

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)	
)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996)	CC Docket No. 96-128
)	
Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking)	DA 03-4027
)	

***EX PARTE* PRESENTATION OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

On October 29, 2008, Michael S. Hamden filed an *ex parte* presentation in this docket, asking the Commission to take immediate action to redress the unjust and unreasonable prices being charged on a daily basis all across the United States for phone calls placed from correctional institutions. As Hamden observes, the inmate calling service (“ICS”) industry has for many years been permitted to exploit the families and friends of inmates with exorbitant and unconscionable prices. At the same time, federal and state correctional officials have shown a growing dependence on profits from inmate telephone service as a means of supporting correctional activities unrelated to telephone service. As a result, inmates and family members have been faced with the dilemma and hardship of either paying the exorbitant and unconscionable charges or foregoing conversations altogether.

Hamden is right. The injustice has been allowed to persist far too long. The Commission should act now to end it.

The position advanced by the National Association of State Utility Consumer Advocates (“NASUCA”) nearly five years ago,¹ based in significant part on the Commission’s own analysis, which was in turn based in significant part on the analysis of a noted jurist,² begs reemphasis: The typical correctional institution awards a contract for inmate telephone service by competitive bidding. It grants the winning provider a monopoly for that service. Under the contract, the winning provider pays commissions to the institution, typically between 20 and 60 percent. These commissions are often the single largest component affecting the rates for telephone service. The competitive bidding process does not ensure a competitive rate **for those who pay for the service**. To the contrary, perversely,³ because the bidder who charges the highest rates can offer the largest commissions, a correctional institution typically has an incentive to award a contract to the highest, not the lowest, bidder. This process cannot result in prices that are just and reasonable. Rather, the resulting prices are monopoly prices instead of competitive prices, and thus must be regulated.

The regulatory gap that allows such pricing to occur causes a vulnerable, often low-income, group of Americans to be the victims of abusive monopolistic rates. The result is commonly one of extreme hardship for relatives of inmates, some of whom must, for example, forgo needed medication or other necessities in order to pay the exorbitant

¹ NASUCA Comments (March 10, 2004).

² See Order on Remand and Notice of Proposed Rulemaking, FCC 02-39, 17 FCC Rcd 3248 (2002) (“*Order on Remand*”), n. 74, citing *Arsberry v. Illinois*, 244 F.3d 558, 566 (7th Cir. 2001) (Posner, J.) (noting that the state of Illinois is a monopolist, “exercising as it does an iron control over access to the inmate market, [that] has rented pieces of the market to different phone companies” and that these companies will pass on much of the rental fee to their customers).

³ *Order on Remand*, ¶ 12.

phone bills.⁴ Compounding the injustice, correctional goals are compromised, as communications with loved ones -- vital to rehabilitation and reduced recidivism after release -- are lost to the exorbitant prices.⁵ For these reasons, the current pricing structure for inmate calls -- both interstate and intrastate -- is at odds with, not supportive of, *both* of the goals of 47 U.S.C. § 276 – promoting competition among payphone providers and promoting the widespread deployment of payphone services.

Nearly seven years ago, the FCC recognized that the commissions paid by the ICS providers to the correctional institutions are profits, not costs.⁶ Yet despite that determination, nothing meaningful has been done to prevent the provider/facility monopolies from including the commissions in the rates they charge. For nearly seven years, inmates and their families and friends have been forced to suffer the consequences stated above, without any meaningful relief.⁷

As previously urged by NASUCA,⁸ the Commission should: (1) declare inmate interstate phone rates to be unjust and unreasonable to the extent such rates are in excess of the reasonable costs of providing telecommunications services to inmates and their called parties; (2) prohibit the inclusion of contract commissions in the billing of inmate interstate telephone services, whether in the form of a rate component or a billing line

⁴ See *Byrd v. Goord*, No. 00 Civ. 2135(GBD), 2005 WL 2086321 nn. 8, 9 and 11 (S.D.N.Y. 2005).

