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

In the Matter of:	)	
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Martha Wright, Dorothy Wade, Annette Wade, Ethel Peoples, Mattie Lucas, Laurie Nelson, Winston Bliss, Sheila Taylor, Gaffney & Schember, M. Elizabeth Kent, Katharine Goray, Ulandis Forte, Charles Wade, Earl Peoples, Darrell Nelson, Melvin Taylor, Jackie Lucas, Peter Bliss, David Hernandez, Lisa Hernandez and Vendella F. Oura	)	File No. _____
	)	
Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues In Pending Rulemaking	)	

PETITION FOR RULEMAKING OR, IN THE ALTERNATIVE, PETITION TO ADDRESS REFERRAL ISSUES IN PENDING RULEMAKING

Deborah M. Golden
D.C. Prisoners' Legal Services Project, Inc.
2639 Connecticut Ave., N.W.
Suite 225
Washington, D.C. 20008
(202) 775-0323

Cheryl A. Tritt
Frank W. Krogh
Jennifer L. Kostyu
Morrison & Foerster, LLP
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006
(202) 887-1510

Stephen G. Seliger
Laurie S. Elkin
Seliger & Elkin, Ltd. #500
155 North Michigan Avenue
Chicago, IL 60601
(312) 616-4244

Barbara J. Olshansky
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6464 x 439

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To the Commission:

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Martha Wright, Dorothy Wade, Annette Wade, Ethel Peoples, Mattie Lucas, Laurie Nelson, Winston Bliss, Sheila Taylor, Gaffney & Schember, M. Elizabeth Kent, Katharine Goray, Ulandis Forte, Charles Wade, Earl Peoples, Darrell Nelson, Melvin Taylor, Jackie Lucas, Peter Bliss, David Hernandez, Lisa Hernandez and Vendella F. Oura (collectively, "Petitioners") petition this Commission to address anticompetitive practices that result in excessive inmate telephone service rates at privately-administered prisons. Martha Wright and other Petitioners originally sought relief from these practices in *Wright, et al. v. Corrections Corporation of America, et al.* ("*Wright*"), which was referred to the Commission with the instruction that the

parties "file the appropriate pleadings with the FCC".[1] Accordingly, pursuant to Section 1.401 of the Commission's rules,[2] Petitioners request the Commission to initiate a notice and comment rulemaking proceeding to address certain of the referral issues as set forth below.

I. INTRODUCTION AND SUMMARY

Prison inmates generally pay some of the highest long distance rates in the country, the result of the exclusive service agreements that prison administrators typically enter into with telecommunications carriers for inmate calling services. These arrangements usually involve the payment of generous commissions to the prison facility by the winning service provider, which recovers these costs by charging exorbitant rates. Prison officials assert that multiple telephone service providers would jeopardize prison security and anti-fraud measures and undermine other penological goals. These exclusive arrangements, however, preclude effective competition for inmate calling services and result in excessive calling rates. At some prison facilities, inmates also are limited to collect calling services and are not offered the cheaper alternative of debit card or debit account calling services.

Petitioners are current or former prison inmates in facilities operated by the Corrections Corporation of America ("CCA"), a defendant in the *Wright* case, and family members, loved ones, legal counsel and others who receive and typically pay for interstate telephone calls from inmates. The Petitioners and other similarly situated persons are harmed by the inflated rates resulting from these exclusive service agreements, excessive commissions and "collect call-only" requirements governing the provision of inmate telephone services at CCA facilities by the

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[1] *Wright v. Corrections Corp. of America*, C.A. No. 00-293 (GK) (D.D.C. Aug. 22, 2001), Order, slip op. at 1.

[2] 47 C.F.R. § 1.401.

long distance carrier defendants in the *Wright* case. The tremendous cost of long distance telephone calls from inmates, often located far from their relatives and legal counsel, harms the Petitioner inmates and other low income Petitioners paying these rates. Petitioners are forced to restrict their calling or acceptance of collect calls, effectively depriving Petitioner inmates and family members of their most reasonable means of communication and further straining the family and community ties necessary for released inmates' rehabilitation.[3]

Existing Commission rules and policy have long condoned these exclusive service arrangements and restrictions on inmate calling options based upon the assumption that security and other penological considerations justify these practices. As demonstrated in the attached expert affidavit of Douglas A. Dawson ("Dawson Affidavit"), however, that assumption is wrong. It is both technically and economically feasible for multiple carriers to offer telephone services to inmates at any given prison *while meeting all legitimate security and other penological needs*. Accordingly, Petitioners request that the Commission prohibit exclusive inmate calling service agreements and collect call-only restrictions at privately-administered prisons and require such facilities to permit multiple long distance carriers to interconnect with prison telephone systems in the manner described in the Dawson Affidavit. Under that structure, the Commission would establish a benchmark access fee that the prison telephone system would be allowed to charge the long distance provider selected by the inmate. The Commission also should require inmate service providers to offer debit card or debit account service as an

[3] Petitioners' interests thus are directly affected by the Commission's policies regarding inmate calling services. *See* 47 C.F.R. § 1.401(d).

alternative to collect calling services.[4] Because the penological justifications for exclusive inmate calling service agreements can no longer be substantiated and are pretextual,[5] there is no longer any justification for such arrangements.

