

The Honorable Julius Genachowski  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

**Re: Comment in the Matter of Rates for Inmate Calling Services,  
WC Docket No. 12-375**

Dear Commissioner Genachowski:

The American Bar Association (ABA) submits the following comments in response to the Commission's Notice of Proposed Rulemaking on WC Docket No. 12-375, with respect to Inmate Calling Services (ICS).

The ABA is a world-wide voluntary professional organization, with nearly 400,000 members and more than 3,500 entities committed to serving its members, improving the legal profession, eliminating bias and enhancing diversity, and advancing the rule of law throughout the United States and around the world.

In a recent report, the Pew Center on the States found that one out of every thirty-one adults in the United States is either on probation, parole, or behind bars.<sup>1</sup> The report also found that one in four of those released from behind bars will be re-incarcerated within three years.<sup>2</sup> For those incarcerated or on parole, their family and community connections will play a crucial role in determining whether or not they become that one in four.

We commend the Federal Communications Commission (FCC) for addressing changes to the rules governing rates for interstate interexchange inmate calling services (ICS). For more than 25 years the ABA has steadfastly maintained that any limitations placed on "prisoners' communications should be the least restrictive necessary to serve the legitimate interests of institutional order and security and the protection of the public."<sup>3</sup> The ABA Standards on the Treatment of Prisoners (the Standards) also recognizes the important link between a prisoner's communication with family and community, and their successful re-entry into society. Notably, Standards 23-1.1 ("General principles governing imprisonment"), 23-1.2 ("Treatment of prisoners"), 23-8.7 ("Access to telephones"), 23-8.8 ("Fees and financial obligations"), and 23-8.9 ("Transition into the community") stress that correctional facilities should initiate re-entry planning during incarceration, ensure open and affordable lines of communication between a prisoner, their family, and community,

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<sup>1</sup> STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 1, PEW CENTER ON THE STATES (Washington, DC: The Pew Charitable Trusts, April 2011).

<sup>2</sup> *Id.*

<sup>3</sup> *ABA Standards for Criminal Justice, Legal Status of Prisoner*, Standard 23-6.1.(a)(1981)(communication rights).

and not burden the prisoner with arbitrary fees during incarceration. By charging prisoners exorbitant fees for phone use, many correctional facilities operate in contravention of these standards.

In addition, the ABA House of Delegates voted unanimously in August 2005 to adopt a resolution solely focused on telephone access. It provides:

RESOLVED, That the American Bar Association encourages federal, state, territorial and local governments, consistent with sound correctional management, law enforcement and national security principles, to afford prison and jail inmates reasonable opportunity to maintain telephonic communication with the free community, and to offer telephone services in the correctional setting with an appropriate range of options at the lowest possible rates.

The Association has previously filed comments on several occasions with the FCC in regard to long-pending rulemaking.

The ABA is also committed to protecting the interests of immigrant detainees who are a particularly vulnerable population. During the late 1990's, the ABA worked with the then-Immigration and Nationality Service (now the Department of Homeland Security Immigration and Customs Enforcement, of ICE) to develop the ICE National Detention Standards. The ICE Standards are comprehensive and encompass a diverse range of issues, including access to telephones. In 2012 the ABA adopted the ABA Civil Immigration Detention Standards which state that, "Residents should have reasonable and equitable access to modestly priced telephone services. Charges imposed for phone use should be competitive with rates charged to the public."<sup>4</sup> The Department of Homeland Security detains over 400,000 immigrants every year in facilities around the country, including federal prisons and state and local jails. The men and women in immigration detention are not serving criminal sentences. Rather, they are in detention for violations of civil immigration laws. Immigration detention is not meant to be a punishment, but rather is used to ensure that noncitizens appear in immigration court. Nevertheless, these men and women are held in regular jails, often with criminal inmates, rather than in facilities that reflect the Department of Homeland Security's civil immigration authority. Despite the ICE standards, immigration detainees continue to struggle with inadequate access to telephones, legal representation and legal materials, and other issues.

The Federal Communications Commission (FCC) has before it an opportunity to help guide correctional facilities back in line with these Standards and related policy, and help reduce the high rates of recidivism plaguing our country. To accomplish this, the ABA recommends that the FCC cap rates within the inmate calling services (ICS) market, open up the ICS market to outside competition, and bar states from receiving site commissions. The FCC not only has the statutory authority, but is statutorily

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<sup>4</sup> ABA Civil Immigration Detention Standards, VI. Communications, B. Telephonic and other Real-Time Communications, 2.

compelled to regulate the telecommunications market so that prisoners and their families are not subjected to unfair and unreasonable rates at the hands of self-interested telecommunications providers and state agencies.

For immigration detention facilities, the ABA also recommends: 1) that service providers be required to offer the broadest range of calling options, consistent with sound correctional practices, to include toll-free-calling, debit calling and collect calling; 2) the elimination of per-call charges which make calls to legal representative unreasonably expensive; 3) a prohibition on allowing only prepaid calling options which can delay communication following a detainee's transfer and which have resulted in refusals to return funds which remain in a detainee's account after their transfer; 4) that interstate rates for calling be set at a level no higher than intrastate rates; 5) that certain free calls be available to assist detainees who are representing themselves; 6) and that calls to a legal representative be provided to detainees at no cost.

