

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

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**In the Matter of**

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

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

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**CC Docket No. 96-128**

**PETITIONERS' REPLY COMMENTS**

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Petitioners Martha Wright, *et al.* (“Petitioners”) submit this reply to the comments filed in response to Petitioners’ Alternative Rulemaking Proposal (“Alternative Proposal” or “Proposal”).<sup>1</sup> The technical claims and conclusory cost assertions they present fail to address the demonstration in the Alternative Proposal and supporting material that interstate inmate long distance telephone services could be, and are being, provided -- in some cases by the parties opposing the Proposal -- at a fraction of the typical current rates and that debit account or debit card calling could, and should, be a required option.

Not only do the opposing comments (“Oppositions”) confirm that most inmate service providers’ interstate calling rates are unreasonably excessive under Section 201(b) of the Communications Act (“the Act”), but they also reveal that those rates are so excessive that the revenue generated thereby might unlawfully be cross-subsidizing the service providers’ intrastate inmate services. The Commission accordingly should investigate the service providers’

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<sup>1</sup> Petitioners’ Alternative Rulemaking Proposal, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (Mar. 1, 2007) (“Alternative Proposal” or “Proposal”); FCC Public Notice, *Comment Sought on Alternative Rulemaking Proposal Regarding Issues Related to Inmate Calling Services*, 22 FCC Rcd 4229 (WCB 2007) (“Public Notice”).

interstate inmate calling service costs and rates and establish the interstate inmate benchmark rates requested in the Alternative Proposal.

## **I. INTRODUCTION AND SUMMARY**

The Proposal, supported by the expert declaration of Douglas A. Dawson (“Dawson Alternative Declaration”), demonstrated that the actual cost of providing interstate long distance calling services to prison inmates is far below typical current inmate rates and that some of the same parties opposing the Proposal currently provide interstate inmate long distance services at rates as low as ten cents per minute, with no per-call charges. The Dawson Alternative Declaration demonstrated, relying on a comparable rates analysis as well as an analysis of inmate calling service providers’ costs, that the requested interstate benchmarks of \$0.20 per minute for inmate debit card or debit account services (collectively, “debit calling”), and \$0.25 per minute for inmate collect calling are more than reasonable.<sup>2</sup>

The Proposal also demonstrated that debit calling should be a permitted option at all served facilities and that restrictions on debit calling can no longer be justified for security and other penological considerations. It is both technologically and economically feasible to offer debit calling services as an alternative to collect calling to prison inmates while meeting all legitimate security and other penological needs.

The Oppositions raise a welter of inconsistent, and in some cases, contradictory, factual and legal arguments against the Proposal, ranging from claims that the requested relief is too “sweeping” to an assertion that the scope of the Proposal is too “narrow” to “warrant[] Commission attention.”<sup>3</sup> They fail to provide any compelling reason why the Commission should not grant the relief sought in the Proposal.

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<sup>2</sup> See Declaration of Douglas A. Dawson in Support of Petitioners’ Alternative Proposal (Feb. 16, 2007) (“Dawson Alternative Declaration”), attached to Alternative Proposal.

<sup>3</sup> Compare CCA Comments at 1 with Pay Tel Comments at 6. The initial comments on the Proposal will be cited in this abbreviated manner throughout. Pay Tel, at 6 & n.14, misreads the Proposal as limiting the requested rate relief to privately administered facilities, ignoring

The Oppositions either fail to address the cost data presented by Petitioners or mischaracterize it. The inmate service providers present no hard cost data of their own, but only qualitative, generalized conclusions about the nature of their interstate costs. As the parties in sole possession of all of the relevant cost data, the service providers, having presented no data to rebut the Petitioners' showing, must be presumed to have no such data. Indeed, one of the service providers, Pay Tel Communications, Inc. ("Pay Tel"), admits to earning so much from its interstate inmate services that it covers its intrastate inmate service losses with its interstate revenues.<sup>4</sup>

