

[ORAL ARGUMENT NOT YET SCHEDULED]

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 13-1280
(consolidated with 13-1281, 13-1291, 13-1300, 14-1006)

SECURUS TECHNOLOGIES, INC., *ET AL.*,
PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
RESPONDENTS.

On Petitions for Review from an Order of the
Federal Communications Commission

**BRIEF OF INTERVENORS MARTHA WRIGHT, DOROTHY WADE,
ANNETTE WADE, ETHEL PEOPLES, MATTIE LUCAS, LAURIE NELSON,
WINSTON BLISS, SHEILA TAYLOR, GAFFNEY & SCHEMBER,
M. ELIZABETH KENT, KATHERINE GORAY, ULANDIS FORTE,
CHARLES WADE, EARL PEOPLES, DARRELL NELSON, MELVIN TAYLOR,
JACKIE LUCAS, PETER BLISS, DAVID HERNANDEZ, LISA HERNANDEZ,
VENDELLA F. OURA, THE D.C. PRISONERS' LEGAL SERVICES PROJECT, INC.,
CITIZENS UNITED FOR THE REHABILITATION OF ERRANTS, PRISON POLICY
INITIATIVE, THE CAMPAIGN FOR PRISON PHONE JUSTICE, AND OFFICE OF
COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST**

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

1. Parties and Amici Curiae.

All parties and Intervenors appearing in this Court are listed in the Petitioners' briefs. The following organizations and individuals have been granted leave to participate as *amici curiae* in support of the FCC: Professors Richard H. Frankel, Steven H. Goldblatt, and Alistair E. Newbern, of the Law School Appellate Litigation Clinics at Drexel, Georgetown, and Vanderbilt Universities; Asian Americans Advancing Justice-AAJC, the NAACP, and the Lawyers' Committee for Civil Rights Under Law; and Verizon.

2. Rulings under review.

The ruling at issue is *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 14107 (2013)(JA_____).

3. Related cases.

The Order on review has not previously been the subject of a petition for review in this Court or any other court. Counsel is not aware of any related cases pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to the United States Court of Appeals for the District of Columbia Circuit R. 26.1 and Fed. R. App. P. 26.1, The D.C. Prisoners' Legal Services Project, Inc., Citizens United for Rehabilitation of Errants, the Prison Policy Initiative, The Campaign for Prison Phone Justice, and Office of Communication, Inc. of the United Church of Christ respectfully submit this Corporate Disclosure Statement.

The D.C. Prisoners' Legal Services Project is a project of the Washington Lawyers' Committee for Civil Rights & Urban Affairs, Inc., which is a nonprofit corporation that does not have any parent companies, subsidiaries, or affiliates that have issued shares to the public.

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Prison Policy Initiative is a nonprofit corporation that has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

The Campaign for Prison Phone Justice is jointly led by the Media Action Grassroots Network, Working Narratives, Prison Legal News, and diverse civil and human rights organizations. The Media Action Grassroots Network is a project of the Center for Media Justice, a nonprofit corporation that has no parent companies, subsidiaries, or affiliates that have issued shares to the public. Working Narratives is a nonprofit organization that has no parent companies, subsidiaries, or affiliates that

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Respectfully submitted,

/s/

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October 20, 2014

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
GLOSSARY	ix
STATUTES AND REGULATIONS	1
SUPPLEMENTAL STATEMENT OF THE CASE	1
I. Attempts to Lower ICS Rates Prior to the 2012 Rulemaking	2
II. The Rulemaking Proceeding	3
A. The Impact of High ICS Costs on Families	5
B. Charges to ICS Customers	7
C. The Role of Site Commissions.....	9
D. Changes in the ICS Industry	11
SUMMARY OF ARGUMENT	13
ARGUMENT	14
I. The Commission’s Actions Do Not Impermissibly Interfere with the Administration of State and Local Prison Facilities. ..	14
A. The Exclusion of Site Commissions from Costs is Lawful and Does Not Impermissibly Interfere With Prison Administration.....	15
B. How Correction Facilities Use Site Commissions is Not Relevant, but in Any Event, Site Commissions are Used for Many Purposes Unrelated to Prisoners’ Welfare.	17
C. Security Features are Compensable Costs of ICS.....	21
D. The Commission Has Clear Authority over Interstate ICS.....	24
E. The Legal Authorities cited by Petitioners Do Not Support Their Position.	27
II. The Commission’s Requirement that Ancillary Fees be Cost- Based is Reasonable.	29

A. The Plain Language of the Communication Act Gives
the Commission Authority over Ancillary Fees..... 30

B. All ICS Customers are Required to Pay Ancillary Fees 30

C. The Cost-Based Rule is Necessary to Prevent Providers
from Offsetting Lower ICS Rates with Ancillary Fees..... 31

CONCLUSION 32

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

APPENDIX

TABLE OF AUTHORITIES

Cases

<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	27
<i>Business Roundtable v. SEC</i> , 905 F.2d 406 (D.C. Cir. 1990)	25, 26
* <i>Cable and Wireless P.L.C. v. FCC</i> , 166 F.3d 1224 (D.C. Cir. 1999)	16, 17
<i>California v. FCC</i> , 798 F.2d 1515 (D.C. Cir. 1986).....	27
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)	27
<i>Jones v. N.C. Prisoners' Labor Union, Inc.</i> , 433 U.S. 119 (1977).....	27
* <i>NAACP v. Fed. Power Comm'n</i> , 425 U.S. 662 (1976).....	25, 26
* <i>Pa. Dep't of Corr. v. Yeskey</i> , 524 U.S. 206 (1998)	27, 28, 29
<i>Preiser v. Rodriguez</i> , 411 U.S. 475 (1973).....	27, 28
<i>Schuette v. BAMN</i> , 134 S. Ct 1623 (2014)	27
<i>Sorenson Communications, Inc. v. FCC</i> , 765 F.3d 37 (D.C. Cir. 2014).....	16
<i>Time Warner Entertainment Co., L.P. v. FCC</i> , 56 F.3d 151 (D.C. Cir. 1995)	15

Statutes

47 U.S.C. § 151.....	26
47 U.S.C. § 152(a)	28
* 47 U.S.C. § 201(a)	25
* 47 U.S.C. § 201(b)	28, 32

47 U.S.C. § 276(b)(2)	28
* 47 U.S.C. § 276(d)	25, 32
Ala. Code § 45-3-231.20	21
Ariz. Rev. Stat. § 41-1604.03(B)	20
Ark. Code § 12-27-128	20
Cal. Penal Code § 4025	21
Fla. Stat. § 945.215(b)	19
Haw. Rev. Stat. § 353-136	21
Ind. Code § 5-22-23-7(a)	20
Mass. Gen. Laws ch. 127 § 3	21
Mass. Gen. Laws ch. 29 § 2	19
Miss. Code § 47-5-158(3)	20
Miss. Code § 47-5-66(2)	20
Tenn. Code § 41-7-104	21
Tex. Gov't Code § 495.027(c)	19
Va. Code § 53.1-127.1	21
Wis. Stat. § 301.105(1)	19

Other Authorities

<i>About Securus, Securus</i>	13
<i>Barbagallo, FCC Proposes Cap on Prison Phone Rates, Explores Two Companies' Market Dominance, Bloomberg BNA (Jan. 2, 2013)</i>	11
<i>GTL Deposit Systems, Global Tel*Link</i>	12
<i>History of Securus, Securus</i>	11
<i>Michaelson, et al., More Than Visiting Hours, 4 Sociology Compass 576 (2010)</i>	7
<i>Securus Grows by 28% in 2010, Now More than 800 Associates Strong, Securus (Dec. 20, 2010)</i>	13
<i>Shields, Prison Phones Prove Captive Market for Private Equity, Bloomberg Business Week (Oct. 4, 2012)</i>	11
<i>Transcript of FCC Workshop on Inmate Calling Services (July 9, 2014)</i>	31
<i>Xu, Castle Harlan Said in Talks to Sell Securus for \$640 Million, Bloomberg News (Apr. 5, 2013)</i>	12

* Authorities chiefly relied upon are marked with asterisks.

GLOSSARY

Commission	Federal Communications Commission
Communications Act	Communications Act of 1934 (codified as amended at 47 U.S.C. §151 <i>et seq.</i>)
Corr. Br.	Joint Brief for Correctional Facility Petitioners and Supporting Intervenors
CURE	Citizens United for the Rehabilitation of Errants
FCC Br.	Brief for the Federal Communications Commission
HRDC	Human Rights Defense Center
ICS	Inmate Calling Services
ICS Br.	Joint Brief for ICS Provider Petitioners and Supporting Intervenors
Justice Project	University of St. Thomas Community Justice Project
LCCHR	The Leadership Conference on Civil and Human Rights
NYU Ctr.	New York University Law School Center on the Administration of Criminal Law
Order	<i>Rates for Interstate Inmate Calling Services</i> , 28 FCC Rcd 14107 (2013)
PPI	Prison Policy Initiative

STATUTES AND REGULATIONS

The FCC's addendum to its brief sets forth the relevant statutes and rules.

