

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of: )

Implementation of Pay Telephone )  
Reclassification and Compensation )  
Provisions of the Telecommunications )  
Act of 1996 )

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CC Docket No. 96-128

**NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES**  
**COMMENTS IN OPPOSITION TO**  
**PETITION FOR RULEMAKING FILED REGARDING ISSUES**  
**RELATED TO INMATE CALLING SERVICES**  
*“Wright Petition”*

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The New York State Department of Correctional Services (DOCS) submits these comments in opposition to the *Wright Petition*. The Commission should deny the request to initiate a notice and comment rulemaking proceeding to consider precluding exclusive service arrangements and to possibly impose additional restrictions on the provision of inmate telephone service. Although the Petitioners state that the scope of the *Wright Petition* is limited to inmate telephone services at private prison facilities, they acknowledge that the adoption of such rules by the Commission would likely preempt state laws and regulations governing the administration of both State Correctional Facilities and publicly administered local correctional facilities.<sup>1</sup> Furthermore, the contracts for such services are awarded by the state and local agencies pursuant to the applicable procurement laws, New York State Finance Law sections 160, et seq. Any such regulatory action would preempt state law with respect to contracting for such services. In addition, the Petitioners seek to limit commissions available under such contract. It is the

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<sup>1</sup> *Wright Petition* at Page 4, footnote 4.

responsibility of the Legislature to determine how such funds will be allocated for the benefit of the inmate population in the State of New York. Any regulatory action by the Commission in this area will directly interfere with the State Legislature's budgetary process.

The Commission is being asked to initiate a rulemaking proceeding to consider imposing restrictions on how inmate calling services are offered by carriers providing such services. However, to do so the Commission must set aside contracts entered into in compliance with state procurement laws and dictate to the State Legislature how to pay for state expenditures. The Commission should not preempt these important state functions.

More importantly, the Commission is being asked to substitute its judgment for that of prison administrators as to how to appropriately manage prison systems and to ensure appropriate levels of security at every prison and jail throughout the nation. The Commission should decline the invitation to determine how prison administrators should meet legitimate security and other penological needs while affording inmate telephone service.

## **I. DOCS INMATE CALL HOME PROGRAM**

### **A. The New York State Department of Correctional Services and its Inmate Telephone System.**

DOCS is the state agency charged with the responsibility of confining all persons convicted of a felony and sentenced to imprisonment in New York State. DOCS operates 71 correctional facilities throughout the State of New York including the Willard Drug Treatment Campus. DOCS presently houses approximately 65,000 inmates. These facilities vary in size, structure and purpose. DOCS operates one Drug Treatment campus, three correctional camps, several work release facilities, and a number of minimum, medium and maximum security

facilities. The smallest facility currently has 86 inmates under custody while 2,895 inmates are in the largest facility.<sup>2</sup>

Although there is no constitutional right for an inmate to have unlimited access to telephone communications with family and friends, DOCS established the Inmate Call Home Program as one of several available methods for inmates to maintain contact with their loved ones. DOCS, through its contract with MCI, operates a number of inmate telephones providing a means for inmates to communicate with their friends and families by placing collect calls to pre-approved telephone numbers. All self-dialed inmate telephone calls from DOCS' facilities are handled by the Inmate Call Home Program. DOCS' regulations regarding the Inmate Call Home Program are set forth in the Official Compilation of Codes, Rules and Regulations of the State of New York at Title 7 NYCRR Part 723. The Inmate Call Home Program operates in each of the above-described facilities.

The telephone system itself consists of some 3,335 collect call-only telephones, some 150 high capacity T-1 facilities dedicated to inmate telephone traffic, and a call registry including 1,331,674 telephone numbers. About one-third of the numbers on the call registry are presently active.<sup>3</sup> DOCS' inmates complete approximately 500,000 calls per month with an average length of 19 minutes, totaling roughly 9.5 million minutes.<sup>4</sup> In addition, DOCS' inmates attempt approximately 2 million additional calls each month that are not completed. For each non-completed call, the inmate is advised of the reason for the denial by a voice response system. The call record is also marked with the call denial reason. DOCS' counselors have access to these call records to assist the inmate with any concerns.<sup>5</sup>

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<sup>2</sup> See Affidavit of Robert E. Koberger (Koberger Aff.), ¶ 3.

