

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

In the Matter of)

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

CC Docket No. 96-128

**Petition for Rulemaking or, in the
Alternative, Petition to Address Referral
Issues In Pending Rulemaking**)

DA 03-4027

PETITIONERS' ALTERNATIVE RULEMAKING PROPOSAL

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February 28, 2007

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Petitioners Martha Wright, *et al.* (“Petitioners”) submit this request to establish benchmark rates for long distance prison inmate calling services as an alternative to the approach previously proposed in the above-captioned Petition For Rulemaking (“Wright Petition”)¹ and supporting expert Affidavit of Douglas A. Dawson (“Dawson Affidavit”)² filed on November 3, 2003.³ Not only is it entirely feasible for long distance telephone services to be provided to prisoners at rates far below those prevailing at most prison facilities, but the utter failure of the market to bring about reasonable inmate calling service rates also has become increasingly clear. Petitioners present this alternative proposal in order to provide the Commission with another possible solution to the vexing problem of extortionate inmate calling rates.

¹ Petition For Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking (Nov. 3, 2003) (“Wright Petition”). All filings in CC Docket No. 96-128 regarding the Wright Petition will be cited in this abbreviated manner throughout.

² Affidavit of Douglas A. Dawson (Oct. 29, 2003) (“Dawson Affidavit”) (appended as Attachment A to the Wright Petition).

³ See FCC Public Notice, *Petition for Rulemaking Filed Regarding Issues Related to Inmate Calling Services; Pleading Cycle Established*, CC Docket No. 96-128, DA 03-4027 (Dec. 31, 2003).

I. INTRODUCTION AND SUMMARY

A. The Need For Commission Relief Has Become Increasingly Urgent.

According to a report released in June 2006 by a national commission (“Prison Report”), prison inmate calling rates remain “extraordinarily high.”⁴ Typical long distance inmate collect calling rates include a per-call charge of \$3.95 plus as much as \$0.89 per minute.⁵ At that rate, one hour of conversation per week can result in a monthly telephone bill of \$300, a huge financial burden for the innocent families and loved ones receiving and paying for these inmate collect calls. One cause of these exorbitant rates is the tremendous commissions -- sometimes as much as 65 percent of gross revenues⁶ -- paid by inmate service providers to prison administrators, which are then recovered through higher service charges. The Commission itself has acknowledged this market failure, in which the “competition” for exclusive prison telephone service contracts drives commission rates ever higher, resulting in unreasonably high inmate calling rates.⁷

The upward trend in commission rates and inmate calling service rates has continued for years.⁸ Inmate telephone service now stands in isolation as the last remaining telecommunications monopoly niche. Petitioners initially sought relief from these exorbitant rates in *Wright v. Corrections Corp. of America* (“Wright”), which was referred to the

⁴ Commission on Safety and Abuse in America’s Prisons, *Confronting Confinement* 36 (John J. Gibbons & Nicholas de B. Katzenbach, Comm’n Co-Chairs) (June 2006) (“Prison Report”) (portions of which are attached as Appendix A).

⁵ Declaration of Douglas A. Dawson in Support of Petitioners’ Alternative Proposal ¶¶ 18-20 (Feb. 16, 2007) (“Alternative Dawson Declaration”) (attached as Appendix B).

⁶ See Letter from Robert D. Evans, Director, Governmental Affairs Office, ABA, to Rep. Bobby Rush, at 2 (Jan. 31, 2006) (“ABA Letter”) (attached as Appendix C).

⁷ See, e.g., *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand and Notice of Proposed Rulemaking, 17 FCC Rcd 3248, 3252-53, 3260 (2002) (“*Inmate Payphone Order and NPRM*”).

⁸ Alternative Dawson Declaration ¶¶ 16-20 (attached as Appendix B).

Commission with the instruction “to resolve the core issues in this case, namely *the reasonableness of the rates charged* and the feasibility of alternative telephone arrangements in [prison] facilities.”⁹

These cases raise issues that are of great human concern to inmates, their family members and their counsel. . . . In referring this matter to the FCC, the Court expects the agency to move with dispatch to conclude its ongoing proceedings so as to provide both courts and parties with meaningful analysis and guidance on these issues.¹⁰

The urgency of Commission action on this issue recently has become even more widely recognized, with the American Bar Association (“ABA”) adoption of a recommendation in 2005 that inmate telephone services be provided “at the lowest possible rates” (“ABA Recommendation”)¹¹ and the publication of the June 2006 Prison Report, which urged policymakers to “support family and community bonds . . . by minimizing the cost of prisoners’ telephone calls.”¹² More recently, New York Governor Eliot Spitzer announced last month that the state would waive its 57.5 percent commission on prison inmate calls and renegotiate the state’s current inmate telephone service contract in order to reduce the cost of collect calling by about half.¹³ Similarly, Florida and Washington recently cut their commissions to lower inmate

⁹ *Wright v. Corrections Corp. of America*, C.A. No. 00-293 (GK) (“*Wright*”), Memorandum Opinion, slip op. at 10-11 (D.D.C. Aug. 22, 2001) (“*Referral Opinion*”) (appended as Attachment B to the Wright Petition) (emphasis added).

¹⁰ *Id.* at 14-15.

¹¹ American Bar Association, Recommendation Adopted by the House of Delegates (Aug. 8-9, 2005) (“ABA Recommendation”). *See also* Catherine Anderson, Chair, Criminal Justice Section, American Bar Association, Report (Aug. 2005) (“ABA Report”) (together with ABA Recommendation attached as Appendix D).

¹² Prison Report at 36 (attached as Appendix A).

¹³ Editorial, *A Good Call in New York*, N.Y. Times, Jan. 10, 2007; Communications Daily, State Telecom Activities, Jan. 11, 2007.

service rates, citing studies showing that prisoners are less likely to reoffend if they maintain regular contact with their families while in prison.¹⁴

On January 18, 2007, Rep. Rush (D., Ill.) re-introduced a bill in Congress originally introduced in 2005 directing the Commission to consider the types of measures proposed in the Wright Petition and this alternative proposal.¹⁵ The bill now has six co-sponsors and has been referred to the House Energy and Commerce Committee.¹⁶ In light of this gathering consensus for effective relief and the increasing certainty that the market will never bring about reasonable inmate service rates, there is no longer any excuse for delay in addressing “usurious” inmate calling rates.¹⁷

B. Petitioners Request, As An Alternative To The Structural Relief Sought In The Wright Petition, The Establishment Of Benchmark Long Distance Inmate Service Rates.

Petitioners demonstrated in their prior pleadings that it would be technically and economically feasible to restructure the provision of long distance inmate calling services to introduce competition. Nevertheless, at least one alternative approach would raise fewer legal, technical and engineering cost issues than Petitioners’ initial “structural” approach. It would be far simpler and less regulatory to establish benchmark rates for all interstate, interexchange inmate calling services, based partly on the cost analysis previously submitted by Petitioners and supplemented by an analysis of comparable service rates, that carriers must charge.