SUPPLEMENTAL STATEMENT OF THE CASE

Intervenors adopt the Federal Communications Commission's ("Commission") statement of the case and offer these supplemental facts.

Most Americans today pay only a few cents per minute to make a long-distance interstate phone call. Prior to the Commission's actions on review here, however, millions of Americans could pay up to \$17.30 plus additional fees for a 15-minute interstate phone call to a family member behind bars. *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 14107, ¶35 (2013) ("Order") (JA____). Because prisoners are often incarcerated hundreds of miles from home, their families, which are typically among the most economically distressed in the country, rely on Inmate Calling Services ("ICS") as the primary way to stay in touch with their loved ones. *Id.* ¶¶2, 42 (JA____,____). The financial burden of ICS deterred communication with prisoners, often forcing families to choose between speaking with a prisoner or paying for basic necessities. *Id.*, Statement of Comm'r Clyburn (JA____,____).

For more than a decade, families of prisoners and civil rights groups have advocated for the Commission to bring down ICS rates. Finally in 2013, the Commission found that ICS rates were unjust, unreasonable, and

unfair under Sections 201 and 276 of the Communications Act. As more fully explained in the Commission's brief, the Commission's actions brought down the cost of a 15-minute call to \$3.75, allowing more families to connect or talk more frequently. At the same time, the *Order* allowed ICS providers to cover their costs and reasonably profit while ensuring that necessary security features of the service remain. *Id.* ¶2 (JA_____).

I. Attempts to Lower ICS Rates Prior to the 2012 Rulemaking

Families, prisoners, and lawyers faced with crippling ICS phone bills have fought for reform for more than a decade. The case that eventually led to the Commission's *Order* began in 2000 when Martha Wright, a retired nurse living in Washington, D.C., found herself paying more than \$100 per month to call her grandson, Ulandis Forte. Compl. of Martha Wright, *et al.* 7 (Feb. 16, 2000); *Wright v. Corrections Corp. of Am.*, No. 00-293, Opinion and Order (D.D.C. Aug. 22, 2001)(App. 1-3). Mr. Forte was incarcerated in Arizona, too far from home to permit Ms. Wright to visit him.

Joined by other D.C. residents and defense attorneys, Ms. Wright filed a putative class action that sought to end ICS monopolies at private prison facilities. The complaint alleged that exclusive agreements between ICS providers and facilities, which required providers to share profits with prisons in arrangements known as "site commissions," led to unjust and unreasonable rates under the Communications Act. (App. 3).

Invoking the primary jurisdiction doctrine, the District Court referred the case to the Commission. (App. 4-5). The court listed five reasons for referring the case, including that “the FCC is statutorily charged with handling all claims contesting the reasonableness of telephone rates” and that “Congress has given the FCC explicit statutory authority to regulate inmate payphone services in particular.” (App. 6, 8). Regarding plaintiffs’ concerns about site commissions, the court held that the “FCC has authority to order that Defendants’ rates not reflect commissions.” (App. 7). In referring the case to the Commission, the court “expect[ed] the agency to move with dispatch.” (App. 15).

When the Commission took no action on the court’s referral, the class filed a petition for rulemaking in 2003. *Martha Wright et al. Petition for Rulemaking*, Dkt. 96-128 (Nov. 3, 2003)(JA_____). The FCC sought public comment on the petition but took no further action.

Four years later, as the problems with ICS worsened, *Wright et al.* filed a second petition asking the Commission to cap rates at \$0.20 per minute for debit calls and \$0.25 per minute for collect calls. *Alternative Wright Petition*, Dkt. 96-128 (Mar. 1, 2007)(JA_____). Again the Commission sought and received comments but failed to act, despite the continued urging of the Petitioners.

II. The Rulemaking Proceeding

Finally, in December 2012 the Commission granted the Wright Petitions and issued a Notice of Proposed Rulemaking. *Rates for Interstate*

Inmate Calling Services, 27 FCC Rcd 16629 (2012) (“*Notice*”)(JA_____). The *Notice* specifically sought comment on whether the rate caps proposed by the Wright Petitioners (Intervenors herein who were the petitioners below) would “ensure just and reasonable rates,” and asked what factors the Commission should “consider in determining an appropriate per-minute rate cap.” *Id.* ¶20 (JA_____). The Commission also sought comment on ICS rates proposed by providers in 2008. *Id.* ¶24 (JA_____). The *Notice* also asked for “specific, detailed cost information and other relevant data” to determine appropriate caps and asked how it should treat other charges, such as monthly account fees, that must be paid to use the service. *Id.* ¶¶20, 33 (JA_____,_____).

Public response to the *Notice* was overwhelming. Tens of thousands of members of the public took the time to urge the Commission to lower ICS rates.¹ More than one hundred organizations also participated, including prison reform and social justice organizations that joined Martha Wright and the original class of plaintiffs to comment on the *Notice*.² *See Order*, Ex. B (JA_____).

¹ One organization submitted comments signed by more than 24,000 people, including family members and friends of prisoners. *Color of Change Comments* (Mar. 25, 2013)(JA_____). *See also* 4,822 Comments filed by Credo Mobile (Mar. 23, 2013)(JA_____).

² Organizations joining the Wright Petitioners in their comments included D.C. Prisoners’ Legal Services Project, Citizens United for the Rehabilitation of Errants (“CURE”), Prison Policy Initiative (“PPI”), and The Campaign for Prison Phone Justice. The Campaign for Phone Justice is made up of Media Action Grassroots Network, Working Narratives, and

Commenters developed a robust record for the Commission. Intervenor Human Rights Defense Center (“HRDC”), for example, provided comprehensive data on ICS rates. HRDC Comments, Ex. B (Mar. 25, 2013)(JA_____). Intervenor Prison Policy Initiative (“PPI”) submitted a report detailing how ICS providers use ancillary fees to increase customers’ bills. *Please Deposit All of Your Money: Kickbacks, Rates, and Hidden Fees in the Jail Phone Industry* 10, PPI (May 9, 2013) (“PPI Report”)(JA_____).

A. The Impact of High ICS Costs on Families

The thousands of individual stories and studies presented to the Commission showed how high ICS bills harmed prisoners’ families, including 2.7 million children. Because at least 50% of prisoners are incarcerated more than 100 miles away from home, with 10% more than 500 miles away, ICS is the main way families can meaningfully communicate with imprisoned loved ones. Wright Comments 34 (March 25, 2013)(JA_____).

Although prisoners use ICS, it is family, friends, and clergy outside facility walls that typically end up footing the bill because most prisoners are indigent. NYU Ctr. Comments 4-5 (Mar. 25, 2013)(JA_____). Families with imprisoned loved ones struggle financially, in large part because the prisoner was often the primary breadwinner before incarceration. *Id.* at 5

the Human Rights Defense Center (“HRDC”). The United Church of Christ, Office of Communication, Inc., participated in a Commission workshop, filed separate comments on behalf of itself while joining the comments LCCHR, and joined the Wright Petitioners as Intervenor.

(JA_____). The lost income of the primary wage earner means that the spouse on the outside must work more to pay for basic needs such as childcare. Center for Media Justice, *et al.* Reply Comments 4 (Apr. 22, 2013)(JA_____).

With families already struggling to pay for food, utilities, and other basic needs, ICS costs can become an insurmountable barrier. In one study of families reporting significant barriers to maintaining contact with loved ones, 76% cited ICS costs as a primary impediment. *See* LCCHR Comments 3 (Mar. 25, 2013)(JA_____).

Individual stories bring the burden of ICS bills into stark relief. One prisoner explained that high ICS costs prevented him from speaking with his children for two years. Comments of James Whitley (Apr. 2, 2013)(JA_____). Parents of a terminally ill prisoner described how they could afford only limited contact with him. Prisoners' Legal Services of Mass. Comments 3 (Mar. 25, 2013)(JA_____). One mother reported sacrificing food and heat to speak with her son, while a disabled father went without his medicine to call his son. *See* Color of Change Comments 1,486 (comments of Melissa Jacobs), 2,266 (comments of Stephen Hurst) (JA_____,_____).

High ICS costs have a profound effect on the 2.7 million children in the United States who have at least one incarcerated parent. *Order* ¶2 (JA_____). Only 53% of parents in state prisons reported calling their children while incarcerated. Vera Inst. Comments 2 (Mar. 14,

2013)(JA_____). Incarcerated mothers are imprisoned an average of 160 miles away from home, and less than half have had monthly contact with their children. *Order* ¶42 (JA_____); Comments of Michael Stewart 2 (Feb. 23, 2013) (citing Michaelson, *et al.*, *More Than Visiting Hours*, 4 *Sociology Compass* 576, 580 (2010))(JA_____). Children who lack regular contact with incarcerated parents are more likely to face developmental difficulties and fall into cycles of crime, truancy, and depression. *Order* ¶¶2, 42 (JA_____,_____).

