

**Before The
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Pay Telephone)	CC Docket No. 96-128
Reclassification and Compensation)	
Provisions of the Telecommunications)	
Act of 1996)	

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

David C. Bergmann
Chair, NASUCA Telecommunications Committee
Assistant Consumers' Counsel
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574
bergmann@occ.state.oh.us

Elizabeth A. Noël
People's Counsel
Office of the People's Counsel
for the District of Columbia

Joy M. Ragsdale
Assistant People's Counsel
Office of the People's Counsel
for the District of Columbia
1133 15th Street, N.W., Suite 500
Washington, D.C. 20005-2710

Gerald A. Norlander, Esq.
Executive Director
Public Utility Law Project
90 State Street, Suite 601
Albany, NY 12207

NASUCA
8300 Colesville Road, Suite 101
Silver Spring, MD 20910

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I. INTRODUCTION AND SUMMARY

The National Association of State Utility Consumer Advocates¹ (“NASUCA”) files reply comments in response to the Public Notice (“Notice”) released on December 31, 2003, in the above-captioned proceeding.² In summary, no party submitted a legitimate legal argument that bars the Federal Communications Commission (“Commission” or “FCC”) from granting the *Wright Petition* and reconsidering its policy on interstate telephone service and rates provided in prisons. Second, parties opposing the *Wright*

¹ NASUCA is a non-profit, national association organized in 1979, whose members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. NASUCA members operate independently from state utility commissions, primarily as advocates for residential ratepayers, although some members also represent small business ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General’s office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

² *Petition for Rulemaking Filed Regarding Issues Related to Inmate Calling Services Pleading Cycle Established*, DA 03-4027, CC Docket No. 96-128 (Dec. 31, 2003) (“*Wright Petition*”). On February 3, 2004, by Order, the FCC extended the filing dates for initial and reply comments to March 10, 2004, and March 31, 2004, respectively. *In re Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, CC Docket No. 96-128 (Feb. 3, 2004). The date for filing reply comments was later extended to April 21, 2004. *See*, FCC Order, CC Docket No. 96-128, DA 04-774 (Mar. 24, 2004).

Petition failed to submit cost studies to support their contentions that rates for interstate telephone service in prisons are just and reasonable.

As discussed further below, there is clearly a demonstrated need for the Commission to adopt a consistent interstate rate policy to guide states in this matter given the divergent views of the parties and lack of consensus on the cost issues raised by the affidavit of Douglas Dawson. Accordingly, NASUCA urges the FCC to grant the petition filed by Martha Wright and other prison inmate and non-inmate petitioners (“Petitioners”) requesting the FCC to prohibit exclusive calling service agreements that permit unjust and unreasonable interstate telephone rates and surcharges.

II. ARGUMENT

A. Summary of Initial Comments

In general, NASUCA, the Brennan Center for Justice, CURE, and ACLU filed comments supporting the Wright Petitioners’ request that the FCC prohibit exclusive telephone service agreements and exorbitant commissions embedded in telephone rates for inmates.³ Commenters supporting the *Wright Petition* recognize the consequential and detrimental effect high cost telephone rates have on inmates and the recipients of inmate collect calls -- primarily families of inmates and often low-income consumers.

In contrast, prison and correctional facility administrators, and telephone service providers who filed comments in this proceeding – and have a pecuniary interest in this matter -- opposed the *Wright Petition* under the facade that security needs of the facilities

³ *Supra* n.2, Comments of the National Association of State Utility Consumer Advocates (“NASUCA”) (filed Mar. 10, 2004); Comments of the American Civil Liberties Union (“ACLU”) and The Washington Lawyers’ Committee for Civil Rights and Urban Affairs (“WLC”) (Mar. 10, 2004); 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, Brennan Center for Justice (Mar. 10, 2004); Comments of Citizens United for Rehabilitation of Errants in Response to the Wright Petition for Rulemaking (“CURE”) (Mar. 10, 2004).