II. BACKGROUND

In selecting inmate service providers, prison administrators commonly accept bids from multiple service providers and grant a monopoly to the winning bidder for a particular prison.[6] Inmates, and the individuals they call, have access only to the monopoly service provider. Moreover, the services are typically limited to operator assisted collect calling and debit card or debit account calling services, and in some cases, collect calling services only. As part of the bidding process, competing service providers generally are expected to offer the administrators generous commissions for the right to provide exclusive service to the facilities.[7] The winning bidder is typically the service provider that offers the highest commission rates, often exceeding

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[4] Petitioners limit the scope of this Petition to inmate telephone services at private prison facilities in order to avoid any possible conflict with state laws regulating the administration of publicly administered correctional facilities. Moreover, *Wright* involves only a private prison administrator, the CCA. Petitioners do not concede thereby that state laws or regulations governing the administration of publicly administered correctional facilities could not be preempted by this Commission.

[5] *See* Justin Carver, *An Efficiency Analysis of Contracts for the Provision of Telephone Services to Prisons*, 54 Fed. Comm. L.J. 391, 394 (2002) ("Carver"). A copy of the Carver article is attached as Exhibit 4 to the expert affidavit of Douglas A. Dawson, *In the matter of Martha Wright, et al.,* Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues In Pending Rulemaking ("Dawson Affidavit"), appended hereto as Attachment A.

[6] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 3248, 3252 (2002) ("*Inmate Payphone NPRM*").

[7] *Id.*

45 percent and sometimes more than 60 percent of gross revenues.[8] The winning bidder then charges excessive rates for inmate calls in order to cover the huge commissions that it has agreed to pay to the prison administrator.

The Commission itself has recognized that this approach to the selection of inmate calling services has the distorting effect of allowing competitive pressures to drive prices up, rather than down. "[P]erversely, because the bidder who charges the highest rates can afford to offer the confinement facilities the largest location commissions, the competitive bidding process may result in higher rates."[9] Thus, rather than awarding contracts to service providers based upon service quality and low rates, these contracts are awarded based upon the commission rates.

For years, prison inmate advocates have pressed for regulatory mechanisms that would provide relief from the exorbitant rates and limited service options for inmate long distance calling services. Citizens United for Rehabilitation of Errants ("CURE") and The Coalition of Families and Friends of Prisoners of the American Friends Service Committee ("AFSC") have stressed the need to reduce the burden of oppressively high inmate calling rates, which is borne largely by economically disadvantaged relatives and friends of inmates, often located far from the facilities where the inmates are incarcerated. Not only do these exorbitant rates directly injure the non-inmates paying them, but, as studies cited by CURE and AFSC explain, they also work to the detriment of society by reducing rehabilitative ties that reduce recidivism, preserve

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[8] *Id.* at 3253 n.34; Carver, 54 Fed. Comm. L.J. at 394, 395 n.22.

[9] *Id.* at 3253; *see also Billed Party Preference for InterLATA 0+ Calls*, 13 FCC Rcd 6122, 6156 (1998) ("*0+ Second Report*"), *modified*, 16 FCC Rcd 22314 (2001); Carver, 54 Fed. Comm. L.J. at 394-96, attached as Exhibit 4 to the Dawson Affidavit.

families, ease prison tensions and promote societal efforts to rehabilitate ex-offenders.[10] Moreover, these exorbitant rates are imposed on a captive market that is unable to afford them, while all other consumers enjoy the benefits of increased competition and choices in telecommunications services.[11]

Until now, the Commission has accepted the status quo based upon its assumption that competition in inmate services is incompatible with prison officials' legitimate security and other penological goals. The Dawson Affidavit, however, explains how competition in long distance inmate services can be structured to accommodate those goals and demonstrates that withholding the benefits of competition from the inmate telephone service market can no longer be justified.

