

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**IN THE MATTER OF THE COMMISSION
INQUIRY INTO THE RATES AND CHARGES
OF INSTITUTIONAL OPERATOR SERVICE
PROVIDERS**

)
)
) **Case No. 07-00316-UT**
)

07-00316-UT
PUBLIC REGULATION COMMISSION
NEW MEXICO

PREPARED DIRECT TESTIMONY

OF

JOHN J. REYNOLDS

PUBLIC VERSION – CONFIDENTIAL MATERIAL REDACTED

January 23, 2009

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PREPARED DIRECT TESTIMONY OF
John J. Reynolds
Case No. 07-00316-UT

1 **Q. Please state your name and occupation.**

2 A. My name is John J. Reynolds. I am employed by the New Mexico
3 Public Regulation Commission (“Commission”) as a Utility Economist in
4 the Telecommunications Bureau of the Utility Division.

5

6 **Q. Please summarize your educational background.**

7 A. I earned a Bachelor of Arts Degree in Linguistics as well as a Masters in
8 Business Administration with a concentration in Finance from the
9 University of Rochester in Rochester, NY.

10

11 **Q. Please summarize your professional experience.**

12 A. From 1978 to 2002, I worked in the non-ferrous metals production and
13 manufacturing industry in internal auditing, purchasing of raw materials
14 and trading of commodity derivatives to manage exposure to price
15 fluctuations. More recently, I have worked as an analyst for individual
16 income taxation with the Commonwealth of Virginia and as a Federal
17 Royalty Auditor in the Oil & Gas Bureau of the State of New Mexico’s
18 Taxation and Revenue Department. In September of 2008, I joined the
19 Commission as a Utility Economist.

20

21 **Q. Have you previously testified before this Commission?**

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1 A. No. This is my first time testifying before the Commission.

2

3 **Q. What is the purpose of your testimony?**

4 A. The purpose of my testimony is to provide background, history and an
5 economic analysis of the market for inmate telephone services in New
6 Mexico. My intent is to provide a rational approach to the evaluation
7 inmate telephone rates that prevail in New Mexico correctional institutions.
8 Inmate Operator Service Providers (IOSPs) provide telephone services to
9 inmates pursuant to contracts independently negotiated with the operators
10 of each correctional institution. My review will consist of:

- 11 • A history of the Commission's scrutiny of the inmate
12 telephone industry in New Mexico
- 13 • An overview of the inmate telephone industry and how it
14 operates in New Mexico and other (lower 48) states.
- 15 • A review of the cost-based information provided by IOSPs to
16 support the rates.
- 17 • A review of inmate telephone rates that prevail in other
18 states.
- 19 • An analysis of the cost and market based information
20 supporting inmate telephone rates to determine whether
21 New Mexico rates are just and reasonable.

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Q. What is the background of this case?

A. On July 25, 2007, the Commission ordered that an inquiry be opened into the rates and charges of IOSPs offering services within New Mexico. The Commission further ordered that these IOSPs file with the Commission cost of service studies or other ratemaking methodologies to justify the rates currently on file. In its petition for this inquiry, Staff stated that the conditions prevailing in the inmate telephone industry in New Mexico were the same as those that caused the Commission to start a prior investigation seven years earlier. IOSPs have long been the subject of scrutiny by the Commission. A significant number of complaints to the Consumer Relations Department about high inmate telephone rate was cited in support of the prior case mentioned above (NMPRC Case No. 3317). During the pendency of that case, the New Mexico Legislature enacted House Bill 133, effective June 15, 2001, which prohibited any “commission or other payment to the operator of the correctional facility or jail based upon amounts billed by the telecommunications provider for telephone calls made by inmates in the correctional facility.” In turn, the role of such commissions paid to the correctional facility became central to the investigation related to that case.

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1 **Q. What was the ultimate resolution of NMPRC Case No. 3317 that**
2 **applied to all of the IOSPs?**

3 A. Once the HB 133 prohibitions on commissions became law, the focus of
4 that case was on the effective timing of such prohibitions. IOSPs negotiate
5 contracts with operators of correctional facilities at various points in time.
6 At the time of the investigation, thirty-two contracts existed between
7 IOSPs and operators of New Mexico correctional institutions. Twenty-nine
8 of these thirty-two contracts included provisions for the payment of
9 commissions. Commission payments at that time ranged from 17% to
10 44.8% of billed revenues. Some of these contracts could be extended
11 indefinitely while others had expiration dates as distant as May 2011 if the
12 parties exercise all extension terms. The lion's share of these contracts
13 had escape clauses that allowed for termination by the contracting IOSPs.
14 The Hearing Examiner's recommended decision stated that (1) tariffs that
15 are commission-based from contracts in existence as of June 15, 2001
16 were just and reasonable, (2) tariffs that are commission-based from
17 contracts in existence after June 15, 2001, or renewed or amended after
18 that date, are not just and reasonable.

19

20 **Q. Please provide some background as to the inmate telephone**
21 **business and the role of commission payments.**

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1 A. While telephone service is now widely available to inmates around the
2 nation, the nature of the service differs significantly from what is available
3 to the rest of us. Rates available to the general public through direct-
4 dialing, calling cards and monthly plans are generally not available to
5 inmates who make calls from institutions. Inmate telephone service is
6 provided by IOSPs under negotiated contracts with operators of
7 correctional institutions. The user and payors of this telephone service, i.e.
8 the inmates and their families, friends and lawyers, are not a party to the
9 establishment of bidding criteria or to the negotiations that lead to a
10 contract to locate the equipment in the facility and provide service to the
11 inmates housed in that facility. There is competition among IOSPs to
12 provide service and contracts are generally awarded as a result of a
13 competitive bidding process. With a contract in hand, the winning IOSP
14 becomes the exclusive provider of telephone service to the inmates
15 housed in the institution in question. The telephone equipment is generally
16 owned, installed, operated and maintained by the IOSP. All security
17 related hardware and software for call blocking and monitoring in
18 accordance with the institution's guidelines are the responsibility of the
19 IOSP. The contracts between the IOSPs and the operators of the
20 correctional institutions are generally long-term. In other words, the
21 contracts last one year or more with options to renew and/or extend the

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1 duration of the contracts for a year or more. Also, these contracts are
2 many times called zero-cost contract in that the IOSP bears all the cost of
3 installing, owning and maintaining the hardware and software related to
4 the provision of inmate telephone service thus there costing zero to the
5 operator of the correctional institution

6 As became evident during the investigation relating to the prior IOSP
7 case, the proverbial elephant-in-the-room related to the inmate telephone
8 industry is the issue of commission payments by the IOSPs to the
9 correctional institutions that can be a part of a contract awarded to an
10 IOSP. At the time HB 133 became effective in New Mexico on June 15,
11 2001, commissions paid by IOSPs operating in New Mexico ranged from
12 17% to 44.8% of gross billed inmate telephone revenues. New Mexico
13 was one the first states to prohibit the payment of such commissions to
14 operators of correctional institutions. Even today, there are only a handful
15 of states where such commissions are prohibited. I will testify to practices
16 in other states later in my testimony. The practice of paying commissions
17 has been and continues to be common nationwide. In most states, the
18 commissions generated by inmate phone calls are a significant source of
19 funding for the correctional facility. Operators of correctional facilities who
20 are recipients of commission payments thus become a revenue-sharing

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1 partner of the IOSP by agreeing to have the IOSP locate its equipment in
2 the facility but with little of the risk borne by the IOSP.

3

4 **Q. In what states are commission payments from IOSPs disallowed?**

5 A. Since the resolution of last IOSP case before this Commission and since
6 the passage of HB 133 in New Mexico, there have been a small number of
7 states that have moved to disallowing commission payments from IOSPs
8 to operators of correctional institutions. The most prominent state to make
9 this change was New York. In January 2007, former Governor Elliott
10 Spitzer directed the NY Department of Corrections to no longer accept
11 commission payments from IOSPs. The NY Department of Corrections
12 was directed to renegotiate its inmate telephone rates with its existing
13 IOSP and new zero-commission rates became effective in April 2007. This
14 prohibition applies only to correctional institutions under the jurisdiction of
15 the State of New York. Also in 2007, state law prohibiting commission
16 payments by IOSPs became effective in Rhode Island. Nebraska has a
17 long history of disallowing any commission payments from IOSPs. I also
18 understand that Missouri also disallows such commission payments. Later
19 in my testimony, I will provide some analysis about the impact of the
20 prohibition of commission payments on inmate telephone rates.

21

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1 **Q. Who are the major players operating as IOSPs in New Mexico?**

2 A. There are five IOSPs who are actively operating in New Mexico and who
3 are also parties to this case. They are (1) Conversant Technologies, Inc.
4 (CTI), (2) Evercom Systems, Inc. (Evercom), (3) Inmate Calling Solutions,
5 LLC (ICS), (4) Public Communications Services, Inc. (PCS), and (5) T-
6 Netix Telecommunications, Inc. (T-Netix). CTI provides inmate telephone
7 service at only one institution in New Mexico: Otero County Prison Facility,
8 a privately operated facility under contract with the US Marshals Service.
9 Global Tel*Link (GTL) is also a party to this case but they do not appear to
10 be operating in New Mexico at this time and they are not actively
11 participating in this case. Following some industry consolidation since the
12 prior IOSP case, Evercom and T-Netix “have joined forces” to become
13 Securus Technologies, Inc. (Securus) (See/Listen to intro on
14 www.securustech.com web site). Evercom and T-Netix are wholly-owned
15 subsidiaries of H.I.G Capital, a private investment firm. Also part of the
16 H.I.G. Capital family is Correctional Billing Services, a division of Evercom
17 & T-Netix. Correctional Billing Services (CBS) is the billing arm for
18 Evercom & T-Netix and acts as the customer service point for friends &
19 families of inmates concerning inmate telephone calls.
20 There are two other inmate telephone providers currently operating in New
21 Mexico who are not parties to this case: (1) Digital Solutions, Inc. (DSI),

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1 and (2) Inmate Communications Corporation (ICC). DSI, which files under
2 the name of ITI Inmate Telephone Inc., has filed annual reports and a tariff
3 with the Commission. ICC has been filing annual reports with the
4 Commission and has a tariff on file. There is no record of ICC updating its
5 tariff since it was filed in October 1995. Also, ICC was a participant in the
6 prior IOSP case.

7

8 **Q. What is the size of the inmate telephone market in New Mexico?**

9 A. I have reviewed the last Carrier and Utility Inspection Report filed with the
10 Commission by each of the 8 IOSPs currently operating in New Mexico.
11 Gross receipts reported by the 8 IOSPs totaled \$9.85 million for 2007. Of
12 this amount, \$7.25 million (73.6%) were receipts for intrastate telephone
13 activity. Following is a list of the top IOSPs by share of gross receipts:

14 1) Securus (Evercom & T-Netix) 57.6%

15 2) PCS 30.6%

16 3) CTI 8.5%

17

18 **Q. Please provide an overview of the correctional institutions currently**
19 **operating in New Mexico.**

20 A. I have personally surveyed the locations of all correctional institutions
21 located in New Mexico which house adult inmates under state or county

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1 jurisdiction by contacting the New Mexico Corrections Department
2 (NMCD), the 33 counties and/or county correctional institutions. I
3 attempted to confirm and augment this information by viewing the web
4 sites of NMCD, for-profit operators of correctional facilities, and counties.
5 To the extent I was unable to get any information from any county or from
6 a county's web site, I tried to fill in the blanks with information from other
7 sources, e.g. the public records from the current docket and from the prior
8 IOSP case, web sites of for-profit operators of correctional facilities, and
9 press reports. I have excluded any facilities exclusively under federal
10 jurisdiction or privately operated under contract only with the federal
11 government or an agency thereof.

12 As a result of my research, I have developed a universe of 41 correctional
13 facilities in New Mexico that house adult state and county inmates. NMCD
14 manages 11 correctional institutions and also houses some state inmates
15 in 2 of the county facilities that are operated by subcontractors. Of these
16 11 NMCD institutions, 6 of them are also operated by NMCD. The other 5
17 institutions are operated by for-profit subcontractors. The GEO Group, Inc.
18 (GEO) operates 3 of them and Corrections Corporation of America (CCA)
19 operates the last 2. Out of 33 counties in New Mexico, 29 have at least
20 one correctional institution. Most of these institutions are operated by the
21 county corrections or public safety department. A few are operated by the

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1 local Sheriff's Office. Three county facilities are operated by for-profit
2 operators under contract with the county and, in 2 cases, the state. CCA
3 operates the Tarrant County Detention Facility which houses county,
4 state and federal inmates. Cornell Companies, Inc. (Cornell) operates two
5 county facilities: (1) the Regional Correctional Center in Albuquerque and
6 (2) the Lincoln County Detention Center in Carrizozo. Four counties in
7 New Mexico do have not county managed correctional facilities: (1) Mora
8 County has an agreement with San Miguel County to house any inmates,
9 (2) Guadalupe County uses the NMCD facility in Santa Rosa which is
10 operated by GEO, (3) Union County used the NMCD facility in Clayton
11 also operated by GEO, and (4) Harding County uses adjoining county
12 detention facilities.