justify charging excessive telephone rates and, more importantly, bar the FCC from implementing stronger consumer protection measures to shield consumers from unaffordable and abusive telephone rates and charges.⁴ Implausibly, these same parties allege maintaining a monopolistic telephone market in the prison environment benefits the public interest of consumers and promotes a competitive and level-playing field in the telecommunications market. These parties place an undue burden on the consumer to either not accept collect calls from inmates or to place a permanent block on their telephone -- restricting essential communications between an inmate and his or her family. Finally, the carriers wrongly assert the FCC has limited authority to regulate the rates of interstate telephone service established in their contracts for prisons and custodial facilities.⁵

B. The FCC is Expressly Authorized by Law to Ensure All Telephone Rates are Just and Reasonable.

Congress expressly authorized the FCC to ensure that telephone rates, including telephone rates for inmates, must conform with Section 201(b) of Telecommunications Act of 1996 that specifically provides that “[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and

⁴ *Supra*, n.2, Comments of AT&T Corp. in Opposition to the Wright Petition for Rulemaking Regarding Issues Related to Inmate Calling Services (filed Mar. 10, 2004); RBOC Payphone Coalition’s Comments on the Notice of Proposed Rulemaking Regarding Inmate Calling Services (Mar. 10, 2004); Comments of the Association of Private Correctional and Treatment Organizations (Mar. 10, 2004); New York State Department of Correctional Services Comments in Opposition to Petition for Rulemaking Filed Regarding Issues Related to Inmate Calling Services (“NYDOCS”) (Mar. 9, 2004); Initial Comments of Evercom Systems, Inc. (Mar. 10, 2004); Comments of Worldcom, Inc. d/b/a MCI (Mar. 10, 2004); Comments of T-NETIX, Inc. (Mar. 10, 2004).

⁵ MCI Comments at 10.

reasonable.”⁶ Fulfilling its statutory obligations to ensure consumers are protected from abusive practices does not interfere with administrators’ control of internal prison activities as some parties would lead the FCC to believe in this proceeding. Contrary to the opposing parties’ assertions, federal courts did not give prison administrators unfettered discretion in governing matters related to internal prison operations. As AT&T noted, the federal courts decided prison officials [might] determine the appropriate terms of offering telephone service on the condition that such restrictions are *reasonably related* to legitimate penal interests.⁷ However, NASUCA submits exclusive contracts permitting telephone rates embedded with commissions that range from 20 to 60 percent are unreasonable. Accordingly, the Commission should prohibit exclusive service contracts that permit service providers to set high telephone rates embedded with commissions.

In the Operator Service Provider (“OSP”) Reform proceeding, the FCC noted “... that prisons would likely seek to recover the cost of any equipment employed for legitimate security reasons....”⁸ However, in this proceeding, prison administrators and the carriers readily admit commissions are used to recover more than the equipment costs associated with prison security needs. Recipients of inmate telephone calls are subsidizing the costs of non-telecommunications services and unrelated operational expenses through

⁶ 47 U.S.C. § 201(b). *In re Billed Party Preference for InterLATA 0+ Calls*, CC Docket No. 92-77, 13 FCC Rcd 6122, ¶ 59 (Jan. 28, 1998).

⁷ AT&T Comments at 7, citing *Johnson v. California*, 2000 WL 290255 (9th Cir., Mar. 21, 2000) (emphasis added). It is worthy to note that the federal cases relied upon by parties opposing the *Wright Petition* addressed internal prison operations that had little effect on persons outside of the prison walls in contrast to the high commissions and telephone charges paid by families of inmates. No party filing comments has denied that recipients of inmate phone calls are often subject to service disconnection due to the high per minute charges (*e.g.*, \$3 per minute) for accepting collect calls from inmates.

⁸ *Supra*, n.6, ¶ 56 (emphasis added) (Jan. 29, 1998).

commissions embedded within inmate telephone service rates.⁹ For example, APCTO noted that commissions pay for the costs of chairs, tables, and additional guards;¹⁰ Evercom asserts commissions pay for GED and AIDS awareness programs, as well as family outreach programs;¹¹ and NYDOCS stated that the 57.5 percent commission it receives from MCI subsidizes the costs for recreational benefits like cable television, family reunion programs and free bus service for New York prison visitors.¹² NASUCA submits costs for non-telecommunications such as these are not appropriately considered by this Commission in setting interstate rates and charges paid by recipients of telephone calls from prison inmates.