<sup>3</sup> Koberger aff., ¶ 9.

<sup>4</sup> Id.

<sup>5</sup> Id.

DOCS' inmates completed 6,706,916 calls during 2003. Of those completed calls, 13% were interstate calls. The overwhelming majority of calls, 87%, were intrastate local and long distance calls terminating inside New York State.<sup>6</sup>

B. Limitations on Telephone Access Under the Inmate Call Home Program.

The benefits of providing such a system must be balanced with the risks of giving inmates access to instantaneous communications with the outside world. Accordingly, DOCS has implemented a number of limitations associated with the Inmate Call Home Program. All inmate self-dialed calls are outgoing collect calls only and no credit card nor incoming calls are permitted. *See* 7 NYCRR § 723.5(a). Each inmate is allowed a maximum of 15 active phone numbers on his or her telephone list. *See* 7 NYCRR §§ 723.2(a), 723.5(c). All calls are subject to monitoring. 7 NYCRR 723.3(c). Furthermore, any individual's number may be blocked for a variety of reasons. *See* 7 NYCRR 723.3(d). Otherwise, broad categories of calls are simply prohibited based on either the status of the called person or the method of placing the call. 7 NYCRR § 723.3(e) (amended effective January 7, 2004). Included in the types of calls DOCS prohibits are the placing of calls to operator information; placing calls to unrelated minors under 18 years of age; all calls which utilize any means of call forwarding or third-party calling; and the placing of calls to wireless communication devices unless specifically authorized for an emergency telephone call. Such calls are prohibited for valid security reasons including but not limited to DOCS' concern that an inmate may utilize the inmate telephone system to harass a crime victim or witness, or that calls placed via call forwarding, third-party calling or to a wireless phone may be used by an inmate to direct the commission of a crime from prison, and also may assist the inmate in avoiding detection of that criminal act.

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<sup>6</sup> Koberger aff., ¶ 10.

C. The Inmate Call Home Program Contract.

The contract for the provision of telephone service for the Inmate Call Home Program is currently held by MCI. MCI's current contract with DOCS began on April 1, 2001 and expires March 31, 2006, with the possibility of two one-year extensions. Under the contract, MCI is the exclusive provider of inmate phone service to all state correctional facilities in New York.

MCI's contract with DOCS sets forth the terms and conditions under which MCI will provide inmate calling services to all correctional facilities in New York consistent with the above-referenced regulations. Under the terms of the contract, MCI provides collect calling to inmates of the correctional facilities, and provides DOCS with the security features referenced above, as well as a number of associated security features. The telephone system is programmed by date and time to turn on and off; limit inmate calls to a specific length; limit the number of refused calls by an inmate to any single recipient; and to restrict certain classes of services (such as 800 or 900 calls). DOCS also requires MCI to provide monitoring and recording capability, including all equipment necessary to perform these functions. Finally, the rates charged for such calls are capped under the contract, and the provider must file all appropriate tariffs with the State Public Service Commission.<sup>7</sup>

DOCS receives a 57.5% commission from MCI. The revenue from this commission is deposited into an Inmate Benefit Fund, which was created by the New York State Legislature in 1987 as part of the state budget process. While some of the commission revenue is used to pay for annual operation and maintenance expenses associated with the Inmate Call Home Program, the remainder of the funds pay for a number of benefits for the inmate population including cable

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<sup>7</sup> The contract was recently amended and a new tariff was filed by MCI implementing a new, flat-rate structure for all inmate calls placed on the Inmate Call Home Program. The PSC issued its determination finding that the rates were just and reasonable on October 30, 2003. PSC Case No. 03-C-1058.

television service in a number of facilities without adequate television reception; free bus service for visitors from New York City and several upstate cities; expenses associated with DOCS' Family Reunion Program which allows relatives to spend two days with the inmate inside a secure perimeter; nursery and family development programs at two facilities housing female offenders; a medical parole program; and a number of infectious disease control programs including funding of an AIDS Institute, AIDS pharmaceuticals, staff training and related programs.<sup>8</sup>

The Petitioners' assertion that commission payments are used "as a general slush fund" is simply baseless.<sup>9</sup> The use of the commission payments is approved by the State Legislature through the annual budget process, and every dollar is allocated to certain authorized purposes that are intended to benefit the inmate population.