The most striking aspect of the Oppositions is their silence regarding how they and other service providers are able to provide inmate long distance services in some prison facilities at reasonable rates, net of commission payments, while being unable to do so at other facilities. As explained in the Reply Declaration of Douglas A. Dawson in support of Petitioners' Alternative Rulemaking Proposal ("Dawson Alternative Reply" or "Dawson Alt. Reply"), appended hereto as Attachment A, the Oppositions fail to explain why the prison systems cited in the Alternative Proposal and supporting material are not a representative sample of all state and other large correctional systems or why the cost of serving those systems should be significantly different from the cost of serving any other large prison system.<sup>5</sup> Moreover, the overwhelming majority of interstate inmate calls are made from state and federal prison systems. Given that all of the cited prison systems can be served at interstate rates, net of commissions, below the proposed

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Petitioners' repeated statements that, *e.g.*, "[b]enchmark rates, which *would apply to all interstate inmate telephone services*, also have the advantage of obviating any need for" distinguishing between "privately administered and publicly administered facilities." Proposal at 15 (emphasis added). *See also id.* at 8 ("there would be no need for different benchmark rates or different regulatory schemes for publicly and privately administered prisons").

<sup>4</sup> *See* Pay Tel Comments at 17 n.40.

<sup>5</sup> Reply Declaration of Douglas A. Dawson in support of Petitioners' Alternative Rulemaking Proposal ¶¶ 8-16 (June 20, 2007) ("Dawson Alternative Reply" or "Dawson Alt. Reply") (appended hereto as Attachment A).

benchmarks of \$0.20 per minute for debit calling and \$0.25 per minute for collect calling, it must be concluded that the proposed benchmarks more than cover the average cost of interstate inmate calls.

Although opponents continue to argue against debit calling as a mandatory option on security grounds, they concede that they and other service providers offer debit calling at an increasing share of correctional facilities. The widespread use of debit calling in prisons confirms that there are easily implemented mechanisms that can minimize the supposed security risks and administrative burdens of debit calling services.

As in the case of the oppositions to Petitioners' original Petition for Rulemaking ("Wright Petition"),<sup>6</sup> the recent Oppositions raise multiple legal arguments concerning state penal discretion and the Commission's proper role that are irrelevant to the Commission's review of inmate long distance telephone services under Section 201(b) of the Act and wrong as a matter of law. As Petitioners have exhaustively explained, the Wright Petition and the Alternative Proposal arise from a referral order in which a federal court has already determined in the *Wright* case that the Commission has the authority, and "clearly is in the best position 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."<sup>7</sup>

The *Wright* court thus has determined that the Commission is in the best position to decide what reasonable interstate long distance rates would be or whether it would be feasible to require that debit calling be made available at all served facilities. Two of the parties opposing

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<sup>6</sup> Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (Nov. 3, 2003) ("Wright Petition").

<sup>7</sup> *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*") (Attachment B to the Wright Petition).

the Proposal -- Corrections Corporation of America (“CCA”) and Global Tel\*Link (“Global”) -- were also defendants in *Wright*.<sup>8</sup> If they objected to the referral, they should have appealed it.

Moreover, the Oppositions’ arguments about the discretion of state correctional authorities over prisoners’ telephone services ignore the Supremacy Clause in the U.S. Constitution. The states, including state correctional authorities, may not override or nullify federal law, including the Communications Act. There is no exception in Section 201(b) of the Act for prisons and other correctional facilities. Opponents’ antebellum notions of states rights and their insistence that the Commission maintain its “past reverence and treatment of inmate telephone services” cannot save their exorbitant rates.<sup>9</sup> Opponents’ arguments regarding commission payments are also irrelevant. The Proposal seeks no injunctive or other relief against commissions. As long as service providers keep their interstate long distance rates within the benchmarks, they may do whatever they want with their revenue, whether paying commissions or otherwise.

The Oppositions’ lack of substance strongly suggests that they are intended primarily to delay Commission consideration of the issues referred to it by the court and to preserve their excessive rates. Accordingly, the Commission must act promptly to respond to the court’s referral and grant the relief requested in the Proposal.