13 Beyond the universe identified above, I know of two other major
14 correctional institutions that house only inmates under federal jurisdiction:
15 (1) Cibola County Correctional Center operated by CCA and (2) Otero
16 County Prison Facility operated by Management & Training Corporation
17 (MTC).

18

19 **Q. Which IOSPs provide inmate telephone service in the New Mexico**
20 **institutions you have surveyed?**

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1 A. For the sake of simplicity and in light of the industry consolidation, I will
2 refer to Evercom and/or T-Netix as simply Securus. In my review, I have
3 found that many I have contacted at various counties and facilities referred
4 to their IOSP as Securus. While it is true that Evercom and T-Netix have
5 been filing separate tariffs with the Commission, they appear to be
6 effectively managed as a single entity and in this reply I will refer to either
7 of them as Securus. Evercom and T-Netix tariffs filed with the Commission
8 have become increasingly similar over time since their common ownership
9 and the individuals managing the tariffs named in the public
10 correspondence with the Commission have the same name.

11 In the universe of 41 institutions identified earlier, I have been able to
12 ascertain that ■■■■■ is the provider of inmate telephone service at ■■ of
13 those institutions. PCS is the provider at 12 institutions and ■■ is the
14 provider at ■ institutions. DSI and ICC each provide service to 1 institution.
15 A complete list of which IOSP provides inmate phone service to what
16 institutions is detailed in Exhibit JJR-1 attached to the confidential version
17 of my direct testimony. A redacted version of Exhibit JJR-1 is included with
18 the public version of my testimony.

19 As far as billing to friends & families of inmates is concerned, CBS is the
20 billing agent for 29 of the correctional institutions in my universe while
21 PCS is the billing agent for 4 of the institutions. This information was

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1 garnered from the web sites of CBS and PCS (last checked on 1/5/09).
2 CBS is the billing agent for at least 5 of the institutions managed and
3 operated by NMCD where PCS is the contracted IOSP. As CBS and PCS
4 are not members of the same family of companies, one would not expect
5 a company from one family to be a billing agent for an IOSP from a
6 different family especially where each family has active billing agents.
7 However, the record from the prior IOSP case before this Commission
8 indicates that PCS, the contracted IOSP for NMCD managed and
9 operated institutions, has been subcontracting its inmate telephone
10 service at these institutions to Evercom, a member of the family of
11 companies that includes CBS. I assume this subcontracting arrangement
12 continues to this day.

13
14 **Q. Since NMCD is the largest single client or host for inmate telephone**
15 **services, please review the rates that prevail at NMCD locations and**
16 **what impact HB 133 has had on those rates, if any.**

17 A. PCS is the provider of inmate telephone service at NMCD operated
18 facilities in Los Lunas, Santa Fe, Roswell, Las Cruces, Springer and
19 Grants as well as the NMCD facility in Santa Rosa which is operated by
20 GEO. The record of the prior IOSP case indicates that PCS has been the
21 IOSP to NMCD facilities since its contract with the State dated November

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1 13, 1997. That contract between PCS and NMCD called for payment of
2 commission from PCS to NMCD equal to 48.25% of gross billed inmate
3 telephone revenues. The prevailing rates for a collect inmate telephone
4 call during evening/week-end hours lasting 15 minutes were the following:

5 Local	\$4.58
6 IntraLATA/Intrastate	\$4.90
7 InterLATA/Intrastate	\$4.90

8 After the passage of HB 133 which became effective June 15, 2001, PCS
9 renegotiated its contract with NMCD to eliminate any commission payment
10 provisions and the rates for the same telephone calls as described above
11 were and still are the following:

12 Local	\$2.15	down 53.1%
13 IntraLATA	\$3.63	down 25.9%
14 InterLATA/Intrastate	\$3.63	down 25.9%

15
16 **Q. Provide a history before the Commission of the cost-based**
17 **information provided by IOSPs to support their tariffed rates?**

18 A. In its April 4, 2000 Final Order approving PCS's request for certification as
19 an IOSP in Case No. 3113, the Commission docketed Case No. 3317 to
20 investigate whether the rates charged by PCS and other IOSPs were
21 reasonable, and whether rate caps or other rate limitations were

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1 necessary. The Commission ordered PCS and other IOSPs to furnish cost
2 of service studies or other ratemaking methodology to justify current rates.
3 The Final Order issued December 13, 2003 in Case No. 3317 determined
4 that: (1) IOSP tariffs containing the costs of revenue-based commissions
5 resulted in higher costs to customers; and (2) that IOSP tariffs containing
6 the costs of revenue-based commissions resulting from contracts
7 executed after the effective date of HB 133 (June 15, 2001), or renewed or
8 amended after that date are not just and reasonable because they contain
9 such costs. The immediately preceding Q and A illustrates the impact of
10 removing such commissions from the costs that inflated inmate telephone
11 rates.

12 The Commission's Notice of Inquiry (NOI) in Case No. 07-000316-UT was
13 opened to determine whether there was a cost basis for the rates being
14 charged, and ordered IOSPs to file cost of service studies or other
15 ratemaking methodologies to justify current rates. Following IOSP
16 responses to the NOI, Staff filed a motion on December 21, 2007
17 requesting that the IOSPs be ordered to submit cost information as
18 specified by Staff in the Exhibit A attached to that motion. All IOSPs filed
19 objections to Staff's motion. On January 30, 2008, the Hearing Examiner:
20 (1) ordered Staff to brief the issue of whether the Commission had the
21 legal authority to require the IOSPs to furnish cost of service studies or

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1 similar ratemaking methodologies, and to respond to the IOSPs'
2 objections to its motion; and (2) also ordered the IOSPs to respond to
3 Staff's Brief and to include any estimates of expenses in providing cost of
4 service studies. The IOSPs filed their Joint IOSP Proposal to Commission
5 Staff Regarding Data to be Provided on March 6, 2008 advocating a rate
6 cap proposal based upon a nationwide benchmarking of IOSP rates. Staff
7 and the IOSPs engaged in intermittent discussions regarding whether
8 Staff and the IOSPs could agree to a form of cost study for the purposes
9 of supporting current IOSP rates, considering that these cost studies may
10 also be useful in possibly setting price caps in a later rulemaking
11 proceeding. In particular, the parties proposed cost studies along the lines
12 of the table and associated explanatory information contained on pages
13 11 - 12 of the August 21, 2000 Direct Testimony of Dr. Richard Cabe,
14 Ph.D. filed on behalf of Gateway Technologies, Inc. in Case No. 3317.
15 Due to similarities between Dr. Cabe's testimony and the cost information
16 originally requested by Staff in its December 21, 2007 motion, Staff
17 believed that approach, with some modifications proposed by Staff, would
18 be useful. By August 25, 2008, all IOSPs filed confidential cost
19 information, and Staff followed with its second set of interrogatories served
20 on October 2, 2008.

21

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1 **Q. Did Staff find the responses of the IOSPs adequate to provide a basis**
2 **to determine whether the rates charged by the IOSPs are just and**
3 **reasonable?**

4 A. The IOSP-provided cost information lacked sufficient organization and
5 detail to determine whether the currently tariffed IOSP rates, some of
6 which may vary by facility, are justified by the costs of service. This may
7 at least in part be due to the fragmented nature of the market. Moreover,
8 the IOSPs have stated they do not use traditional cost of service
9 methodology to set rates or record expenses and revenues.

10

11 **Q. What is the status of the contract for the provision of inmate**
12 **telephone services between PCS and NMCD?**

13 A. The expiration date of the contract between PCS and NMCD has already
14 been reached. However, inmate telephone services continue to be
15 provided at NMCD institutions by PCS in accordance with the terms and
16 conditions of the expired contract under an emergency extension
17 agreement between PCS and NMCD.

18

19 **Q. How is NMCD addressing the future provision of inmate telephone**
20 **service at its facilities?**

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1 A. The State of New Mexico (General Services Department, State
2 Purchasing Division) has an issued a Request for Proposals (State RFP)
3 dated July 25, 2008 to select a provider of inmate telephone service at 6
4 NMCD managed and operated correctional facilities. The RFP can be
5 accessed on the internet at the following link:
6 <http://www.generalservices.state.nm.us/spd/rfp903610001086.html> (last
7 accessed on 1/16/2009). This RFP process is nearing a conclusion.
8 Based on the sequence of 14 steps outlined on page 6 of the State RFP,
9 the process is currently in step 12 – “Finalize Contract”. The State is
10 currently in discussion with a potential IOSP to produce a final contract.
11 Should the State and the potential IOSP reach an agreement, the contract
12 will be publicly awarded (step 13). The final step (14) provides for a 14-
13 day period to allow other IOSPs to protest the award. The State RFP calls
14 for a contract with zero cost to the State and it expressly states that the
15 State will “not accept any commission from the automated inmate
16 telephone system.”

17
18 **Q. Do you know what will be the inmate telephone rates in the new**
19 **contract to provide this service in NMCD facilities?**

20 A. No. The inmate telephone rates that will prevail under the new contract at
21 NMCD facilities will not be disclosed until the contract is publicly awarded.

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1 At the time of the award, the rates proposed in the awarded contract as
2 well as the rates proposed by other IOSPs will become publicly available.

3

4 **Q. What weight does the State of New Mexico RFP give to inmate**
5 **telephone rates in its evaluation of offers from IOSPs?**

6 A. On a 1000-point scale, the weight given to “rates and other charges” is
7 250 points. The next most significant factor, with 200 points, is the IOSPs’
8 “oral presentation and demonstration.”

9

10 **Q. How important is the ultimate award of a new contract by the State of**
11 **New Mexico to this case and to the evaluation of existing inmate**
12 **telephone rates?**

13 A. In the context of this case, it is difficult to overstate the importance of the
14 new inmate telephone rates that will prevail in NMCD institutions as a
15 result of a new contract. This is the first public bidding process for a new
16 contract for inmate telephone service at NMCD operated institutions that
17 appears to be reaching a conclusion since the passage of HB 133. HB
18 133 provides that “a contract to provide inmates with access to
19 telecommunications services...shall be negotiated and awarded to an
20 entity that...provides the lowest cost of service to inmates” and that such a
21 contract “shall not include a commission or other payment...based upon

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1 amounts billed by the telecommunications provider for telephone calls
2 made by inmates.” The outcome of the State RFP will therefore publicly
3 reveal market-based inmate telephone rates which result from a
4 competitive bidding process where inmate telephone rates are the single
5 most important factor in the award of the contract and where the host
6 institution refuses to accept any commission payments from the provider.
7 One of the biggest challenges in evaluating the panoply of inmate
8 telephone rates in New Mexico (or any other state) is the wide range of
9 timing and conditions of existing contracts with state and local correctional
10 institutions. While the costs (not including the cost of commission
11 payments) incurred by IOSPs at different facilities may be different due to
12 conditions specific to the facility or because they were imposed by the
13 contract specific to a facility, there are enough similarities in the nature of
14 the service provided to assess the value of essentially similar services by
15 comparing market-based rates. To this end, the rates that will prevail from
16 the new contract awarded by the State of New Mexico will provide a useful
17 benchmark to evaluate all other inmate telephone rates prevailing in New
18 Mexico.

19 Another important factor is the high visibility of the contract award by an
20 agency of the State of New Mexico. Since the State of New Mexico has
21 jurisdiction over a significant portion of all state and county inmates

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1 housed in New Mexico, the process and the ultimate result should provide
2 an example and a resource for local governments to follow in negotiating
3 new contracts or renegotiating existing contacts with IOSPs.

4

5 **Q. Before comparing rates between state and local institutions in New**
6 **Mexico, what about comparing inmate telephone rates at NMCD**
7 **institutions with statewide rates elsewhere?**

8 A. I believe that is a valid comparison as statewide rates are almost always
9 the result of a highly visible and highly competitive public bidding process.
10 However, it is first very important to classify the states based on the
11 existence or absence of commissions paid by IOSPs to the contracting
12 state agency. The payment of commissions has an unarguable impact on
13 the resulting inmate telephone rates as it is the telephone revenue
14 generated by inmates and their friends & families that provide the
15 resources necessary to pay the commission. I believe the information I am
16 about to provide will bear that out.

17

18 **Q. What have you been able to find out about the inmate telephone**
19 **market in states other than New Mexico and whether these other**
20 **states accept commission payments?**

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1 A. The research I have been doing in preparation for this testimony has led
2 me to a clear premise that the large majority of states (40+) do not
3 disallow payments of commissions by IOSPs to the states. It has also
4 become clear to me that, where states do not disallow the payment of
5 commissions, the payments of commissions do occur. That appears to
6 have been the standard practice within the industry as the provision of
7 inmate telephone service has become widespread. Note that, for my
8 research on this market in other states, I am focusing on corrections
9 agencies or departments at the state level and not at the local level. Due
10 to time limitations, my focus has been on finding states that disallow the
11 payment of commissions and states that awarded contracts relatively
12 recently so that telephone rates reflect improvements in technology and
13 current competitive market conditions.