¹⁴ *Inmates’ call costs trimmed nearly \$2: Prison panel also cuts its take 10%*, Arkansas Democrat-Gazette, Jan. 19, 2007, at 13.

¹⁵ Family Telephone Connection Protection Act of 2007, H.R. 555, 110th Cong., 1st Sess. § 3(b) (2007) (“Connection Bill”) (attached as Appendix E).

¹⁶ *Id.*

¹⁷ Editorial, *Keeping in Touch With a Parent in Prison*, N.Y. Times, Jan. 14, 2006, at A14 (“*Keeping in Touch*”) (attached as Appendix F).

In the *0+ Second Report*, the Commission declined to impose benchmark rates for inmate calling services because it was thought that benchmarks might stifle the development of rate competition.¹⁸ It has become painfully obvious in the intervening eight years, however, that the inmate calling service market will never produce reasonable rates on its own and that the unique nature of that market causes inmate calling rates to increase, rather than to decline.

It has also become clear, based on the actual cost of providing inmate calling services and declining rates for comparable services, that long distance inmate debit card or debit account calling (collectively, “debit calling”) services can be provided to prison inmates within a range of \$0.15 - \$0.20 per minute, with no call set-up or other per-call charge. Some of the very same parties opposing the Wright Petition currently provide long distance debit calling services to prison inmates in some states for a total charge of even less than \$0.15 per minute, net of commission payments. Inmate collect calling service could be provided within a range of \$0.20 - \$0.25 per minute, based on the additional costs of collect calling. If the Commission does not provide the relief requested in the Wright Petition, it should impose benchmark rates no higher than \$0.20 per minute for debit calling and \$0.25 per minute for collect calling, with slightly higher benchmarks for service providers offering prisoners a certain amount of free calling.

II. ESTABLISHING BENCHMARK LONG DISTANCE INMATE SERVICE RATES WOULD BE AN ADMINISTRATIVELY SIMPLER WAY TO BRING ABOUT URGENTLY NEEDED RELIEF.

The Wright Petition and Dawson Affidavit demonstrated that it is both technologically and economically feasible for multiple carriers to offer long distance telephone services to inmates at a given private prison facility while meeting all legitimate security and other penological needs. Moreover, the commissions paid by inmate service providers drive up the providers’ rates.

¹⁸ *Billed Party Preference for InterLATA 0+ Calls*, Second Report and Order and Order on Reconsideration, 13 FCC Rcd 6122 (1998) (“*0+ Second Report*”), *mod.*, 16 FCC Rcd 22314 (2001).

Accordingly, Petitioners requested that the Commission prohibit exclusive inmate long distance service arrangements and commission payments for interstate calls at privately administered prisons and allow competitive carriers to interconnect with inmate telephone service facilities in order to provide competitive long distance inmate calling services.¹⁹ Petitioners also demonstrated that the opposing comments (“Oppositions”) failed to grapple with Petitioners’ showing that the proposed structural relief is legally valid and technologically and economically feasible.²⁰

Although Petitioners’ filings demonstrated that the current inmate calling arrangements and restrictions can no longer be justified by security or other penological considerations, the otherwise unreasonable long distance service arrangements could be justified if the long distance rates charged to prison inmates were reduced to reasonable levels. Petitioners’ ultimate aim is to secure the “just and reasonable” interstate rates for prisoners required by Section 201(b) of the Communications Act (“the Act”), irrespective of the means used to achieve that goal.

Petitioners therefore propose, as an alternative approach to the relief sought in the Wright Petition, that the Commission establish a benchmark rate for domestic interstate interexchange inmate debit calling service of \$0.20 per minute and a benchmark rate for domestic interstate interexchange inmate collect calling service of \$0.25 per minute, with no set-up or other per-call charge. Under this alternative approach, service providers could continue to offer services under exclusive service arrangements and pay commissions to prison administrators, as long as they charged prison inmates, or other bill payers on inmate collect calls, no higher than the benchmark interstate rates for inmate long distance calls.

Petitioners also request that the rate relief sought here be coupled with one of the remedies requested in the Wright Petition, namely, that prisoners have access to debit calling

¹⁹ See, e.g., Wright Petition at 4-6, 11-18.

²⁰ See Petitioners’ Reply Comments (Apr. 21, 2004) (“Petitioners’ Reply Comments”); Reply Declaration of Douglas A. Dawson (Apr. 21, 2004) (appended as Attachment A to Petitioners’ Reply Comments).

service. One problem that recently has become more common is service providers' practice of blocking inmate collect calls to numbers served by local exchange carriers with which the service provider has no billing agreement. Because debit calling enables the service provider to collect the charge up front, a debit calling option would avoid this blocking. Petitioners accordingly renew their request to make debit calling universally available at all prison facilities.

In the past, the Commission has declined to cap inmate rates in the hope that competitive forces would reduce them. Instead, as demonstrated in Petitioners' prior pleadings, the structure of inmate services is such that the competition among service providers to secure exclusive service arrangements has driven inmate rates up, while all other telecommunications rates have come down. In fact, the Commission recognized in the *Inmate Payphone Order and NPRM*, and leading providers of inmate calling services admit, that these site commissions drive the rates for inmate calling services to unreasonably high levels.²¹ If the Commission declines to order the structural relief sought in the Wright Petition, this uniquely non-competitive market niche thus requires that Section 201(b) be enforced by means of interstate inmate benchmark rates.

Establishing benchmark rates offers several administrative and jurisdictional advantages over the structural relief sought in the Wright Petition. By leaving most serving arrangements as they are, security and other penological concerns would be greatly diminished. There also would be no need to require inmate service providers to interconnect with competitive long distance carriers, with all of the alleged equal interconnection issues attendant thereto. Moreover, because the Commission's authority over interstate telecommunications rates is unquestioned, all of the federal-state jurisdictional issues raised by other parties would be eliminated. Reasonable benchmark rates would lessen the urgency of direct Commission action restricting the payment of commissions to prison administrators. Finally, because service providers typically do not

²¹ See, e.g., *Inmate Payphone Order and NPRM*, 17 FCC Rcd at 3252-53, 3260; Initial Comments of T-NETIX, Inc. at 3-5, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 (May 24, 2002) ("2002 T-NETIX Comments").

charge different long distance rates depending on whether the facility to be served is privately or publicly administered, there would be no need for different benchmark rates or different regulatory schemes for publicly and privately administered prisons, a distinction that aroused considerable opposition from other parties.

The relatively simpler application of benchmark inmate long distance rates with a required debit calling option would also permit speedier Commission action in response to recent developments highlighting the need for reform. The August 2005 ABA Recommendation urges all levels of government to “afford prison and jail inmates reasonable opportunity to maintain telephonic communication with the free community, and to offer telephone services in the correctional setting with an appropriate range of options at the lowest possible rates.”²² The Recommendation was accompanied by a report citing studies demonstrating the importance of regular telephone communication between prisoners and family and friends for prisoners’ rehabilitation and eventual return to the community as law-abiding citizens.²³ Prisoners’ families and friends often cannot afford the exorbitant rates charged for inmate collect calls, which frequently prevent children from maintaining regular contact with a confined parent.²⁴

The proposed legislation introduced by Rep. Rush similarly contains findings that prisoners’ families and loved ones ultimately pay for most calls from prisoners, whether collect calls or otherwise.²⁵ The bill finds that the excessive rates imposed on “[i]nnocent citizens . . . simply due to having a family member or loved one who is incarcerated” are “a burden on interstate commerce.”²⁶ The bill also finds that the excessive rates are due to a lack of

²² ABA Recommendation (attached as Appendix D).