The record also showed that lower ICS rates would have cumulative societal benefits. Through increased communication with family and friends, prisoners would feel more connected with the outside world, easing their transition into communities upon release. *See* Congressional Black Caucus Comments 3-4 (Apr. 22, 2013)(JA_____); Justice Project Comments 2-3 (Apr. 22, 2013)(JA_____). When released prisoners feel connected to their communities, they are less likely to commit additional crimes, reducing recidivism rates and decreasing criminal justice costs. Justice Project Comments 2-3 (JA_____).

B. Charges to ICS Customers

ICS customers' bills have been so high because they typically include three types of charges: per-call, per-minute, and ancillary fees.

Per-call charges are fixed charges that must be paid anytime a customer initiates a call. For example, the record showed that providers charged customers \$3.95 per call in Alabama and Alaska, and \$2 per call in

Arizona. Wright Comments 20 (JA_____). Because the per-call charge is added to every phone call, a short call costs disproportionately more. *Order* ¶85 (JA_____). Sometimes in the course of a single conversation, customers must pay multiple per-call charges because providers frequently drop calls. *Id.* (JA_____); Wright Petitioner Reply Comments 19 (Apr. 22, 2013)(JA_____). Petitioner GTL warns its customers that “even short pauses may result in disconnection.” *See* PPI Report, Ex. 22 (JA_____).

In addition to the per-call charges, high per-minute rates mean that “[f]amilies of incarcerated individuals often pay significantly more to receive a single 15-minute call from prison than for their basic monthly phone service.” *Order* ¶42 (JA_____). For example, the rates of Mississippi and Arizona were as high as \$0.75 and \$0.40 per minute, respectively. HRDC Comments, Ex. B (JA_____). Combining the high per-minute rate with per-call fees, the Commission found that a single 15-minute phone call could cost up to \$17.30. *Order* ¶35 (JA_____).

On top of per-call and per-minute fees, customers must pay ancillary fees. *See Order* ¶90,n.335 (JA_____). The record showed, for example, that Petitioner GTL charges the following ancillary fees:

- \$9.50 to set up an account. *Id.* (JA_____).
- Up to \$9.50 to add money to an account. *Id.* (JA_____).

- \$2.89 to receive a paper bill from GTL. *Id.* (JA _____).³
- \$5 to receive a refund. *Id.* (JA_____).

As a result, ancillary fees “can easily double the cost of a single telephone call, and can add 50% to the phone bills charged to the families that receive more frequent calls.” PPI Report 6 (JA_____). Indeed, ancillary fees represent 38% of the \$1 billion spent annually by ICS customers. *Id.* at 10 (JA_____).

C. The Role of Site Commissions

The record also detailed how most correctional facilities charge ICS providers site commissions in exchange for exclusive contracts to provide phone service to prisons and jails. In the seven states that have made the public policy decision to ban site commissions, ICS rates are much lower. For example, a 15-minute call in New Mexico dropped from \$10.50 to \$0.65 after it banned site commissions. *Order* ¶38 (JA_____). But in states that allow site commissions, ICS rates remained high because providers sought to outbid each other for monopolies at particular facilities by promising to split a share of their profits. *See Order* ¶41 (JA_____).

The record showed that ICS providers contract to share anywhere between 20 to 88% of their profits with prison facilities. *Order* ¶34 (JA_____). States often use site commission revenue to subsidize their

³ To avoid the paper bill charge, GTL recommends that customers log their own calls. PPI Report, Ex. 22 (JA_____). This is difficult because family members outside a prison do not control when they receive ICS calls.

general funds and prison operation expenses, such as employee salaries and benefits, facility maintenance, equipment, and prisoner programs. *See Order* ¶34 (JA_____). Thus, the record showed that “some correctional facilities may base their selection of a contractor largely on the amount of cash . . . offered rather than being driven by proposals focused on high quality service at the most affordable rates for customers.” *Order* ¶41 (JA_____).

As the Commission described, the resulting dysfunctional marketplace rewarded ICS providers for inflating prison phone bills far beyond the direct costs of the service and also discouraged correctional facilities from imposing rate constraints on providers. *Order* ¶41 (JA_____). Thus, the Commission found that “where site commission payments exist, they are a significant factor contributing to high rates.” *Order* ¶34 (JA_____).

Site commissions not only lead to high per-call charges and per-minute rates, they also result in high ancillary charges. The record showed that ICS providers offset the profits they share with facilities through ancillary charges. *See* PPI Report at 7 (JA_____). The fees are a direct revenue stream for providers because they are not split with prison facilities. *Id.* (JA_____).

The record also showed that the seven states choosing to prohibit site commissions still provided effective service and security measures for prisoners, correctional staff, and call recipients. *Order* ¶38 (JA_____). In

those states, providers saw additional revenue because as ICS rates decreased, call volume increased. *Id.* (JA_____).

D. Changes in the ICS Industry

Consolidation among ICS providers, changes in technology, and centralization of the service have significantly decreased the costs of providing ICS. The three ICS Petitioners in this case dominate the industry, with Global Tel*Link (“GTL”) and Securus controlling about 80% of the market and CenturyLink holding roughly another 10%. *Order ¶29, n.106* (JA_____); *Wright Comments 19* (JA_____).⁴

Petitioner Securus was formed by the merger of two companies, which themselves had previously acquired at least eight other ICS providers.⁵ Petitioner GTL acquired ICS operations previously owned by Verizon and AT&T, among others. *Wright Comments 18-19* (JA_____ - _____). GTL has purchased at least four previously independent ICS operators in the last four years. *Id.* at 18 (JA_____).

The consolidated ICS companies are very profitable. For example, Veritas/Goldman Sachs purchased Petitioner GTL for \$345 million in 2008.

⁴ See Shields, *Prison Phones Prove Captive Market for Private Equity*, Bloomberg Business Week (Oct. 4, 2012), www.businessweek.com/news/2012-10-04/prison-phones-prove-captive-market-for-private-equity; Barbagallo, *FCC Proposes Cap on Prison Phone Rates, Explores Two Companies' Market Dominance*, Bloomberg BNA (Jan. 2, 2013), <http://www.bna.com/fcc-proposes-cap-n17179871636/>.

⁵ See *History of Securus*, Securus, <https://securustech.net/web/securus/securus-history> (last visited Oct. 20, 2014).

Id. at 19 (JA_____). American Securities purchased GTL two years later for \$1 billion, “resulting in a \$655 million profit for its investors.” *Id.*

(JA_____). And in 2011, private equity firm Castle Harlan purchased Petitioner Securus from H.I.G. Capital for \$450 million. *Id.* (JA_____).

Castle Harlan sold Securus to ABRY Partners, another private equity firm, in 2013 for an estimated \$640 million.⁶

Besides economies of scale gained through consolidation, technology has also helped providers reduce costs and centralize services. As a result, “[e]ach of the major ICS providers now route each call through their centralized calling centers – which are located hundreds, if not thousands of miles from both the caller and the person receiving the call.” Wright Comments 17-18 (JA_____). Regardless of where calls originate, they are routed to a calling center where providers apply all ICS security features before forwarding them on to the called party. *Id.* (JA_____).

Further, the call centers are highly automated, using “interactive voice response” technology so that most calls are handled without human intervention.⁷ Thus, they handle higher volumes of calls with fewer

⁶ Xu, *Castle Harlan Said in Talks to Sell Securus for \$640 Million*, Bloomberg News (Apr. 5, 2013), <http://www.bloomberg.com/news/2013-04-05/castle-harlan-said-in-talks-to-sell-securus-for-640-million.html>.

⁷ GTL Deposit Systems, *Global Tel*Link*, <http://www.gtl.net/correctional-facility-services/payment-and-deposit-solutions/deposit-systems/> (last visited Oct. 20, 2014).

employees.⁸ According to one ICS provider, “[g]iven modern-day technology, the costs for providing secure phone and video services to correctional facilities are low (and are getting lower).” Turnkey Corrections Comments 3 (Mar. 25, 2013)(JA_____).

The calling centers and automation of ICS means that “the only on-premises equipment at each correction and detention facility is a [Voice over IP] router, several workstations for the site’s guards, and the actual inmate telephone handsets.” Wright Comments 18 (JA_____). The Commission predicted that ICS costs were likely to continue to decrease because of new technology and greater centralization of ICS. *Order* ¶¶29-31 (JA_____).

SUMMARY OF ARGUMENT

The Commission’s interim action to lower the costs of interstate ICS was a lawful and reasonable response to a failed market. Intervenors write separately to address two claims made by Petitioners. First, the Commission did not interfere with the day-to-day administration of state and local prisons facilities under the guise of lowering phone rates.

⁸ Securus, for example, reported having 800 employees in 2010. *Securus Grows by 28% in 2010, Now More than 800 Associates Strong*, Securus (Dec. 20, 2010), http://apps.securustech.net/press_listing.asp?press_id=78. However, Securus’ website currently reports that it has 750 employees. *About Securus*, Securus, <https://securustech.net/web/securus/about-securus> (last visited Oct. 20, 2014).