## **II. THE COMMISSION SHOULD NOT PREEMPT THE DECISION MAKING AUTHORITY OF PRISON ADMINISTRATORS WITH RESPECT TO LEGITIMATE SECURITY NEEDS**

When the Commission first addressed this issue it determined that "the definition of 'aggregator' does not apply to correctional institutions in situations in which they provide inmate-only phones... [because] the provision of such phones to inmates presents an exceptional set of circumstances that warrants their exclusion from the regulation being considered" in that proceeding. In the Matter of Policies and Rules Concerning Operator Service Providers, 6 FCC Rcd. 2744, ¶ 15 (1991). This conclusion was affirmed by the Commission in 1996. In the Matter of Amendment of Policies and Rules Concerning Operator Service Providers and Call Aggregators, 11 FCC Rcd. 4532, 4547 (1996). Thus, while the Commission has expressed a

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<sup>8</sup> See "Inmate Pay Phone Access Fosters Family Ties, Enhances Security For All," New York State Department of Correctional Services (August 2003), annexed hereto as Exhibit A, page 4.

<sup>9</sup> *Wright Petition* at pp 21-22.

concern with the rates charged by some providers, the Commission has consistently held that due to the unique set of circumstances that exist within the prison environment, the regulations that apply to public payphones do not apply to inmate-only telephones.

Similarly, the United States Supreme Court has recognized that “running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources” in cautioning the federal courts to exercise restraint in supervising the minutiae of prison life should also be considered by the Commission. Turner v. Safley, 482 U.S. 78, 84-85, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). Because of the complex nature of running a prison, and due to the expertise required to do so, the Supreme Court has warned the federal courts to afford deference to the appropriate prison authorities. Id.

For the same reason, the Commission should recognize that operating an inmate telephone system requires penological expertise not associated with any other type of telephone service. The Commission should show appropriate deference to the determinations of prison administrators about how to satisfy both the desire to provide inmate telephone service and the need to implement appropriate security measures for such service.

**III. THE MULTIPLE IXC ENVIRONMENT  
SUGGESTED BY PETITIONERS’ EXPERT  
PRESENTS MANY OF THE SHORTCOMINGS  
DOCS SEEKS TO AVOID BY USING A  
SINGLE PROVIDER**

Petitioners rely heavily upon the opinions of Douglas A. Dawson to support their petition. Mr. Dawson is the president of a communications consulting firm.<sup>10</sup> While he states that he has experience and expertise relevant to the issues of this proceeding, and he implies that he has specific experience with the provision of long distance calling for prison inmates, he does not

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<sup>10</sup> Affidavit of Douglas A. Dawson (Dawson Affidavit) at ¶ 1.

claim to have ever worked in a correctional system.<sup>11</sup> Many shortcomings of Dawson's hypothetical system become apparent when examined with respect to a prison system like that in New York State. Dawson envisions an inmate calling system where a number of IXC's establish service and compete for the business of the inmates and/or their families. This seems to make sense when taken from the perspective of a single prison with over 1,700 inmates. In the DOCS' system, however, this business model simply falls apart.

First, there is little chance that even one IXC is going to compete for the business of the inmates at DOCS' work release and other small facilities with very little telephone traffic. Those inmates could be left with no service whatsoever. Inmates at larger facilities would likely have more choices than inmates at smaller facilities. This could result in telephone calls from one facility costing substantially more than telephone calls from a facility that is less than one mile away.