²³ ABA Report at 2 (attached as Appendix D).

²⁴ *Id.* at 3-4.

²⁵ *See* Connection Bill at § 2(4) (attached as Appendix E).

²⁶ *Id.* § 2(5), (10).

competition and the high commissions paid by service providers to administrators.²⁷ Excessive inmate service rates “weaken the family and community ties that are necessary for successful reentry into society” by released prisoners and burden the rehabilitation that “reduces crime and the future costs of imprisonment.”²⁸ In effect, excessive inmate service rates generate more social and economic costs for all of society.

The ABA has endorsed the proposed legislation, pointing out “the human costs” of excessive inmate rates,²⁹ as has The New York Times, most recently just before Christmas 2006, citing the “shameful,” “cruel,” “counterproductive and morally indefensible” practice of “gouging the poorest families in the country to subsidize some prison-related activities.”³⁰ In endorsing the bill, the ABA pointed out that “the family and friends of incarcerated people,” rather than the prisoners themselves, “regularly shoulder the high cost of prison telephone services,” which makes it more difficult to achieve “the penological and societal benefits that occur when incarcerated people are able to maintain contact with the outside world.”³¹ The ABA also explained that entering into exclusive service arrangements that provide commission payments of as much as 65 percent of all telephone revenue “creates an ethical quagmire” for prison administrators.³²

On February 1, 2006, the American Correctional Association approved an amended formal policy statement recognizing that “offenders should have access to a range of reasonably

²⁷ *Id.* § 2(7) - (9).

²⁸ *Id.* § 2(13), (14).

²⁹ ABA Letter at 2 (attached as Appendix C).

³⁰ *Keeping in Touch*; Editorial, *The Bankrupt-Your-Family Calling Plan*, N.Y. Times, Dec. 22, 2006 (attached as Appendix F).

³¹ ABA Letter at 2 (attached as Appendix C).

³² *Id.*

priced telecommunications services.”³³ The Prison Report released in June 2006, issued by a diverse national commission including correctional and other public officials and chaired by Nicholas de B. Katzenbach and former federal appellate Judge John L. Gibbons, confirms the need for reduced inmate telephone service rates. It stresses the negative effects that the “extraordinarily high rates” charged for inmate telephone calls have on the family and community bonds necessary to prevent violence and the need to “smooth the process of reentry and make it more likely that prisoners will succeed after release.”³⁴ It urges policymakers to “end practices such as” extracting huge commissions from inmate telephone service providers and limiting inmate telephone service to collect calling “that interfere with the maintenance of critically important family and community ties.”³⁵

These recent developments underscore the increasing urgency of Commission action, and, as explained below, recent inmate service contracts negotiated by opponents of the Wright Petition demonstrate the feasibility of establishing benchmark rates far below prevailing inmate service rates. There has never been a better set of circumstances for effective Commission relief for the continuing market failure in inmate calling service rates.

III. THE COMMISSION SHOULD IMPOSE INTERSTATE INTEREXCHANGE INMATE SERVICE BENCHMARK RATES.

A. Long Distance Inmate Calling Rates Typically Remain Excessive.

As discussed in the Declaration of Douglas A. Dawson in Support of Petitioners’ Alternative Proposal (“Alternative Dawson Declaration”), attached hereto as Appendix B, long distance inmate calling rates generally have remained excessive, relative to other long distance

³³ American Correctional Ass’n., Public Correctional Policy on Adult/Juvenile Offender Access to Telephones (Jan. 24, 2001; Feb. 1, 2006), <http://www.aca.org/government/policyresolution/> (select “Policy,” type in “Access to Telephones” and click on “Search”) (last visited February 14, 2007).

³⁴ Prison Report at 35-36 (attached as Appendix A).

³⁵ *Id.* at 37.

rates.³⁶ For example, the tariffed interstate long distance inmate service rates charged by Evercom Systems, Inc. (“Evercom”) just prior to detariffing in 2000 were \$0.59 per minute plus a \$3.95 per-call charge for collect calling and \$0.65 per minute for debit account calls. Evercom’s and other inmate service providers’ rates apparently have not declined significantly since then, and the collect rates appear to have risen even higher. For example, telephone bills attached to the Alternative Dawson Declaration as well as rates previously shown on Evercom’s website reflect Evercom and AT&T charges for interstate inmate collect calls of \$0.89 per minute plus \$3.95 per call. SBC’s website shows recent interstate inmate collect calling rates of \$0.85 per minute plus \$3.95 per call. Evercom’s interstate debit account rate at a Colorado prison facility in early 2003 apparently was \$1.80 per call and \$0.45 per minute.³⁷ These sample charges show that inmate long distance calling rates typically continue to be extremely high.

Rates of that magnitude are especially burdensome for the lower income families and others who receive and pay for inmate collect calls. Just one hour of conversation per week results in monthly phone bills of \$200 - \$300.

B. The Commission Clearly Has The Authority To Establish Benchmark Rates For Interstate Telephone Calls By Prison Inmates.

Section 201(b) of the Act provides that “[a]ll charges [or] practices . . . for and in connection with [interstate or foreign communication by wire or radio] . . . shall be just and reasonable, and any such charge [or] practice . . . that is unjust or unreasonable is hereby declared to be unlawful.”³⁸ Section 201(b) also authorizes the Commission to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.”³⁹ Some of the Oppositions to the Wright Petition expressly conceded that the Commission

³⁶ Alternative Dawson Declaration ¶¶ 18-21, 35-36 (attached as Appendix B).

³⁷ *Id.* ¶¶ 18-20.

³⁸ 47 U.S.C. § 201(b).

³⁹ *Id.*

has authority under Section 201(b) to ensure reasonable inmate telephone rates,⁴⁰ and none denied that such authority exists. Moreover, the district court referring the *Wright* case to the Commission found that “Congress has given the FCC explicit statutory authority to regulate inmate payphone services. . . .”⁴¹ The Commission has clear authority to establish benchmark rates for interstate inmate telephone services.

C. The Commission’s Rationale For Its Previous Decision Not To Impose Benchmark Rates For Inmate Calling Services Is No Longer Valid.

Over eight years ago, in response to complaints about excessive inmate calling rates, the Commission considered whether to establish benchmark rates on inmate calling services. At that time, the Commission, expecting -- or at least hoping -- that competition might reduce inmate calling rates, decided not to impose benchmarks for inmate calling services, for the same reasons that it declined to impose benchmark rates for operator service providers (“OSPs”) generally. In its *0+ Second Report*, the Commission decided against benchmarks for operator services because

benchmarks would not be the best alternative for addressing the problem. We believe that the imposition of price controls or benchmarks upon the entire industry, in order to curtail rate gouging by some carriers and aggregators, would be overly regulatory and could even stifle competition (e.g., if it results in carriers migrating their rates to the benchmark, or only slightly below it).