Petitioners grossly mischaracterize the Commission's actions in pursuit of this argument. A fair reading of the *Order* shows the agency established just, reasonable, and fair ICS rates as required by federal law.

Second, the Commission has explicit statutory authority over ancillary ICS fees. Because customers must pay ancillary fees to make ICS calls, they are an essential part of the service that the Commission can require to be cost-based. Moreover, the cost-based rule ensures that providers do not undermine the purpose of the Commission's ICS reforms by offsetting lost revenue from the interim rate caps with higher ancillary fees.

ARGUMENT

As the Commission's brief demonstrates, the agency has broad statutory authority to enact interim interstate ICS rules. The Commission gave sufficient notice of its intent to require that ICS charges be cost-based, and it established interim rates based on the information available to it that will both lower customers' bills and ensure a return for providers. In this brief, Intervenors address two issues raised by Petitioners: first, whether the Commission's action impermissibly interfered with the operation of state and local prison facilities; and second, whether the Commission has the authority to require that ancillary fees be cost-based.

I. The Commission's Actions Do Not Impermissibly Interfere with the Administration of State and Local Prison Facilities.

Correctional Petitioners argue that the Commission dramatically exceeded its authority and transformed itself into "a prison reform board"

that interfered with state and local prison administration under the cloak of lowering interstate ICS phone rates. Corr. Br. 17, 22-45.⁹ The Commission did nothing of the sort; it merely determined the costs of interstate prison phone service under the Communications Act and set just, reasonable, and fair rates. See *Order* ¶¶12-15 (JA_____-____). Those actions are entitled to “particularly deferential” review “because ratemaking is far from an exact science and involves policy determinations in which the agency is acknowledged to have expertise.” *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151, 163 (D.C. Cir. 1995) (internal quotations omitted).

A. The Exclusion of Site Commissions from Costs is Lawful and Does Not Impermissibly Interfere With Prison Administration.

Petitioners argue that the Commission exceeded its authority and interfered with state and local prison administration by barring site commissions. Corr. Br. 27-29; ICS Br. 26. However, it is simply not true that the Commission barred site commissions. The Commission explicitly stated that “[w]e do not conclude that ICS providers and correctional facilities cannot have arrangements that include site commissions. We conclude only that, under the Act, such commission payments are not costs.” *Order* ¶56 (JA_____). Thus, ICS providers are free to share their profits with facilities as they see fit; they just cannot pass on the costs of the

⁹ ICS Providers make largely the same argument with regard to the Commission’s treatment of site commissions. ICS Br. 26. That argument is addressed below in Part A.

profit sharing arrangements to customers because the resulting rates would be unjust and unreasonable.¹⁰

The Commission has broad authority to determine costs and exclude certain expenses ICS providers incur from the ultimate rate charged to customers. Indeed, this Court recently recognized the Commission's authority to separate providers' actual costs in providing a service from additional revenue that they seek to collect from their customers. *See Sorenson Communications, Inc. v. FCC*, 765 F.3d 37, 46-47 (D.C. Cir. 2014).

In any event, even if Correctional Petitioners are correct that the Commission "effectively barr[ed]" site commissions, that action would also be lawful. Corr. Br. 29. This Court has held in a closely analogous case that the Commission does not exceed its authority simply because its actions have practical effects on entities outside its jurisdiction. *Cable and Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

In *Cable and Wireless*, a group of foreign phone companies sought review of a Commission rule that capped domestic telephone rates that could be paid to foreign providers for terminating a call. *Id.* at 1226. In challenging the rule, the foreign carriers argued that "the FCC's Order unlawfully asserts regulatory authority over foreign telecommunications services." *Id.* at 1229.

¹⁰ Importantly, the Commission indicated that if correctional facilities incur direct costs for providing ICS, such as expenses for installing and maintaining physical phones, those costs may be recovered. *Order* ¶54, n.203 (JA_____).

This Court rejected the argument, holding that although the Order had practical effects on foreign carriers, “the Commission does not exceed its authority simply because a regulatory action has extraterritorial consequences.” *Id.* at 1230. This Court went on:

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. Otherwise, we would have to conclude, for example, that the Environmental Protection Agency regulates the automobile industry when it requires states and localities to comply with national ambient air quality standards

Id. Thus, just because the Commission’s ICS reforms have consequences on prison facilities, those effects do not invalidate its actions.

B. How Correction Facilities Use Site Commissions is Not Relevant, but in Any Event, Site Commissions are Used for Many Purposes Unrelated to Prisoners’ Welfare.

Correctional Petitioners also argue that because they provide “welfare programs to rehabilitate inmates,” lost revenue from site commissions “would hobble the [inmate welfare] programs that many States have deemed desirable or necessary to managing their prisons.” Corr. Br. 24, 29. This is wrong as a matter of law and fact.

It is irrelevant under the Communications Act whether ICS rates fund beneficial programs unrelated to the cost of making a prison phone call. The Commission correctly found that although programs funded by site commissions “may contain worthy goals, we are bound by our statutory mandate to ensure that end user rates are ‘just and reasonable,’ and ‘fair.’”

Order ¶57 (JA_____). Indeed, “[t]he Act does not provide a mechanism for funding social welfare programs or other costs unrelated to the provision of ICS, no matter how successful or worthy.” *Id.* (JA_____).

Even if how facilities spend site commission revenue were relevant here, Correctional Petitioners’ arguments are not supported by the facts. First, their argument states that “users of prisons – inmates – ought to help cover the expenses of prison life and the services that correctional facilities provide.” *Corr. Br.* 25 (internal quotations omitted). But in fact, it is usually families, clergy, friends, and legal counsel, not prisoners, that pay for ICS calls. *Order* ¶42 (JA_____); *supra* 5-6. Petitioners’ assumption about who pays for ICS is therefore incorrect.

Second, Petitioners’ claim that site commissions pay for services that benefit inmates is not supported by the record. The record showed that although not all states collect site commissions, where they do, the funds are frequently used for purposes unrelated to inmate welfare. *See Wright Petitioners Reply Comments* 25-27, Ex. H (Apr. 22, 2013)(reviewing state laws governing how site commissions are spent)(JA_____,_____). State laws also give local sheriffs broad discretion on how they spend site commission proceeds from their county jails.

Intervenors Martha Wright *et al.* showed that in four states, corrections department officials must deposit some or all site commission revenue into the states’ general funds. *Id.* (JA_____). Florida and Massachusetts’ Department of Corrections must deposit 100% of site commissions in their

states' general funds; in Wisconsin, it is two-thirds; in Texas, half. Fla. Stat. § 945.215(b); Mass. Gen. Laws ch. 29 § 2; Wis. Stat. § 301.105(1); Tex. Gov't Code § 495.027(c).

Other states, including Petitioner Mississippi and Intervenor Arkansas, deposit revenue into state funds unrelated to inmate welfare. The Mississippi Department of Corrections, for example, uses 25% of its site commission revenue to pay for departmental phone equipment unrelated to inmate calling and deposits 35% into the Prison Agricultural Enterprise Fund. Miss. Code § 47-5-158(3). Mississippi law provides that the agricultural fund can be used to support "agricultural and nonagricultural enterprises of the department." Miss. Code § 47-5-66(2). By its own terms then, the statute allows officials to use the agricultural fund for nearly any purpose they desire.

Intervenor Arkansas Department of Corrections creates a "cash fund" from site commission revenue that it can use "for periodic transfers to other department funds or for disbursements in support of department operations or debt service." Ark. Code § 12-27-128. This grants Intervenor broad discretion to use the funds in any way it wishes.

Even in states where site commission revenues are spent at correctional facilities, they are mostly used for employee salaries and benefits or facilities, not programs for prisoners. Petitioner Arizona Department of Corrections must deposit \$500,000 of site commission revenue in a "building renewal fund." Ariz. Rev. Stat. § 41-1604.03(B).

Intervenor Indiana Department of Corrections must use site commission revenue “for the purposes of improving, repairing, rehabilitating, and equipping department of correction facilities.” Ind. Code § 5-22-23-7(a). Alabama, Hawaii, and Tennessee use the revenue to pay for employee salaries, training, equipment, and supplies. *See* Ala. Code § 45-3-231.20; Haw. Rev. Stat. § 353-136; Tenn. Code § 41-7-104.

When it comes to how county jails spend their site commission revenue, state laws give local sheriffs very broad discretion. For example, under Massachusetts law, site commission revenue received by Intervenor Barnstable County Sheriff’s Office “may be expended for the general welfare of all the inmates at the discretion of the superintendent.” Mass. Gen. Laws ch. 127 § 3. In California, “[i]nmate welfare funds may be used to augment those required county expenses as determined by the sheriff to be in the best interests of inmates.” Cal. Penal Code § 4025. *See also* Ala. Code § 45-3-231.20 (giving sheriffs discretion to spend site commission revenue on “other law enforcement purposes [. . .] that are in the interest of the public”); Va. Code § 53.1-127.1 (“[a]ny other profits may be used for the general operation of the sheriff’s office”).