### **CURRENT PRISON PHONE CALL RATES**

A prisoner's ability to maintain a close connection with his family and community while incarcerated rests largely on phone calls. Many correctional facilities are built hundreds of miles from urban centers, causing prisoners to be held great distances from family and community support services. Since most prisoners tend to come from low-income families, in-person visits are not a realistic option. For yet another subset of prisoners, written communication is hampered due to literacy problems. In the end, telephonic communication becomes the lifeline between the prisoner and the people who will help support him during incarceration and upon his release. For the last twenty years, however, this lifeline has been eroded due to the absurdly high rates that prisoners' families are required to pay in order to receive phone calls from loved ones.<sup>5</sup> These excessive and arbitrary phone rates are the unfair and unreasonable result of monopolistic business practices between states and telecommunications providers, and a lack of regulation and oversight by governmental agencies.

Up until 1984, commercial payphone services within state correctional facilities across the country were operated almost exclusively by AT&T, and were offered at

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<sup>5</sup> See PRISON PHONE CONTRACT DATA / KICKBACKS / DAYTIME COLLECT CALL RATES, NATION INSIDE (2012) available at [http://nationinside.org/images/pdf/RATE\\_CHART\\_10\\_30\\_12.pdf](http://nationinside.org/images/pdf/RATE_CHART_10_30_12.pdf) (data based on prison phone contracts obtained via public records requests from all 50 states, revised as of December 31, 2012). A local 30-minute phone call can range anywhere from free-of-charge in Alaska, to over \$9.00 in Colorado, Maine, or Montana; an intrastate 30-minute phone call can be as little as \$1.40-2.40 in Florida, Nebraska, New York, and Rhode Island, but as much as \$14.00 in Kansas, over \$16.00 in South Dakota, and almost \$25.00 in Oregon; an interstate 30-minute phone call will cost the recipient anywhere from under \$5.00 in states such as Nebraska, New York, and Florida, to over \$30.00 if placed from a prisoner in Alabama, Alaska, Colorado, Connecticut, Georgia, Illinois, Minnesota, North Carolina, Ohio, Oregon, or Washington.

the same price as similar services offered to the general public.<sup>6</sup> AT&T was broken up by the United States Department of Justice in the mid-1980s due to antitrust violations, and since then States have entered into individual exclusive agreements with a host of telecommunications providers.<sup>7</sup> These exclusive agreements between states and telecommunications providers construct insurmountable barriers to entry for other interested service providers who could provide similar, if not better, services, for less cost to prisoners.

Instead of awarding exclusive agreements to the telecommunications provider who offers the lowest costs to the state, and thus the lowest rates to prisoners, states choose a provider based on which company is willing to return the largest portion of revenue to the state in the form of commissions.<sup>8</sup> In other words, whichever company is willing to charge prisoners the most on behalf of the state that is holding them captive. As of December 31, 2012, over half of the states received a 40% or greater commission off of these exclusive provider agreements, the average commission rate of all states coming in at 41.9%.<sup>9</sup>

### **THE ABA STANDARDS ON THE TREATMENT OF PRISONERS**

The first volumes of the ABA Criminal Justice Standards were issued in 1968, and have guided criminal justice policy makers and practitioners ever since. Warren Burger, former Chief Justice of the Supreme Court of the United States, described these standards as “the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession,” further recommending that everyone connected with criminal justice “become totally familiar” with their substantive content.<sup>10</sup>

Policy groups and practitioners around the world have commended the ABA Standards on the Treatment of Prisoners. The Human Rights Watch praised the most recently revised Standards, stating that their implementation “would advance the protection of internationally recognized human rights in US prisons and jails... the

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<sup>6</sup> See Steven J. Jackson, *Ex-Communication: Competition and Collusion in the U.S. Prison Telephone Industry*, 22 CRITICAL STUDIES IN MEDIA COMMUNICATION 263, 268 (2005).

<sup>7</sup> *Id.* at 269.

<sup>8</sup> David Fisher, *Reach Out and Gouge Someone: The boom in prison phone systems*, U.S. NEWS & WORLD REPORT (April 27, 1997) available at [http://www.usnews.com/usnews/biztech/articles/970505/archive\\_006873.htm](http://www.usnews.com/usnews/biztech/articles/970505/archive_006873.htm).

<sup>9</sup> See PRISON PHONE CONTRACT DATA, *supra* note 3.

<sup>10</sup> Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 ABA CRIMINAL JUSTICE (Winter 2009) available at [http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_magazine/makingofstandards\\_marcus.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/makingofstandards_marcus.authcheckdam.pdf).

Standards would help ensure respect for the rights of prisoners while meeting the needs of institutional order and security.”<sup>11</sup>

### **A Prisoner’s Access to Telephones**

The ABA Standards on the Treatment of Prisoners, *Standard 23-8.7. Access to telephones*, provides:

(a) Correctional authorities should afford prisoners a reasonable opportunity to maintain telephonic communication with people and organizations in the community, and a correctional facility should offer telephone services with an appropriate range of options at the lowest possible rate, taking into account security needs. Commissions and other revenue from telephone service should not subsidize non-telephone prison programs or other public expenses.<sup>12</sup>

With the imposition of such high rates on local, intrastate, and interstate calls, correctional authorities are hardly affording prisoners a “reasonable opportunity to maintain telephonic communication with people and organizations in the community.” Many of those incarcerated do not earn money while incarcerated, and those that do are paid almost nothing.<sup>13</sup> Moreover, most correctional facilities only offer collect calling options. This means that the cost of a prisoner attempting to keep in touch with the outside world falls to his family and community support networks. In most cases however, these families and community support networks cannot afford to accept charges, because correctional facilities fail to “offer telephone services with an appropriate range of options at the lowest possible rate.”