Furthermore, NYDOCS argues that the FCC lacks authority to review and set interstate rates paid by recipients of calls from inmates because the New York state comptroller previously approved the MCI inmate telephone contract under the State Finance Law. NYDOCS' contention is without merit.¹³ Just as a New York court held that rates set under a service provider's contract with a state agency are subject to regulatory review,¹⁴ so should this Commission hold that it has full jurisdiction over all

⁹ Noticeably absent from the parties opposing the *Wright Petition* are cost studies to support their contention that prison telephone rates and commissions are just and reasonable. Furthermore, removing implicit subsidies was one of the goals of the Telecommunications Act of 1996.

¹⁰ Comments of the Association of Private Correctional and Treatment Organizations ("ACPTO"), at 15.

¹¹ Comments of Evercom Systems Inc., at 8.

¹² Comments of New York State Department of Correctional Service, at 6.

¹³ NYDOCS also argues that "the overwhelming majority" of the 6,706,916 completed calls from New York inmates in 2003 were intrastate, and that only 13%, or approximately 875,000 calls in that year were interstate. *Id.*, at 4. That argument, obviously, fails to address the Commission's statutory obligation to assure that all rates and charges for interstate service are just and reasonable.

¹⁴ "...[I]t cannot be seriously argued that the parties herein could, by their contract, negate the PSC's cited statutory authority to set rates which it deems just and proper." *New York Telephone Co. v. State of New York, Division of State Police*, 85 A.D.2d 803, 445 N.Y.S.2d 609 (App. Div. 3d Dept. 1981),

rates and contracts affecting interstate telephone service, including contracts a telecommunications provider enters into with a state.

III. CONCLUSION

The Commission's policy to resolve inmate call service complaints in a less intrusive manner and to require rate quotation of payphone rates has been ineffective in protecting consumers from supracompetitive commissions embedded in inmate telephone rates.

The need for less regulation has not been obviated as the FCC optimistically projected in 1998.¹⁵

For the reasons set forth herein, NASUCA reiterates its recommendation that the Commission should make the following determinations, either through a rulemaking proceeding or by Order:

1. Declare inmate interstate phone rates to be unjust and unreasonable to the extent that such rates are in excess of the reasonable costs of providing telecommunications service to inmates and their called parties. The affidavit of Douglas Dawson (Wright Petition, Attachment A) provides the record substantial evidence upon which the Commission may rely in determining the reasonable costs of such services.
2. Prohibit the inclusion of contract commissions in the billing of inmate interstate telephone services, whether in the form of a rate component or billing line item;
3. Allow affected custodial institutions and telecommunications carriers up to 180 days to reform their contracts and rates in accordance with the Commission's determinations;
4. Encourage custodial institutions to develop modern calling methods, such as prepaid debit accounts with direct dialing, in order to decrease the overall costs of inmate interstate calls;

1981 N.Y. App. Div. LEXIS 16619 (approving New York PSC modification of rates set by contract with state police previously approved by state comptroller under the state finance law).

¹⁵ *Supra*, n.8, ¶ 59.

5. Encourage custodial institutions to engage in competitive bidding methods or allow inmate access to multiple competitors in order to secure competitively priced interstate telephone services; and
6. Encourage custodial institutions to consider the procurement of appropriate security measures by lower cost software and hardware solutions as opposed to monthly recurring interstate telecommunications rates.

Respectfully submitted,

David C. Bergmann
Chair, NASUCA Telecommunications Committee
Assistant Consumers' Counsel
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574
bergmann@occ.state.oh.us

Elizabeth A. Noël
People's Counsel
Office of the People's Counsel
for the District of Columbia

Joy M. Ragsdale
Assistant People's Counsel
Office of the People's Counsel
for the District of Columbia
1133 15th Street, N.W., Suite 500
Washington, D.C. 20005-2710
(202) 727-3071

Gerald A. Norlander, Esq.
Executive Director
Public Utility Law Project
90 State Street, Suite 601
Albany, NY 12207
(518) 449-3375

NASUCA
8300 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

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