The broad discretion allows sheriffs to spend their counties’ site commission proceeds on other items that do not benefit inmates. In 2012, for example, the Orange County, California sheriff used 74% of site commission revenue for staff salaries, reserving only 0.8% for services, supplies, and training for inmate educational programs, and 0.6% for

inmate re-entry programs. *See* Wright Reply Comments 26 (JA____). In nearby Los Angeles County, the sheriff spent 49% of the department's site commission revenue on jail maintenance. *Id.* (JA____).

As the state statutes make clear, rather than paying for programs or services that help inmates, site commission revenue is used for the benefit of the correctional facilities or to pay general expenses. Thus, Petitioners' claim that it is appropriate for prisoners to foot the bill for services through site commissions is both irrelevant and misleading.

C. Security Features are Compensable Costs of ICS.

In addition to arguing that the Commission's treatment of site commissions interferes with local administration of prison facilities, Correctional Petitioners also argue that the *Order* "undermines the determination of state and local authorities that advanced security measures are essential to protecting the public, prison officials, and prisoners." Corr. Br. 30.

This argument is based on a gross mischaracterization of the Commission's actions. The *Order* makes clear that ICS security features are an essential aspect of the service and are compensable costs.¹¹ The

¹¹ The Commission repeatedly recognized that call recording, screening, preventing three-way calling, and other features are essential aspects of the service. *See, e.g., Order* ¶2 (JA____)(recognizing that ICS includes "important security features, such as call recording and monitoring, that advance the safety and security of the general public, inmates, their loved ones, and correctional facility employees"); ¶38 (JA____)(discussing how "no evidence in this record" showed that states with rates lower than the

Commission stressed at the outset that the “Order ensures that security features that are part of modern ICS continue to be provided and improved.” *Order* ¶2 (JA_____).

The *Order* later emphasized that “[w]hile our actions to establish interim ICS safe harbors and rate caps prohibit the recovery of site commission payments, we include costs associated with security features in the compensable costs recovered in ICS rates.” *Id.* ¶58 (JA_____). Costs of security features were incorporated into the rate caps adopted by the Commission, which were “based on cost studies that include the cost of advanced security features such as continuous voice biometric identification.” *Id.* (JA_____).

Moreover, the Commission rejected the rates proposed by Martha Wright *et al.* in part because their proposal did “not include additional security features typically needed for ICS.” *Order* ¶67,n.255 (JA_____). Thus, the Commission could not have been more clear that security features are a necessary aspect of ICS and that the cost of providing security will be compensated.

Order’s rate caps were “below cost or insufficient to cover necessary security features”); ¶61 (JA_____)(concluding that safe harbor rates “include full recovery for security features the correctional facilities have determined to be necessary to protect the public”); ¶74 (JA_____)(setting rate caps based on “the highest costs in the record, which include the costs of advanced ICS security features”).

Correctional Facility Petitioners seize on the *Order's* language in a single paragraph stating that “compensable costs would likely include [. . .] costs associated with security features,” *id.* ¶53 (JA____), to argue that “any security measure not enumerated by the Order [. . .] is presumptively not recoverable.” Corr. Br. 31. As the Commission explains in its brief, the argument is unsound because the language “merely reflects the fact that the Order sets forth an interim framework for rates.” FCC Br. 35. Moreover, Petitioners’ argument overlooks the rest of the *Order's* explicit assurances that security features would be treated as costs, as described above. And if the cost of particular security features would require rates above the *Order's* interim price caps, providers may seek a waiver. *Order* ¶82 (JA____).

Further, the record showed that states with rates much lower than the interim caps were still able to provide necessary security features for their ICS calls. *Order* ¶32,n.123 (JA____). In New York, which has banned site commissions, ICS rates are less than \$0.05 a minute, with the rate including the cost of security features required by state corrections officials. *Id.* (JA____). Should Petitioners have additional evidence regarding the cost of security features, they have an opportunity to present it to the Commission as part of its pending rulemaking to establish permanent ICS rates.

D. The Commission Has Clear Authority over Interstate ICS.

Correctional Petitioners contend that the Commission relied on some notion of promoting the general welfare as authority for its actions and thus exceeded its jurisdiction. *Corr. Br. 2, 27-39*. The argument conflates the social benefits of lower ICS rates with the Commission's authority to do so.

The Commission repeatedly cited Sections 201 and 276 of the Communications Act in the *Order* as the basis for its authority over interstate ICS, not some general public interest standard. *Order* ¶¶12-15, 45-53 (JA_____ - _____). Those sections of the Communications Act give the Commission authority over "interstate . . . communication by wire or radio," including "the provision of inmate telephone service in correctional institutions." 47 U.S.C. §§ 201(a); 276(d). Thus, the plain text of the Act gives the Commission authority over interstate ICS.

Correctional Petitioners confuse the Commission's discussion of the benefits of lowering ICS rates with the agency's authority to determine the costs of prison phone service. The Commission had overwhelming evidence that lower rates would allow prisoners to talk to their families more often, resulting in many societal benefits. *See Order* ¶¶42-44 (JA_____ - _____). It was perfectly reasonable for the Commission to take the evidence into account as a factor in determining just, reasonable, and fair ICS rates. But that evidence was not the basis of the Commission's authority to set the rates for ICS at just and reasonable levels.

As the Commission stated in its *Order*, it had clear evidence that ICS rates were unjust, unreasonable, and unfair in violation of the Communications Act, *Order* ¶¶12-14 (JA_____). Thus, by law the Commission had to lower ICS rates, regardless of whether societal benefits would result.

Moreover, Correctional Petitioners' argument that the Commission lacks authority because it cited to the general public interest objectives of the Communications Act (47 U.S.C. § 151) is without merit. Corr. Br. 38-39. Even if Section 151, which states that the Commission's purpose is "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges," is not found to be a source of authority, the fact that the Commission cited to Section 151 of the Act along with Sections 201 and 276 as the source of its authority would not render the *Order* invalid. So long as the Commission has authority for its actions under any provisions of the Act – which it clearly has under Sections 201 and 276 – its citation to other provisions of the statute does not invalidate that authority.

The cases Correctional Petitioners cite to argue that the Commission impermissibly used its public interest authority to regulate jails and prisons are inapposite. Corr. Br. 16, 32-34, 36-38 (citing *NAACP v. Fed. Power Comm'n*, 425 U.S. 662 (1976) and *Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990)).

NAACP does not support Petitioners' claims; in fact, it supports the Commission's actions. In that case, the Supreme Court held that the Federal Power Commission ("FPC") could not use its general "public interest" mandate to base licensing and rate decisions on utilities' equal employment opportunity practices. *NAACP*, 425 U.S. at 669. Nonetheless, the Court reasoned that the FPC could use its just and reasonable rate mandate to prohibit utilities from passing on expenses to consumers that arose from discriminatory practices. *Id.* at 668. The same logic applies here. The Commission can rely on the Communication Act's just and reasonable requirement to exclude any charges from customers' bills that are unrelated to providing ICS. *Order* ¶55 (JA_____).

Business Roundtable is also inapposite because in that case the Security Exchange Commission relied on its general public interest authority to upset state corporate law, an area historically belonging to the states. 905 F.2d at 412-13. In this case, Section 152(a) of the Commission Act gives the Commission exclusive authority over "all interstate and foreign communication by wire or radio." Further, the Commission relied specifically on its authority under Sections 201 to ensure that all charges for interstate communications are just and reasonable and Section 276 to "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." 47 U.S.C. §§ 201(b), 276(b)(2).

Nor are the cases calling for a congressional statement of intent to override state authority applicable here. Corr. Br. 22-23, 32-33 (citing *Schuette v. BAMN*, 134 S. Ct 1623 (2014) (plurality opinion); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *California v. FCC*, 798 F.2d 1515 (D.C. Cir. 1986)). Congress has unambiguously given the Commission authority over interstate ICS under the Communications Act. In any event, even if the Act were ambiguous regarding the FCC's authority over ICS—and it is not—the Commission merits *Chevron* deference in interpreting its jurisdiction under the Act. *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1868 (2013).

E. The Legal Authorities cited by Petitioners Do Not Support Their Position.

Petitioners rely on a string of Supreme Court cases recognizing states' strong interests in administering their prisons for the proposition that federal authorities must defer to local prison officials' judgments regarding prison operations. Corr. Br. 23, 27-28; ICS Br. 22-23, 27 (citing *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977); *Preiser v. Rodriguez*, 411 U.S. 475 (1973)). The cases are inapplicable here because they concern challenges to a prisoner's conditions of confinement rather than the lawfulness of an agency's actions regulating interstate commerce.