. . . .

. . . [W]e believe those OSPs whose rates currently are below [the benchmark] levels would have an incentive to increase their rates to those levels.

. . . The anomalies in this segment of the . . . market are directly attributable to consumers lacking sufficient information of the cost of service. . . . We believe that the oral disclosure requirements that we adopt today will help to ensure that

⁴⁰ See, e.g., Comments of T-NETIX, Inc. at 11, 20 & n.16 (Mar. 10, 2004). See also Reply Comments of Evercom Systems, Inc. at 9 (Apr. 21, 2004) (conceding Commission “jurisdiction over the rates charged by regulated carriers”).

⁴¹ *Referral Opinion* at 8.

consumers have the information they need to make informed decisions concerning whether they wish . . . to place the call through one of hundreds of other OSPs competing in this market.⁴²

In reaching the same conclusion as to inmate calling services, “[f]or the reasons set forth . . . above,” the Commission explained that “[i]f we set caps or benchmarks, carriers would have little incentive to contract to offer services at a lower rate.”⁴³ In order to provide recipients of inmate calls some protection, the Commission ordered rate disclosure requirements for inmate calls similar to those imposed on operator services generally, so that “the billed party can decide whether to accept the call and can limit the length of the call.”⁴⁴

In light of subsequent developments, including the Commission’s own findings in more recent proceedings, the Commission can no longer rely on this reasoning, if it ever could, to defer the establishment of benchmark rates for long distance inmate calling services. Excessive inmate service rates are virtually universal, rather than “anomalies” reflecting “rate gouging by some carriers.”⁴⁵ As the Commission found in the *Inmate Payphone Order and NPRM*, because neither the prisoners placing the calls nor their family members and loved ones receiving the calls have any choice of provider, market forces cannot be relied upon to constrain rates.⁴⁶ Excessive inmate service rates thus are not merely “attributable to consumers lacking sufficient information of the cost of service,” and the required rate disclosures accordingly do not operate to provide any protection from the excessive rates, other than giving the call recipients the option of refusing the call or limiting its length.⁴⁷

⁴² *O+ Second Report*, 13 FCC Rcd at 6141-42.

⁴³ *Id.* at 6156.

⁴⁴ *Id.* at 6157.

⁴⁵ *Id.* at 6141-42.

⁴⁶ *Inmate Payphone Order and NPRM*, 17 FCC Rcd at 3253, 3276.

⁴⁷ *O+ Second Report*, 13 FCC Rcd at 6142, 6157.

The Commission also has recognized, since the *0+ Second Report*, that the bidding process for inmate service contracts and accompanying commission payments to prison administrators exacerbate the problem by driving up costs and thus inmate service rates.⁴⁸ T-NETIX, formerly the leading provider of inmate services in the United States and now a wholly-owned subsidiary of Securus Technologies,⁴⁹ confirmed this fact in its 2002 comments in this docket.⁵⁰ T-NETIX's expert witness explained that site commissions are a significant reason that "the benefits of competition do not presently reach those who pay for inmate calling."⁵¹ The RBOC Payphone Coalition also admits that the current competition to secure exclusive inmate service contracts "may result in high commission payments and thus to [sic] higher rates for calls from inmate institutions. . . ." ⁵²

Contrary to the Commission's expectations in the *0+ Second Report*, therefore, there is no "rate competition" in inmate calling services that might be "stifle[d]" by benchmark rates.⁵³ Moreover, excessive inmate service rates are so widespread that there is also no danger that a reasonable benchmark rate might stifle providers' incentives to reduce rates below the benchmark, the concern expressed in the *0+ Second Report*.⁵⁴ Accordingly, the total market

⁴⁸ *Inmate Payphone Order and NPRM*, 17 FCC Rcd at 3252-53, 3260, 3276. *See also id.* at 3260 n.74.

⁴⁹ Securus Technologies: About Us, http://www.securus.net/aboutus_default.asp (last visited July 7, 2006). *See also* FCC Public Notice, *Notice of Streamlined Domestic 214 Applications Granted*, 19 FCC Rcd 7201 (WC 2004) (approving the transfer of control of T-NETIX to TZ Holdings, Inc.); FCC Public Notice, *Domestic Section 214 Application Filed for Transfer of Control of Evercom Systems, Inc. to TZ Holdings, Inc.*, 19 FCC Rcd 17482 (WC 2004) (noting that TZ Holdings changed its name to Securus Technologies, Inc.).

⁵⁰ 2002 T-NETIX Comments at 3-5.

⁵¹ *Id.*, App. A, Declaration of Richard Cabe ¶ 6 (May 22, 2002).

⁵² RBOC Payphone Coalition's Comments on the Notice of Proposed Rulemaking Regarding Inmate Calling Services at 5 (Mar. 10, 2004).

⁵³ *0+ Second Report*, 13 FCC Rcd at 6141.

⁵⁴ *Id.* at 6156.

failure in inmate telephone services, as reflected in the Commission's own findings, overrides its previous rationale for inaction.

D. Benchmark Rates Would Be Administratively Feasible And Effective.

Addressing market failure through benchmark-type rate setting is the Commission's traditional method of ensuring that "charges" for interstate telecommunications services "shall be just and reasonable,"⁵⁵ and benchmark rates cannot be considered to infringe on state jurisdiction or penological goals. There is no legitimate penological interest in excessive inmate calling rates.

Moreover, if the Commission establishes reasonable benchmark rates for both collect and debit inmate calling services, no other regulation, other than a required debit calling option, would be necessary. Petitioners have little interest in restructuring inmate telephone services or the nature of service providers' costs as long as rates are reasonable and service quality is acceptable. Benchmark rates, which would apply to all interstate inmate telephone services, also have the advantage of obviating any need for cost allocations between services provided to privately administered and publicly administered facilities.

⁵⁵ 47 U.S.C. § 201(b). See *Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9940-41 (2001) ("*CLEC Access Reform Order*"), *recon. denied*, 19 FCC Rcd 9108 (2004) (establishing benchmark based on comparable rates in a rulemaking proceeding); *Beehive Telephone Co.*, 13 FCC Rcd 12275, 12285-87 (1998) ("*Beehive*") (prescribing rates in a tariff investigation based on costs and investments of comparable carriers); *International Settlements Rates*, 12 FCC Rcd 19806 (1997) ("*International Settlements Order*") (setting benchmark international settlement rates), *aff'd sub nom.*, *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (1999) ("*Cable & Wireless*"); *Capital Network System, Inc.*, 10 FCC Rcd 13732, 13734 (CCB 1995) ("*CNS*") (order to show cause in a rate investigation why rates should not be pegged to rates for comparable services).

