposition to reform can only be

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<sup>3</sup> Census of Jail Facilities, 2006. ICPSR26602-v1. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor] (January 26, 2010), doi:10.3886/ICPSR26602.v1, available at <http://dx.doi.org/10.3886/ICPSR26602.v1>.

<sup>4</sup> Census of State and Federal Adult Correctional Facilities, 2005. ICPSR24642-v2. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor] (October 05, 2010), doi:10.3886/ICPSR24642.v2, available at <http://dx.doi.org/10.3886/ICPSR24642.v2>.

<sup>5</sup> Prisoners in 2012 - Advance Counts, Bureau of Justice Statistics (July 2013, publication NCJ 242467), available at <http://www.bjs.gov/content/pub/pdf/p12ac.pdf>. Another similar example is in a letter from the Sheriff of Forsyth County, North Carolina, who lamented that his large 1,016-person jail is just a “local” facility and should be exempt from regulation. We note that his facility is larger than 59% of state or federal prisons. (Sheriff of Forsyth County, NC letter to the FCC, dated December 9, 2013, available at <http://apps.fcc.gov/ecfs/document/view?id=7520961155>.) (Comparison to state or federal prisons is from our analysis of Census of State and Federal Adult Correctional Facilities, 2005. ICPSR24642-v2. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor] (October 05, 2010), doi:10.3886/ICPSR24642.v2, available at <http://dx.doi.org/10.3886/ICPSR24642.v2>.)

<sup>6</sup> Letter from National Sheriffs’ Association, American Correctional Association, and the Major County Sheriffs’ Association, *In re Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 (Submitted October 31, 2013), available at <http://apps.fcc.gov/ecfs/document/view?id=7520954326>.

explained by the fact that the current president of the ACA is Christopher B. Epps, who oversees the Mississippi Department of Corrections, which takes the 5th highest commission of any state prison system.

We repeat our previous conclusion<sup>7</sup> that any difference between prisons and jails is irrelevant to the question of predatory pricing:

In short, the industry and its sheriff and jail partners have repeatedly emphasized the fact that local jails are very different from state and federal prisons. From the perspective of the sheriffs who run these facilities for local governments, rather than running a larger facility for a state or federal government, this is no doubt true. But from the perspective of the FCC deciding whether to protect consumers from predatory pricing, the distinction between jails and prisons is largely<sup>8</sup> irrelevant.

The FCC has made it clear it is interested in giving a full hearing to arguments that the distinction between prisons and jails is relevant, asking a long list of questions, including how the FCC should “define ‘jails’ and ‘prisons’”.<sup>9</sup> While we can imagine a universe where such hair-splitting could lead to a weak argument that certain kinds of facilities should be treated differently, we note that no such evidence has been offered. In particular, neither the correctional administrators, nor the well-resourced correctional associations, nor their ghost writers in the industry have offered an answer to the FCC’s request for a workable suggestion on where to draw the line.

### **Population churn is not relevant to rates**

Pay Tel Communications has put forth the argument that the higher turnover in jails justifies their request that the FCC issue a partial stay — as applied to jails — on the FCC’s order to cap the rates:

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<sup>7</sup> Prison Policy Initiative letter to the FCC dated July 17, 2013, attached and available at <http://apps.fcc.gov/ecfs/document/view?id=7520931268>.

<sup>8</sup> There is, however, one relevant distinction between prisons and jails that opponents of regulation are reluctant to bring to your attention: 61% of people in jail on any given day have not been convicted of anything. Rather, they have been arrested, are attempting to make bail, and are presumed innocent under the law. (The 61% figure is drawn from Table 7 of the Bureau of Justice Statistics report *Jail Inmates at Mid-Year 2011, Statistical Tables*, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4235>).

<sup>9</sup> Report and Order and Further Notice of Proposed Rulemaking, *In re Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 at ¶ 159 (Adopted August 9, 2013).

“As previously demonstrated by Pay Tel in this proceeding, in a jail setting the turnover of inmates is rapid.”<sup>10</sup>

“A significant driver of ICS costs in jails is the necessity of setting up individualized accounts for each inmate and integrating these accounts with local facility systems, which requirements vary from facility-to-facility in the jail setting.”<sup>11</sup>

In so far as this is an actual legitimate concern — i.e. that people are creating accounts during very short jail stays and then making out-of-state calls — it would seem that the solution to the high cost of account creation would not be to delay implementation of interstate rate caps but instead for Pay Tel to continue to charge a fee for creating accounts.<sup>12</sup>

### Data sources for prisons and jails

Finally, on a technical matter, the FCC asked a number of questions about, if it decides to treat certain facilities differently, about what data source should be used for that determination. In particular, the FCC asked about the Census of Jail Facilities.<sup>13</sup> Our suggestion, having used this data set which is collected about every 5 years and made available several years later for a number of purposes, would be to use this data set only for statistical purposes or if the FCC needs a way to identify facilities by size in advance. A more robust and future-proof methodology might be just to require disclosure of the average daily population in the previous year, as this figure is widely accessible to facility administrators.

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<sup>10</sup> Further Comments of Pay Tel Communications, Inc., *In re Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 (received July 17, 2013) available at <http://apps.fcc.gov/ecfs/document/view?id=7520931330>.