This Petition arises from an order in *Wright*, a class action brought in the United States District Court for the District of Columbia by certain of the Petitioners and other individuals against the CCA, a private prison facility administrator for state and local governments, and five telecommunications carriers with exclusive contracts to provide inmate calling services at different CCA facilities. Petitioners allege in their federal court complaint in *Wright* that the defendants' exclusive dealing arrangements restrict telephone service choices for inmate calls, resulting in substantially increased rates for such services, thereby violating various

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[10] *See, e.g.*, CURE Comments on Second Further Notice of Proposed Rulemaking at 1-5, *Billed Party Preference for 0+ InterLATA Calls*, CC Docket No. 92-77 (July 16, 1996) ("CURE Comments"); Comments of Citizens United for Rehabilitation of Errants and The Coalition of Families and Friends of Prisoners of the American Friends Service Committee at 1-5, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 (June 21, 1999) ("CURE/AFSC Comments").

[11] CURE/AFSC Comments at 2-4.

constitutional and statutory rights, including Section 201(b) of the Communications Act of 1934, as amended (the "Act").[12]

In an August 22, 2001 Memorandum Opinion and Order, the federal district court dismissed the complaint and directed the parties "to file the appropriate pleadings with the FCC to ensure that the issues raised in this lawsuit are presented to the FCC," finding that such referral would "assist the Court in its task of adjudicating these claims."[13] In an Order released on November 5, 2001,[14] the court granted Petitioners' Motion to Reconsider the dismissal of the complaint and stayed the federal court action until the Commission considered the claims.[15]

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[12] 47 U.S.C. § 201(b). Petitioners also allege that these unjustifiable restrictions abridge inmates' First, Fifth and Fourteenth Amendment rights under the United States Constitution.

[13] *Wright v. Corrections Corp. of America*, C.A. No. 00-293 (GK) (D.D.C. Aug. 22, 2001), Order, slip op. at 1; Memorandum Opinion, slip op. at 13. The court's Memorandum Opinion and Order are appended hereto as Attachments B and C.

[14] The court's November 5, 2001 Order is appended hereto as Attachment D.

[15] Following the court's referral, and pursuant to the Commission's referral procedures, Petitioners' counsel engaged in protracted discussions with the Enforcement Bureau ("EB") staff and other parties to the district court case regarding: (a) the most appropriate procedural vehicle or vehicles to use to bring the referral claims before the Commission; and (b) the EB's pre-filing mediation procedures in referral complaint cases. *See* FCC Public Notice, *Primary Jurisdiction Referrals Involving Common Carriers*, 15 FCC Rcd 22449 (2000). The Public Notice states that "primary jurisdiction referrals in cases involving common carriers are appropriately filed as formal complaints with the Enforcement Bureau pursuant to section 208 of the [Act]. There may be circumstances, however, in which this approach may not be appropriate." Accordingly, the Public Notice directs parties to contact the Enforcement Bureau prior to filing any pleadings.

The parties were in the middle of these procedural discussions and the complaint pre-filing process when the comment cycle for the *Inmate Payphone NPRM* closed on June 24, 2002. After further discussions and meetings, Petitioners reached an understanding with the EB and Wireline Competition Bureau ("WCB") staff dividing the referral claims between a formal complaint to be filed with the EB, limited to claims regarding unreasonable inmate calling rates and related claims, and a petition to be filed with the WCB, challenging the Commission's acceptance of exclusive service agreements and other restrictions in the provision of inmate long

Accordingly, based on the technical and economic analysis presented in the Dawson Affidavit and the legal discussion below, Petitioners request that the Commission reconsider, in the context of privately administered prison facilities, its assumption that exclusive dealing arrangements for the provision of interstate inmate telephone service are the only means of satisfying legitimate security and other penological goals. Because that assumption is incorrect, the Commission should reverse its policy and require such facilities to permit competition in the provision of long distance inmate calling services in the manner described in the Dawson Affidavit and allow inmates a choice between collect calling and debit card or debit account services.

Specifically, the Commission should conclude that:

- the Commission's previous assumption that prison security, anti-fraud and other penological goals can be met only when one carrier provides all telephone services to inmates in a prison is incorrect because it is technologically and economically feasible to permit prison inmates to choose among multiple carriers, consistent with all legitimate security and other penological concerns;
- similarly, all legitimate security and other penological concerns can be met while offering inmates debit card or debit account calling services as an alternative to collect calling services;
- the excessive rates charged for inmate calling services result primarily from the lack of competition in the provision of inmate telephone services and the commissions that carriers pay to prison administrators as a part of their exclusive contracts to provide inmate calling services;
- such commissions are driving inmate calling rates up;
- accordingly, the Commission should require all privately administered prison facilities to permit competition in the provision of interstate long distance inmate calling services in the manner described in the Dawson Affidavit, allow inmates a choice between collect calling and debit card or debit account services and prohibit such commissions except to

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distance services. Accordingly, Petitioners also intend to file a formal complaint with the EB challenging the reasonableness of the inmate service rates charged by defendants.

the extent they are to reimburse the costs actually incurred by prison administrators in connection with the provision of telecommunications services to inmates.