Inmates committed to serve a sentence of imprisonment in DOCS may be transferred to any of its facilities.<sup>12</sup> Transfers occur frequently during a period of incarceration based on changing security classification levels, programming needs, discipline, and a number of other factors. Because DOCS' facilities are so different, the cost of placing a telephone call could easily change with a transfer. Furthermore, assuming that the inmate's family member has established a prepaid account with an IXC offering service at one facility, that family member would not be able to use that prepaid account if the inmate is transferred to a facility where the particular IXC is not an option. This raises a number of administrative issues, and associated costs. It may also mean that an inmate would be prevented from calling a family member simply because he was transferred.

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<sup>11</sup> Dawson Affidavit at ¶ 2.

<sup>12</sup> New York Correction Law § 23.

Under DOCS' single provider system, an inmate's approved telephone number list and PIN are only active at the facility where the inmate is housed. That list is automatically transferred to the receiving facility with the inmate and is usable at any prison location that the inmate is transferred to. At the same time, the inmate's PIN is deactivated at the sending facility. Under Dawson's theory, if the family establishes the debit account and the inmate is transferred to a facility where the particular IXC is not an option, that family could not use that prepaid account. Under Dawson's alternative theory where the inmate is permitted to select the IXC, even more complications are presented. In addition to moving the approved telephone number list and authorized facility for the PIN, the inmate would need to be provided with a facility specific menu of available IXC's. Based on which IXC's are available at the facility, adjustments will be required each time the inmate moves. This would be a staff intensive endeavor and would certainly present an additional financial burden for the State.

A. Petitioners Have Misconstrued the Complex Security Issues Associated With Operating an Inmate Calling System.

The suggestion that further restrictions such as limiting debit fund payments to a small list of outside parties could prevent the creation of a commodity demonstrates a fundamental misunderstanding of prison society.<sup>13</sup> Dawson states that "it should also be kept in mind that a collect calling system can be abused as much as a debit calling system. Whatever value can be extorted from another inmate's debit account could also be extorted from his collect calling PIN." Dawson is simply wrong. DOCS prohibits inmates from possessing money. In a system where the inmate has a debit card, that inmate has money and that inmate can pay for someone else's calls. For example, through violence or threat of violence, one inmate can force a second inmate to add a telephone number to his list of approved numbers. Thereafter, the first inmate

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<sup>13</sup> Dawson Affidavit ¶ 37.

can place calls to his desired call recipient using that second inmate's PIN and debit account at the expense of the second inmate. With collect calling, there is no financial motive for such extortion because the called party pays for the call no matter whose PIN is used. Similarly, one inmate could voluntarily pay for a second inmate's calls to purchase drugs or other contraband from that inmate.

Dawson also suggests that the creation of a commodity through debit calling can be avoided if techniques for limiting the calling for each inmate "is combined with the inability to re-originate calls."<sup>14</sup> However, he does not explain how DOCS can prevent the re-origination of calls through the use of a platform. He also fails to explain how DOCS can force an IXC with no contractual relationship with DOCS to impose restrictions on the re-origination of calls.

B. Implementation of a Debit System will Increase Cost and Result in Less Money Being Available to the Inmate for Telephone Calls.

In any event, DOCS has identified a number of issues associated with operating a debit account system for the inmate. First, the administration of a debit system would greatly increase the cost of administering the Inmate Call Home Program, and in particular DOCS' Inmate Accounts system. As required by New York Correction Law sections 112 and 116, DOCS has established facility accounts for the deposit of inmate funds. Accordingly, DOCS has established a system for the control of such inmate accounts and for the collection and repayment of inmate advances and obligations.

The State Legislature has created a whole host of fiscal penalties that can be imposed on an inmate as part of a criminal sentence following the conviction of a crime. These monetary penalties can be imposed together with sentences of imprisonment and include such things as mandatory surcharges, fines, restitution, reparation and a crime victims assistance fee. From a

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<sup>14</sup> Dawson Affidavit ¶ 37.