As previously stated, the exclusive agreements between states and telecommunications providers only give prisoners one option: pay the absurd cost, or have no telephonic communication at all. Furthermore, since these agreements are made on the basis of which provider will charge the most to prisoners, and in return give the most back to the state, the rates offered to inmates are anything but the “lowest possible.”

Finally, states that enter into contracts with high commission rates use those funds to “subsidize non-telephone prison programs or other public expenses.” The bulk of the rates are used to offset the commissions required by the state, and are not related to

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<sup>11</sup> David C. Fathi, *Letter Supporting Proposed ABA Standards on the Treatment of Prisoners*, HUMAN RIGHTS WATCH (July 22, 2009) <http://www.hrw.org/news/2009/07/22/letter-supporting-proposed-aba-standards-treatment-prisoners>.

<sup>12</sup> STANDARDS ON TREATMENT OF PRISONERS 23-8.7 (2010).

<sup>13</sup> See Peter Wagner, *The Prison Index: Taking the Pulse of the Crime Control Industry*, PRISON POLICY INITIATIVE (2003).

the actual expenses incurred by the telecommunication provider. In most instances, the commissions are placed into general correctional facility operational funds, which cover expenses completely unrelated to phone use.<sup>14</sup> Other states place the money into general state funds, used to fund public expenses that may be completely detached from correctional facilities all together.<sup>15</sup>

In the end, commissions charged on phone calls end up serving as a tax or a fine, levied against families who have loved ones incarcerated.<sup>16</sup> In essence, the commission portion of the rates operate “as an additional punishment imposed on the consumer for no reason other than that a family member of the consumer has been incarcerated.”<sup>17</sup>

### **Charging Prisoners Fees**

The ABA Standards on the Treatment of Prisoners, *Standard 23-8.8. Fees and financial obligations*, provides:

(a) Unless a court orders otherwise in a situation in which a prisoner possesses substantial assets, correctional authorities should not charge prisoners fees for any non-commissary services provided them during the period of imprisonment, including their food or housing or incarceration itself, except that correctional authorities should be permitted to assess prisoners employed at or above minimum wage a reasonable portion of their wages in applicable fees.<sup>18</sup>

In requiring commissions as part of agreements with telecommunications providers, correctional facilities are indirectly charging prisoners fees for non-commissary services provided to them during their period of incarceration. As previously stated, over forty states require commissions from telecommunications providers.<sup>19</sup> While the initial payment for phone usage goes to the provider, a substantial portion of that payment goes right back to the correctional facility or the state through commissions. Through this cycle, correctional facilities are indirectly charging prisoners fees for the programs and services funded by these commissions.

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<sup>14</sup> See Justin Carver, *An Efficiency Analysis of Contracts for the Provision of Telephone Services to Prisons*, 54 FED. COMM. L.J. 391, 400 (2002).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 400-01.

<sup>18</sup> STANDARDS ON THE TREATMENT OF PRISONERS 23-8.8 (2010).

<sup>19</sup> See PRISON PHONE CONTRACT DATA, *supra* note 3.

## **Familial Relationships and Re-entry**

The ABA Standards on the Treatment of Prisoners, *Standard 23-1.1. General principles governing imprisonment*, provides:

(a) A correctional facility should be safe and orderly and should be run in a fair and lawful manner.

(b) Imprisonment should prepare prisoners to live law-abiding lives upon release. Correctional authorities should facilitate prisoners' reintegration into free society by implementing appropriate conditions of confinement and by sustained planning for such reintegration.<sup>20</sup>

*Standard 23-1.2. Treatment of prisoners*, provides:

In order to effectuate these principles, correctional authorities should: (a) provide prisoners with... (vi) conditions conducive to maintaining healthy relationships with their families... [and] (viii) comprehensive re-entry planning....<sup>21</sup>

*Standard 23-8.9. Transition into the community*, provides:

(a) Governmental officials should ensure that each sentenced prisoner confined for more than [6 months] spends a reasonable part of the final portion of the term of imprisonment under conditions that afford the prisoner a reasonable opportunity to adjust to and prepare for re-entry into the community. A correctional agency should provide community-based transitional facilities to assist in this reintegration process.

(b) In the months prior to anticipated release of a sentenced prisoner confined for more than [6 months], correctional authorities should develop an individualized re-entry plan for the prisoner ... Preparation for re-entry should include assistance in locating housing, identifying and finding job opportunities, developing a resume and learning interviewing skills, debt counseling, and developing or resuming healthy family relationships.<sup>22</sup>

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<sup>20</sup> STANDARDS ON THE TREATMENT OF PRISONERS 23-1.1 (2010).

<sup>21</sup> STANDARDS ON THE TREATMENT OF PRISONERS 23-1.2 (2010).