Because Petitioners seek a new regulatory regime for inmate services, including the "ground rules" discussed below, a notice of proposed rulemaking ("NPRM") will be required in order to address these issues. The pending *Inmate Payphone NPRM* also involves related issues, but the Commission assumes in that proceeding that exclusive arrangements are the only method by which prison administrators' security and other penological goals can be satisfied.[16] Full consideration of Petitioners' challenge to that policy assumption and the rules Petitioners seek to establish thus requires a further NPRM, either by enlarging the scope of the pending *Inmate Payphone* proceeding or initiating a new phase of CC Docket No. 96-128.[17]

III. THE COMMISSION'S POLICY ALLOWING EXCLUSIVE DEALING ARRANGEMENTS IS BASED ON AN INCORRECT ASSUMPTION, PREVENTS COMPETITION IN THE INMATE CALLING SERVICE MARKET AND MUST BE RECONSIDERED

A. The Commission's Policy Incorrectly Assumes That Security Concerns Preclude The Possibility of Competition In Inmate Calling Services

The Commission's policy accepting exclusive service arrangements derives not from any statutory prohibition against competition in inmate services, but, rather, is based entirely on a factual assumption that, as explained below, is incorrect. The Commission historically has recognized that security concerns differentiate inmate calling services from other types of telecommunications services, such as payphone services that are available to the public at large

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[16] *Inmate Payphone NPRM*, 17 FCC Rcd at 3276.

[17] *See Sprint Corp. v. FCC*, 315 F.3d 369, 374-77 (D.C. Cir. 2003) (when an agency changes, rather than clarifies, a rule, NPRM published in the Federal Register is required; public notice and comment are not sufficient).

and aggregator services.[18] The Commission has assumed, based on those considerations, that "an outbound calling monopoly ... serving [a] particular prison" is necessary "to recognize the special security requirements applicable to inmate calls."[19] Most recently, the Commission assumed in the *Inmate Payphone NPRM* that "legitimate security considerations preclude reliance on competitive choices, and the resulting market forces, to constrain rates for inmate calling."[20] Thus, the Commission's policy of approving exclusive inmate service arrangements is based entirely upon the untested factual assumption that inmate service monopolies are necessary to meet prison administrators' legitimate security and other penological goals.

The Commission has recognized that the market structure resulting from this policy works in reverse from the traditional telecommunications market, where competitive pressures drive prices down.[21] Nevertheless, the Commission has not questioned whether there might be other means to satisfy the security and other penological goals of prison administrators.

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[18] *See Inmate Payphone NPRM*, 17 FCC Rcd at 3252-53; *Billed Party Preference for InterLATA 0+ Calls*, Second Order on Reconsideration, 16 FCC Rcd 22314, 22322, n. 41 (2001) ("*0+ Second Reconsideration Order*"); *0+ Second Report*, 13 FCC Rcd at 6156; *Policies and Rules Concerning Operator Service Providers*, 6 FCC Rcd 2744, 2752 (1991) ("*Operator Service Order*"), *aff'd*, 7 FCC Rcd 3882 (1992).

[19] *0+ Second Report*, 13 FCC Rcd at 6156; *see also 0+ Second Reconsideration Order*, 16 FCC Rcd at 22323, n.45 ("Recognizing the security needs of prisons, the Commission does not require them to grant inmates access to multiple OSPs."); *Amendment of Policies and Rules Concerning Operator Service Providers and Call Aggregators*, 11 FCC Rcd 4532, 4547-48 (1996) ("*Amended Operator Service Order*").

[20] *Inmate Payphone NPRM*, 17 FCC Rcd at 3276 (emphasis added).