## **II. OPPONENTS’ CONCESSIONS AND LACK OF RELEVANT DATA CONFIRM THE REASONABLENESS OF THE REQUESTED BENCHMARKS.**

### **A. Petitioners Presented Both A Comparable Rates Analysis And A Cost Analysis In The Proposal And Dawson Alternative Declaration.**

The Proposal, supported by the Dawson Alternative Declaration, presented a comparable rates analysis, based on interstate inmate calling service rates and other comparable service rates. The comparable rates analysis showed that interstate inmate debit calling service can be provided

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<sup>8</sup> *See Referral Opinion* at 4.

<sup>9</sup> APCTO Comments at 3.



for less than \$0.20 per minute, with no set-up or other per-call charge. Mr. Dawson provided a cost analysis based on available information regarding inmate service providers' costs to buttress the inmate debit calling comparable rates analysis. He also relied on inmate service provider cost data to demonstrate that no more than five cents per minute should be added to the cost of debit calling to derive a reasonable interstate inmate collect calling rate. Mr. Dawson confirmed the reasonableness of the resulting interstate inmate collect calling benchmark of \$0.25 per minute by reference to comparable inmate collect calling rates.<sup>10</sup>

Opponents appear to have given up on any serious effort to rebut Petitioners' showings. Although the opponents addressed at least the themes of the Petitioners' cost analysis, without providing any contrary hard cost data, they appear not to have noticed the comparable rates analysis, which stands unscathed.

The opponents largely confirm Petitioners' comparable rates analysis by conceding that inmate interstate calling services are being provided in a variety of correctional settings at reasonable rates and provide no hard data in support of any contrary cost analysis. Even their one expert, Richard Cabe, provides only "soft" qualitative analysis, rather than cost support for the unreasonable rates charged by his clients, T-NETIX and Evercom ("T-NETIX/Evercom"). Various opponents catalog the challenges faced by inmate service providers and the functions they must perform at length, but they never ascribe any specific costs to those functions, all of which were considered in Petitioners' previous cost analyses.<sup>11</sup>

Pay Tel criticizes Mr. Dawson's reliance on old inmate service provider cost data, but, as he points out, Petitioners were forced to use such outdated information by the service providers' failure to submit current, reliable, verifiable cost data.<sup>12</sup> Because they are the sole source of such data, they have no basis to criticize others' use of whatever data is publicly available. Indeed,

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<sup>10</sup> Dawson Alternative Declaration ¶¶ 25-43.

<sup>11</sup> *See, e.g.*, Pay Tel Comments at 18-22; GEO Group Comments at 8-9.

<sup>12</sup> Dawson Alt. Reply ¶¶ 28-36.

their failure to provide current, reliable data tends to confirm Petitioners' analyses. Because the service providers have "withheld the very cost data that would have enabled the Commission to establish precise, cost-based rates," it must be concluded in these circumstances that Petitioners' "methodology provides a reasonable basis for establishing . . . benchmarks. . . ."<sup>13</sup>

**B. At Least One Of The Opponents May Be Cross-Subsidizing Intrastate Services With Interstate Inmate Service Revenues.**

One possible explanation for the opponents' reluctance to reveal their actual interstate costs might lie in some parties' requests that the Commission consider service providers' *intrastate* costs and revenues in setting any *interstate* inmate benchmarks.<sup>14</sup> Pay Tel, for example, provides data demonstrating that its local and other intrastate inmate calls generate much less revenue per minute than its interstate inmate calls and that its relatively low proportion of interstate calls thus provide a disproportionate share of its total revenue. In February 2007, the 3.7 percent of its inmate calls that were interstate generated a whopping 16.6 percent of its total revenue.<sup>15</sup> Pay Tel also complains that inmate service providers often lose money on local inmate calls, which are capped in many states, and that "*Pay Tel has been forced to raise its interstate long distance rates to make up for the losses from below-cost local collect call rates.*"<sup>16</sup>

In other words, Pay Tel, and perhaps other service providers, may be using their interstate inmate service revenues to subsidize their intrastate inmate services. As the Commission explained, in finding cross-subsidization unlawful under Section 201(b), "care must be taken to avoid excessively high rates for a carrier's noncompetitive services . . . which tend to offset

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<sup>13</sup> *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1233 (D.C. Cir. 1999) ("*Cable & Wireless*") (quoting *International Settlement Rates*, 12 FCC Rcd 19806, 19839 (1997)).