<sup>22</sup> STANDARDS ON THE TREATMENT OF PRISONERS 23-8.9 (2010).

The Public Service Commissioner of Louisiana, Foster Campbell, has called high prison phone rates a crushing blow for poor families trying desperately to stay in contact with loved ones behind bars.<sup>23</sup> Low-income families end up with monthly phone bills reaching several hundred dollars, and are forced to make hard financial decisions; for some families, the cost of keeping in touch with their incarcerated loved one surpasses rent as their largest monthly expense.<sup>24</sup> Ultimately, many families are forced to restrict or cut off entirely contact with their incarcerated relatives. This lack of communication between a prisoner and his family has devastating consequences on their post-release relationship with each other.

Family and community ties do not begin right when a prisoner steps off the bus that returns him home, instead such relationships are forged prior to and throughout their period of incarceration.<sup>25</sup> Prisoners convey that one of the biggest obstacles in maintaining and building these social ties is the difficulty of communication; in particular the high cost for families to visit and accept collect calls.<sup>26</sup> Some prisoners even choose to withdraw from their families in part or entirely in order to protect them from burdensome collect call bills.<sup>27</sup>

A prisoner's post-release relationship with his family and community is one of, if not the most significant factor in determining whether or not he will re-offend or violate parole. This conclusion has been reached consistently in dozens of studies over the past seventy-five years.

A prisoner's release from incarceration is a critical transition in his life, during which it is imperative that he stay away from substance abuse, find employment, refrain from further criminal behavior, and maintain a positive attitude. Immediate connections with family, friends, and community-based organizations upon release have been shown to help recently released prisoners achieve these goals.<sup>28</sup> Moreover,

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<sup>23</sup> Greg Garland, *PSC probing rates for inmate phone calls*, THE ADVOCATE (2011) <http://theadvocate.com/home/928995-79/story.html>.

<sup>24</sup> See Jackson, *supra* note 4, at 272.

<sup>25</sup> See William D. Bales & Daniel P. Mears, *Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?*, 45 J. RES. IN CRIME & DELINQ. 287, 290 (2008); see also Creasia Hairston, James Rolling, and Han-jin Jo, *Family Connections During Imprisonment and Prisoners' Community Re-entry* 1, JANE ADDAMS CENTER FOR SOCIAL POLICE AND RESEARCH, UNIVERSITY OF ILLINOIS AT CHICAGO (2004).

<sup>26</sup> See Nancy G. La Vigne, Samuel Wolf, & Jesse Jannetta, *Voices of Experience: Focus Group Findings on Prisoner Re-entry in the State of Rhode Island* 24, URBAN INSTITUTE (2004).

<sup>27</sup> *Id.*

<sup>28</sup> See Marta Nelson, Perry Deess, & Charlotte Allen, *The First Month Out: Post-Incarceration Experiences in New York City* 6, VERA INSTITUTE OF JUSTICE (1999) (a study of recently released prisoners in New York City found that families not only provide material support, such as housing, food, and finances, but also emotional support in the form of acceptance and encouragement); see also Nancy G. La Vigne, Christy Visser, & Jennifer Castro, *Chicago Prisoner's Experiences Returning Home* 7-8, 10, URBAN INSTITUTE (2004) (a study of recently released prisoners in Chicago found that

such connections alleviate some of the fear, loneliness, and confusion many prisoners feel when they first re-enter society from the confines and structure of incarceration.<sup>29</sup>

For many released prisoners, an actively supportive family keeps them from turning to drug abuse or engaging in other behavior that would violate their conditions of parole.<sup>30</sup> Moreover, family acceptance and support plays a large role in an ex-prisoner's confidence and attitude upon release, encouraging him to confidently look for work, develop new relationships, and begin planning for the future.<sup>31</sup> Overall, many prisoners who violate parole or re-offend report that they did so because they felt isolated, helpless, and desperate, in large part because of a lack of family support.<sup>32</sup>

Individually and collectively, the foregoing practices also make it more difficult for incarcerated people to communicate with their lawyers. Telephone calls are an efficient means for attorneys to communicate with incarcerated clients, particularly when literacy or English-speaking skills are a factor. It is regularly less burdensome for an attorney to speak with a client over the telephone than to travel to the facility and conduct a meeting or personal interview. The high cost of prisoner phone calls makes it difficult or impossible for many prisoners' lawyers to accept their calls. The vast majority of incarcerated people are represented by public defenders or court-appointed attorneys who operate with extremely limited budgets. When attorneys are able to accept prisoner calls, the high cost of the calls cuts into the attorneys' budgets, making it difficult for them to afford other items necessary to their clients' defense. This has serious implications given the constitutional protections surrounding a prisoner's ability to communicate with counsel.

## ACCESS TO COUNSEL FOR IMMIGRATION DETAINEES

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92% of participants relied on the financial support of their family at some point in the first few months after release, and 77% of those still looking for employment were relying on income from their spouses, family, and friends); *see also* Christy Visher, Vera Kachnowski, Nancy La Vigne, & Jeremy Travis, *Baltimore Prisoner's Experiences Returning Home* 6, URBAN INSTITUTE (2004) (a similar study in Baltimore found that 51% of prisoners were receiving financial support from families one-to-three months after release, and 80% were still living with family members); *see finally* La Vigne, Visher, & Castro, *supra* note 24, at 17 (the participants of the Rhode Island focus groups noted that finding employment while incarcerated was a major obstacle, therefore a strong family and community network upon release was a significant factor for them in finding a job).