<sup>11</sup> Notice of Ex Parte Presentation, *In re Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 (received December 9, 2013) available at <http://apps.fcc.gov/ecfs/document/view?id=7520961206>.


<sup>12</sup> We note that Pay Tel currently has a lower account creation fee than many other companies; and given Pay Tel's repeated concerns that account creation is so expensive, we assume that Pay Tel has hard evidence on hand of those costs that they could use to meet the FCC's requirement that ancillary charges be backed by evidence of actual costs.

<sup>13</sup> Report and Order and Further Notice of Proposed Rulemaking, *In re Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 at ¶ 158 (Adopted August 9, 2013).

## Conclusion

The size of the correctional facility that someone is arbitrarily assigned to should not determine the rate their loved ones are charged for a phone call.

Sincerely,



Peter Wagner  
Executive Director



Aleks Kajstura  
Legal Director

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July 17, 2013

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

Dear Ms. Dortch,

I am submitting this letter to share several points on the differences between prisons and jails that I didn't have time to address during my presentation at the *Workshop on Reforming Inmate Calling Services Rates* on July 10<sup>th</sup>.

In short, the industry and its sheriff and jail partners have repeatedly emphasized the fact that local jails are very different from state and federal prisons. From the perspective of the sheriffs who run these facilities for local governments, rather than running a larger facility for a state or federal government, this is no doubt true. But from the perspective of the FCC deciding whether to protect consumers from predatory pricing, the distinction between jails and prisons is largely<sup>1</sup> irrelevant.

By way of background, I've prepared a helpful table to provide an overview of prisons and jails:

	<b>Prisons</b>	<b>Jails</b>
<b>Daily population<sup>2</sup></b>	1,504,150	735,601
<b>Operating authority</b>	State or Federal	County or Municipal
<b>People incarcerated are largely</b>	Convicted of felonies (more serious crimes)	Presumed innocent, or convicted of misdemeanors (less serious crimes)
<b>Number of facilities<sup>3</sup></b>	1,821	3,085
<b>Average daily population per facility<sup>4</sup></b>	786	204

<sup>1</sup> There is, however, one relevant distinction between prisons and jails that opponents of regulation are reluctant to bring to your attention: 61% of people in jail on any given day have not been convicted of anything. Rather, they have been arrested, are attempting to make bail, and are presumed innocent under the law. (The 61% figure is drawn from Table 7 of the Bureau of Justice Statistics report *Jail Inmates at Mid-Year 2011, Statistical Tables*, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4235>.)

<sup>2</sup> Bureau of Justice Statistics, *Correctional Populations in the United States, 2011*, Table 2, (Nov. 2012) available at <http://www.bjs.gov/content/pub/pdf/cpus11.pdf>.

<sup>3</sup> Prison data is based on an analysis of United States Department of Justice. Office of Justice Programs. Bureau of Justice Statistics. *Census of State and Federal Adult Correctional Facilities, 2005*. ICPSR24642-v2. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor], 2010-10-05. doi:10.3886/ICPSR24642.v2 available at <http://dx.doi.org/10.3886/ICPSR24642.v2> and the jail data is based on an analysis of United States Department of Justice. Office of Justice Programs. Bureau of Justice Statistics. *Census of Jail Facilities, 2006*. ICPSR26602-v1. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor], 2010-01-26. doi:10.3886/ICPSR26602.v1 available at <http://dx.doi.org/10.3886/ICPSR26602.v1>.

At the FCC's July 10<sup>th</sup> workshop, a number of presenters used different examples to make the rhetorical point that because some jails are small, no jails should be subject to price regulation. I heard, for example, concerns about how FCC regulation would affect telephone companies' contracts with 50-, 24-, and 15-person jails.

The correctional population data simply do not support such claims, and I'll examine here the most extreme red herring presented at the workshop: 15-person jails.<sup>5</sup> According to the *Census of Jail Facilities*,<sup>6</sup> there were 679 jails holding between one and 15 people in 2006. The combined total number of people held in these tiny jails, however, comprises an extremely small percentage of the total jail population.<sup>7</sup> Put another way, the vast majority of people who are held in jail — and therefore the vast majority of the people who create business for telecommunications companies by placing calls to their families — are in larger facilities.

The 2006 *Census of Jail Facilities* shows that just 5,160 people were confined in those 679 jails, or 0.84% of the entire jail population.<sup>8</sup> Of the 2.3 million people incarcerated in all prisons and jails in the United States, the portion confined in these tiny jails is a microscopic 0.22%.<sup>9</sup>

The Sheriffs Association, the American Jail Association, and the industry as a whole have presented you with a red herring by focusing on small jails. I urge you to ignore this distraction and act quickly bring fairness to the prison and jail telephone market.

Sincerely,



Peter Wagner  
Executive Director

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<sup>4</sup> *Ibid.*

<sup>5</sup> The other examples cited at the workshop don't stand up to scrutiny either. According to the same dataset, there were 10,587 people confined in jails that held 1-24 people, and 31,846 people confined in jails that held 1-50 people. Thus, of the 2.3 million people incarcerated in this country, only 1.4% are held in jails that hold 1 to 50 people. Small jails, no matter how they are defined, are a red herring intended to delay regulation of telephone calls from correctional facilities.

<sup>6</sup> See *supra* note 3.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> This calculation is based on *supra* note 3 and *supra* note 2.