14
15 **Q. Which states disallow the payment of commissions by IOSPs and**
16 **what are the rates prevailing in those states?**

17 A. New Mexico was one of the first to pass a law (HB 133) that disallows the
18 payment of commissions by IOSPs to the contracting party. Nebraska is
19 another state that has not allowed such commissions for a long time. As
20 stated earlier in my testimony, New York, Rhode Island, and Missouri
21 have more recently disallowed the payment of commissions. Prior to the

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1 Governor's prohibition in early 2007, New York was collecting
2 commissions from its IOSP at the rate of 57.5% of gross billed inmate
3 telephone revenue, the highest prevailing commission rate by a statewide
4 agency. The NY Department of Corrections re-negotiated its inmate
5 telephone rates with its existing provider in April 2007 and the inmate
6 telephone rates were reduced by more than half. In 2008, New York
7 awarded a new contract to a new provider (Unisys) at rates reportedly
8 lower than the current rates but I have been so far unable to ascertain
9 those rates. However, the RFP for this for this latest contract award states
10 that the evaluation process will allocate 70% of the total evaluation score
11 to the bidder with the lowest per minute inmate telephone rate. The RFP
12 therefore makes clear that the telephone rate paid by inmates is by far the
13 largest single factor in the award process. In 2007, a new law was passed
14 in Rhode Island prohibiting the payment of commissions from IOSPs. Also
15 in 2007, a new IOSP contract was awarded by the state for inmate
16 telephone service. Missouri also recently prohibited IOSP commission
17 payments and awarded a new contract to provide inmate telephone
18 service. Following is a summary of the cost to an inmate in those 3 states
19 for a 15-minute call prepaid with the purchase of a calling card at the
20 institution's commissary as well as the current cost for the same call at
21 NMCD institutions:

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	NY	RI	MO	NM
Local	\$2.30	\$0.63	\$1.50	\$1.80
Intrastate LD	\$2.30	\$0.63	\$1.59	\$3.60
Interstate LD	N/A	\$5.22	N/A	N/A

2

3

4 **Q. Why are you comparing rates only for 15-minute prepaid inmate**
5 **calls?**

6 A. IOSPs currently offer 3 ways to make and complete a telephone call in
7 most institutions: collect, prepaid collect, and prepaid inmate. All other
8 things being equal, my research indicates that collect calls are the most
9 expensive while prepaid inmate calls are the least expensive. Correctional
10 institutions generally limit the duration of a single phone call to 15-20
11 minutes. Time of day is become less and less relevant in the pricing of
12 phone calls by inmates. To the extent contracted rates vary by the time of
13 day, I will be referring to the lowest evening/week-end rates. In light of the
14 above information, I have chosen to establish a proxy call for the purpose
15 of benchmarking rates in my testimony. The proxy call is prepaid by the
16 inmate and lasts 15 minutes. If relevant to the existing rates, the proxy call
17 takes place during evening and week-end hours.

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Q. What states did you find that do not disallow the payment of commissions by IOSPs and what are the prevailing inmate telephone rates in those states?

A. I have examined inmate telephone rates prevailing in Colorado, Kansas, Maine, Nevada, and Texas. All of the rates prevailing in the institutions managed by state corrections agencies in these states are the result of relatively recent contract awards or updates. Colorado deregulated the inmate telephone business in 2003 and the Public Utilities Commission has no jurisdiction over the providers of inmate telephone service. The rate information I have for Colorado was updated in 2008. I was unable to find out the rate of commissions paid by IOSPs to the State of Colorado. Kansas awarded a new contract for IOSP services to Embarq in 2008. The new contract calls for commissions to be paid at a rate of 41% of telephone revenue and it also calls for a minimum annual commission payment of just over \$1 million. Inmate telephone rates in Maine were updated in 2007. I was unable to determine the rate of commissions paid back to the State of Maine. In 2008, Nevada awarded a new contract to Embarq for the provision of inmate phone service. This contract calls for ongoing commission payments from Embarq at the rate of 54%. The prior contract had a commission rate of 52%. Finally, Texas, which has one of

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1 the largest inmate populations in the country, awarded a new contract to
2 Embarq to establish and provide inmate telephone service. Texas was the
3 last of 50 states to provide readily available phone service to its inmates.
4 The contract with Embarq calls for a commission payment back to the
5 State of Texas at a rate of 40%.

6 Following are the rates for the proxy call described above that prevail at
7 the state correctional institutions in the 5 states above which do not
8 disallow the payment of commissions back to the state:

	CO	KS	ME	NV	TX
Local	\$3.20	\$1.96	\$4.50	\$1.45	\$3.45
Intrastate LD	\$3.20	\$6.12	\$4.50	\$2.73	\$3.45
Interstate LD	\$3.95	\$5.78	\$4.50	\$16.10	\$5.85

10

11

12 **Q. Based on the rates you found that prevail in states that disallow**
13 **commission payments and rates in states that do not disallow**
14 **commission payments, what conclusions do you draw about the**
15 **impact of commissions?**

16 **A.** In my view, the rate data outlined above and illustrated in the
17 accompanying charts clearly suggests that commission payments

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1 constitute a major portion of IOSP costs where such commissions are
2 payable and that rates paid by inmates and friends & families of inmates
3 are effectively inflated by the amount of the commission the IOSP is
4 paying. The cheapest local proxy call in the zero commission states is
5 57% less than the cheapest such call in commission states I have
6 examined. For local calls, there are some states where commissions are
7 paid where the local rate is slightly lower than New York's rate for a local
8 call, the highest local rate of any state where commissions are not paid.
9 Given that many state correctional institutions are located in relatively
10 remote areas of the state, it is reasonable to assume that most intrastate
11 inmate phone activity is long distance (instead of local). A comparison of
12 intrastate long distance even more clearly supports my view in that the
13 cheapest intrastate long distance proxy call in commission paying states is
14 more expensive than the most expensive equivalent call in zero
15 commission states. This is further supported by the inmate phone rate
16 reductions negotiated by the NY Department of Corrections in early 2007
17 without any change in provider. In that case, there were no other changes
18 to the provision of inmate telephone service other than a reduction of
19 commission payments from 57.5% to 0% and a concomitant reduction in
20 rates. The same impact of commissions on rates is also illustrated by the
21 renegotiation of rates at NMCD operated institutions following the passage

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1 of HB 133 without any change in IOSP or equipment provided by the
2 IOSP.

3
4 **Q. What conclusions do you draw about the reasonableness of rates**
5 **currently paid by inmates or friends & families of inmates housed in**
6 **NMCD correctional institutions?**

7 A. My approach to evaluating the reasonableness of inmate phone rates paid
8 by inmates or friends & families of inmates housed in NMCD institutions is
9 to compare the rates with those prevailing in other state correctional
10 institutions where the payment of commissions is prohibited. This is
11 important because as I contended earlier the existence of commission has
12 a major impact on the cost of providing inmate telephone and thus the
13 rates that prevail under those conditions. A comparison of inmate
14 telephone rates at an institution where commissions are paid by the IOSP
15 at a rate I am unable to ascertain with telephone rates at an institution
16 where no commissions are paid would be an “apples and oranges”
17 comparison. To that end, I have attempted to equalize the commission
18 factor when making comparisons to make the comparison as valid as
19 possible. Clearly, there are factors other than the payment of commissions
20 that may influence the comparison but my view is that the commission
21 factor stands far above all others.

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1 The cost of a local proxy call as defined above from an NMCD institution is
2 slightly lower than for the equivalent call in New York but is 20% and
3 186% higher than the same call in Missouri and Rhode Island
4 respectively. The cost of an intrastate long distance proxy call from an
5 NMCD institution is higher than the cost of the same call in any of the
6 three other states: 65% higher than New York, 140% higher than Missouri,
7 and 471% higher than Rhode Island. Further, it is also 46% higher than
8 the cost to the IOSF of an equivalent **interstate** call from a “marginal”
9 correctional facility as put forth by The Wood Report, a cost study dated
10 August 15, 2008 that was funded by the inmate telephone industry.

11 Another perspective is the relative difference between local and intrastate
12 long distance proxy calls in each of the four states in my review that do not
13 allow the payment of commissions. In New York, Rhode Island and
14 Missouri, there is no difference between the cost of local and intrastate
15 long distance proxy calls. In New Mexico, the cost of an intrastate long
16 distance proxy call is exactly double the cost of a local proxy call.

17 In my view, the comparisons outlined above show that the cost of a local
18 call from NMCD operated institutions is not significantly different from the
19 cost of the same call in states that are comparable to New Mexico. The
20 cost of an intrastate long distance call from NMCD operated institutions is
21 disproportionately higher than the cost of similar calls in other states

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1 comparable to New Mexico and is also disproportionately high in relation
2 to the cost of a local call. Therefore, staff believes that the cost intrastate
3 long distance calls from NMCD institutions are not just and reasonable.

4

5 **Q. Turning to both state and county facilities in New Mexico, what are**
6 **the rates paid by inmates and their friends & families for telephone**
7 **calls from those institutions?**

8 A. In the universe I defined earlier testimony, there are 10 correctional
9 institutions under state jurisdiction and the other 31 institutions are under
10 county jurisdiction. All of these institutions offer inmates the ability to make
11 collect calls. I could not find the rate information for facilities #37 and #40
12 (See Exhibit JJR-1) as the existing IOSPs (DSI and ICC) at these 2
13 institutions are not party to this case and thus did not provide the
14 information. Based on the information available to me, only ■ of the 41
15 institutions allow inmates to purchase prepaid calling cards and to make
16 telephone calls such calling cards. ■ institutions do not offer prepaid
17 calling cards to inmates. I was unable to ascertain whether facility #5
18 offers prepaid calling cards. For facilities #37 and #40, I was unable to
19 verify the existence of prepaid calling card rates for the same reason
20 outlined above concerning collect call rates. Please see Exhibit JJR-2 filed

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1 with the confidential version of my testimony for a listing of rates and
2 payment methods.

3 The cost of 15-minute collect call at 39 of the 41 institutions ranges from
4 \$0.50 to \$3.83 for a local call and from \$2.00 to \$6.00 for an intrastate
5 long distance call. See Exhibits JJR-3 and JJR-4 for a distribution of
6 collect call rates.

7 The cost of 15-minute prepaid inmate call at 24 of the 41 institutions
8 where this service is available ranges from \$1.25 to \$7.50 for a local call
9 and from \$1.50 to \$8.50 for an intrastate long distance call. See Exhibits
10 JJR-5 and JJR-6 for a distribution of prepaid inmate call rates.

11 **Q Does it appear that the IOSPs have adjusted their rates since the**
12 **passage of HB 133?**

13 A. Earlier in my testimony, I reviewed how PCS, the IOSP to NMCD operated
14 institutions, renegotiated inmate telephone in the middle of its contract
15 period in 2001 as HB 133 became effective. The renegotiated rates led to
16 the updated tariff filed by PCS in June 2001. With the negotiation of new
17 contracts and with the amendment and renewal of existing contracts
18 between IOSPs and New Mexico facility operators, the cost of a 15-min
19 collect call at most facilities is now the same or very near to what it was
20 based on the rates renegotiated in 2001 between NMCD and PCS. Since
21 2001, however, new contracts have been awarded which indicates that a

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1 disparity exists between prevailing inmate phone rates at various
2 institutions. My previous reply along with exhibits JJR-3 through JJR-6
3 illustrates such a disparity. Also, the growth of prepaid inmate calling since
4 then is providing an additional choice for inmates but similar rate
5 disparities exist with prepaid inmate rates. A review of the existing IOSP
6 contracts and the continuing existence of rate disparities within New
7 Mexico suggest that the elimination of commission payments mandated by
8 HB 133 is resulting in rate benefits to inmates and their friends & families
9 only in isolated cases across the state. One would anticipate, given a
10 competitive market for contracts without the incentive for revenue
11 payments to the institutions, that contract and therefore tariffed rates may
12 be reduced somewhere in the magnitude of the revenue based payments
13 originally paid by the IOSPs to the inmate facilities as dictated by the prior
14 HB 133 contracts. The upcoming award of a new contract resulting from
15 the State of New Mexico RFP mentioned earlier should give us a clear
16 indication of competitive rates where revenue sharing is not a factor. We
17 already have indications of such competitive rates in other states where
18 inmate phone revenue is not shared in any way. Recently in New Mexico,
19 a handful of counties have awarded new contracts for inmate telephone
20 service where revenue sharing is minor or nonexistent factor. In late 2007,
21 Evercom filed an update to its tariff for a facility identified by Evercom as

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1 “Location 2” where a 15-minute local call costs \$0.50 while the same
2 intrastate long distance costs \$2.00. The same call at many other
3 institutions is 3 or 4 times more expensive. The disparity is even wider for
4 prepaid inmate rates. The prepaid inmate rate at the facility identified as
5 “Location 2” by Evercom is now \$0.10/minute for all calls within the United
6 States. A similar 15-minute prepaid inmate call from many other facilities
7 today costs 5 times more.