<sup>14</sup> *See, e.g.*, Pay Tel Comments at 7-8.

<sup>15</sup> *Id.* at 6.

<sup>16</sup> *Id.* at 17 n.40 (emphasis added).

deficiencies resulting from unduly low rates” for other services.<sup>17</sup> Cross-subsidization “is an immediate burden on ratepayers of . . . services[] whose rates must subsidize” other services.<sup>18</sup> Whether or not the Commission grants the requested relief, Pay Tel’s admission and Global’s request that the Commission consider its intrastate services in reviewing the Proposal call for an immediate investigation of all inmate service providers’ interstate service costs and earnings and possible unlawful cross-subsidization of their intrastate inmate costs and services.<sup>19</sup>

**C. Opponents Concede That They And Other Service Providers Are Able To Offer Interstate Inmate Services At Reasonable Rates.**

**1. The Costs Of Serving The Prison Systems Cited In Petitioners’ Comparable Rates Analysis Are Representative Of The Costs Of Serving All Large Prison Systems.**

No party disputes any of the facts set forth in the Alternative Proposal and Dawson Alternative Declaration as to any of the eight state inmate calling service contract rates and the federal Bureau of Prisons (“BOP”) contract debit calling rate cited in support of Petitioners’ comparable rates analysis.<sup>20</sup> No party has attempted to demonstrate that the interstate service rates provided in those contracts do not cover all interstate costs and a reasonable profit. The interstate debit calling rates established in the contracts for the BOP and six of those states -- Colorado, Indiana, Maryland, Missouri, Nebraska, and Vermont -- net of commission payments, are each below the requested interstate debit calling benchmark rate of \$0.20 per minute.<sup>21</sup>

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<sup>17</sup> *American Tel. & Tel. Co.*, 61 F.C.C.2d 587, 608 (1976), *recon.*, 64 F.C.C.2d 971 (1977), *further recon.*, 67 F.C.C.2d 1441 (1978), *aff'd in part, rev'd in part on other grounds sub nom. Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981).

<sup>18</sup> *American Tel. & Tel. Co.*, 62 F.C.C.2d 774, 799 (1977), *recon. denied*, 64 F.C.C.2d 994 (1977), *aff'd AT&T v. FCC*, 601 F.2d 401 (D.C. Cir. 1979).

<sup>19</sup> See Global Comments at 12.

<sup>20</sup> See Alternative Proposal at 16-22.

<sup>21</sup> See *id.* at 18-20; Dawson Alternative Declaration ¶¶ 29-33.

Strengthening Petitioners' comparable rates analysis is GEO Group's additional example of an interstate inmate rate of \$0.17 per minute, with no per-call charge, at a Department of Homeland Security facility operated by GEO Group.<sup>22</sup>

Opponents insist that the inmate calling service market is "robustly competitive," with several vendors pursuing each inmate service contract.<sup>23</sup> A number of service providers compete nationally and provide calling services to large state correctional systems with tens of thousands of prisoners.<sup>24</sup> In a vigorously competitive market, the interstate debit calling rates in the BOP contract and the six state contracts, net of commission payments, would be the rates that inmate service providers "would have needed to consider in pricing [their] services" and are thus the appropriate comparable rates against which to measure the reasonableness of the typical inmate interstate debit calling rate.<sup>25</sup> No party has attempted to explain how it is possible to serve those systems at such reasonable rates profitably but impossible to serve other state and other large systems at similar rates.

CCA argues that a comparable rates analysis depends on "services offered under substantially similar circumstances using similar facilities" and that the variety of prison facilities precludes such an analysis here.<sup>26</sup> In fact, the prison systems cited by Petitioners are so varied and so numerous that they may be presumed to be representative of all state and other large correctional systems. Neither CCA nor any other service provider offers any reason to believe that they would not be representative of any large prison system.