<sup>29</sup> *See* Marta Nelson, Perry Deess, & Charlotte Allen, *The First Month Out: Post-Incarceration Experiences in New York City* 6, VERA INSTITUTE OF JUSTICE (1999).

<sup>30</sup> *Id.* at 10 (such support came in the form of family members accompanying ex-prisoners to Narcotics Anonymous meetings, or having relatives accompany them whenever they left the house to help temper their temptations).

<sup>31</sup> *Id.* at 11.

<sup>32</sup> *Id.* at 23.

In regards to legal telephone calls for immigration detainees, the Civil Detention Standards state, “Residents should have no-cost access to telephones, e-mail and video technology in order to communicate with legal representatives, according to the provisions under this section and Standard VI.B Telephonic and Other Real-Time Communications.”<sup>33</sup>

Of particular concern to the ABA is immigration detainees’ ability to use telephones to identify and access attorneys.<sup>34</sup> Men, women and children lack the right to government funded counsel in immigration proceedings and the ABA’s 2010 study, *Reforming the Immigration System* found that 84% of detained immigrants lacked representation. Nearly all immigration detainees have active legal cases since most detainees are held pending final resolution of their immigration cases. For that minority of detainees who are able to obtain counsel, ICE has the option to transfer a detainee to any detention facility within the United States. ICE detention facilities are often located in rural areas, far from the pro-bono representation.<sup>35</sup> Many facilities are located an hour or more from metropolitan centers where attorneys practice, making interaction with clients an impediment to representation. This makes telephonic communication imperative. In light of this situation, any factor which increases the expense of telephone calls limits a detainee’s access to justice.

The ABA’s Commission on Immigration operates a detainee correspondence project including a toll-free hotline accessible to immigration detainees across the country. In the course of taking calls from detainees several recurring obstacles to effective communication with legal representatives have been observed which appear to be particular practices impacting access to counsel. Many facilities holding immigration detainees automatically cut off telephone calls after 15 minutes. This leads to the need for detainees to redial numbers multiple times, often leading to additional charges. Costs per call are high, particularly interstate calls to legal representatives and family members. Many detention facilities require that detainees establish prepaid calling accounts which delay their ability to communicate with legal representative and their families. And typically, detainees are not able to transfer accounts to a new detention facility following a transfer. Finally, collect calls from detention facilities are high, the high cost of collect calls which makes it impossible for pro bono legal representatives to accept such calls.

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## **THE CURRENT PROPOSED RULEMAKING BY THE FCC**

As just discussed, these high ICS rates place a great number of correctional facilities in contravention of the ABA Standards on the Treatment of Prisoners. The FCC has

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<sup>33</sup> ABA Civil Immigration Detention Standards, VII. Access to Legal Services, A.7.

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<sup>35</sup> Heartland Alliance National Immigrant Justice Center, *Isolated in Detention* (September 2010), at 8, available at <http://www.immigrantjustice.org/isolatedindetention>.

authority under the Telecommunications Act of 1996 (the Act) to enact regulations that establish rate caps, open up the ICS market to outside competition, and bar site commissions as part of agreements between states and telecommunications providers. In doing so, the FCC would guide these facilities back into compliance with the ABA Standards on the Treatment of Prisoners.

Re:   **III.   ENSURING ICS RATES ARE JUST AND REASONABLE**  
          **A.    Rate Caps in the ICS Market**

Section 201(b) of the Act provides that all charges in connection with telecommunication services “shall be fair and reasonable.”<sup>36</sup> The Act again emphasizes consumer protection in providing that the FCC and the states “should ensure that universal service is available at rates that are just, reasonable, and affordable.”<sup>37</sup>

The ABA recommends that the FCC use its authority under section 201(b) to set “the lowest possible rate, taking into account security needs,” as required by the ABA Standards on the Treatment of Prisoners, Standard 23-8.7(a). Such a fair and reasonable rate would “afford prisoners a reasonable opportunity to maintain telephonic communication with people and organizations in the community,” also required under Standard 23-8.7(a).

In placing just and reasonable caps on prison phone call rates, the FCC would protect prisoners’ families by providing them affordable rates at which to stay in touch with their loved ones. Moreover, by setting caps at the lowest possible rate which still allows phone service providers to recoup their expenses, the FCC would be ensuring that “all payphone service providers are fairly compensated for each and every completed intrastate and interstate call.”<sup>38</sup>

Finally, setting rates that are fair and reasonable is conducive for prisoners “maintaining healthy relationships with their families,” and provides prisoners “conditions that afford [them] a reasonable opportunity to adjust to and prepare for re-entry into the community,” as required by ABA Standard on the Treatment of Prisoners, Standards 23-1.2(a) and 23-8.9(a).

Re:   **III.   ENSURING ICS RATES ARE JUST AND REASONABLE**  
          **C.    Additional Proposals in the Record**  
          36.   *Competition in the ICS Market*

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<sup>36</sup> 47 U.S.C. § 201(b) (1996).

<sup>37</sup> 47 U.S.C. § 254(i) (2008).