8
9 **Q. What, in your opinion, explains the disparity of prevailing inmate**
10 **telephone rates in New Mexico since the passage of HB 133?**

11 A. NMCD and a small number of counties have recently awarded or are
12 about to award contracts that do not call for sharing of inmate phone
13 revenue in any way. Revenue sharing is still widely accepted as standard
14 practice in the IOSP industry across the country and so far only new law
15 or a governor’s decision has led to states or counties foregoing the
16 sharing of inmate telephone revenue. It is therefore reasonable to assume
17 that the absence of revenue sharing in such awarded contracts in New
18 Mexico is a direct consequence of the passage of HB 133. While the
19 existence of HB 133 suggests that commission payments to facility
20 operators based on inmate phone revenue have been mostly eliminated,
21 sharing of revenue in other ways continues to take place in most county

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1 institutions. My analysis of inmate telephone contracts signed since
2 6/15/2001 and associated contract rates indicates that revenue sharing
3 continues to take place. A small number of contracts signed since the
4 passage of HB 133 include the payment of commissions based inmate
5 phone revenue. It appears that almost all of the inmate facility contracts
6 have replaced simple commission based payments by IOSPs to the
7 inmate facilities with revenue sharing (e.g. [REDACTED]
8 [REDACTED]
9 [REDACTED]) with impacts similar to the prior negotiated
10 commission payments, which does not, possibly depending upon how the
11 language in HB 133 is read, mean such revenue sharing is in violation of
12 the law by negotiating it into the newly negotiated contracts. Under
13 conditions that existed prior to HB 133, IOSPs and state and county facility
14 operators all shared inmate telephone revenues through a payment of a
15 simple commission payment from the IOSP to the facility. In the case of
16 NMCD operated institutions, the commission rate was 48.25% of phone
17 revenues. Therefore, the disparity among pre-HB 133 rates was not
18 among inmate phone rates but between inmate phone rates generally and
19 rates paid by the public outside correctional institutions. The existence of
20 HB 133 has led some counties to forego any revenue sharing with IOSPs
21 while most other counties have opted to continue sharing inmate phone

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1 revenue with IOSPs but in ways other than simple straightforward
2 commissions. To the extent facility operators continue to seek sharing
3 such revenue sharing results in the inflation in inmate phone rates
4 necessary to cover the sharing of revenue. The differing approaches of
5 facility operators which choose to seek or reject sharing of revenue results
6 in a wider and more apparent disparity of inmate telephone rates.

7

8 **Q. Do the rates contracted by the IOSPs with correctional institutions**
9 **match the IOSPs filed rates with the Commission?**

10 A. Inmate telephone rates are not consistently spelled out in contracts
11 between IOSPs and correctional institutions. Most contracts simply refer to
12 the tariffed rates filed with the Commission that will apply to inmates in the
13 particular institution. A small number of contracts refer to rates that appear
14 to be the result of negotiation and thus differ from the standard tariffed
15 rates. Where rates for certain institutions depart from the standard tariffed
16 rates, IOSPs generally submit revisions to the tariff or notices of deviations
17 from the tariff for specific locations only. In these revisions or notices of
18 deviation, IOSPs either identify the facility where the revised rate applies
19 or the identification of the facility is withheld, e.g. the facility is referred to
20 as "Location 1" or "Location 2". IOSPs do not submit any contract
21 information to support the revisions or notices of deviation but rather

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1 assert a prerogative to deviate from tariffed rates as long as the
2 contracted rates are filed with the Commission.

3 My review of the rates that prevail at 41 state and county institutions in
4 New Mexico indicates that inmate telephone rates at the lion's share of
5 these institutions match the tariffs on file with the Commission. Where
6 some rates depart from the tariff, those rates are always lower than the
7 standard tariffed rates. The distribution of inmate telephone rates charted
8 in my Exhibit JJR-3 through JJR-6 illustrates how the cost of phone calls
9 from institutions is very similar at most of them but that significantly lower
10 rates exist at a small number of institutions.

11

12 **Q. Are there other fees being charged to inmates and their friends &**
13 **families that increase the cost of a phone call beyond rates reviewed**
14 **so far in your testimony?**

15 A. As mentioned earlier, there are 3 payment methods inmates can choose
16 from prior to initiating a phone call from a institution: (1) collect where the
17 call recipient is billed on the recipient's LEC bill after accepting the call, (2)
18 prepaid collect where the call recipient can set up an account with the
19 IOSB or its billing agent and prepay for subsequent collect calls, and (3)
20 prepaid inmate where the inmate can purchase calling cards at the
21 institution's commissary. Each method of payment entails additional fees

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1 that increase the cost of a call beyond the stated tariffed for the call.

2 These additional fees are spelled out in the IOSPs' filed tariffs.

3 For collect calls, the billed party is subject to a billing cost recovery of
4 \$2.49 for each month that a collect call charge appears on the recipient's
5 local telephone bill.

6 For prepaid collect accounts, the parties setting up such accounts are
7 subject to a fee of \$6.95 for processing credit card payments or check
8 payments by phone. Returned check fees vary from \$15.00 to \$25.00.
9 Refunds of unused balances on prepaid collect accounts are subject to a
10 processing fee of \$15.00 by 2 IOSPs. I was unable to ascertain from the
11 other tariffs on file how the other IOSPs address requests for refunds of
12 unused account balances.

13 For prepaid inmate calls, tariffs filed indicate that 2 IOSPs collect a service
14 charge of \$1.00 per completed intraLATA or interLATA telephone call. It
15 appears that this service charge is not included in the rate information
16 provided by the IOSPs for the facilities they serve. The rates highlighted
17 earlier in testimony were based on the rates by the IOSPs and thus
18 presumably do not include this service charge. As this service charge is
19 part of a number of prepaid inmate rate options listed in the tariff of 2
20 IOSPs, it is not clear to me whether it is currently being assessed. Unused
21 balances on prepaid inmate calling cards are not refundable according of

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1 2 IOSPs. I was unable to determine any analogous refund policy for the
2 other IOSPs from their filed tariffs.

3 The various fees and charges outlined above are the focus of a separate
4 case currently before the Commission (Case No. 07-00442-UT).

5

6 **Q. Did the passage of HB 133 ensure that non-telecommunications**
7 **related costs were not included in the terms of the contracts between**
8 **IOSPs and state or county correctional facilities after June 15, 2001?**

9 A. No. My review of the contracts between IOSPs and certain facility
10 operators executed after this date indicates that other non-commission
11 costs to be paid by IOSPs were negotiated in to the contracts between the
12 IOSPs who won those contracts and the institutional operators who
13 awarded those contracts. For example, the Albuquerque Journal reported
14 on January 9, 2002 about the award to PCS at that time of a contract to
15 provide inmate telephone service at Bernalillo County's Metropolitan
16 Detention Center (See my Exhibit JJR-7 for a copy of this article). In this
17 case, it was reported that the inmate telephone rates offered by PCS were
18 higher than the rates offered by two competing IOSPs (Qwest and Sprint).
19 However, PCS included in its offer the provision of "\$925,000 in cabling
20 and wiring." A dissenting Bernalillo County Commissioner was at that time
21 concerned that this could be considered a payment and thus a violation of

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1 HB 133. Other County Commissioners who supported the award to PCS
2 said that the lower telephone rates offered by competing IOSPs “had not
3 yet been approved by the Public Regulation Commission” and that their
4 review of the legality of the agreement led them to conclude it did not
5 conflict with HB 133. The award of the Bernalillo contract to PCS shows
6 that facility operators continue to benefit from inflated inmate telephone
7 rates. The IOSP providing the lowest inmate telephone rates was not
8 selected. In this case, Bernalillo County received cabling and wiring
9 services from PCS with a value of \$925,000 for the Metropolitan Detention
10 Center which was under construction at the time the contract was
11 awarded. While the passage of HB 133 resulted in the gradual phasing
12 out of commission payments based on a simple percentage of inmate
13 telephone revenue, the award of the Bernalillo contract illustrates how
14 other methods were subsequently developed to channel in-kind value
15 back to the institutional operators based on inflated inmate telephone
16 rates. PCS contributed \$925,000 in cabling and wiring during the
17 construction of the institution thus presumably reducing the county’s
18 construction expenditures by an equal amount.

19

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1 **Q. Is your perspective of the inmate telephone contract between**
2 **Bernalillo County and PCS supported by the actual contract that was**
3 **provided by PCS as part of the record of this case?**

4 **A.** [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 [REDACTED] The county chose to award the
20 IOSP contract which included \$925,000 of cabling and wiring services,
21 financed by shared telephone revenue from inmates and their friends &

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1 families, instead of another contract which provided for lower inmate
2 telephone rates offered by competing IOSPs at that time.

3

4 **Q. Please provide another example of the forms of revenue sharing that**
5 **take place as a result of contracts between facility operators and**
6 **IOSPs signed since the effective date of HB 133?**

7 A.

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

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1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]

17

18 **Q. Is the market for inmate telephone service in New Mexico**
19 **competitive?**

20 **A.** In order to answer this question, one must be clear about defining the
21 market and the providers and customers who are part of this market as

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1 well as the impact of any competition. What is clearly stated in the
2 agreements to provide inmate telephone is the identity of the two parties:
3 the IOSPs named throughout this testimony and the operators of the
4 correctional facilities, e.g. state, county or private operators. Rather than a
5 market to provide telephone service, this is more accurately described as
6 a market to host an automated telephone system with security features in
7 a detention facility with captive users and payors of the system. In this
8 market where IOSPs and operators strike an agreement to host a
9 telephone system there is nothing to suggest an absence of competition.
10 In as much as there is a public bidding process where an ample number of
11 IOSPs have the opportunity to compete by submitting independent bids to
12 provide inmate telephone service, Staff submits there is ample competitive
13 pressure for IOSPs to control cost, improve technology and take any
14 further measures to minimize the cost of providing telephone service while
15 meeting the needs of the facility and maximize the odds of securing future
16 agreements to provide this service. Staff finds that IOSPs do not appear to
17 be profiting from any apparent predatory pricing of inmate telephone
18 service. In this context, the IOSPs and the public or private facility
19 operators are engaging in rational behavior to maximize their welfare.
20 There is another differently defined market for inmate telephone service
21 where the existence of competition is not evident. This is the market

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1 where the IOSPs are the providers and the inmates or the friends &
2 families of inmates are the customers. Put another way, this is a market
3 for non-optional operator assisted telephone service. Unlike the operators
4 of the institution (in the market defined earlier, the customers) who can
5 choose among competing IOSPs, inmates face only one choice: use the
6 service provided at the terms and conditions agreed to between the IOSP
7 and the operator or not use the service. Unlike the average landline
8 telephone customer who can choose a provider for local service and long
9 distance service, inmates can only use the provider at the institution that
10 was selected by the operator. Unlike the person in the street who can
11 choose from a wide array of calling cards to make use a public payphone
12 or who can make a collect call in an emergency, inmates may have the
13 ability to buy or not to buy a calling card from a single provider and must
14 use operator services provided by the IOSP to complete any call whether
15 it is an emergency or not. Only to the extent the operator of the institution
16 acts as a proxy for the inmates while negotiating an agreement with an
17 IOSP can inmates benefit from competition. While there appear to be
18 additional security related costs to provide inmate telephone, the current
19 disparity between rates prevailing throughout New Mexico indicates that
20 the benefits of competition are still not trickling down evenly to the inmates
21 or their friends & families. Given the range of rates reviewed by Staff,

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1 there is no evidence to suggest that the cost of differing security
2 requirements or other physical circumstances at particular institutions are
3 anywhere sufficient to justify the disparity in rates. While the cost of a 15-
4 min collect long distance phone call is \$6 at many institutions, the cost for
5 the same call from one institution is only \$2. Such a wide pricing disparity
6 in the market where IOSPs are the providers and inmates and their friends
7 & families are the customers suggests an absence of effective
8 competition. If inmates were free to move between institutions to take
9 advantage of lower telephone rates, inmates would move to those
10 institutions where lower rates prevail. Institutions with higher rates would
11 react by lowering rates to keep from losing inmates or to attract new
12 inmates. Eventually, most institutions would have roughly equal phone
13 rates in order to maintain their inmate customer base. Clearly, this does
14 not and cannot happen thus the absence of competition in this market.
15 Competition manifests itself not in declining rates by inmates and their
16 friends & families but rather in increasing the share of tariff-based inmate
17 phone revenue that benefits the partnership consisting of the IOSPs and
18 the public or private facility operators.