⁵ See American Bar Association Position Paper (at 2) (attached to Hamden ex parte).

⁶ See *Order on Remand*, ¶ 38.

⁷In proceedings before the Iowa Utilities Board, Evercom Systems, Inc. (Evercom) advised that, as of January 2006, its rate for interstate calls was \$3.95 per call plus \$.89 per minute. *Office of Consumer Advocate v. Evercom Systems, Inc.*, No. FCU-06-40 (Iowa Utilities Bd. Dec. 6, 2007 and Mar. 14, 2008), *appeal pending*, *Evercom Systems, Inc. v. Iowa Utilities Bd.*, Polk Cty (IA) Dist. Court No. CV 7107. According to other discovery responses in the case, Evercom is a wholly owned subsidiary of Securus Technologies, Inc., which is the largest independent provider of inmate telecommunications services to correctional facilities in the United States and Canada, serving 3,100 facilities.

⁸ NASUCA Reply Comments (April 21, 2004) at 6-7.

item⁹; and (3) allow affected correctional institutions and telecommunications carriers up to 180 days to reform their contracts and rates in accordance with the Commission's determinations. The Commission should also (4) encourage correctional institutions to develop modern calling methods, such as prepaid debit accounts with direct dialing, in order to decrease the costs of inmate interstate calls; (5) encourage correctional institutions to engage in competitive bidding methods that do not result in contracts being awarded to the highest bidder or allow inmate access to multiple competitors in order to secure competitively priced interstate telephone services; and (6) encourage correctional institutions to consider the procurement of appropriate security measures by lower cost software and hardware solutions as opposed to monthly recurring interstate telecommunications rates.

In order to ensure that rates for interstate calls from correctional institutions become just and reasonable without the need for complex regulatory reviews, the Commission should include a provision that any interstate rate charged for a call from a correctional institution is unjust and unreasonable if it exceeds a benchmark determined by the Commission. This provision should be without prejudice to any party's ability to argue that a higher or lower rate is in fact just and reasonable in a particular case. In light of the continuing drop in the costs for interstate phone calls generally and the advances in technology resulting in the automation and improved efficiency in the provision of inmate calling services, NASUCA proposes that this provisional rate cap be established at ten cents per minute, which is more than triple the lowest interLATA rate currently

⁹ The FCC's analysis is that the commissions are profits, not costs, and their very presence shows that the business is profitable and hence that companies are recovering all of their costs as required by section 276. *Id.* As the FCC noted, as of 2002 most states charged commissions that averaged 45%. *Id.*, n.34. Further, the FCC found that commissions were "exorbitant" location rents. *Id.*, ¶ 26. Thus commissions should be excluded from the category of legitimate costs.

available to ordinary consumers. With the understanding that many ICS rates consist of a set-up or per-call charge plus a per-minute rate, we propose that the total benchmark cost of a fifteen-minute call -- including the set-up or similar fees -- should not exceed \$1.50.

Appropriate Commission action at the national level to regulate interstate rates, including, most importantly and immediately, recognizing the need for the ICS providers to justify the pricing for monopoly services with appropriate supporting cost data if the rates exceed the federal cap, and disallowing commissions as a legitimate cost of the telephone service, will meaningfully address the problem as it relates to interstate rates. It will also concretely and effectively encourage similar appropriate prompt action at the state level with respect to intrastate rates.¹⁰ It appears in this respect that most inmate calls are intrastate.

The states are well equipped to perform this role, as New York has demonstrated.¹¹ Especially given the great diversity of local costs and conditions,¹² the states are in a far better position than the Commission to evaluate the cost justification, or lack of it, for the various features of each inmate calling system.¹³ They also have an

¹⁰ See *id.*, ¶ 29.