<sup>38</sup> 47 U.S.C. § 276(b)(1)(A) (1996).

“The Telecommunications Act of 1996 is the first major overhaul of telecommunications law in almost 62 years. The goal of this new law is to let *anyone enter any communications business -- to let any communications business compete in any market against any other.*”<sup>39</sup> One of the driving forces behind the passing of the Act was the intent of Congress to introduce competition into the telecommunications market, in order to protect consumers from abuse at the hand of monopolistic business practices.<sup>40</sup>

Section 253(a) of the Act provides that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”<sup>41</sup> Section 253(d) goes on to provide that if the FCC finds “that a State or local government has permitted or imposed any statute, regulation, or legal requirement” that violates section 253(a), the FCC “*shall* preempt the enforcement of such statute, regulation, or legal requirement.”<sup>42</sup>

The ABA recommends that the FCC use its statutory authority under section 253(d) of the Act to preempt states from entering into exclusive provider agreements, and open up the ICS market to fair and widespread competition. Even though states have not enacted statutes or regulations that require exclusive contractual agreements between correctional facilities and telecommunications providers, “by allowing only one company to be the provider of service to a prison, the state has put into place a ‘*legal requirement*’ that prevents entry into the market.”<sup>43</sup> Such legal requirements of state and local officials are in violation of section 253(a) of the Act, and give the FCC authority to intervene and preempt enforcement under section 253(d).

Furthermore, section 251(a) of the Act provides that it is the general duty of telecommunications carriers “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.”<sup>44</sup> In essence, this section requires that a telecommunications provider which controls a prison’s telecommunications services to lease its facilities to rivals. This is in order to allow rivals to enter the market without incurring substantial costs, therefore removing another barrier to entry and promoting market competition.<sup>45</sup> Under such hypothetical agreements, providers would share all the same facilities, *including existing security systems.*<sup>46</sup> By operating under exclusive provider agreements,

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<sup>39</sup> *Telecommunications Act of 1996*, FEDERAL COMMUNICATIONS COMMISSION (May 31, 2011) <http://transition.fcc.gov/telecom.html>.

<sup>40</sup> See Carver, *supra* note 12, at 401-02.

<sup>41</sup> 47 U.S.C. § 253(a) (1996).

<sup>42</sup> 47 U.S.C. § 253(d) (1996) (emphasis added).

<sup>43</sup> See Carver, *supra* note 12, at 402 (emphasis added).

<sup>44</sup> 47 U.S.C. § 251(a)(1) (1999).

<sup>45</sup> See Carver, *supra* note 12, at 403.

<sup>46</sup> *Id.*

competing providers are being denied access to existing facilities, a practice in violation of section 251(a) of the Act.

Finally, telecommunications providers and states operate against the express intent of the Act by preventing third-party providers to compete collaterally. Several companies have surfaced over the past decade that offer telephonic services through remote call forwarding techniques.<sup>47</sup> These techniques allow a prisoner to access the cheaper local call rates when calling family members who live far away, while still being subjected to the same security checks (call monitoring, recording, and number verification) as calls placed through the contracted providers.<sup>48</sup> Prisoners who use these services however, are often punished,<sup>49</sup> and many contracted providers block numbers that operate through such services.<sup>50</sup>

By preventing states from engaging in monopolistic business practices, and opening up the ICS market to outside competition, the FCC would allow the market to actually work. Rates would drop as companies are forced to compete with one another within the same prison market. As rates drop, prisoners gain increased access to telephonic communication with their family and community support services, and are better equipped to successfully re-enter society, bringing correctional facilities back in line with the ABA Standards on the Treatment of Prisoners.

**Re: III. ENSURING ICS RATES ARE JUST AND REASONABLE**  
**C. Additional Proposals in the Record**  
37-38. *Site Commissions*

There is a distinct difference between ICS rates in states that have barred site commissions as part of telecommunications provider agreements and those that have not. The average cost of a 30-minute phone call from a prisoner to their families from a prisoner in a state that has barred site commissions is \$2.31 for local, \$3.99 for intrastate, and \$8.89 for interstate.<sup>51</sup> Compare those 30-minute averages with states that still require commissions: \$2.95 for local, \$8.80 for intrastate, and \$18.99 for interstate.<sup>52</sup>

While some states have begun to ban commissions as part of agreements with telecommunications providers,<sup>53</sup> this is not evidence that “the market is working.”

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<sup>47</sup> See Jackson, *supra* note 4, at 273.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See PRISON PHONE CONTRACT DATA, *supra* note 3.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* (the eight states that have banned commissions as part of telecommunications agreements are California, Michigan, Missouri, Nebraska, New Mexico, New York, Rhode Island, and South Carolina).

These actions are instead forced responses by states due to large settlements and judgments being levied against telecommunications providers as the result of questionable billing practices within their correctional facilities.<sup>54</sup> Such practices include: “programming phones to start billing before the recipient accepts the call; imposing surcharges in excess of those allowed; failing to discount calls made at off-peak times; and charging for unauthorized calls.”<sup>55</sup> Many prisoners also complain that their calls are prematurely cut off, forcing them to re-dial their family members and subject them to repeated connection charges.