IV. THE INTERSTATE INTEREXCHANGE INMATE CALLING BENCHMARK RATE SHOULD BE SET AT \$0.20 PER MINUTE FOR DEBIT CALLS AND \$0.25 PER MINUTE FOR COLLECT CALLS, WITH NO PER-CALL CHARGE.

A. The Commission Should Base Inmate Calling Benchmark Rates On Charges For Comparable Services As Well As Service Costs.

Where the market has failed to constrain rates for a given service, the Commission looks to the rates charged for other services using comparable network functions to assess the reasonableness of the service rate in question.⁵⁶ The Commission has recognized that “services offered under substantially similar circumstances using similar facilities lead to the expectation of similar charges.”⁵⁷ The Commission has used rate comparisons, benchmarks, and other factors to evaluate the justness and reasonableness of rates in a wide variety of proceedings, including rulemakings.⁵⁸ A comparable rates approach is especially appropriate where, as in the case of inmate telephone services, there is a market failure because the party paying the rate is not the party choosing the carrier.⁵⁹ The Commission also considers costs in assessing the reasonableness of inmate service rates.⁶⁰

⁵⁶ *AT&T Corp. v. Business Telecom, Inc.*, 16 FCC Rcd 12312, 12323-24 (2001) (“*BTP*”), *recon. denied*, 16 FCC Rcd 21750 (2001).

⁵⁷ *Id.* at 12324 (citation omitted).

⁵⁸ *Id.* (basing assessment of reasonableness on comparable rates in a formal complaint case). See *CLEC Access Reform Order*, 16 FCC Rcd at 9940-41 (establishing benchmark based on comparable rates in a rulemaking proceeding); *Beehive*, 13 FCC Rcd at 12285-87 (prescribing rates in a tariff investigation based on costs and investments of comparable carriers); *International Settlements Order*, 12 FCC Rcd at 19839-50 (setting benchmark international settlement rates based on calculations derived from foreign carriers’ tariffed domestic rates); *CNS*, 10 FCC Rcd at 13734 (order to show cause in a rate investigation why rates should not be pegged to rates for comparable services).

⁵⁹ See *CLEC Access Reform Order*, 16 FCC Rcd at 9934-40 (because end user choosing a competitive local carrier does not pay access charges imposed by the local carrier, Commission will look to comparable access rates to assess the reasonableness of competitive carrier access rates).

⁶⁰ *Inmate Payphone Order and NPRM*, 17 FCC Rcd at 3276-78.

B. Typical Inmate Debit Calling Rates Are Vastly Higher Than Rates For Comparable Services Or The Cost Of Providing Inmate Services.

As explained in the Alternative Dawson Declaration, typical interstate, interexchange inmate debit calling rates are several multiples of a conservatively generous estimate of their costs, based on data previously provided by inmate calling service providers.⁶¹ The unreasonableness of current inmate debit calling rates under Section 201(b) of the Act is further confirmed by an examination of rates for comparable services. Dawson explains that inmate debit calling services are comparable to commercial automated calling services offered to the general public, such as prepaid, debit and calling card services offered by most interexchange carriers, plus the cost of installing all prison telephone equipment. Those commercial services include some of the same functions that are also necessary for prison security, such as providing for the use of a personal identification number (“PIN”).⁶²

As discussed in the Alternative Dawson Declaration, consumer prepaid and calling card rates are now \$0.05 per minute or less, with no per-call or other charges, and rates that are available to carriers on a high-volume basis are even lower.⁶³ Moreover, the vast disparity between those rates and typical inmate debit calling rates cannot be attributed to the additional costs of installing prison telephone equipment and security functions. Dawson explains that those additional security and equipments costs account for, at most, about \$0.07 per minute in additional costs, for a total “composite” cost of about \$0.12 per minute.⁶⁴ In fact, the reduction

⁶¹ Alternative Dawson Declaration ¶¶ 23-28 (attached as Appendix B).

⁶² *Id.* ¶ 34.

⁶³ *Id.* ¶¶ 35-36.

⁶⁴ *Id.* ¶¶ 37-38. The *Inmate Payphone Order and NPRM*, 17 FCC Rcd at 3254, notes that a coalition of inmate telephone service providers provided data purporting to show that a 12-minute inmate call costs approximately \$1.30 more than a typical non-inmate call, or about \$0.11 per minute, and not all of the cost differences are attributed to additional security costs. *See* Alternative Dawson Declaration ¶ 38 n.38. Adding the entire \$0.11 to a comparable debit offering rate of \$0.05 per minute would yield a total inmate long distance debit rate of \$0.16 per minute. *Id.*

in switching costs brought about by the deployment of soft switches and resulting centralization of signaling and control functions in recent years likely means that the \$0.07 and \$0.12 per minute estimates are too high.⁶⁵ Although basing a rate ceiling partly on rates for comparable network functions “is not a pure cost-based methodology,” such data “enables [the Commission] to bring rates closer to costs,” thus providing “a reasonable basis upon which to establish benchmarks.”⁶⁶

Other inmate service rates confirm that the inmate rates typically charged cannot be justified by security and other penological needs. The debit account rate applicable to the federal Inmate Telephone System (“ITS”) managed by the Federal Bureau of Prisons (“FBOP”) is \$0.23 per minute, with no per-call charge, and only \$0.17 per minute of that amount is attributable to telephone service costs. Effective March 1, 2002, the ITS debit calling rate was \$0.17 per minute. All of the increases since then are solely for “the inmate Trust Fund to support Trust Fund Programs,” rather than to pay for telephone services. Thus, for comparative purposes, the ITS debit account long distance rate is \$0.17 per minute.⁶⁷ Because the adjusted debit account rate applicable to federal prison inmates necessarily reflects security functions similar to those required at other prison facilities, as well as all of the other costs of providing inmate service, and because inmate service providers like AT&T, MCI, Evercom and T-NETIX are able to take advantage of the economies of scale generated by customer bases of hundreds or thousands of correctional facilities, the adjusted federal debit account rate provides significant guidance in setting the maximum benchmark rate for inmate debit calling rates generally.⁶⁸

⁶⁵ Alternative Dawson Declaration ¶ 37.

⁶⁶ *International Settlements Order*, 12 FCC Rcd at 19839.

⁶⁷ Alternative Dawson Declaration ¶ 30.

⁶⁸ *Id.* ¶ 31. *See also BTI*, 16 FCC Rcd at 12324 (“[S]ervices offered under substantially similar circumstances using similar facilities lead to the expectation of similar charges.”).