[21] *Id.* at 3253; *see also 0+ Second Report*, 13 FCC Rcd at 6144, 6156. As explained in the Dawson Affidavit, commissions typically add more than 40 percent to the total costs, before commissions, of inmate telephone services. Dawson Affidavit at ¶ 67. Thus, the theory of contestable markets does not apply to the market for inmate calling services, and the rates of inmate service providers are inflated as a result of the exclusive service contracts and excessive

B. Competition In Inmate Calling Services May Be Allowed Without Sacrificing Legitimate Security Or Other Penological Goals

The factual assumption underlying the Commission's policy is incorrect because exclusive dealing arrangements and collect call-only restrictions are not necessary in order to enforce prison security or to carry out related penological goals. As explained in the Dawson Affidavit, call monitoring, blocking calls to certain telephone numbers, preventing fraud and other security functions can operate consistently with a choice of multiple carriers. Private prison administrators can implement necessary security functions whether or not operator assisted collect calling is used, whether a debit card or debit account is used, or whether or not the telephone company has an exclusive service agreement.[22] Exclusive service arrangements thus serve only to allow carriers to maximize profits from persons trapped in a captive market without options available to other consumers and to allow private prison administrators to reap excessive commissions from the carriers.

As explained in the Dawson Affidavit, it is technically and economically feasible to permit multiple carriers to provide inmate calling services at any given prison while meeting all legitimate security and other penological needs. Inmate service competition could be implemented by allowing multiple long distance carriers to interconnect directly with the telephone system in a prison facility. This service configuration, under which the competitive carriers would pay a usage charge to the party installing and operating the prison telephone system, would be technically and economically feasible. Thus, there would be two components

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commissions they pay to the prison administrators. *See* Carver, 54 Fed. Comm. L.J. at 394-96, attached as Exhibit 4 to the Dawson Affidavit.

[22] *See* Dawson Affidavit at ¶¶ 19-49.

to the competitive system described in the Dawson Affidavit -- an underlying prison telephone system with a switch to control the routing of outgoing calls to different carriers and two or more long distance carriers interconnected with the prison switch.[23]

As demonstrated in the Dawson Affidavit, the underlying prison telephone system could be operated profitably for a fee as low as 4.4 to 5.9 cents per minute, to be paid to the underlying system operator by the interconnecting long distance company carrying a given call.[24] It is also clear from the Dawson Affidavit that the long distance "segment" would add less than another $0.15 per minute, assuming that both debit calling and collect calling were provided. Competition will quickly bring the rates charged by competitive long distance carriers down to their actual efficient costs.[25]

Moreover, the cost of the long distance segment would be still lower if only debit card or debit account service were provided. In its *0+ Second Report*, the Commission stated that:

> prisons may allow inmates ... as the Florida Commission has done, ... to use pre-paid debit cards. Such options would exert downward pressure on high interstate rates for 0+ calls from inmate phones, diminish the ability of a prison and its [presubscribed long distance carrier] to set supracompetitive rates, and thus lessen or obviate the need for further federal regulations concerning 0+ rates in this submarket.[26]

In its comments in that proceeding, the Florida Public Service Commission ("FPSC") asserted that debit cards would prevent "rate shock" because they could be purchased in advance at a

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[23] *See id.* at ¶¶ 39-49. It should be noted that the interconnecting competitive carriers could also provide local and other intrastate services for inmates. This Petition, however, addresses only the interstate long distance services directly under the jurisdiction of this Commission.

[24] *Id.* at ¶¶ 50-71.

[25] *Id.* at ¶¶ 43-44, 50-69.

[26] *0+ Second Report,* 13 FCC Rcd at 6156 (citation omitted).

predetermined rate. The FPSC noted that the use of debit cards would still allow prison administrators to "exercise security measures by screening the access number the inmate would use to place the call before allowing the card to be used."[27] The FPSC also recognized that customer-premises equipment was readily available to control fraud.[28]

> [I]t is appropriate to review the justification for restricting all inmate outbound calls to a single provider. If, after investigation, it is determined that instrument implemented fraud control devices satisfactorily restrict inmate access and prevent abuse of the telephone network, there may be justification ... to provide some competition for inmate services where none exists today.[29]

According to the FPSC, allowing competition in the inmate calling services market may offer benefits such as "savings to inmate families, legal counsel and public defenders from reduced telephone charges."[30]

The Dawson Affidavit confirms these findings. If only long distance debit card or debit account calling is provided, the resulting elimination of billing costs and uncollectible charges from the cost of the long distance segment of the configuration described in the Dawson Affidavit would reduce the overall cost of inmate long distance service by more than $0.06 per minute.[31]

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[27] Comments of the Florida Public Service Commission at 10-11, *Billed Party Preference for InterLATA 0+ Calls*, CC Docket No. 92-77 (July 16, 1996).

[28] *Id.*

[29] *Id.* at 11-12.

[30] *Id.* at 12 (citation omitted).

[31] *See* Dawson Affidavit at ¶ 74.