19

20 **Q. Please describe the impact of HB 133 in shaping the current market**
21 **for inmate telephone services.**

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1 A. The disparity among inmate telephone rates within New Mexico appears
2 to have grown since the passage of HB 133. The state and a small
3 number of counties have removed revenue sharing as a factor in the
4 award of new contracts since the effective date of HB 133. Some new
5 contracts are being awarded primarily on the basis of telephone rates paid
6 by inmates and their families & friends. For these facilities, this has led to
7 a dramatic reduction in rates. Most counties in New Mexico continue to
8 seek to benefit from a share of inmate telephone revenue. This has been
9 demonstrated by choices counties have made among competing IOSP
10 offers such as the one made by Bernalillo County in 2002. To meet the
11 demand for revenue sharing from most counties, IOSP have been
12 competing for contracts with counties by offering increasing shares of
13 inmate phone revenue thus leading to a partnership between IOSPs and
14 counties. In this partnership, the gross revenue is a function of the tariff on
15 file with the Commission and competition drives the IOSPs to minimize its
16 telecommunications costs and therefore maximize the remaining revenue
17 shared with the counties. Counties are active participants in the inmate
18 telephone business seldom as advocates for the reduction of inmate
19 telephone rates but most often as direct beneficiaries of revenue streams
20 resulting from tariff-based revenue. As technology improves and drives
21 down the cost of telecommunications, this leaves more tariff-based

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1 revenue to be shared in imaginative ways that differ from simple
2 commissions or payments.

3

4 **Q. Since many counties are effectively active participants in the inmate**
5 **telephone business in spite of the passage of HB 133, would it not be**
6 **preferable for the counties to be party to this case?**

7 A. The absence of the counties from this case is a significant impediment to
8 the even-handed inquiry this case calls for. While my view is that most
9 counties seek to continue reaping the benefits of the inmate phone
10 business and that IOSPs do their best to meet the needs of these counties
11 in competing for contract awards, there may be a compelling public
12 interest case to be made by counties for continued sharing of inmate
13 phone revenue. To the extent that the goal of my analysis is to provide a
14 quantitative benchmark to evaluate the justness and reasonableness of
15 rates paid by inmates and their friends & families, I am not attempting to
16 accept or reject a public interest argument. However, the dichotomy
17 evident in how different counties approach the same set of circumstances
18 by either rejecting or seeking revenue sharing indicates that a public
19 interest consensus on this matter may be difficult to reach.

20

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1 **Q. How can the Commission address the existing disparity in inmate**
2 **telephone rates so that rates reflect only the fixed cost of the secure**
3 **telephone system and the variable telecommunications costs but not**
4 **the revenue sharing sought by many public or private correctional**
5 **facility operators?**

6 **A.** Staff urges the Commission to consider as a matter of public policy the
7 need to insure that inmate telecommunications services are made
8 available by the IOSPs at the lowest reasonable rates in keeping with the
9 underlying purpose and intent of HB 133 and the unique needs of the
10 inmate population within the State of New Mexico. See also the American
11 Bar Association Recommendation dated August 2005 – Exhibit JJR-8.
12 The existence of tariffs where rates for collect calls initiated by inmates in
13 correctional institutions have not changed since the middle of 2001 has
14 led to the legitimization of tariff-based revenues based on
15 telecommunications costs that prevailed in 2001 thus generally depriving
16 inmates from the benefits of a declining cost industry. Tariffs have
17 expanded with the addition of new payment methods such as prepaid
18 collect accounts and prepaid calling cards. There are benefits to be had
19 from the prepayment of phone calls by inmates or their friends & families,
20 e.g. phone rates are cheaper and IOSPs reduce if not eliminate credit or
21 bad debt costs. On the other hand, prepayment methods lead to a

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1 propensity by IOSPs to charge processing fees for payment methodology
2 and refunds of unused balances as well as service charges for call
3 completions. Furthermore, the widespread discounting of prepaid calling
4 cards is another method of revenue sharing with an ultimate impact that is
5 identical to commission payments that are prohibited under HB 133.

6 Staff's recommendation to the Commission to achieve just and reasonable
7 pricing of inmate telephone calls that is devoid of inflation to support
8 revenue sharing is threefold:

- 9
- 10 1) Simplify current tariffs by setting a flat per minute charge regardless
11 of mileage and time of day. No per call charges should be allowed.
 - 12 2) Set a new flat per minute rate that is commensurate with current
13 market-driven rates for similar inmate telephone services at
14 correctional institutions in New Mexico and other states where such
15 institutions do not accept any form of commissions or revenue
16 sharing.
 - 17 3) Any new contracts related to the provision of inmate telephone
18 service and the revenue generated by such service awarded by
19 public or private correctional facility operators to IOSPs should be
20 submitted to the Commission for review.

21

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1 The simplification of the rates in the tariffs filed by the IOSPs would
2 provide sorely needed transparency to inmates, friends & families of
3 inmates, facility operators, and regulators. Such flat rate pricing also
4 mimics simplified pricing of retail telephone service available to the
5 general public. Existing tariffs on file with the Commission still contain
6 antiquated rates based on time of day and mileage bands. One IOSP
7 currently operating in New Mexico has not updated its tariff since 1996. A
8 flat per minute rate is easier to understand and to grasp. It is easier for
9 facility operators to explain to inmates and their families & friends. It is
10 more consistent with the public expectation of the retail pricing of a
11 telephone call. It is less prone to unexpected charges to lead to disputes
12 that are burdensome in so many ways. Regulators are also provided with
13 a simpler yardstick to assess the rates charged by IOSPs. Current IOSP
14 tariffs are replete with unnecessarily complicated rates and they lie
15 dormant for years until inequities and disparities become glaring enough
16 to lead to a case such as this one.

17 There is small but significant trend toward the simplification of inmate
18 telephone rates in New Mexico and other states as a few public facility
19 operators reject any form of revenue sharing and at the same time a
20 simple flat per minute rate for inmate telephone calls. The facility identified

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1 by Evercom as “Location 2” in a tariff update dated November 9, 2007 has
2 a simple set of rates with no time of day considerations:

	Collect Surch	Collect per min	Prepaid Surch	Prepaid per min
Local	\$0.50	None	None	\$0.10
Long Distance	\$0.50	\$0.010	None	\$0.10

3

4 All collect calls at this facility served by Evercom incur a surcharge of
5 \$0.50 with a per minute charge of \$0.10 for long distance calls only. All
6 prepaid calls cost \$0.10 per minute. The rate for prepaid inmate calls from
7 institutions operated by the Missouri Department of Corrections is also a
8 flat \$0.10 per minute regardless of distance or time of day. In its
9 outstanding RFP for an inmate telephone system, the State of New York
10 requests that the rate “shall be a single per minute rate inclusive of all
11 fees, taxes, connect charges, and other costs for all calls within the
12 continental United States, its territories and protectorates, and Canada.
13 The rate shall be a single blended rate for pre-paid and collect calls.” In
14 light of the numerous benefits of simplification and the feasibility of simple
15 rates as demonstrated above, it behooves the Commission that inmate
16 telephone rates be stated in the tariffs filed by IOSPs as flat per minute
17 rates only for collect calls and for prepaid calls with no consideration for

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1 distance, time of day, day of week and with no additional per call
2 surcharges of any kind.

3 Staff recommends that inmate telephone rates be significantly reduced to
4 reflect market-driven rates that prevail in publicly or privately operated
5 correctional facilities that reject any form of revenue sharing with the IOSP
6 and to minimize the current disparity among facilities and between local
7 and long distance rates. It is clear to staff that gross inmate telephone
8 revenues based on the current tariffs far exceed the fixed costs necessary
9 to provide inmate telephone service. In my earlier review of inmate
10 telephone rates in New Mexico and elsewhere, the data in question
11 suggests a clear correlation between the rate charged at a correctional
12 institution and the extent of revenue sharing taking place at that institution.

13 In New Mexico, there is clear disparity between 34 institutions who are
14 revenue sharing partners of the IOSPs where a 15-minute local collect call
15 costs 4 times more than the same call at a single institution that chooses
16 not to accept any share of inmate phone revenue. A 15-minute long
17 distance call costs 3 times more at 22 institutions and 80% more at 13
18 institutions that the same at the single institution that does not share in the
19 revenue stream. There is no other plausible explanation to justify these
20 disparities in New Mexico than the widespread revenue sharing
21 arrangements between public and private facility operators and IOSPs that

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1 still prevail in spite of HB 133's prohibition of commissions and payments
2 based on phone revenues. The objectives achieved by these revenue
3 sharing arrangements are the same as those of commissions and
4 payments prohibited by HB 133. This results in the inflation of inmate
5 phone rates to support revenue sharing thereby conflicting with the HB
6 133 mandate to provide service at the lowest possible cost to inmate and
7 their friends & families.

8 Staff recommends that new flat telephone rate of \$0.10 per minute for all
9 intrastate calls originating from an inmate under state, county or local
10 jurisdiction within a publicly or privately operated correctional facility in
11 New Mexico. Any proposed per call surcharge is to be submitted to the
12 Commission for review with cost or competitive market driven information
13 to support such a per call surcharge. This rate is currently being charged
14 at a facility in New Mexico and Staff sees no reason short of revenue
15 sharing why the same rate cannot apply across New Mexico. Further,
16 Staff reserves the right to review its recommended flat rate of \$0.10 per
17 minute for all intrastate calls upon the upcoming public award of a new
18 contract for inmate telephone service by the State of New Mexico. This
19 new contract is expected to establish a new up-to-date competitive
20 benchmark for inmate telephone rates in New Mexico that excludes any
21 revenue sharing factor. The review by Staff may result in a new

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1 recommended inmate telephone rate to replace the one recommended
2 above.

3 Finally, Staff recommends that all IOSPs operating in New Mexico provide
4 the Commission for the public record: (1) all existing contracts for the
5 provisions of inmate telephone service with public or private facility
6 operators of correctional facilities in New Mexico, (2) any amendments
7 and renewals of existing contracts as described above, and (3) any new
8 contracts for the provision of inmate telephone service in these same
9 facilities. Only by providing such contracts can the Commission make a
10 complete evaluation of prevailing inmate telephone rates. Rates listed in
11 the IOSP tariffs on file with the Commission only serve to establish a
12 revenue derived from inmate telephone usage but provide no indication as
13 to what portion, if any, of that revenue is shared with the operators of the
14 correctional facilities. Only these contracts can provide the information to
15 either support telecommunications costs incurred by the IOSP or reveal
16 the depth of the revenue sharing partnership between the IOSP and the
17 public or private correctional facility operator.

18

No.	Name	Acronym	Location	Avg Pop	Phone	Operator	Jurisdiction	IOSP	Biller	Comm	Verify?	Contact	Expiry	
1	Central New Mexico Correctional Facility	CNMGF	Los Lunas	1,305	505-865-1622	NMCD	State							
2	Guadalupe County Correctional Facility	GCCF	Santa Rosa	599	575-472-1001	GEO	State							
3	Lea County Correctional Facility	LCCF	Hobbs	1,263	575-392-4055	GEO	State							
4	New Mexico Women's Correctional Facility	NMWC	Grants	588	575-287-2941	CCA	State							
5	Northeast New Mexico Detention Facility	NENMDF	Clayton	625	575-374-4005	GEO	State							
6	Penitentiary of New Mexico	PNM	Santa Fe	791	505-827-8205	NMCD	State							
7	Roswell Correctional Center	RCC	Roswell	334	575-625-3100	NMCD	State							
8	Southern NM Correctional Facility	SNMCF	Las Cruces	1,135	575-523-3200	NMCD	State							
9	Springer Correctional Center	SCC	Springer	25	575-483-3100	NMCD	State							
10	Western NM Correctional Facility	WNMCF	Grants	409	575-876-8300	NMCD	State							
11	Bernalillo County Metropolitan Detention Ctr	MDC	Albuquerque		505-839-8700		County							
12	(Bernalillo) Regional Correctional Center		Albuquerque	970	505-242-6177	Cornell	State, Cnty							
13	Catron County Sheriff's Dept		Reserve		575-533-6222		County							
14	Chaves County Detention Center		Roswell		575-624-6517	County	County							
15	Cibola County Detention Center		Milan		505-287-6940	County	County							
	Cibola County Correctional Center		Milan		505-285-4900	CCA	Fed							
16	Cofax County Detention Center		Raton		575-445-3691		County							
17	Curry County Jail		Clovis		575-763-1490		County							
18	De Baca County Detention Center		Ft Sumner	22	575-355-7870	County	County							
19	Dona Ana County Detention Center		Las Cruces	800	575-647-7600	County	County							
20	Eddy County Adult Detention Facility		Carlsbad		575-887-7556		County							
21	Grant County Jail		Silver City		575-534-3803	County	County							
	Guadalupe County	See Guadalupe Facility above						County						
	Harding County	Uses adjoining detention facilities												
22	Hidalgo County Detention Center		Lordsburg		575-542-8828	Sheriff	County							
23	Lea County Detention Facility		Lovington	260	575-396-8694	County	County							
24	Lincoln County Detention Center		Carrizozo	144	575-648-6510	Cornell	County							
25	Los Alamos County Detention Facility		Los Alamos	12	505-662-8279	PD	County							
26	Luna County Detention Center		Deming	275	575-544-0191	County	County							
27	McKinley County Adult Detention Center		Gallup	340	505-726-8474	County	County							
	Mora County	Uses San Miguel Facility						County						
28	Otero County Detention Center		Alamogordo	200	575-434-0710	County	County							
29	Quay County Detention Center		Tucumcari		575-461-4664	County	County							
30	Rio Arriba County Detention Center		T A		575-588-7350	County	County							
31	Roosevelt County Adult Detention Center		Portales		575-356-6871	County	County							
32	San Juan County Adult Detention Center		Farmington	625	505-566-4504	County	County							
33	San Miguel County Correctional Center		Las Vegas		505-454-7403	County	County							
34	Sandoval County Detention Center	SCDC	Bernalillo		505-867-5339	County	County							
35	Santa Fe County Corrections Department		Santa Fe	500	505-428-3100	County	County							
36	Sierra County Detention Center		T or C		575-894-2537	County	County							
37	Socorro County		Socorro		575-835-0945		County							
38	Taos County Adult Detention Center		Taos		575-737-6410	Sheriff	County							
39	Torrance County Detention Center		Estancia		575-384-5184	CCA	State, Cnty							
	Union County	See Northeast Facility above						County						
40	Valencia County Detention Center		Los Lunas		505-565-8900	County	County							
	Otero County Prison Facility		Chaparral		575-824-4884	MTC	Fed							
41	Camino Nuevo Correctional Center		Albuquerque		505-347-7000	CCA	State							