Another example is the interstate inmate debit calling rate at Colorado Department of Corrections (“CDOC”) facilities of \$0.19 per minute, with a \$1.25 per call surcharge, for a total per minute cost of slightly over \$0.25 for a 20-minute call. The commission rate paid by the service provider to the CDOC is 43 percent, leaving the service provider with revenue of well under \$0.18 per minute. Similarly, the Indiana Department of Administration (“IDOA”) contract for inmate calling services provides prepaid long distance service for \$0.25 per minute, with no per-call charge, and a commission rate of 35 percent, yielding net revenue for T-NETIX of just over \$0.185 per minute. The Nebraska Department of Corrections inmate telephone service contract with AT&T sets interstate debit calling rates at \$0.16 per minute plus a \$0.60 service charge, with no commission payments, which comes to \$0.20 per minute for a 15-minute call.⁶⁹

Dawson also cites an inmate service contract for Vermont correctional facilities with an *interstate debit calling rate equivalent to less than \$0.135 per minute* for a 20-minute call, net of commissions; a T-NETIX inmate service contract for the Maryland Department of Public Safety and Correctional Services with an *interstate debit calling rate of \$0.12 per minute*, once commissions are backed out; and a contract with the Missouri Office of Administration providing for *interstate inmate debit and prepaid calling services at \$0.10 per minute*, with no commissions, which are even lower than the FBOP, Colorado and Nebraska net debit calling rates.⁷⁰ These net inmate debit and prepaid calling rates are vastly inconsistent with those service providers’ previous assertions as to costs and are appropriate comparable rates against which to measure the reasonableness of the typical inmate debit calling rate. Because the net inmate debit and prepaid rates discussed above are the rates that inmate service providers “would have needed to consider in pricing [their] services, had the . . . market been truly competitive,” there is no need to consider higher inmate calling rates in setting benchmarks.⁷¹ It is the lowest

⁶⁹ See Alternative Dawson Declaration ¶ 31.

⁷⁰ *Id.* ¶ 32.

⁷¹ *BTI*, 16 FCC Rcd at 12329. See also Alternative Dawson Declaration ¶ 33.

rates that would have been set in a competitive market that provide “the best proxies for actual incremental cost plus a market-based rate of return” and thus the best guidance for the rate that should be applied “in cases of market distortion.”⁷²

Thus, inmate debit calling rates should be no higher than the high end of the range of comparable inmate debit calling rates and the composite debit rates discussed above, which is \$0.20 per minute, with no per-call charge. Such a benchmark rate is well above total costs, leaving aside commission payments.⁷³ As the Commission has found, the payment of commissions cannot cost justify inmate payphone rates because they are not considered a legitimate cost of providing payphone service.⁷⁴ Accordingly, a long distance inmate debit calling rate benchmark of \$0.20 per minute, with no set-up or other per-call charge, would be more than reasonable, by any measure. The much higher inmate debit calling rates that are currently being charged are therefore unreasonable under Section 201(b) of the Act.⁷⁵

C. A Significant Difference Between Inmate Collect Calling And Inmate Debit Calling Rates Cannot Be Cost Justified.

There is no live operator providing “operator assisted” inmate collect calling services; those services are entirely automated. As explained in the initial Dawson Affidavit, the only distinctions between automated inmate collect calling services and inmate debit calling services that create cost differences are the additional costs of billing and the need to cover uncollectibles

⁷² *International Settlements Order*, 12 FCC Rcd at 19870.

⁷³ Alternative Dawson Declaration ¶¶ 29-38.

⁷⁴ *Inmate Payphone Order and NPRM*, 17 FCC Rcd at 3255. *See also id.* at 3259-60; Third Report and Order and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545, 2562 (1999) (“*Third Payphone Order*”) (location rents in the form of commissions increase with the ability of location providers to extract higher proportion of profits; location rents thus not a fixed cost).

⁷⁵ *See BTI*, 16 FCC Rcd at 12332 (rates vastly exceeding relevant benchmark rates without explanation of differences held unreasonable); *International Settlements Order*, 12 FCC Rcd at 19938-39 (international settlements rates above benchmarks declared unreasonable and unlawful).

in the case of collect calling services.⁷⁶ Collect calling does not require additional network functions or make use of a different network architecture from debit calling.⁷⁷ The additional billing and uncollectibles costs should account for no more than an additional \$0.05 per minute over debit calling rates.⁷⁸

Indeed, in the previous round of comments on the Wright Petition, some of the inmate service providers challenged the cost benefits of debit calling, relative to collect calling.⁷⁹ To the extent that those parties are correct, and inmate collect calling would not be significantly more costly than inmate debit calling, there should be a minimal difference between the two rates. Dawson cites a collect call-only service contract for telephone services provided to prisoners in New Hampshire correctional facilities at an interstate rate equivalent to just over \$0.23 per minute for a 20-minute call, net of commissions, an MCI inmate collect call-only service contract with the New York Department of Correctional Services (“NYDCS”) at an interstate rate of only *\$0.135 per minute for a typical call, net of commissions*, and a Missouri contract providing interstate inmate collect calling service for an effective rate of only *\$0.15 per minute for a 20-minute call*, including set-up charge.⁸⁰ These directly comparable rates also support the conclusion that there should be very little difference between inmate debit and collect calling rates. As demonstrated in the attached Alternative Dawson Declaration, taking the cost differences between collect and debit calling, as well as these comparable inmate collect calling

⁷⁶ Dawson Affidavit ¶¶ 60, 62, 70, 74 (appended as Attachment A to the Wright Petition).

⁷⁷ *Id.* See *BTI*, 16 FCC Rcd at 12331-32 (service rate held unreasonable where the service used the same network functions and architecture as another service but was priced much higher than the other service with no explanation).

⁷⁸ Alternative Dawson Declaration ¶¶ 39-41 (attached as Appendix B).

⁷⁹ See, e.g., Comments of WorldCom, Inc. d/b/a MCI at 25 (Mar. 10, 2004) (“MCI Comments”).

⁸⁰ Alternative Dawson Declaration ¶ 42 (attached as Appendix B). Once the NYDCS contract is renegotiated to reflect Gov. Spitzer’s waiver of commissions, the rate charged to inmates may vary from the net rate of \$0.135 per minute.

rates, into account, a reasonable benchmark rate for long distance inmate collect calling service should be no higher than the high end of the range of comparable inmate collect calling rates and the composite collect rates discussed above, which is \$0.25 per minute, with no service or other per-call charge.⁸¹

D. Inmate Service Providers' Payment Of Large Commissions Independently Demonstrates The Unreasonableness Of Inmate Service Rates.

Furthermore, inmate service providers' practice of inflating the rates they charge for inmate calling services to recoup the large commissions they pay to prison administrators and state correctional agencies also is unreasonable, in violation of Section 201(b). In fact, rates reflecting such generous commission payments are presumptively unreasonable under Section 201(b) and support a vastly lower benchmark rate. Commissions range from 20 to 65 percent of gross billable charges for the privilege of providing inmate telephone service on an exclusive dealing basis.⁸² The Commission has found that such commissions constitute profit.⁸³ In these circumstances, monopoly rates reflecting such large commissions are presumptively unreasonable under Section 201(b).⁸⁴ Given that commissions typically account for at least 30 percent of the total cost of an inmate telephone call, reasonable inmate rates must be vastly lower

⁸¹ Alternative Dawson Declaration ¶ 42.

⁸² *Inmate Payphone Order and NPRM*, 17 FCC Rcd at 3260; ABA Letter at 2 (attached as Appendix C).