¹¹ See: Governor Eliot Spitzer Administrative Action, *Phone Charges to be Reduced for Families of Inmates*, January 8, 2007, effective April 1, 2007. www.ny.gov/governor/press/0108071.html.

¹² See *Order on Remand*, ¶ 26.

¹³ In proceedings before the Iowa Utilities Board, Curtis Hopfinger, Director of Regulatory and Governmental Affairs for Securus Technologies, Inc., testified: “Virtually all inmate telephone systems are 'custom build' to the specific requirements of each correctional facility site These requirements could include such things as alerts when certain numbers are dialed, but could also require certain features not be activated. For an example, a facility that houses detainees on a short-term basis . . . may not want to establish Personnel Identification Numbers (PINs) because of the administrative burden to activate and deactivate the PINs with such a great turnover of detainees. Certain features are always active on inmate systems, such as call acceptance by the called party and call blocking with customer alert when charges exceed \$50 in a 24 hour period. However, other features are on the systems at the sole discretion of the correctional institution agency Remember that all fraud prevention systems involve both operational and cost trade-offs for Evercom, correctional facilities, and end-users” *Office of Consumer Advocate v. Evercom Systems, Inc.*, n. 5 above, transcript of hearing held June 12, 2007, pp. 239-40.

essential role to play in finding solutions to related aspects of the problem, including exploration of debit calling or other alternatives to collect calling, examination of more cost-effective security protections, and consideration of the possibility of meaningful competition for telephone service in the correctional institution setting.

At the same time, the Commission's analysis regarding the monopoly profits and the resulting unjust and unreasonable rates is plainly as applicable to intrastate as interstate inmate calling, and the possible conflict of interest for the states -- whose institutions benefit from the commissions -- cannot be ignored. The six recommendations above could therefore be expressed as guidelines that the FCC recommends that the states use for establishing intrastate calling rates. The two strongest of these guidelines should be first, the declaration that monopoly inmate phone rates are unjust and unreasonable if such rates are in excess of the reasonable costs of providing telecommunications services to inmates and their called parties, and second, the prohibition of the inclusion of contract commissions in the billing of inmate telephone services, whether in the form of a rate component or a billing line item (including surcharges). As indicated above, such guidelines would reflect the Commission's own analysis that in monopoly situations the ICS market is inadequate to produce just and reasonable rates. These provisions are consistent with 47 U.S.C. § 276, and should be respected by the states.

Under such guidelines, states would be encouraged to set the rates for intrastate inmate calling based on the provider's actual local costs, rather than on a federal average number. The states should also be encouraged to include a refund mechanism in any cost proceeding. Such a refund mechanism would give the ICS providers and the correctional

institutions a reason to take reformatory action sooner rather than later, because both would know the commissions could not be justified as legitimate costs. The proposed federal benchmark of ten cents discussed above would not apply to intrastate calling, but the benchmark would nonetheless exert downward pressure on rates, as the states would likely need to justify why intrastate calling was more expensive than interstate. A state that sought to adopt ICS rates that exceed the reasonable costs of providing telecommunications to inmates and their called parties, especially by including commissions, could be required to justify the deviation from the federal guidelines.

WHEREFORE, NASUCA urges the Commission to take prompt appropriate action to stop the exorbitant rates charged to inmates, their families, and friends for calls from correctional institutions. Most importantly and immediately, the Commission should recognize the need for the inmate telephone providers to justify the pricing for monopoly interstate services with appropriate supporting cost data and should disallow commissions as a legitimate cost of the telephone service. In order to ensure that these rates become just and reasonable without the need for complex regulatory reviews, but without prejudice to any party's ability to argue that a higher or lower rate is in fact just and reasonable in a particular case, the Commission should further provide that any interstate rate charged for a call from a correctional institution be deemed unjust and unreasonable if it exceeds ten cents per minute. The Commission should also clarify that its interstate calling rate design is intended to serve as a guideline for state determination of intrastate ICS calling rates, as described above.

Respectfully submitted,

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