That exclusive service arrangements and restrictions on the use of debit card or debit account services cannot be justified by legitimate security needs or other penological goals is underscored by a policy statement adopted in early 2001 by the American Correctional Association ("ACA"), the organization of prison and jail administrators throughout the United States. That statement, a "Public Correctional Policy on Inmate/Juvenile Offender Access to Telephones," provides in relevant part:

> [I]nmates/juvenile offenders should have access to a range of reasonably priced telecommunications services. Correctional agencies should ensure that:
>
> . . . .
>
> Contracts are based on rates and surcharges that are commensurate with those charged to the general public for like services. Any deviation from ordinary consumer rates should reflect actual costs associated with the provision of services in a correctional setting; and
>
> Contracts for inmate/juvenile offender telecommunications services provide the broadest range of calling options determined to be consistent with the requirements of sound correctional management.[32]

Because multiple types of telecommunications services could be provided to inmates at rates much lower than the exorbitant rates that are currently available to inmates, the exclusive dealing arrangements, excessive commissions and collect call-only restrictions that generate those excessive rates thus conflict with the above-stated policies of the ACA. Petitioners are forced to accept the calling rates and practices imposed by the monopoly inmate calling service provider if they wish to talk to their loved ones or attorneys. As CURE and AFSC have pointed out, because inmates and their families often cannot afford these rates, inmates are forced to limit the

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[32] Policy adopted by the American Correctional Association Delegate Assembly on Jan. 24, 2001 at the Winter Conference in Nashville Tennessee, a copy of which is appended hereto as Attachment E.

amount of time spent communicating with their family members, which discourages the maintaining of family and community ties, further handicapping Petitioner inmates in their efforts to successfully reenter society upon release.[33]

C. Because Exclusive Dealing Arrangements And Restrictions That Limit Inmate Telephone Services To Collect Calling Are Not Justified, They Should Be Prohibited To Advance The Public Interest In Reasonable Calling Rates

One of the principal goals of the Act is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers."[34] Section 201(b) of the Act specifically provides that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable."[35] Because exclusive dealing arrangements between providers of inmate calling services and private prison administrators and collect call-only limitations are not justified by any legitimate security or other penological goals, such restraints are unreasonably anticompetitive. They unjustifiably deny Petitioners the freedom to use other carriers and the opportunity for other carriers to compete for the provision of inmate services. The Commission accordingly should bar exclusive dealing arrangements for the provision of interstate inmate calling services and collect call-only restrictions to ensure that interstate inmate calling rates are reasonable under Section 201(b) of the Act.[36]

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[33] CURE Comments at 1-5; CURE/AFSC Comments at 1-5.

[34] Telecommunications Act of 1996, Pub. L. No. 104-04, purpose statement, 110 Stat. 56, 56 (1996).

[35] 47 U.S.C. § 201(b).

[36] *See TRAC Communications, Inc. v. Detroit Cellular Telephone Co.*, 4 FCC Rcd 3769 (1989) (exclusivity provision in cellular service resale agreement impeded complainant from reselling

Acting under its Section 201(b) authority, the Commission has prohibited exclusive dealing arrangements and imposed other types of requirements on carriers in a wide variety of situations to ensure that consumers are afforded reasonable rates. For example, in its *Competitive Networks* proceeding, the Commission adopted various measures to promote competitive access to telecommunications services in multiple tenant environments ("MTEs") and to ensure reasonable rates and practices in such locations.[37] One of those measures included prohibiting carriers from entering into exclusive contracts with owners or managers of commercial MTEs for the provision of telecommunications services to the MTEs. In terms paralleling the circumstances presented in the inmate service context, the Commission concluded that such MTE agreements

> effectively restrict premises owners or their agents from permitting access to other telecommunications service providers. The use of exclusive contracts in commercial settings poses a risk of limiting the choices of tenants in MTEs in purchasing telecommunications services, and of increasing the prices paid by tenants for telecommunications services.[38]

The Commission noted that an exclusive dealing agreement between a carrier and the owner or manager of an MTE "may essentially constitute a device to preserve existing market power ... and may impede the development of competition in the market for local telecommunications

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services of other cellular carriers and had anticompetitive effect, violating Section 201(b)), *aff'd*, 5 FCC Rcd 4647 (1990).

[37] *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983 (2000) ("*Competitive Networks*").