Preiser was a *Younger* abstention case concerning whether the Civil Rights Act of 1871 gave state prisoners an end-run around state remedies for challenging the conditions of their confinement. *Preiser*, 411 U.S. at 476-

77, 491-92. Holding that prisoners must exhaust state remedies challenging their confinement before seeking federal court review, the Court reasoned that “[i]t is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of prisons.” *Id.* at 491-92. This statement, relied upon by Correctional Petitioners, Corr. Br. 22-23, simply recognizes that states have a strong interest in dealing with confinement issues first before being reviewed in federal court. It does not support the broad principle that federal laws cannot apply to local prisons.

Moreover, as *amicus* points out, Correctional Petitioners’ contention is wrong because “[i]n areas more closely tied to day-to-day prison operations than interstate calling, state and local prisons and jails are often subject to regulation by federal courts and federal agencies.” Law School Appellate Litigation Clinics Amicus Br. 14.

The only prison case cited by Petitioners that concerns a conflict between state prison administration and federal law actually supports the Commission’s actions. In *Yeskey*, a hypertensive man sued under the Americans with Disabilities Act, arguing that the law afforded him equal access to a boot camp for first-time offenders. *Yeskey* at 208-10. The Court, in a unanimous decision written by Justice Scalia, held that state prisons clearly fell within the ADA’s requirements that states provide equal access to benefits programs. *Id.* at 210.

While the ICS Petitioners selectively quote *Yeskey* to say that “administration of state prisons’ is a core state function reserved to states,” ICS Br. 27,¹² the case actually holds that state prison officials cannot excuse themselves from complying with federal law, even when it affects local decisions about how to confine prisoners. Here, the impact of federal law on state prisons is less substantial than in *Yeskey*, because the *Order* says nothing about how officials run prisons or should manage prisoners. Thus, none of the cases cited by the Correctional Petitioners require the Commission to defer to state authorities with respect to ICS rates.

II. The Commission’s Requirement that Ancillary Fees be Cost-Based is Reasonable.

ICS Petitioners assert that because ancillary fees are “financial transactions,” the Commission lacks authority to require that they be cost-based. ICS Br. 45. This argument is wrong. First, the Communications Act provides the Commission with clear authority over ancillary fees. Second, the record showed that ancillary fees are an inescapable feature of ICS that every customer must pay to make phone calls. Third, if ancillary fees were beyond the purview of the Commission, providers could offset lower rate caps with higher ancillary fees to keep ICS customers’ bills high. Fearing this result, the Commission reasonably required ancillary fees to be cost-based just like all other aspects of ICS.

¹² The term “core state function” is Petitioners’ characterization of the case. The phrase does not appear in the decision.

A. The Plain Language of the Communication Act Gives the Commission Authority over Ancillary Fees.

The plain language of the Communications Act requires that “[a]ll charges, practices, classifications, and regulations for and in connection with” phone services “shall be just and reasonable.” 47 U.S.C. § 201(b). The Act also gives the Commission authority over “inmate telephone service in correctional institutions, and any ancillary services” associated with them. 47 U.S.C. § 276(d). Hence, the Commission has authority over any charges or practices that are bound up with ICS, and its judgment in this regard warrants *Chevron* deference. See FCC Br. 58-59.

B. All ICS Customers are Required to Pay Ancillary Fees

The record showed that ancillary fees are an unavoidable expense of ICS. Customers must pay fees to open an account,¹³ use an account,¹⁴ not use an account,¹⁵ or close an account.¹⁶ Nor can ancillary fees be avoided

¹³ See Supplemental Statement of the Case, *supra* 8-9. Petitioner GTL charges customers \$9.50 to open an account. Order ¶90,n.333 (JA_____).

¹⁴ GTL charges \$9.50 to add \$50 to a customer’s account. *Id.* (JA_____). Petitioner Securus charges a \$3.49 bill statement fee on top of a \$1.49 bill processing fee. See Martha Wright Ex Parte Letter, Ex. 1 (July 17, 2013)(JA_____).

¹⁵ Providers charge up to \$4.95 per month for account inactivity. See Order ¶90 (JA_____).

¹⁶ For example, GTL charges \$5 for customers to receive a refund, which must be requested in writing. Order ¶90,n.335; PPI Report, Ex. 22 (JA_____,_____). GTL claims any money left in an inactive account for more than 90 days. PPI Report, Ex. 22 (JA_____). Intervenor Telmate will not issue a cash refund if a customer has less than \$50 in an account, charging a \$10 fee to close the account and applying any remaining funds to a prepaid calling card. *Id.*, Ex. 45 (JA_____).

by not setting up an account; customers who do not have an account with a provider must pay a non-account fee.¹⁷

It is impossible to use a prison phone without paying ancillary fees, and there is no reason for anyone to pay ancillary fees unless they are going to use a prison phone. Because the fees are therefore an essential aspect of ICS, the Commission has authority over them under the Communications Act.

C. The Cost-Based Rule is Necessary to Prevent Providers from Offsetting Lower ICS Rates with Ancillary Fees.

The Commission's requirement that all charges, including ancillary fees, be cost-based is a reasonable and necessary corollary to its rate caps. As the Commission noted, if such fees were not required to be cost-based, ICS providers could "simply increase their ancillary charges to offset lower rates subject to our caps," resulting in customers paying the same high charges to use prison phones. *Order* ¶91,n.338 (JA____). A central purpose of the ICS rules – providing lower phone bills to customers – would therefore be severely blunted, if not undermined entirely. Or as PayTel President Vincent Townsend recently said, "until you fix these fees, it's like spitting in the wind. You're . . . wasting everybody's time."¹⁸

¹⁷ ICS Providers charge up to \$14.99 for a call placed by parties lacking prepaid or debit accounts with the provider. *Id.* at 9-10 (JA____).

¹⁸ Transcript of FCC Workshop on Inmate Calling Services p. 139 (July 9, 2014) ("Workshop Transcript")
<http://apps.fcc.gov/ecfs/comment/view?id=6018248961>.

The Commission's concerns were grounded in a record demonstrating that ancillary fees have become a dominant feature of the ICS industry. Ancillary fees comprise 38% of the \$1 billion ICS customers pay annually. *See* PPI Report 10 (JA____). Providers increasingly charge ancillary fees because they are not counted as profits that must be shared with prison facilities through site commissions. *Id.* at 7 (JA____). As a result, ancillary fees are direct revenue for providers. *Id.* (JA____).¹⁹

Thus, if the Commission did not require ancillary fees to be cost-based, the purpose of the rules would be defeated because ICS customers could end up paying just as much as before.

CONCLUSION

For the foregoing reasons, this Court should reject Petitioners' arguments and uphold the Commission's Order in its entirety.

Respectfully submitted,

/s/

Angela J. Campbell
Andrew Jay Schwartzman
Aaron Mackey

October 20, 2014

Counsel to Intervenors Martha
Wright, *et al.*

¹⁹ Moreover the Commission's predictions about ancillary fees have proven true. At a recent FCC ICS workshop, PayTel described how after this Court stayed the *Order's* cost-based rule, ancillary fees increased, including fees of nearly \$11 to pay an ICS bill. *See* Workshop Transcript 136-37.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B) because this brief contains 7,431 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14-point Book Antiqua, a proportionally spaced typeface.

Respectfully submitted,

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October 20, 2014

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on October 20, 2014.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully submitted,

/s/

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Counsel to Intervenors Martha
Wright, *et al.*

October 20, 2014

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARTHA WRIGHT, et al. :
 :
 Plaintiffs, :
 :
 v. : Civil Action
 : No. 00-293 (GK)
 CORRECTIONS CORPORATION OF :
 AMERICA, et al., :
 :
 Defendants. :
 :
 _____ :

FILED

AUG 22 2001

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM OPINION

This matter is before the Court on the Motions to Dismiss Plaintiffs' Complaint by Defendant telephone companies and Defendant Corrections Corporation of America ("CCA"). Upon consideration of the motions, oppositions, replies, the Motions Hearing held on August 9, 2001, and the entire record herein, for the reasons stated below, the Court **grants** the Motions to Dismiss the Complaint under the doctrine of primary jurisdiction.¹

I. BACKGROUND

This case involves a putative class-action challenge to the rates and terms arising from the long distance telephone service arrangements between telephone companies and prison facilities operated by the Corrections Corporation of America, Inc. ("CCA").