⁸³ *Inmate Payphone Order and NPRM*, 17 FCC Rcd at 3255. *See also id.* at 3259-60; *Third Payphone Order*, 14 FCC Rcd at 2562 (location rents in the form of commissions increase with the ability of location providers to extract higher proportion of profits; location rents thus not a fixed cost).

⁸⁴ *See BTI*, 16 FCC Rcd at 12332 (defendant failed to explain how revenues from a "truly reasonable" charge "could profitably permit" commissions of up to 24 percent of gross revenues).

than the current typical inmate calling rates, further confirming the validity of the benchmark rates proposed above.⁸⁵

E. Inmate Service Providers Also Should Be Required To Offer Debit Calling Services At All Served Prison Facilities.

As discussed above and in the Petitioners' previous filings in this proceeding, where service providers offer inmate debit calling services, such services are typically offered at lower rates than inmate collect calling services, irrespective of any regulation.⁸⁶ The cost and comparable rate analyses presented above also justify a lower debit calling than collect calling benchmark rate for inmate long distance services. It therefore would help to reduce overall inmate rates to require service providers to offer the more reasonably priced option of debit calling service at all of the prison facilities they serve, and prison administrators should be required to permit such service offerings.

A more pressing concern is the increasing frequency of call blocking in the case of inmate collect calls. Long distance providers typically enter into billing arrangements with local exchange carriers ("LECs") under which the long distance providers' charges, particularly charges to users who are not their presubscribed customers, are included in the users' local telephone bills. Collect calls, which are billed to the recipients of the calls, are typically billed in this manner. Apparently, inmate service providers are increasingly unable or unwilling to enter into billing agreements with LECs and, as a result, cannot bill for an increasing percentage of inmate collect calls.⁸⁷ The inability to bill leads the service providers to block inmate collect calls to numbers served by LECs with which the service providers have no billing arrangements.

⁸⁵ See Alternative Dawson Declaration ¶ 23 (attached as Appendix B).

⁸⁶ See Dawson Affidavit ¶¶ 60, 62, 70, 74 (appended as Attachment A to the Wright Petition).

⁸⁷ The Commission commented on this phenomenon five years ago in the *Inmate Payphone Order and NPRM*, 17 FCC Rcd at 3274.

The service providers' failures to negotiate billing arrangements, either with the LECs serving numbers called by prisoners or with third-party billing and collection service vendors that have contracted with the serving LECs, accordingly prevent many prison inmates from making collect calls to their families and other loved ones. In those facilities where no debit calling is permitted, prisoners attempting to call blocked numbers cannot make any calls at all. Debit calling presents no billing problems because the prisoner has already paid for a certain amount of calling. Accordingly, it is vital that inmate calling service providers be required to offer debit calling at all facilities and that prison administrators be required to permit the option of debit calling.

Petitioners explained the need for a mandatory debit calling option in their previous filings.⁸⁸ Several of the opponents took issue with Petitioners' request that service providers be required to offer debit calling, but, as explained in Petitioners' Reply Comments in support of the Wright Petition, those objections, based on security and administrative considerations, are not credible.⁸⁹ Security concerns can be addressed by issuing every inmate a PIN that has to be dialed before every call and restricting inmates to a limited set of designated telephone numbers that they may call. Each PIN is accordingly matched with a particular inmate's list of numbers in the underlying system provider's database. In that way, the PIN is useless to any other inmate.

In a 2003 10-K Annual Report, T-NETIX stated that it offered a method of biometric authentication called PIN-LOCK®, using SpeakeZ Voice Print® technology, which "makes it practical for all correctional facilities to assign PIN numbers to inmates," including high turnover institutions.⁹⁰ T-NETIX stated that "PIN-LOCK® is a significant enhancement to the security

⁸⁸ Wright Petition at 12-15; Petitioners' Reply Comments at 26-29.

⁸⁹ Petitioners' Reply Comments at 26-29.

⁹⁰ T-NETIX Inc. SEC Form 10-K Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 31, 2002, File No. 0-15016, at 6 (filed Mar. 31, 2003).

features of our inmate calling system.”⁹¹ Currently, Securus Technologies, the parent of T-NETIX and Evercom, features its SECUREvoice™ product on its website, characterizing it as “a powerful biometric method of authenticating a person’s identity.”⁹² Securus also claims that “SECUREvoice works with existing inmate telephone systems to authenticate an inmate’s Personal Identification Number (PIN)”, and “works proactively 24 hours a day, . . . *with no administrative responsibility for the staff.*”⁹³ Securus devotes a separate module of its website to the security and anti-fraud benefits of SECUREvoice™, including the prevention of criminal activity using the telephone.⁹⁴

Further confirmation that debit calling systems do not impose a significant administrative burden on prison personnel is provided by the use of debit calling systems in FBOP and other correctional facilities. For example, the inmate debit/prepaid calling service provided by T-NETIX at Maryland facilities will be handled through the correctional facility commissary system and, according to the Maryland Department of Budget and Management, “*will not require staff time, maintenance or cost from*” the Department of Public Safety and Correctional Services.⁹⁵ Similarly, in its response to the IDOA Request for Proposals, T-NETIX trumpeted its T-NET Family Connections™ Prepaid Calling service, “a paperless, card-free prepaid calling solution to inmate calling customers,” which “allows corrections facilities to offer inmate

⁹¹ *Id.*

⁹² Securus Technologies, SECUREvoice™, http://www.securevoice.com/product_voice.asp (last visited July 7, 2006).

⁹³ *Id.* (emphasis added).

⁹⁴ Securus Technologies, SECUREvoice™, Does Your Facility Face These Concerns? <http://www.securevoice.com/default.asp> (last visited July 7, 2006).

⁹⁵ Maryland Department of Budget and Management Action Agenda, Information Technology Contract, Item 3-IT, at 26B (Dec. 17, 2003), attached as Exhibit 16 to Alternative Dawson Declaration (attached hereto as Appendix B) (emphasis added).

families and friends an alternative to the more costly collect calls *and requires no direct involvement by your facilities* in the collection of prepaid revenues.’⁹⁶

The security and administrative efficiency offered by debit calling is underscored by the fact that a majority of the 2,000 facilities served by Evercom allows some form of prepaid calling services.⁹⁷ MCI helpfully provided examples of correctional agencies that have tried to establish debit-only inmate calling systems, apparently because of the administrative advantages of debit calling over collect calling.⁹⁸ In 2004, AT&T and MCI, among other carriers, testified in favor of proposed legislation in the State of Washington that would allow state prisoners to use prepaid phone cards or a debit system to make long distance telephone calls.⁹⁹ As the ABA reported in August 2005, “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.”¹⁰⁰ Opponents need to explain why such a large sample of prisons and correctional authorities, including the FBOP, as well as inmate service providers, including some opponents of the Wright Petition, either allow or endorse an option that supposedly presents such a security risk and administrative burden.¹⁰¹

To the extent that any state or local requirements might preclude the offering of interstate long distance debit calling services at publicly or privately administered prison facilities, the

⁹⁶ Letter from John Gierscher, Chief Financial Officer, T-NETIX, Inc. to Shelley Harris, Indiana Department of Administration at 2 (Mar. 12, 2001) (attached as Appendix G) (emphasis added).