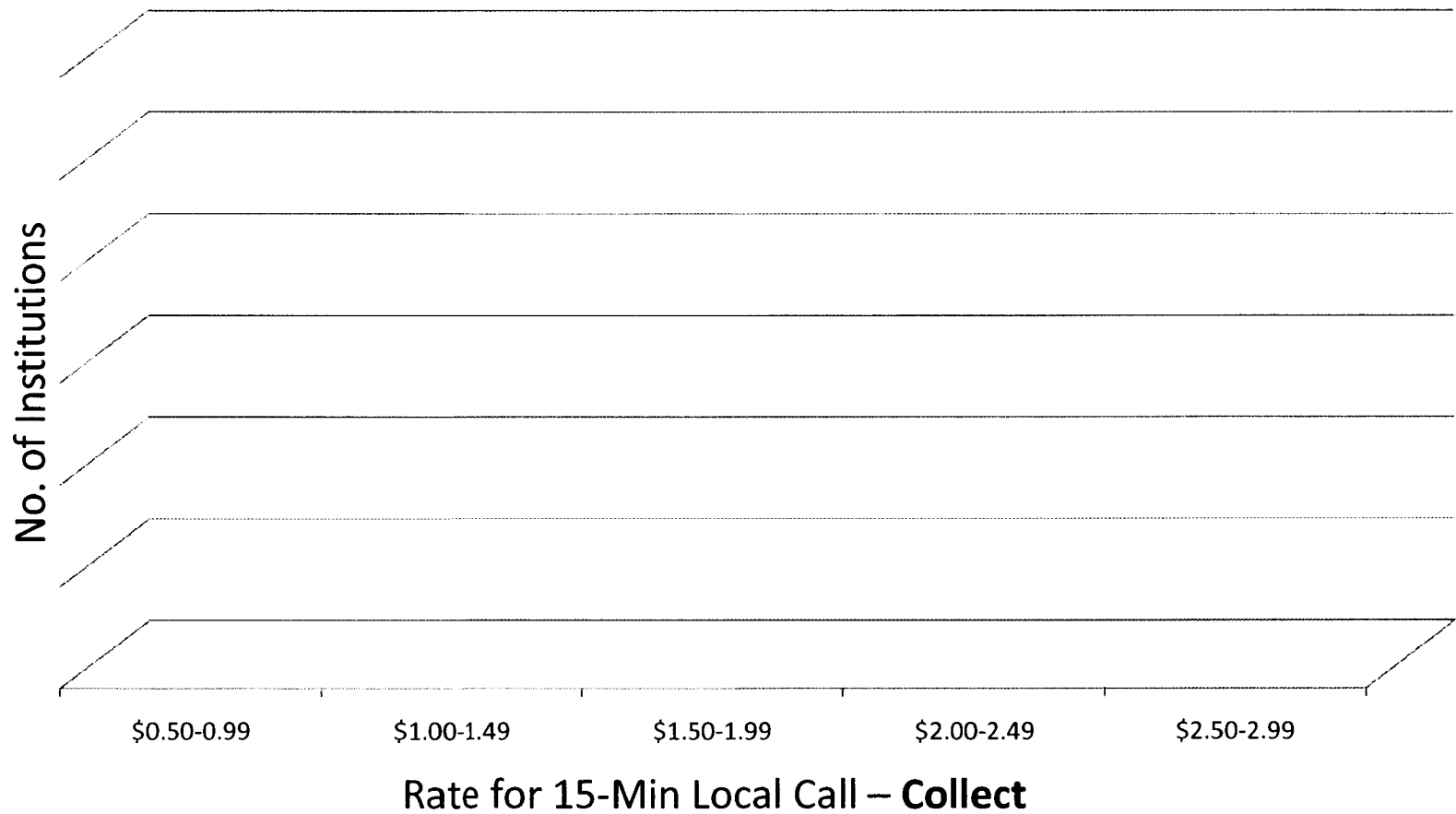
No.	Name	Acronym	Location	Avg Pop	Phone	Operator	Jurisdiction	IOSP	Biller	Comm	Verify?	Contact	Expiry
	Claytown Town Jail		Clayton										
	Espanola Detention Center		Espanola										
	Farmington City		Farmington										
	Hobbs City PD		Hobbs										
	PCS Springer Boys School		Springer										
	Ruidoso City PD		Ruidoso										
	San Juan County DWI		Aztec										

No.	Site	Contract As of	Tariff as of	Ending	Payment	Local	IntraLATA/ Intrastate	InterLATA/ Intrastate	InterLATA/ Interstate
1					Collect				
1					Prepaid Inmate				
1					Collect				
1					Prepaid Inmate				
2					Collect				
2					Prepaid Inmate				
3					Collect				
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No.	Site	Contract As of	Tariff as of	Ending	Payment	Local	IntraLATA/ Intrastate	InterLATA/ Intrastate	InterLATA/ Interstate
24					Collect				
25					Prepaid Inmate				
25					Collect				
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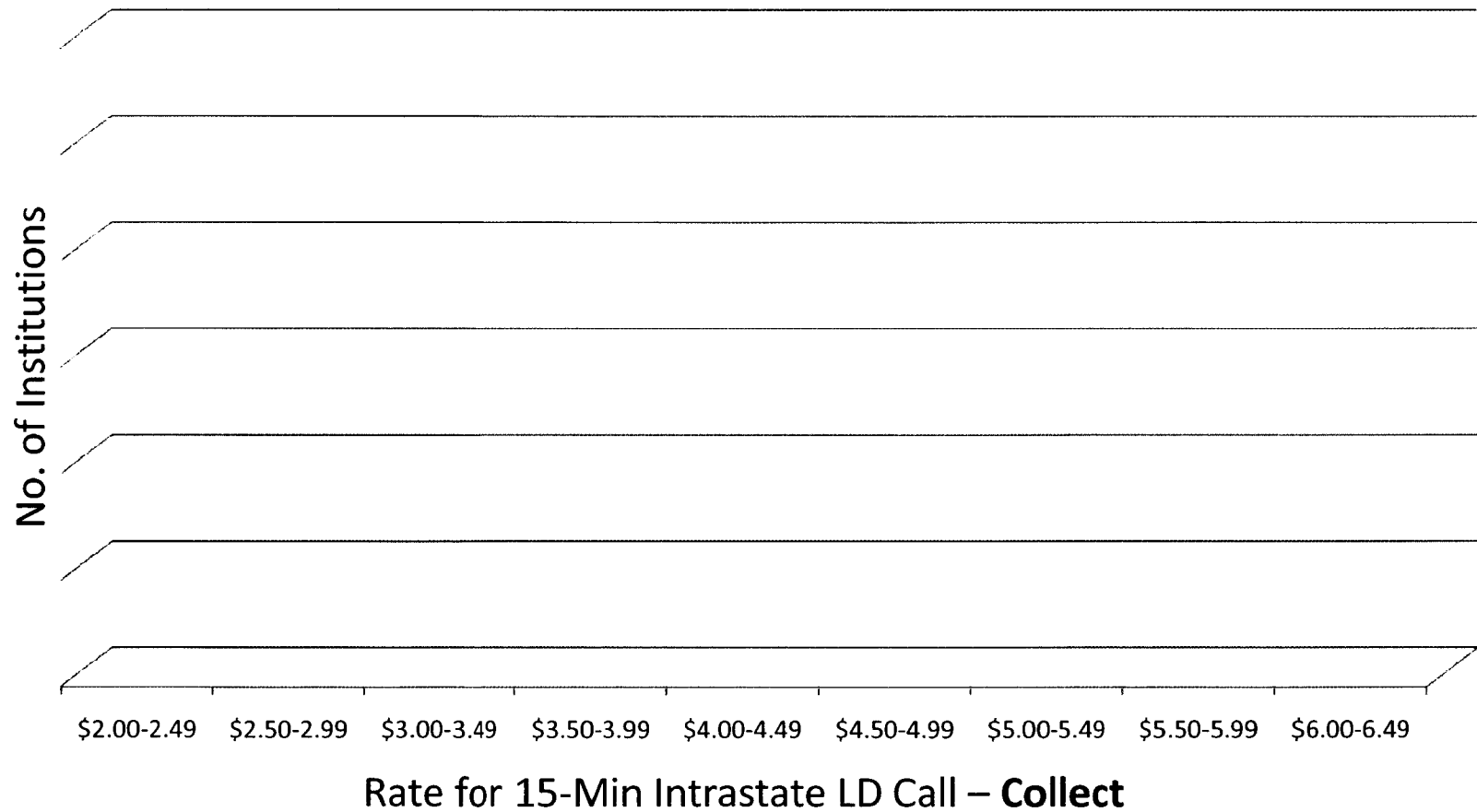
Distribution of Inmate Phone Rates

(__ State and County Institutions in NM)