Though some states have taken responsive action due to these billing practices, many have not. Instead of waiting further decades for lawsuits to pile up and force state legislative responses, the ABA recommends that the FCC take action now and bar states from receiving site commissions as part of agreements with telecommunications providers. Doing so would not only cause a sharp drop in the rates prisoners are forced to pay, but would prevent correctional authorities from charging prisoners fees for non-commissary services, a practice in violation of the ABA Standards on the Treatment of Prisoners, Standard 23-8.8(a).

**Re: III. ENSURING ICS RATES ARE JUST AND REASONABLE  
D. Cost/Benefit Analysis of Proposals**

As discussed in-depth previously, high phone rates that prevent communication between a prisoner and his family are devastating to his chances of living a law-abiding life upon release. Placing caps on ICS rates, opening up market competition, and barring site commissions will work to lower the costs prisoners and their post-release support networks must pay to keep in contact, and help rebuild the lifeline between them.

Some correctional authorities argue that eliminating commissions and reducing rates will lead to a loss in prison programs and guards.<sup>56</sup> But, despite the fact that these rates and commissions are in violation of the ABA Standards on the Treatment of Prisoners to begin with, any loss in revenue would be made up for in long-term cost savings.

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<sup>54</sup> See Jackson, *supra* note 4, at 272 (beginning in the early 1990s, telecommunication providers were agreeing to settlements, and having judgments levied against them, in amounts as high as \$1.7 million for illegal prison billing practices; in a 2001 settlement, MCI agreed to pay back \$500,000 in illegal overcharges to families of those incarcerated in California); see also Jonathan Martin, *AT&T to pay Washington prisoners' families \$45 million in telephone class action settlement*, THE SEATTLE TIMES (February 3, 2013) <http://blogs.seattletimes.com/opinionnw/2013/02/03/att-to-pay-washington-prisoners-families-45-million-in-telephone-class-action-settlement/> (in February 2013, AT&T agreed to pay \$45 million to settle a class action lawsuit brought by families of prisoners in Washington State correctional facilities).

<sup>55</sup> See Carver, *supra* note 12, at 398-99.

<sup>56</sup> See Greg Garland, *PSC probing rates for inmate phone calls*, THE ADVOCATE (2011) <http://theadvocate.com/home/928995-79/story.html>.

Recent studies show that recidivism has been growing at an alarming rate.<sup>57</sup> In recognizing this trend, and the significant cost burden it places on states, policy makers have increased efforts to reduce future criminal activity and violations of parole in order to keep bodies out of prison beds.<sup>58</sup> Regulations that lower phone rates, which in-turn lead to more successful re-entry for prisoners and reduced recidivism, fall squarely in line with these policy trends, and benefit society as a whole.

Prohibitively high calling rates also implicate the prisoners' and detainees' ability to communicate with their counsel, to the extent it undermines the ability of counsel to confer with the client about the facts, possible witnesses, and other issues regarding presentation of the evidence. Telephone calls are an efficient means for attorneys to communicate with detained clients, particularly when literacy or English-speaking skills are a factor. It is less burdensome for an attorney to speak with a client over the telephone than to travel to the facility and conduct a meeting or personal interview. The high cost of prisoner phone calls makes it difficult or impossible for many prisoners' lawyers to accept their calls. When attorneys are able to accept prisoner calls, the high cost of the calls cuts into the attorneys' budgets, making it difficult for them to afford other items necessary to their clients' defense.

To encourage access to legal calls service providers should offer a broad range of calling options, consistent with sound correctional practices. Toll-free calling, debit calling, and collect calling are options that offer different advantages at varying costs. To the extent that existing technology does not permit full access to toll-free numbers for security reasons, correctional authorities should work proactively with telephone service providers to develop and refine technology that extends security features to toll-free calls. Although correctional authorities must be mindful of security concerns when determining what calling options to offer, some telecommunications experts and numerous correctional systems have found that alternatives to collect call-only policies – such as the debit-calling option presently in place in a significant number of facilities – can satisfy legitimate security concerns.

Second, telephone services in the correctional setting should be offered at the lowest possible rates. A wide range of calling options and fair competition in the marketplace will help control excessive costs. Non-exclusive contracts, contracts with multiple vendors, the provision of debit cards through multiple vendors, and unrestricted vendor access to correctional telephone networks are all measures that promote fair competition which will lead to reasonably priced telephone services for prisoners and their families. Greater oversight of the terms and conditions – particularly the site commissions – of service contracts will enable service providers to lower their cost of service and pass those savings on to consumers.

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<sup>57</sup> See STATE OF RECIDIVISM, *supra* note 2.

<sup>58</sup> See Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers* 12, VERA INSTITUTE OF JUSTICE (2012).

## **Part I. Rate Caps, Per-call Charges and Commissions**

*Addresses NPRM #18*

The FCC asked if the elimination of the per-call charge would help ensure just and reasonable ICS rates; ways to prevent multiple per-call charges for a single conversation that is disconnected by security triggers and subsequently allowed to continue while maintaining appropriate security measure; and what other steps could be taken to prevent inmates from being charged multiple per-call charges for what amounts to one conversation.