¹ The Court sincerely appreciates the informative and thoughtful contribution of Mr. John E. Engles, Deputy Associate General Counsel, Federal Communications Commission, during the Motions Hearing.

gpc

Plaintiffs may be divided into two groups: (1) inmates incarcerated at CCA facilities; and (2) family members, legal counsel and other recipients of inmate calls. Defendants are CCA² and various telephone companies.³

Specifically, Plaintiffs challenge the "exclusive dealing contracts" between CCA facilities and Defendant telephone companies. Under these contracts, each CCA facility grants to one telephone company the exclusive right to provide telephone services to that facility's inmates; in return, CCA receives a commission ranging from 25-50% of the revenues generated by the telephone companies from inmate calls. The exclusive dealing contracts further provide that the only way inmates may communicate by telephone is through a collect call-only feature, which charges the highest operator assisted rate.⁴ Inmates cannot receive calls from outside the facility, and neither inmates nor recipients of

²CCA is a private for-profit corporation which operates eighty prisons and jails in twenty-six states pursuant to agreements with state and local governments. CCA owns and operates four institutions housing D.C. prisoners: Central Arizona Detention Center; the Tarrant County, New Mexico, Detention Center; Northeast, Ohio Correctional Center; and District of Columbia Correctional Treatment Facility.

³ Defendant telephone companies are Evercom Inc. ("Evercom"), American Telephone and Telegraph Company ("AT&T"), MCI Worldcom Communications Inc. ("MCI"), Pioneer Telephone Corporate ("Pioneer") and Global Telecommunications Link ("Global Tel Link").

⁴ Plaintiffs allege, for example, that for a typical long-distance call, a Plaintiff must pay an initial surcharge of \$4.00 and then \$.55 per minute thereafter.

inmate calls are permitted to use other long-distance carriers or take advantage of less-expensive calling options for inmate-initiated calls.⁵

Plaintiffs allege that these exclusive dealing contracts have resulted in exorbitant and unconscionable long distance rates, which severely burden communication between inmates and their family members and counsel. They also claim that the terms of these contracts, rather than furthering any security purpose or covering the cost involved in providing phone service to inmates, are primarily designed to enrich Defendants (through the inflated rates and high commission fees) at the expense of the recipients of inmate calls. They allege violations of the First Amendment, Fourteenth Amendment, Sherman Anti-Trust Act, 15 U.S.C. § 1 et seq., Communications Act, 47 U.S.C. § 151 et seq., and D.C. state law. Plaintiffs seek monetary damages and an injunction against the exclusive dealing contracts. All Defendants have moved to dismiss the Complaint for failure to state a claim and/or for lack of jurisdiction.

⁵ For example, Plaintiffs allege that they are prohibited from using calling features such as direct-dial, dial around, and 1-800-COLLECT, all of which would result in rates considerably cheaper than the collect call-only rates mandated by the exclusive dealing contracts. See Pls.' Opp'n at 2; Compl. ¶¶ 9-15, ¶¶ 42-45, ¶¶ 51-72. They also allege that debit cards are not permitted in most CCA facilities, even though debit cards are regularly used in prisons operated by the Federal Bureau of Prisons. See Pls.' Opp'n, Ex. A ("Federal Bureau of Prisons Memorandum").

II. STANDARD OF REVIEW

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661, 1676 (1999). For purposes of ruling on a motion to dismiss, the factual allegations of the complaint must be presumed to be true and liberally construed in favor of the plaintiff. Shear v. National Rifle Ass'n of Am., 606 F.2d 1251, 1253 (D.C. Cir. 1979).

III. DISCUSSION

Defendants raise a number of jurisdictional bars to reaching the merits of this case.⁶ Among other things, they urge that the Court should exercise its discretion to refer Plaintiffs' action to the FCC under the doctrine of primary jurisdiction. Specifically, Defendants argue that Plaintiffs' suit is primarily a challenge to the reasonableness of the collect call-only phone rates charged. Defendants maintain that because the FCC is statutorily charged with evaluating and regulating the reasonableness of phone rates, it is the forum best-suited to resolve Plaintiffs' claims.

The doctrine of primary jurisdiction is properly invoked in

⁶ Defendants Global, AT&T, and Pioneer assert that the Complaint should be dismissed for lack of personal jurisdiction. Defendant AT&T also asserts that the action should be dismissed against it for failure to join an indispensable party.

situations where a court has jurisdiction over a claim or case but it is likely that the case will require "resolution of issues, which, under a regulatory scheme, have been placed in the hands of an administrative body." See Western Pacific R.R. Co., 352 U.S. 59, 64 (1956). Referral to the administrative agency does not deprive a court of jurisdiction, and a court has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice. Reiter v. Cooper, 507 U.S. 258, 268 (1992).

No rigid formula exists for applying the doctrine of primary jurisdiction. Instead, invocation of the doctrine rests both on the advantages of allowing an agency to apply its expert judgment and on a concern for achieving uniform outcomes. Allnet Communications Service, Inc. v. National Exchange Carrier Association, Inc., 965 F.2d 1118 (D.C. Cir. 1992). Expert judgment extends to policy judgments needed to implement an agency's mandate. Id. at 1120. Applying these principles to the case at hand, the Court concludes that Plaintiffs' claims are best resolved by initial consideration by the FCC and application of the primary jurisdiction doctrine.

A. Advantages of Agency Expertise

Although Plaintiffs have advanced numerous constitutional and statutory claims in this action, what is common to all is the complaint that the rates contained in the exclusive dealing

contracts between CCA and Defendant phone companies are unreasonable. Plaintiffs allege that those rates are inflated in part because of the 25-50% commissions received by Defendant CCA. Any remedy would require the Court to order one of two arrangements: (1) that the exclusive dealing contracts contain lower phone rates; or (2) that CCA offer inmates a choice of phone carriers or calling options.

Either arrangement, however, would require a determination of complex economic and technical issues, such as whether telephone rates can be lowered or whether the alternative telephone arrangements Plaintiffs seek are technologically feasible given the exigencies of the prison environment. As explained below, these are issues that have been and continue to be best addressed by the FCC.⁷

First and foremost, the FCC is statutorily charged with handling all claims contesting the reasonableness of telephone rates. 47 U.S.C. § 201(b) ("All charges, practices, classifications, and regulations...shall be just and reasonable...[.]"). Consequently, courts routinely refer rate challenges to the FCC. See e.g., Ambassador, Inc. v. U.S. 325 U.S.

⁷ During the Motions Hearing, the Court asked Plaintiffs' counsel to propose a remedy that would redress the injuries in this case. See August 9, 2001 Motions Hearing Transcript ("Motions Hearing Tr.") at 24:17-26:19. The inability of counsel to articulate a remedy that this Court could enter demonstrates the complexity of the issues involved and the need for FCC guidance on how best to resolve this matter.

317, 324 (1945) (holding that "where the claim of unlawfulness of a [tariffed] regulation is grounded in lack of reasonableness, the objection must be addressed to the [FCC]"); Western Pacific R.R. Co., 352 U.S. at 68-70 (holding that "both the issues of tariff construction and the reasonableness of the tariff as applied were initially matters for the [agency's] determination"); AT&T Co. v. IMR Capital Corp., 888 F.Supp. 221, 244 (D. Mass. 1995) ("[t]here is no doubt that a determination of the reasonableness or discriminatory nature of common carrier rules and charges is squarely at the heart of the FCC's mandate").⁸

Significantly, the FCC, in exercising its mandate to regulate the reasonableness of rates, is authorized to reject inclusion in Defendants' cost-basis of the 25-50% commissions received by CCA. Therefore, insofar as Plaintiffs' challenge is to the commissions received by CCA and the impact those commissions have on increasing rates, the FCC can adequately address those issues by prohibiting long-distance carriers from considering commission costs in their cost-basis. See Motions Hearing Tr. at 48:16-49:8 (FCC has authority to order that Defendants' rates not reflect commissions

⁸ Contrary to Plaintiffs' contention, the D.C. Circuit's recent decision in MCI Worldcom, Inc. v. FCC, 209 F.3d 760 (D.C. Cir. 2000) does not affect the FCC's jurisdiction to regulate the rates of long-distance carriers. The D.C. Circuit decision prohibited the filing of tariffs for long-distance carriers, but in no way altered the FCC's statutory duty to ensure that the rates of those carriers are reasonable and non-discriminatory. See Motions Hearing Tr. at 8:9-20; 11:5-12.

or other considerations in cost-basis).

Second, Congress has given the FCC explicit statutory authority to regulate inmate payphone services in particular. 47 U.S.C. § 276(d) (providing authority to FCC to regulate payphone service, including "the provision of inmate telephone service in correctional institutions."). Indeed, the FCC has considered and continues to consider the issue of inmate calling services. See In the Matter of Billed Party Preference For Interlata 0+ Calls, Second Further Notice of Proposed Rulemaking, CC Docket No. 92-77, 11 F.C.C. Rcd. 7274 (rel. June 6, 1996) (declining to require billed party preference in the prison context for security reasons) (Attached as Ex. 18 to Def. AT&T's Mot. to Dismiss); In the Matter of Billed Party Preference For Interlata 0+ Calls, 13 F.C.C. Red 6122, Second Report and Order, CC Docket No. 92-77 (rel. Jan. 29, 1998) (declining to impose price benchmarks or rate caps) (Attached as Ex. 19 to AT&T's Mot. to Dismiss). The FCC therefore has already developed the necessary specialized expertise on the underlying telephone technology, the telephone industry's economics, practices and rates, and the feasibility of alternative phone systems that provide adequate security measures.