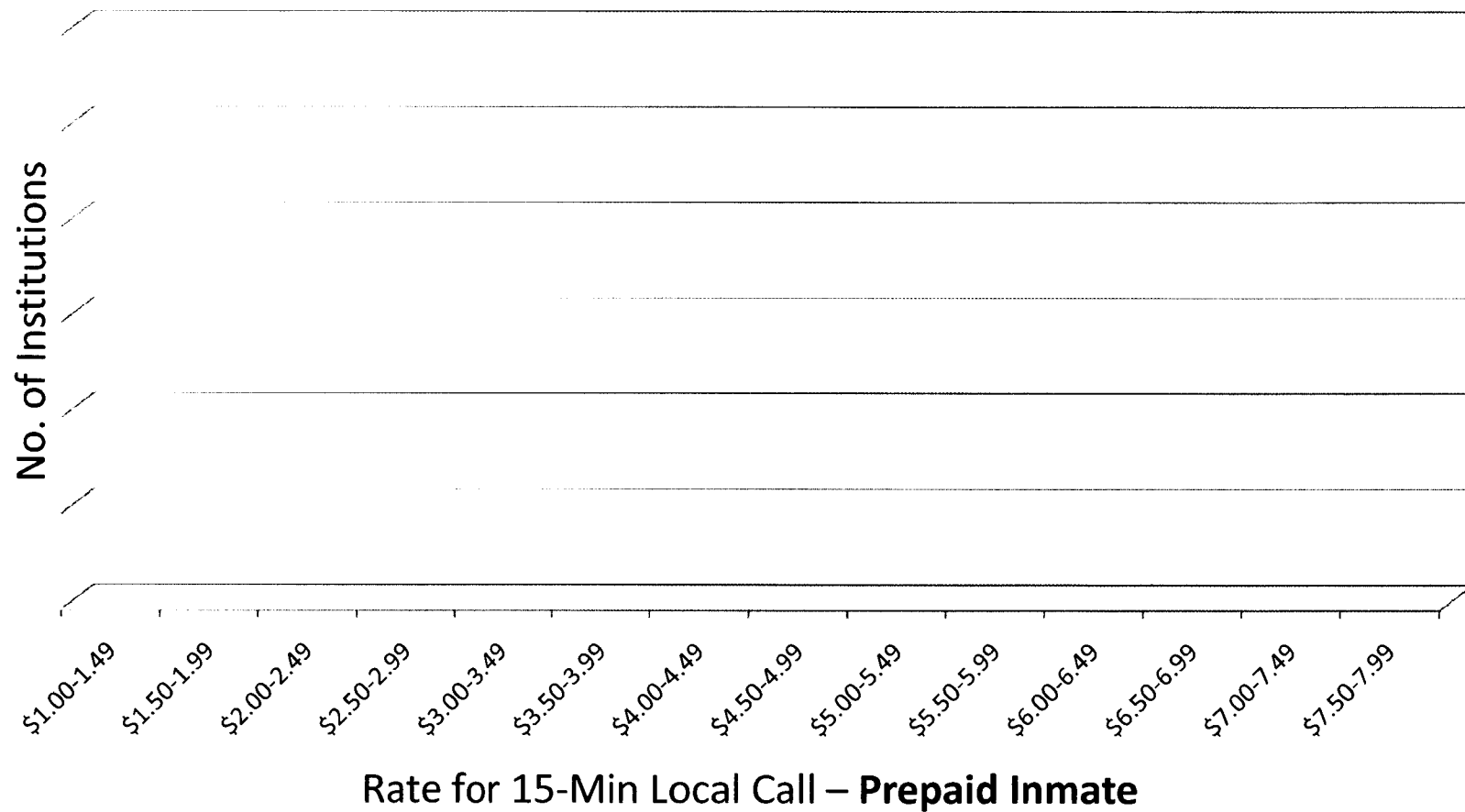
Distribution of Inmate Phone Rates

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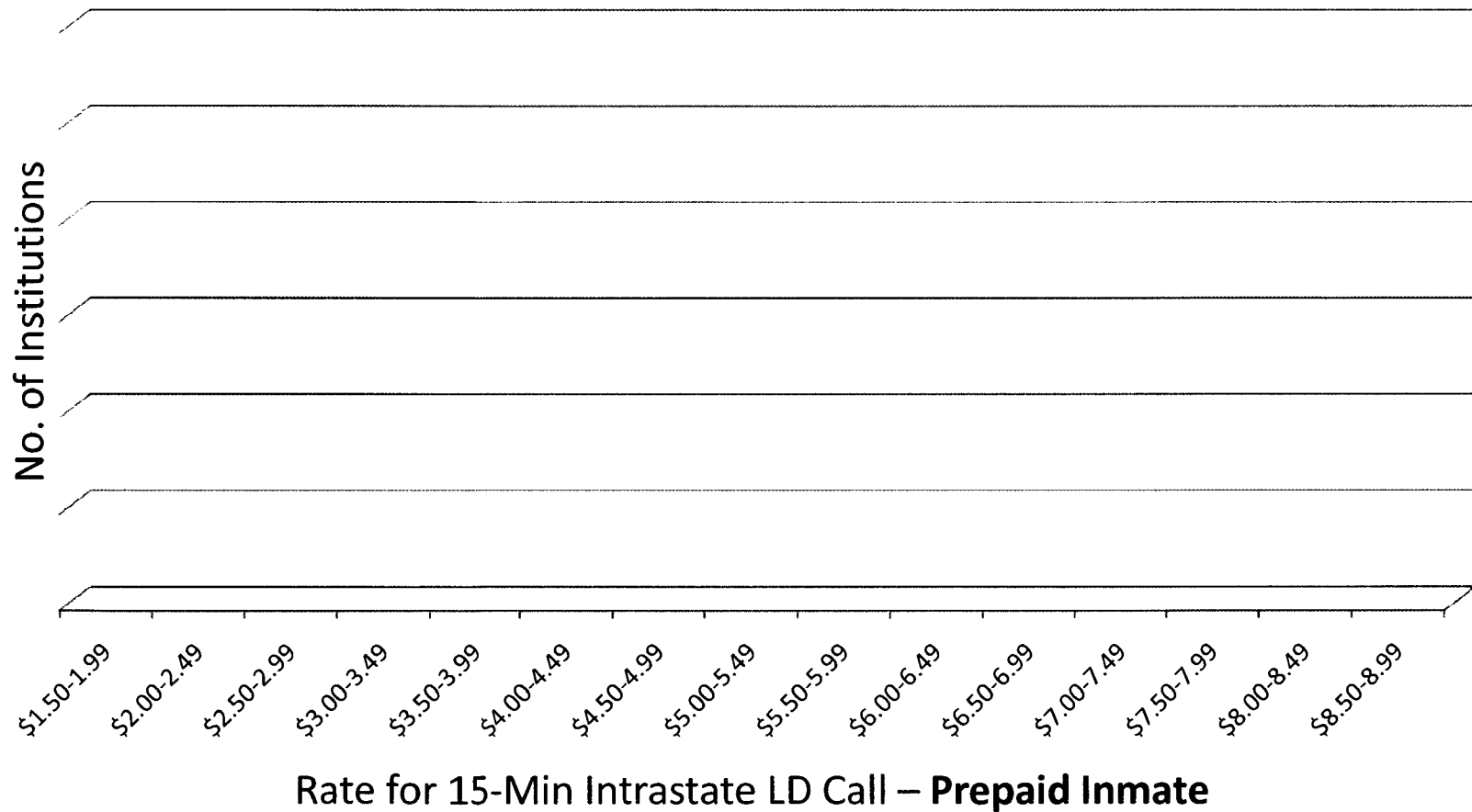
Distribution of Inmate Phone Rates

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


Distribution of Inmate Phone Rates

(__ State and County Institutions in NM)



County OKs Contract for Inmate Phone Calls.(Final)

Source:  Albuquerque Journal (Albuquerque, NM)

Publication Date: 09-JAN-02

Byline: Dan McKay Journal Staff Writer

Bernalillo County commissioners on Tuesday approved the last major contract needed for the new West Side jail.

County officials also said the lockup won't be finished until April, not March as planned.

The eight-year contract approved Tuesday calls for Public Communication Services, a California-based company, to install and operate a system to handle inmate telephone calls at the Metropolitan Detention Center.

The commission voted 3-1 in favor of the contract, with Ken Sanchez in dissent. Steve Gallegos was excused.

As part of the agreement, Public Communication Services is to provide about \$925,000 in cabling and wiring. The company will get revenue from inmate telephone calls.

Sanchez raised several concerns about the agreement. He said other vendors interested in the contract Qwest and Sprint offered a cheaper rate for inmates' local collect calls.

He also said a bill passed by the Legislature last year says a contract to provide inmates with telephone service cannot include a commission or other payment to a jail operator based on amounts billed by the provider for inmates' calls. He said the \$925,000 in wiring could be considered a payment.

Responding to Sanchez, other county officials said the rates offered by competing companies had not yet been approved by the Public Regulation Commission. County administrators also said they reviewed the legality of the agreement and determined it doesn't conflict with the bill passed by the Legislature.

"No one's rights were diminished in any way by moving forward," Commission Chairman Tim Cummins said after the meeting. He said there is a process for other companies to file protests if they want to.

Earlier Tuesday, County Manager Juan Vigil said construction of the new jail will be finished in April. The completion date has been pushed back several times already.

"Several factors have postponed the original opening date," Vigil said in a written statement. "We have not been able to test systems due to the lack of water and some supplies have not come in on time."

County action

In other action Tuesday, commissioners:

- * Chose Tim Cummins as board chairman. Cummins, a Republican, is serving his first term as commissioner. His district includes the Northeast Heights.

The chairman presides at meetings and appoints committee members.

- * Approved an \$811,000 contract with Construction, Contracting and Management Inc. to improve the Rio Bravo and Broadway SE intersection.

The project, which is federally funded, includes adding right-turn lanes in all four directions and other improvements. Construction is expected to start this month.

PHOTO: b/w

CUMMINS: Selected County Commission chairman

**AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION**

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the American Bar Association encourages federal, state, territorial and
2 local governments, consistent with sound correctional management, law enforcement and
3 national security principles, to afford prison and jail inmates reasonable opportunity to maintain
4 telephonic communication with the free community, and to offer telephone services in the
5 correctional setting with an appropriate range of options at the lowest possible rates.
6
1

REPORT

Telecommunications services are integral to human interaction in today's society. Accessing these services is especially important to people who are incarcerated, separated from family, friends and legal counsel by the fact of incarceration. Telephone access is particularly important for the significant percentage of the incarcerated population with limited literacy skills.¹

Leaders in the corrections profession have long recognized the importance of extending telephone privileges to people in their custody as a means of fostering and strengthening ties with their families and their communities.² Telephone access can be a critical component of a prisoner's successful transition to a productive, law-abiding life after leaving prison.³ It can also contribute to safer prisons by reducing the number of disciplinary incidents.⁴ At the same time, we recognize that the desire to provide robust communications services to prisoners remains in tension with legitimate penological constraints of the correctional setting.⁵

Although recognizing the importance of providing expansive telephone privileges, many correctional systems engage in practices that make it difficult, if not impossible, for incarcerated people to use the telephone. First, many correctional facilities only permit prisoners to make

¹ Approximately 40% of the national prison population is functionally illiterate. The Center on Crime, Communities & Culture, *Education as Crime Prevention: Providing Education to Prisoners*, Research Brief: Occasional Paper Series 2 (Sept. 1997).

² See, e.g., the October 1996 Resolution on Excessive Phone Tarriffs adopted by the American Correctional Association (ACA); ACA's Public Correctional Policy on Inmate/Juvenile Offender Access to Telephone (adopted 24 January 2001); and ACA's related standards (*Standards for Adult Correctional Institutions* (3rd ed.); *Standards for Adult Local Detention Facilities* (3rd ed.); *Standards for Adult Community Residential Facilities* (4th ed.); *Standards for Adult Correctional Boot Camp Programs* (1st ed.); *Standards for Juvenile Community Residential Facilities* (3rd ed.); *Standards for Juvenile Detention Facilities* (3rd ed.); *Standards for Juvenile Correctional Boot Camp Programs* (1st ed.); *Standards for Juvenile Training Schools* (3rd ed.); *Standards for Small Juvenile Detention Facilities* (1st ed.); and *Small Jail Facilities* (1st ed.)). See also, the National Sheriffs' Association Resolution of 14 June 1995; and USDOJ-BOP, Program Statement 5264.06, *Telephone Regulations for Inmates* (Jan. 31, 2002).

³ See, e.g., U.S. Department of Justice, Office of the Inspector General, *Criminal Calls: A Review of the Bureau of Prisons' Management of Inmate Telephone Privileges*, Ch. II, n.6 (Aug. 1999), available at <http://www.usdoj.gov/oig/special/9908/callsp2.htm> (last accessed 30 January 2005) ("telephone usage and other contacts with family contribute to inmate morale, better staff-inmate interactions, and more connection to the community, which in turn has made them less likely to return to prison....") and State of Louisiana Department of Public Safety and Corrections, *Time in Prison: The Adult Institutions*, p.5 (2004).

⁴ Bureau of Prisons Program Statement 5264.07, "Telephone Regulations for Inmates," codified at 28 C.F.R. § 540.100 ("Telephone privileges are a supplemental means of maintaining community and family ties that will contribute to an inmate's personal development. . . . Contact with the public is a valuable tool in the overall correctional process."); State of Louisiana Department of Public Safety and Corrections, *Time in Prison: The Adult Institutions*, p. 5 (2004), available at <http://www.corrections.state.la.us/Whats%20New/PDFs/TimeInPrison.pdf>.

⁵ The "correctional setting" refers to facilities where people are detained or incarcerated, irrespective of their actual status as pretrial, civilly committed, adjudicated, or sentenced. Thus, the Recommendation encompasses jails and other detention facilities, prisons, training schools, residential facilities, and correctional facilities of all types.

collect calls. Second, charges for prisoner-initiated telephone calls are high as compared to rates offered in the residential and business markets and, in some cases, excessive.⁶ In some jurisdictions, escalating prices appear to be driven by “commissions” paid by service providers to correctional facilities for exclusive contracts, which hover in the 30% to 40% range, and can be as high as 65%, of all revenue generated. Third, many correctional systems require telephone service providers to block calls from prisoners to certain prohibited phone numbers for reasons of public safety and crime prevention. Some institutions, however, impose call-blocking requirements for inappropriate reasons, including a local carrier’s failure to enter into a billing agreement with the provider, or because the number called is a cell phone or is a remote call forwarding number. In the case of calls placed to cell phones, many telephone service subscribers are opting for cellular service instead of the more conventional land-line connection. Remote call forwarding is a technology that has been employed by some telephone service providers to compete for business by re-directing calls to customers at costs lower than would otherwise apply. In an age of increasing mobility, it will often be possible to reconcile legitimate security concerns with new technologies. Fourth, many prison systems and jails place unreasonable limits on the number of calls a prisoner is allowed to make or receive, or the aggregate amount of time a prisoner can spend on the telephone during a prescribed period.⁷ Finally, correctional institutions monitor and record inmate telephone calls routinely, but policies that permit monitoring client-attorney communications in the correctional setting or that unreasonably limit the availability of permissible unmonitored calls threaten fundamental rights regarding the effective assistance of counsel and access to the courts.⁸ Such policies are presumptively unconstitutional.⁹

⁶ “[C]orrectional agencies should discourage profiteering on tariffs placed on phone calls which are far in excess of the actual cost of the call, and which could discourage or hinder family or community contacts.” ACA’s October 1996 Resolution on Excessive Phone Tariffs.

⁷ In Texas prisons, inmate access to telephones is quite limited. “Offenders who demonstrate good behavior can earn one 5-minute collect phone call every 90 days. . . .” Texas Department of Criminal Justice, Correctional Institutions Divisions, Frequently Asked Questions (<http://www.tdcj.state.tx.us/faq/faq-cid.htm#telephone>) (last accessed 16 January 2005).