The ABA is concerned that per-call charges impede communication between immigration detainees and their legal representatives. The National Detention Standards which regulate, in part, access to telephones by ICE detainees states in relevant part, “The facility shall not restrict the number of calls a detainee places to his/her legal representatives, nor limit the duration of such calls by rule or automatic cut-off, unless necessary for security purposes or to maintain orderly and fair access to telephones.”<sup>59</sup> In our experience, these rules are not consistently followed at all detention centers; calls are routinely terminated by the facility after 15 or 20 minutes. For detainees who are preparing their legal case with their attorney, several consecutive calls may be required to complete their discussion. In those facilities which have a per-call charge such interruptions can impede communication with their lawyer due to the sheer expense.

The ABA recommends the FCC eliminate per-call charges as has been accomplished in Indiana, Michigan, New Mexico, New York, Oregon and Texas,<sup>60</sup> or if per-call charges are deemed necessary, impose a cap on per-call charges capped at under \$1.00.

## **Part I. Rate Caps, Per-call Charges and Commissions**

*Addresses NPRM #33*

The FCC noted that prepaid calling is an alternative to collect and debit calling which allows inmates or their family member to prepay for minutes. The FCC questioned how to handle monthly fees, how to load an account and minimum required account balance, and asked what are other concerns or considerations with prepaid calling.

The ABA is concerned with the manner in which prepaid calling accounts are established in certain facilities which house ICE detainees. As noted above immigration detainees are often transferred from one detention facility to a facility in a different state for the convenience of ICE. It is imperative in such cases that their

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<sup>59</sup> 2000 Detention Operations Manual, Telephone Access, V. F. Telephone Usage Restriction; 2011 Performance Based National Detention Standard, 5.6 Telephone Access, F. Legal Calls, 1. Restrictions

<sup>60</sup> Can we cite the Comment by the Human Rights Defense Center – Holly’s comment?

attorney be able to contact them by telephone and in many facilities the attorney is required to establish a prepaid calling account with a minimum balance. Attorneys have reported to the ABA that when their clients are moved to yet another facility the attorney is required to set up a new account at the new facility, while they have been denied refunds from the account established at the first facility. Therefore the ABA would recommend that facilities be prohibited from allowing prepaid calling only, but offer detainees additional methods of payment such as collect or debit calling.

## **Part I. Rate Caps, Per-call Charges and Commissions**

### *Addresses NPRM 34*

The Commission at NPRM 34 asks to the extent that interstate rates for inmate calling services are significantly higher than intrastate rates, how would a requirement that ICS providers set interstate rates at a level no higher than intrastate, long-distance rates affect the justness and reasonableness of those rates?

At NPRM 50 the Commission notes that only a portion of the telephone calls inmates make from correctional facilities are interstate, interexchange ICS.

While most people who are convicted of a state crime are also imprisoned within that state, the same cannot be said for ICE detainees who are routinely moved around the country based on where ICE beds are available. Therefore, ICE detainees, more than any other group of prisoners are more often housed away from their family and legal representatives, and therefore calls from ICE detainees would have a significantly higher percentage of interstate, interexchange calls.

To encourage telephone access to legal representatives for ICE detainees the ABA recommends that interstate rates for inmate calling be set at a level no higher than intrastate rates.

## **Part IV – Other Calling and Rate-related Issues**

### *Addresses NPRM 39*

The Commission requested comments on no-cost calls for prisoners and detainees. The importance of allowing for certain classes of free calls has been recognized for immigration detainees in the National Detention Standards which provide that certain categories of telephone calls must be free for persons in immigration detention. Detainees are permitted to contact free legal services providers while seeking representation; The Executive Office of Immigration Review and local immigration court; the Board of Immigration Appeals; federal and state courts where the detainee is or may become involved in a legal proceeding; consular officials; DHS/Office of Inspector General, the United Nations High Commission for Refugees; federal, state or local government offices to obtain documents relevant to his/her immigration case; immediate family or others for emergencies, and the ICE/Office of Professional

Responsibility Joint Intake Center. The ability to reach out to these entities without charge is particularly important for detainees who represent themselves in immigration proceedings.

## **Conclusion**

That ABA has continually held that any limitations placed on "prisoners' communications should be the least restrictive necessary to serve the legitimate interests of institutional order and security and the protection of the public."<sup>61</sup>

The practice of reaching into the wallets of prisoners and their families to fund prisons via payphone service rates is in violation of the ABA Standards on the Treatment of Prisoners and the Telecommunications Act of 1996. These practices are tearing families apart, and significantly conflict with and undermine more fundamental correctional policies aimed at promoting successful reentry and at reducing recidivism. The FCC can play a substantial role in helping to correct these unethical practices by removing barriers to entry for competing telecommunications providers, barring site commissions, and enforcing caps on prison phone call rates.

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For additional information on these issues, or to tap into our membership expertise on these subjects, please contact Thomas Susman (202-626-3920; [Thomas.Susman@americanbar.org](mailto:Thomas.Susman@americanbar.org)), Director of the ABA's Governmental Affairs Office, or Bruce Nicholson (202-662-1769; [Bruce.Nicholson@americanbar.org](mailto:Bruce.Nicholson@americanbar.org)), Senior Counsel, ABA GAO, or Kristi Gaines (202-662-1763, [Kristi.Gaines@americanbar.org](mailto:Kristi.Gaines@americanbar.org)).

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<sup>61</sup> *ABA Standards for Criminal Justice, Legal Status of Prisoner*, Standard 23-6.1.(a)(1981)(communication rights).