[38] *Id.* at 22996-97 (citations omitted).

service."[39] The Commission asserted its authority to prohibit these exclusive dealing arrangements under Section 201(b) of the Act, which bars unreasonable rates and practices.[40]

Furthermore, the Commission has required carriers to take affirmative steps to ensure competition in the telecommunications market even though such steps require the expenditure of significant capital resources to meet the Commission's mandate. For example, the Commission required the provision of payphone call tracking by long distance carriers in order to ensure fair payphone compensation, notwithstanding their objections that the installation of tracking mechanisms would require significant expenditures of capital.[41]

Accordingly, the Commission should ban exclusive dealing agreements, and the commissions paid to secure such arrangements, for the provision of interstate telephone services for inmates in privately administered prisons and should require such prisons to allow competition in the manner set forth herein and service providers to offer debit card or debit account services as an alternative to collect calling in order to ensure that interstate inmate calling services are reasonably priced under Section 201(b) of the Act.[42] It is especially

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[39] *Id.* at 22997-98. The Commission also stated that the adoption of this prohibition "will reduce the likelihood that incumbent LECs can obstruct their competitors' access to MTEs, as well as address particular potentially anticompetitive actions by premises owners and other third parties." *Id.* at 23038-39.

[40] *Id.* at 23000.

[41] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 20541, 20588, 20590-91 (1996) (subsequent history omitted).

[42] *See also Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786 (1990), *modified on recon.*, 6 FCC Rcd 2637 (1991), *aff'd sub nom., Nat'l Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993) ("*LEC Price Cap Order*") (establishing price cap regulation of dominant local exchange carriers under Section 201(b) to produce rates within a zone of reasonableness).

incumbent on the Commission to modify its policy because, in light of the Dawson Affidavit, there is no longer any rational relationship between exclusive service agreements and prison officials' legitimate penological goals. The Dawson Affidavit demonstrates that there is no rational basis for the Commission's past policy of allowing such arrangements, and such "changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy"[43] and render any continuation of that policy arbitrary and capricious under cases such as *Bechtel*[44] and *Geller*.[45] That a variety of competitive calling services and rates could be available to inmates without sacrificing prison administrators' security or other penological goals invalidates the current policy.

D. The Commission Should Implement A Competitive Inmate Calling Policy By Issuing Basic Ground Rules

The proposed competitive inmate calling regime would have two components: (1) an underlying inmate telephone system; and (2) interconnecting competitive long distance carriers. Because one entity would provide the underlying telephone system under this proposal, a partial monopoly in inmate calling service would continue to exist. In order to ensure that the telephone system provider charges the interconnecting long distance carriers reasonable rates, the Commission should treat prison telephone system providers as common carriers and place some requirements on their charges in order to ensure reasonable prison telephone system rates.

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[43] *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992), *cert. denied Galaxy Communications v. FCC*, 506 U.S. 816 (1992), *remanded by Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993) ("*Bechtel*").

[44] *Id.*

[45] *Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979) ("*Geller*").

Petitioners suggest that the Commission impose a "safe harbor" benchmark rate analogous to the benchmark established for competitive local exchange carriers ("CLECs") in the *Access Charge Reform Order*.[46] Just as the access service market "does not appear to be structured in a manner that allows competition to discipline rates," enabling CLECs "to impose excessive access charges," a prison telephone system provider could charge competing carriers excessive rates to interconnect with the system in order to carry inmate long distance calls.[47] It would therefore be appropriate to establish a benchmark rate above which the system provider may not charge an interconnecting long distance carrier unless the carrier agrees to a higher negotiated rate.[48] In the absence of an agreed-upon higher charge, the system provider would be required to allow a long distance carrier to interconnect with the prison system and pay the benchmark rate, which would be presumed reasonable and would be tariffed.

In the *Access Charge Reform Order*, the Commission initially pegged the benchmark access rate at 2.5 cents per minute, gradually declining to the composite switched access rate charged by the incumbent local exchange carrier ("ILEC") with which the CLEC competes.[49] In the case of prison telephone systems, there is no comparable valid service rate that could be used as a benchmark. Based on the cost showing in the Dawson Affidavit, however, the Commission should set the benchmark rate at seven cents per minute, which is about one cent per minute

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[46] *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd 9923 (2001) ("*Access Charge Reform Order*").

[47] *See id.* at 9935-36.

[48] *Id.* at 9925, 9938-40.

[49] *Id.* at 9941.

above the high end estimate in the Dawson Affidavit for total prison telephone system costs, not including the long distance segment.[50]

In the alternative, if a prison telephone system provider did not want to be subject to the benchmark limit, it would be allowed to charge a rate higher than the benchmark if it could show that its costs justified such a rate. The Commission might also consider alternative measures to help ensure reasonable prison telephone system rates.