By comparison, the Federal Bureau of Prisons (BOP) policy is generous. BOP Program Statement 5264.07 entitled, “Telephone Regulations for Inmates,” which was codified at 28 C.F.R. § 540.100 *et seq.*, states that inmates are generally permitted privileges to contact up to a maximum of 30 individuals on an approved telephone list for up to 300 minutes per month. P.S. 5264.07, §§ 10.a. (30 numbers), and 10.d.(1)(300 minutes). Although advocating that then-unlimited telephone access be restricted, the Office of the Inspector General found the 300-minute limitation to be “arbitrary.” *Criminal Calls*, *supra* n. 3, Ch. VIII, § I. ¶ 1. (Aug. 1999), available at: <http://www.usdoj.gov/oig/special/9908/callsp7.htm#Punishments> (last accessed 30 January 2005). Indeed, for several consecutive years, the BOP has permitted inmates 400 minutes of telephone access during the months of November and December.

⁸ The U.S. Attorney General signed a directive on 31 October 2001 authorizing correctional officials to monitor inmate-client/attorney communications under certain circumstances. AG Order No. 2529-2001, 66 FR 55062. That directive was subsequently codified at 28 C.F.R. 501.3 (31 Oct. 2001).

⁹ See *infra*, n. 14.

As the billed parties for inmate collect calls, the family and friends of incarcerated people regularly shoulder the high cost of prison telephone services. A call recipient is often confronted with a choice of paying exorbitant rates for a collect call from a jail or prison, or refusing it. Many families cannot afford the inflated rates.¹⁰ One damaging result is that children are frequently unable to maintain contact with parents who are confined. Arbitrarily blocked calls only exacerbate the situation.

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.¹¹ This has serious implications given the constitutional protections surrounding a prisoner's ability to communicate with counsel.¹² 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.

Correctional administrators struggle with the perennial problem of stretching limited financial resources to meet institutional needs. The lure of telecommunications contracts that promise a return of as much as 65% of all revenue can appear irresistible in the absence of alternative sources of revenue. But entering into such an arrangement creates an ethical quagmire of both real and perceived conflicts which compromise both the professional integrity of correctional officials and the public's perception. Given the penological and societal benefits that occur when incarcerated people are able to maintain contact with the outside world, the monetary advantages are not worth the human costs.¹³

¹⁰ See, e.g., *In the Matter of: Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Comments of the Ad Hoc Coalition for the Right to Communicate Regarding Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking*, and accompanying declarations, FCC Docket No. 96-128 (filed 10 March 2004).

¹¹ According to the U.S. Department of Justice, 82% of felony defendants in state cases in the 75 largest counties in the country in 1996, and 66% of felony defendants in federal cases in 1998 were represented by court-appointed attorneys. Department of Justice, Bureau of Justice Statistics, *Defense Counsel in Criminal Cases*, Nov. 2000. Both public defenders and other court-appointed counsel are paid by the same governments (state and federal) whose monies are used to fund the correctional systems from which inmate telephone calls originate. Given the current fiscal crisis in governments at all levels, exorbitant rates for inmate-generated telephone calls seem particularly pernicious.

¹² Compare *Alabama v. Shelton*, 535 U.S. 654 (2002) and *Gideon v. Wainwright*, 372 U.S. 335 (1963) (indigent's constitutional right to counsel in criminal cases) with *Lewis v. Casey*, 518 U.S. 343 (1996) and *Bounds v. Smith*, 430 U.S. 817 (1977) (prisoners' right of access to the courts with regard to certain civil and post-conviction matters).

¹³ The Nebraska Department of Correctional Services does not accept commissions on inmate telephone charges. Instead, rates are set by the Nebraska Public Service Commission. Nebraska Department of Correctional Services, *Frequently Asked Questions*, available at: http://www.corrections.state.ne.us/frequent_questions/telephone-index.html (last accessed 30 January 2005).

Although some courts have recognized the constitutional problems inherent in correctional policies that make it impossible for prisoners to contact lawyers and others,¹⁴ neither the courts¹⁵ nor regulatory agencies¹⁶ have yet required correctional authorities to abandon sole-source contracts and open the prison environment to competition that could result in a broader range of calling options at the lowest possible rates.

The resolution encourages federal, state, territorial and local governments to ensure that incarcerated people are afforded a reasonable opportunity to maintain telephonic communication with family and friends in the free community, consistent with the imperatives of correctional management, law enforcement and national security. While the resolution does not go further to specify particular measures correctional authorities must take to ensure the “reasonable

¹⁴ Courts have long recognized that the ability to communicate privately with an attorney by telephone is essential to the exercise of the constitutional rights to counsel and to access to the courts. *Murphy v. Waller*, 51 F.3d 714, 718 & n.7 (7th Cir. 1995)(“Restrictions on a detainee’s telephone privileges that prevented him from contacting his attorney violate the Sixth Amendment right to counsel. . . . In certain limited circumstances, unreasonable restrictions on a detainee’s access to a telephone may also violate the Fourteenth Amendment.”); *Tucker v. Randall*, 948 F.2d 388, 390-91 (7th Cir. 1991)(denying a pre-trial detainee telephone access to his lawyer for four days would implicate the Sixth Amendment); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051 (8th Cir.1989)(holding that inmates’ challenge to restrictions on the number and time of telephone calls stated a claim for violation of their rights to counsel); *Miller v. Carlson*, 401 F. Supp. 835 (M.D. Fla. 1975), *aff’d & modified on other grounds*, 563 F.2d 741 (5th Cir. 1977)(granting a permanent injunction precluding the monitoring and denial of inmates’ telephone calls to their attorneys). *See also* Dana Beyerle, *Making Telephone Calls From Jail Can Be Costly*, Times Montgomery Bureau (Sept. 22, 2002)(Etowah, Alabama county jail under court order to provide phones to people incarcerated in the jail based in part on complaints they could not talk to lawyers). They have accordingly held that, when prisons’ collect call-only policies interfere with the ability of incarcerated people to communicate with their lawyers, they may violate these rights. *See, e.g., Lynch v. Leis*, Docket No. C-1-00-274 (S.D. Ohio Feb. 19, 2002)(holding that where public defender’s office and many private attorneys refused most collect calls, a prison’s collect call-only policy was unconstitutional)(unpublished decision on file with the Brennan Center); *In re Ron Grimes*, 208 Cal. App. 3d 1175, 1178 (1989)(holding that switch by Humboldt County (California) Jail from coin operated to collect-only calls violated the constitutional rights of people incarcerated there because the public defender’s office, other county departments, and some private attorneys did not accept collect calls).

¹⁵ *See, e.g., Arsberry v. Illinois*, 244 F.3d 558 (7th Cir. 2000). Illinois granted one phone company the exclusive right to provide telephone services to inmates in return for 50 percent of the revenues generated. Prisoners and members of their families challenged the practice as a violation of their free speech rights, as a discriminatory denial of equal protection of the laws, and as a violation of federal anti-trust laws. In the *Arsberry* case, the United States Court of Appeals for the Seventh Circuit concluded that the practice did not violate the constitution or any federal law. *See, also, Daleure v. Kentucky*, 119 F. Supp. 2d 683 (W.D. Kentucky 2000)(The court found defendants’ actions did not violate the Constitution); *Miranda v. Michigan*, 141 F. Supp. 2d 747 (E.D. Mich. 2001)(Plaintiff’s Federal Telecommunications Act claims fell within the primary jurisdiction of the Federal Communications Commission and were dismissed).

¹⁶ *See, e.g., In the Matter of Wright Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking*, CC Docket 96-128 (Federal Communications Commission)(decision pending); *In re: Petition of Outside Connection, Inc.*, DA 03-874 (Federal Communications Commission); *Voluntary Remand of Inmate Telephone Services Issues*. CC Docket No. 96-128 (Federal Communications Commission); and North Carolina Utilities Commission, Docket No. P-100, Sub 84; Docket No. P-55, Sub 1005; and Docket No. P-100, Sub 126, These cases were matters in which prisoner advocates filed briefs, appeared at oral argument, and engaged in discussions with commission personnel, all without success.

opportunity” that is urged, there are a number of basic steps that have been identified as deserving of serious consideration. First, correctional authorities should encourage service providers to 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.¹⁷

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.

Third, telephone service contracts should expressly forbid call-blocking for any reason other than legitimate law enforcement and national security concerns, requests initiated by the customer, or failure to pay legitimately invoiced charges.

Finally, if correctional authorities conclude that limits must be placed on the number of calls a prisoner makes, or on the aggregate amount of telephone time allotted a prisoner in a given period, those limits should be as flexible and generous as possible in light of the many benefits of maintaining ties between incarcerated people, their families, and their communities.

Respectfully submitted,

Catherine Anderson
Chair, Criminal Justice Section
August 2005

¹⁷ See *In the Matter of Wright Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking*, FCC Docket 96-128, Affidavit of Douglas Dawson. The federal Bureau of Prisons permits prisoners to place calls using debit cards, demonstrating that collect call-only policies are not necessary to maintain prison security. See U.S. Department of Justice, Federal Bureau of Prisons, Memorandum For All Institution Controllers All Trust Fund Supervisors, from Michael A. Atwood, Chief, Trust Fund Branch, Trust Fund Message Number 18-02 (Feb. 8, 2002) at 2.

GENERAL INFORMATION FORM

1. **Summary of Recommendation.** encourages federal, state, territorial and local governments, consistent with the constraints of sound correctional management, law enforcement and national security principles, to afford prison and jail inmates every 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 proposed resolution encourages federal, state, territorial and local governments to afford incarcerated people every reasonable opportunity to maintain telephonic communication with the free community consistent with the constraints of sound correctional management principles, and to offer the broadest possible range of telephone services in the correctional setting at the lowest possible rates.

2. **Approved by Submitting Entity.**

This recommendation was approved by the Criminal Justice Section Council at its May 14-15, 2005 meeting.

3. **Similar Recommendations Submitted Previously.**

This recommendation has not previously been submitted to the House of Delegates or the Board of Governors.

4. **Relevant Existing ABA Policies and Affect on These Policies.** None.

5. **Urgency Requiring Action at this Meeting.** The proposed resolution has been the subject of deliberation and discussion among a broad range of people with diverse interests. Drafts of the proposed resolution have been widely circulated, and based upon comments received, the proposed resolution has been repeatedly revised and refined. As it is presently worded, the proposed resolution has been approved by the Corrections and Sentencing Committee of the Criminal Justice Section and is ready for consideration by the Board of Governors and the House of Delegates.

6. **Status of Congressional Legislation (If applicable).** None.

7. **Cost to the Association.** None.

8. **Disclosure of Interest (If Applicable).**

No known conflict of interest exists.

9. **Referrals.**

Concurrently with submission of this report to the ABA Policy Administration Office for calendaring on the August 2005 House of Delegates agenda, it is being circulated to the following:

Sections, Divisions and Forums:

All Sections and Divisions

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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION


IN THE MATTER OF A COMMISSION INQUIRY)
INTO THE RATES AND CHARGES OF)
INSTITUTIONAL OPERATOR SERVICE PROVIDERS)Case No. 07-00316-UT
_____)

AFFIDAVIT OF JOHN J. REYNOLDS

STATE OF NEW MEXICO)
)ss.
COUNTY OF SANTA FE)

I, John J. Reynolds, do hereby swear, depose and state as follows:

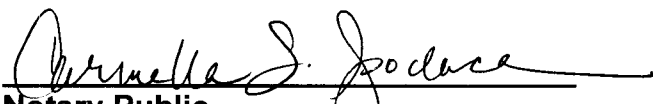
I hereby attest that I have read the foregoing **Prepared Direct Testimony of John J. Reynolds**, and the statements contained therein are true and accurate to the best of my knowledge and information.



John J. Reynolds
1/23/2009
Date

SUBSCRIBED AND SWORN to before me this 23 day of January, 2009.

My Commission Expires: 8/14/2009



Notary Public

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**IN THE MATTER OF A COMMISSION INQUIRY)
INTO THE RATES AND CHARGES OF)
INSTITUTIONAL OPERATOR SERVICE PROVIDERS)**

Case No. 07-00316-UT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Prepared Direct Testimony of John J. Reynolds**, issued January 23, 2009, was forwarded on this date to the New Mexico Public Regulation Commission's offices at the PERA Building, 1120 Paseo De Peralta, Santa Fe, NM 87501, for mailing to each of the following:

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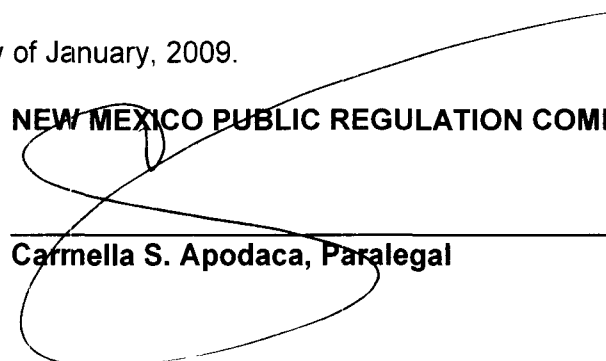
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DATED this **23rd** day of January, 2009.

NEW MEXICO PUBLIC REGULATION COMMISSION



Carmella S. Apodaca, Paralegal