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<sup>22</sup> GEO Group Comments at 8.

<sup>23</sup> Embarq Comments at 4. *See also* Global Comments at 8.

<sup>24</sup> *See, e.g.*, Global Comments at 2-3.

<sup>25</sup> *AT&T Corp. v. Business Telecom, Inc.*, 16 FCC Rcd 12312, 12329 (2001) ("BTI"), *recon. denied*, 16 FCC Rcd 21750 (2001). Presumably, the GEO Group - Homeland Security contract also involves a debit calling rate, given that GEO Group does not mention a per-call charge, and thus would be another comparable rate that must be met in a competitive market.

<sup>26</sup> CCA Comments at 7 (quoting *BTI*, 16 FCC Rcd at 12324).

In particular, no party has attempted to demonstrate that the costs of providing interstate debit calling services for each of the six state correctional systems listed above are somehow unrepresentative of the costs of the other state systems. Opponents discuss the differences among types, sizes, and locations of correctional facilities and other factors that might account for differences in the cost of providing inmate calling services, but only in the most general terms.<sup>27</sup> Those factors are characteristics that will vary within any state prison system and thus should even out among large prison systems. Opponents never explain how the costs of serving the sample correctional systems cited by Petitioners are sufficiently similar to each other but are so different from the costs of serving all other state and other large prison systems that no other system can be served profitably at similar rates, net of commission payments.<sup>28</sup> The inmate services provided to those representative systems and all other large prison systems thus are “offered under substantially similar circumstances using similar facilities.”<sup>29</sup>

For example, T-NETIX/Evercom never explains how it is able to provide inmate interstate prepaid service to prisoners in Indiana correctional facilities for a net rate, after backing out commissions payments, of \$0.185 per minute, or inmate interstate debit service to prisoners in Maryland correctional facilities for a net rate, after commissions, of \$0.12 per minute, but is unable to provide similar services to other prison systems at similar rates.<sup>30</sup> Public Communications Services (“PCS”) never explains how it is able to provide inmate interstate debit service to prisoners in Vermont correctional facilities for a rate, net of commission payments, equivalent to \$0.135 per minute, or inmate interstate debit and prepaid services to

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<sup>27</sup> See, e.g., GEO Group Comments at 10; Global Comments at 5-8; CCA Comments at 6-7.

<sup>28</sup> Dawson Alt. Reply ¶¶ 8-16.

<sup>29</sup> *BTI*, 16 FCC Rcd at 12324.

<sup>30</sup> See Dawson Alternative Declaration ¶¶ 31-32.

prisoners in Missouri correctional facilities for \$0.10 per minute, but is unable to provide similar services to other prison systems at similar rates.<sup>31</sup>

In the absence of any contrary data or even the suggestion of a cost difference between these examples and other state prison systems, it must be presumed that the cost characteristics of the interstate debit calling services provided to the six state systems, as well as the Homeland Security facility served by GEO Group, are representative of the cost characteristics of all other large correctional systems. The number and variety of the six state systems, with widely varying prison populations, geography and other cost characteristics, strengthens the conclusion that their inmate calling service costs are representative of all large correctional systems' inmate calling service costs. There may be inmate calling service cost differences within each of the six state prison systems cited, but those differences apparently average out to fairly low costs overall. No party has explained why that should not be the case for all other state prison systems or, indeed, for any large service provider's inmate service customer base as a whole.<sup>32</sup>

It is especially telling that a relatively sparsely populated state, Nebraska, and a state with a relatively small population, Vermont, are among these examples. Opponents bear a heavy burden in explaining how systems with such presumably high cost characteristics can be served at such reasonable interstate debit rates, net of commissions, while prison systems in highly populated states are costlier to serve.

Because opponents have failed to distinguish all of these examples from other state systems and other large correctional systems, or to explain why the costs of serving those systems are significantly different from the costs of serving other large systems, it must be

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<sup>31</sup> *See id.* ¶ 32. Assuming that Global has succeeded to AT&T's inmate service contract with the Nebraska Department of Corrections (*see* Pay Tel Comments at 8), Global has similarly failed to explain how it can provide interstate debit calling to prisoners in Nebraska correctional facilities for a rate equivalent to \$0.20 per minute on a 15-minute call, *see* Dawson Alternative Declaration ¶¶ 31, 42, but is unable to provide similar services to other large prison systems at similar rates.