Third, the FCC has the explicit statutory authority to consider the reasonableness of Plaintiffs' request to have access to other calling options, such as 1-800 services and dial around. See Motions Hearing Tr. at 19:15-24 (the statutory requirement that

carriers make services available upon reasonable request provides the FCC with authority to determine whether Plaintiffs' request for different calling options is reasonable); 47 U.S.C. 201(a) ("It shall be the duty of every common carrier . . . to furnish such communication service upon reasonable request.").⁹

Fourth, the FCC is currently considering challenges to the very same rates and practices challenged by Plaintiffs in this action. In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Public Notice, CC Docket, No. 96-128, 14 F.C.C. Rcd. 7085 (rel. May 6, 1999). In particular, the pleadings in that proceeding raised the principle issues raised by the pleadings in this case: the reasonableness of inmate telephone rates and the feasibility of different calling options, such as debit cards, 1-800 calls, or direct dial services. See Motions Hearing Tr. at 12:23-14:2; 15:17-16:5; 17:17-18:23. Moreover, the FCC invited comments from parties representing inmates and their families in that proceeding, and has received comments from them. See Defs.' Reply, Ex. 5 ("Comments of Citizens United For Rehabilitation of Errants and the Coalition of Families and Friends

⁹ The FCC has exercised this authority in analogous, non-inmate contexts on several occasions. For example, the FCC determined that AT&T's practice of giving volume discounts to single customers who have large communications needs but not to a group of customers who might be able to pool their needs was prohibited. See Motions Hearing Tr. at 20: 2-15.

of Prisoners of the American Friends Service Committee ("CURE/AFSC"), CC Docket No. 96-128 (filed June 21, 1999)).¹⁰ The pendency of nearly identical claims before the FCC makes invocation of the primary jurisdiction in this case particularly suitable. See Total Tele. Comm. Serv. v. AT&T, 919 F.Supp. 472, 478-479 (D.D.C. 1996).

Finally, courts faced with similar challenges to inmate phone rates have already referred such challenges to the FCC under the doctrine of primary jurisdiction. See e.g., Arsberry v. Illinois, No. 99-CV-2457 (N.D. Ill. March 22, 2000) (court referred to FCC because of its experience in determining fairness of telephone rates), aff'd in part on other grounds, Arsberry v. Illinois, 244 F.3d 558 (7th Cir. 2001) (dismissing the equal protection claim under the doctrine of primary jurisdiction but reaching the merits on the other claims); Daleure v. Kentucky, 97-CV-709H (W.D. Ky. Feb. 10, 2000).

Accordingly, for all the foregoing reasons, the Court concludes that the FCC is clearly in the best position to resolve the core issues in this case, namely the reasonableness of the

¹⁰ The Utility Consumers' Action Network ("UCAN") also filed comments in the FCC's proceeding and advised the FCC that it "recently undertook a detailed six month investigation into the billing practices of collect calls that originate from correctional facilities. UCAN seeks to share "its findings with the [FCC] and to educate the [FCC] staff as to paramount issues at stake in this proceeding." See Defs.' Reply, Ex. 7 ("Opening Comments of UCAN," CC Docket No. 96-128 (filed June 21, 1999)).

rates charged and the feasibility of alternative telephone arrangements in CCA facilities.¹¹

B. Uniformity

Concern about inconsistent judgments further strengthens the case for application of the primary jurisdiction doctrine. Congress specifically delegated to the FCC the authority to regulate common carriers' rates, "classifications, practices, and charges," for interstate calls, including the rates and practices that apply to collect calls made by inmates. 47 U.S.C. § 203(a). As explained above, parties representing inmates are presently applying to the FCC for the same relief Plaintiffs seek in this action. As such, there is a risk that this Court may render a ruling that undermines or is inconsistent with FCC determinations on the rates and terms of Defendants' arrangements. There is also a risk that any decision would be inconsistent with the decisions of state courts and state regulatory bodies that are currently deciding these matters. See Defs.' Reply, Ex. 9 (October 26, 2000 Order dismissing class-action inmate challenge to phone rates on grounds of primary jurisdiction in Valdez v. State of New Mexico, No. D-0117-CV-2000-00104 (1st Judicial Dist. County of Rio Arriba)).

¹¹ The Court observes that other non-CCA prison facilities have used different calling arrangements that provide for both lower rates and adequate security measures. See e.g., Pls.' Opp'n., Ex. A ("Federal Bureau of Prison Memo") (charge for debit cards in Federal Bureau of Prisons is \$.15 per minute). The Court expects and anticipates that the FCC will examine this disparity in the course of its present proceeding.

Accordingly, the Court concludes that uniformity concerns counsel in favor of FCC referral.

C. Constitutional Issues

Plaintiffs seek to avoid application of the primary jurisdiction doctrine by arguing that their challenge raises constitutional issues that should be resolved by this Court. However, the presence of constitutional issues in an action poses no absolute bar to invoking primary jurisdiction. See Allnet Communications Service, Inc., 965 F.2d at 1121 (concluding that even a constitutional issue may warrant an "initial take" by the Commission).

The constitutional issues are certainly no bar in this case. First, the FCC has considered constitutional issues in the telephone regulatory context in the past. See Motions Hearing Tr. at 49:21-50:5. Second, all of Plaintiffs' constitutional claims essentially revolve around the reasonableness of the rates charged. For example, Plaintiffs' equal protection claim is premised on the theory that Plaintiffs are charged a higher tariffed rate vis a vis other rate-payers -- both inside and outside similar prison facilities. Their claim is therefore one of a discriminatory rate charge, and is exactly the type of claim that falls within the primary jurisdiction of the FCC and state regulators. See e.g., Arsberry, 244 F.3d at 565.

Similarly, Plaintiffs' First Amendment and due process claims

are premised on the theory that the exclusive dealing contracts, and in particular, the collect call-only long distance rates, are so unreasonable that communications between inmates and their family and counsel are unconstitutionally burdened. The FCC's "initial take" on the reasonableness of the current rates and on other terms of the exclusive dealing contracts, while not dispositive of the constitutional issues, would substantially assist the Court in its task of adjudicating these claims.¹² See Allnet, 965 F.2d at 1121.

Importantly, the primary jurisdictional referral would mean only that the FCC will exercise its regulatory authority in the

¹² For example, in order to prevail on their First Amendment claims, Plaintiffs must first demonstrate that the exclusive dealings contracts entered into between Defendants result in rates which are so exorbitant that reasonable access to the telephone is denied. See Johnson v. California, 207 F.3d 650, 656 (9th Cir. 2000) (rates not "so exorbitant" to deny plaintiff phone access); Strandberg v. City of Helena, 791 F.2d 744, 747 (9th Cir. 1986) (as long as limitations on phone access are reasonable, there is no First Amendment violation); Washington v. Reno, 35 F.3d 1093, 1100 (6th Cir. 1994) (inmate has no right to unlimited telephone use and telephone access is subject to rational limitations in face of security interests).

If Plaintiffs were to make such a showing, this Court would then have to evaluate whether the current arrangement resulting in the burdening of phone access is reasonably related to a legitimate penological interest. See Turner v. Safley, 482 U.S. 78 (1987). The FCC has considered and continues to consider factual issues bearing on this question, such as the costs associated with serving inmate facilities, the level of bad debt associated with inmate payphone service providers, factors prohibiting the use of debit cards, the burden on rate-payers, and the feasibility of other billing options.

first instance. After the FCC does so, to the extent that any constitutional claims remain, the Court will have the benefit of the agency's expert findings in addressing them. See e.g., Far East Conference v. United States, 342 U.S. 570, 574-575 (1952) (primary jurisdiction doctrine requires that in "cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined.") (emphasis added).

Therefore, in view of the fact that the Court would benefit from the FCC's expertise; that concerns for uniformity counsel against decision at this time; and that the constitutional issues are no bar to FCC referral, the Court concludes that the FCC is the entity best suited to make the initial determination of the issues presented by Plaintiffs' claims.

On a final note, the Court observes that there are a number of cases now pending throughout the country involving similar challenges to phone rates that are alleged to be unconscionable and discriminatory. These cases raise issues that are of great human concern to inmates, their family members and their counsel. The hardships of prison life are only exacerbated by limiting the ability of prisoners and their families and lawyers to maintain person-to-person communications. In referring this matter to the

FCC, the Court expects the agency to move with dispatch to conclude its ongoing proceedings so as to provide both courts and parties with meaningful analysis and guidance on these issues.

IV. CONCLUSION

For the reasons stated above, this case is **dismissed without prejudice** under the doctrine of primary jurisdiction.¹³ An Order will issue with this Opinion.

Aug 22, 2001
Date

Gladys Kessler
Gladys Kessler
United States District Judge

¹³ The Court has the option under the doctrine of primary jurisdiction of either staying the case or dismissing it without prejudice. The Court discerns no prejudice to the parties in dismissing, as opposed to staying, this case.