The establishment of a benchmark rate, cost justification requirement or other pricing requirement for the underlying telephone system should eliminate any need for price regulation of the long distance segment of the inmate service or of overall inmate service rates. If a long distance provider charges more than its actual costs, including profit, other long distance providers will request interconnection until competition reduces long distance rates to actual costs. In order to ensure that there are no impediments to competition, the underlying system provider at each prison facility should be required to permit a reasonable number of competitive carriers to interconnect and offer the long distance segment of the inmate service. The underlying provider should be permitted to offer the long distance segment as well, but if it does so, it should be required to offer exactly the same interconnection terms and technical conditions to other competitive carriers as it provides to its own long distance operation at a given facility. The underlying system provider should also be required to charge itself the same underlying system rate that it charges to the other long distance competitors, whether that is a benchmark

[50] Dawson Affidavit at ¶¶ 50-71.

rate or some other rate. These simple rules will facilitate the transition to competition that is needed in inmate long distance calling services.[51]

IV. CONCLUSION

For the reasons set forth above, Petitioners request that the Commission grant this petition and reexamine its long-standing policy that security reasons preclude the competitive provision of interstate telecommunications services to inmates in privately administered correctional facilities and that such services may be limited to collect calling. The Commission should find that private prison administrators must permit competition in the provision of inmate calling services in the manner set forth in the Dawson Affidavit and allow inmates to use debit cards or debit account services as an alternative to collect calling. The Commission should acknowledge that it is technologically and economically feasible to permit prison inmates to choose among multiple carriers and that a prison's security and other penological goals can be met when multiple carriers offer long distance services to a prison facility. Given the lack of any justification for exclusive dealing arrangements for inmate telephone services, Section 201(b) of the Act requires that inmate telephone service rates be restructured to permit competition.

The Commission also should find that commission payments, which drive inmate calling rates up, are justifiable only to the extent that they reimburse the costs incurred by prison administrators in connection with the provision of telephone services to inmates. The current use of commissions as a general slush fund cannot be squared with the public interest in reasonable

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[51] Because of the unavoidable inefficiencies of serving extremely small facilities, *see* Dawson Affidavit at ¶ 68 n.46, it may not be feasible to apply these rules to low-capacity prisons. Most such facilities, however, are locally-administered jails. Privately administered facilities, which typically house at least several hundred prisoners, are large enough for multiple carriers to serve efficiently.

rates under Section 201(b).[52] Accordingly, in order not to frustrate a properly functioning competitive inmate service regime, the Commission should also prohibit the imposition and payment of commissions by inmate telephone service providers except to the extent that the commissions cover legitimate costs directly incurred by the prison administrators in implementing and carrying out legitimate security and other penological goals in connection with the provision of inmate telephone services.

In order to facilitate the transition to competition, the Commission should provide for a one-year period in which current exclusive dealing arrangements and commission agreements would have to be modified to permit competition in the manner set forth in the Dawson Affidavit and to limit commission payments as requested above.[53] The Commission also should prohibit carriers and private prison administrators from extending existing exclusive dealing arrangements or entering into new exclusive dealing arrangements. Finally, the Commission should establish a benchmark service rate or cost justification requirement for the underlying

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[52] *See Inmate Payphone NPRM*, 17 FCC Rcd at 3277 (noting that Commission proceeds typically used for inmate services or assigned to the state's general revenue fund); *see also* Carver, 54 Fed. Comm. L.J. at 400-01, attached as Exhibit 4 to the Dawson Affidavit.

[53] The Commission recognized in the *Competitive Networks* proceeding that it has "authority to modify provisions of private contracts when necessary to serve the public interest." 15 FCC Rcd at 23001; *see also Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987) ("the Commission has the power to ... modify ... private contracts when necessary to serve the public interest."); *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5906 (1991).

inmate telephone system at private prison facilities and rules governing long distance carrier interconnections with the underlying inmate telephone system as discussed above and in the Dawson Affidavit.

Respectfully submitted,

Martha Wright, *et al.*

By: Deborah M. Golden (Tritt)

Deborah M. Golden
D.C. Prisoners' Legal Services Project, Inc.
2639 Connecticut Ave., N.W.
Suite 225
Washington, D.C. 20008
(202) 775-0323

By: Frank W. Krogh

Cheryl A. Tritt
Frank W. Krogh
Jennifer L. Kostyu
Morrison & Foerster, LLP
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006
(202) 887-1500 (Voice)
(202) 887-0763 (Fax)

Stephen G. Seliger
Laurie S. Elkin
Seliger & Elkin, Ltd.
155 North Michigan Avenue
Suite 500
Chicago, IL 60601
(312) 616-4244

Barbara J. Olshansky
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6464 x 439

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Attachments

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