⁹⁷ See Initial Comments of Evercom Systems, Inc. at 1, 10-12 (Mar. 10, 2004).

⁹⁸ MCI Comments at 23-25.

⁹⁹ Richard Roesler, *Bill would reduce inmates’ phone fees; Required collect calls are burden for families*, Spokesman-Review (Jan. 29, 2004).

¹⁰⁰ ABA Report at 6 (attached as Appendix D).

¹⁰¹ See also Petitioners’ Reply comments at 27-29.

Commission should preempt such requirements. There can be no justification for a state or local requirement overriding the Commission's regulation of interstate telecommunications services.

F. In Order To Fulfill Universal Service Goals, Service Providers Might Be Permitted To Charge Higher Rates In Exchange For Some Free Services.

As another variation on the relief that might be granted, the Commission could consider advancing universal service goals by allowing service providers to choose slightly higher benchmark rates in return for providing a certain amount of free long distance calling to prison inmates. For example, if a service provider agreed to provide 20 minutes of free long distance calling per month to every inmate at each institution it served, its benchmark rates might be set somewhat higher than the standard inmate benchmarks. Twenty free minutes of calling per month would be especially valuable to inmates needing to maintain contact with small children. Because inmate telephone privileges vary so much at different facilities, the economic effect of providing 20 free minutes per inmate per month would also vary. For example, the FBOP's 1997 ITS Request for Proposal shows average telephone usage of 4,242 long distance minutes per year per FBOP inmate, or slightly over 350 minutes per month.¹⁰² An analysis by the California Department of Corrections, however, shows average total monthly inmate telephone usage of only 76 minutes.¹⁰³ Taking a conservative estimated average of 200 minutes of long distance inmate calling per month, 20 minutes of free calling per month would reduce inmate long distance revenue approximately ten percent.

Assuming a ten percent revenue impact, service providers willing to provide 20 free minutes per month for each inmate might be allowed to charge higher benchmark rates, perhaps \$0.22 per minute for debit calling and \$0.275 per minute for collect calling. In order to prevent

¹⁰² Dawson Affidavit ¶ 66 n.43 (appended as Attachment A to the Wright Petition).

¹⁰³ Analysis of the Federal Bureau of Prisons Inmate Telephone System and Applicability to the California Department of Corrections, Executive Summary at 1, attached to Div. of Communs., Virginia State Corp. Comm'n, *Report on Rates Charged to Recipients of Inmate Long Distance Calls* (2000), attached as Exhibit 8 to the Dawson Affidavit (appended as Attachment A to the Wright Petition).

“cherry picking,” service providers would have to be willing to provide the free calling at every prison facility they serve to qualify for the higher benchmarks. They also would have to be willing and able to administer the free calling without burdening prison staff. In effect, the free calling would have to be “invisible” to prison administrators. Under these conditions, the free calling option would serve the Commission’s universal service goals by making some long distance service available to all prison inmates, while avoiding an undue burden on inmates paying for most of their calling or on prison administrators. Because each inmate would receive the first 20 minutes of long distance calling for each month free of charge, his or her average rates would be somewhat lower than the benchmark rates of \$0.22 and \$0.275 per minute.

G. Inmate Service Providers Should Be Given A One Year “Fresh Look” Transition To Renegotiate Service Contracts.

Given current conditions, many inmate service providers might not be able to pay the excessive commissions required by their exclusive dealing contracts with prison administrators and state correctional authorities under the proposed benchmark rates. In order to permit the service providers to renegotiate their contracts, the Commission should provide for a one-year “fresh look” transition period before the new benchmark rates go into effect. During the transition, entities contracting with inmate service providers would be required to permit the service providers to terminate their existing contracts or renegotiate the contracts to take account of the benchmark rates taking effect at the end of the transition. There would be no need for any restrictions on the form or content of the renegotiated service contracts, other than the requirement to permit debit calling. As a practical matter, the benchmarks would force the parties to drastically reduce or eliminate the payment of commissions based on long distance revenues.

Section 201(b) was held in the *Competitive Networks* proceeding to provide ample authority to ensure reasonable rates by means other than prescribing rates, including “undoubted power to regulate the contractual or other arrangements between common carriers and other

entities, even those entities that are generally not subject to Commission regulation.”¹⁰⁴ The Commission’s authority to modify existing contracts between private parties when necessary in the public interest includes the authority to require that parties be allowed to terminate existing contracts.¹⁰⁵

V. CONCLUSION

For the reasons set forth above and in the attached Alternative Dawson Declaration, as well as in the Petitioners’ initial submissions, Petitioners request that the Commission provide the relief requested in the Wright Petition or, in the alternative, establish the interstate interexchange inmate debit and collect calling benchmark rates proposed herein and require the offering of debit calling at all served facilities. Especially in view of the Vermont, Maryland and Missouri contracts discussed above, the requested benchmark rates of \$0.20 per minute for long distance inmate debit calling service and \$0.25 per minute for long distance inmate collect calling service may well be too high. If the Commission determines that its universal service goals would be furthered by the offering of a certain amount of free inmate long distance calling, the Commission might consider setting slightly higher benchmark rates for service providers choosing to provide some free service.

If the Commission determines that the record is not sufficient to order the relief sought in this alternative proposal, Petitioners request that the Commission take whatever steps are necessary to create a sufficient record, including an order requiring inmate service providers to

¹⁰⁴ *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983, 23000 n.85 (2000) (“*Competitive Networks*”) (citation omitted). *See also id.* at 23001; *TRAC Communications, Inc. v. Detroit Cellular Telephone Co.*, 4 FCC Rcd 3769 (CCB 1989), *aff’d*, 5 FCC Rcd 4647 (1990) (exclusivity provision in cellular service resale agreement invalidated); *Cable & Wireless*, 166 F.3d at 1231-32; *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987) (“[T]he Commission has the power to . . . modify . . . private contracts when necessary to serve the public interest.”).

¹⁰⁵ *Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd 5880, 5906 (1991) (requiring that customers be permitted to terminate contracts without incurring termination liability) (subsequent history omitted).

submit data proving their service costs. Finally, irrespective of whether the Commission orders the requested relief, it should, at the very least, provide the “meaningful analysis and guidance” requested by the *Wright* court’s *Referral Opinion* as to the “complex economic and technical issues” that must be resolved in determining either the feasibility of the competitive inmate service regime proposed in the Wright Petition or reasonable rates for long distance inmate calling services.¹⁰⁶

Respectfully submitted,

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February 28, 2007

¹⁰⁶ *Referral Opinion* at 6-8, 10-11, 13, 15-16, discussed in Petitioners’ Reply Comments at 3-9.

CERTIFICATE OF SERVICE

I, Theresa Rollins, hereby certify on this 28th day of February, 2007, a copy of the foregoing Petitioners' Alternative Rulemaking Proposal with Appendices has been served via electronic mail (*) or first class mail, postage pre-paid, to the following:

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