<sup>32</sup> Dawson Alt. Reply ¶¶ 8, 12.

concluded that interstate inmate debit calling services can be provided profitably for all state and other large prison systems at the requested debit calling benchmark rate. Higher debit calling rates need not be considered in a comparable rates analysis because those rates would not be “consider[ed] in pricing . . . services” in a competitive market.<sup>33</sup>

Similarly, no party attempted to distinguish the cost characteristics of interstate inmate collect calling services for the Missouri, New Hampshire and New York correctional systems from the cost characteristics of providing interstate inmate collect calling services to other state and other large systems. The interstate inmate collect calling rates established in those contracts, net of commissions, are each below the requested interstate collect calling benchmark of \$0.25 per minute.<sup>34</sup> Again, it is revealing that such a small state, New Hampshire, is among these examples, demonstrating that it should be feasible to provide interstate collect calling service to any other state prison system at the requested benchmark rate.

PCS never explains how it is able to provide inmate interstate collect calling service to prisoners in Missouri correctional facilities for a rate equivalent to \$0.15 per minute on a 20-minute call, or to prisoners in New Hampshire correctional facilities for a rate, net of commissions, equivalent to \$0.23 per minute on a 20-minute call, but is unable to provide collect calling service to other prison systems at similar rates.<sup>35</sup> Mr. Dawson adds a fourth example, a Florida Department of Corrections contract providing interstate inmate collect calling, net of commissions, at a rate equivalent to a little over \$0.21 per minute for a 15-minute call. It must be concluded that interstate inmate collect calling service can be provided profitably at any state or other large prison system at the benchmark rate.<sup>36</sup>

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<sup>33</sup> *BTI*, 16 FCC Rcd at 12329. See Dawson Alt. Reply ¶¶ 12-14.

<sup>34</sup> See Alternative Proposal at 21-22; Dawson Alternative Declaration ¶¶ 42-43.

<sup>35</sup> See Dawson Alternative Declaration ¶ 42.

<sup>36</sup> Dawson Alt. Reply ¶¶ 5, 10-11.

Mr. Dawson also reviewed commercial long distance service rates as part of his comparable rates analysis. Once commercial rates are adjusted to include the additional security and other penological costs of inmate debit calling services, they can serve as comparable rates in determining reasonable interstate inmate debit calling rates. Because those composite comparable interstate debit calling rates are even lower than some of the comparable interstate inmate debit calling rates, they confirm the reasonableness of the requested debit benchmark.<sup>37</sup> Finally, Mr. Dawson used a cost analysis to determine the additional costs of interstate inmate collect calling over the cost of interstate inmate debit calling and confirmed the results of his comparable rates analyses with a cost analysis based on his previous analyses in this docket.<sup>38</sup>

## **2. Opponents Rely On Rates That Are Not Comparable To Challenge Petitioners' Comparable Rates Analysis.**

As Mr. Dawson points out, the T-NETIX/Evercom expert, Richard Cabe, misunderstands the comparable rates analysis in criticizing Petitioners for focusing only on the lowest inmate service rates. Because the purpose of the analysis is to determine the rate that would be set in a competitive market, there is no reason to examine rates that would not be competitive with the lowest, commercially viable rates. Opponents, who are in possession of all of the relevant cost data, did not demonstrate any service cost differences between the examples cited by Petitioners and other state prison systems. It must therefore be concluded that the higher inmate interstate service rates in other state correctional service contracts reflect higher profit, rather than cost differences.<sup>39</sup>

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<sup>37</sup> Dawson Alternative Declaration ¶¶ 34-38

<sup>38</sup> *Id.* ¶¶ 25-28, 39-41.

<sup>39</sup> See *Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9941 n.104 (2001) (“*CLEC Access Reform Order*”), *recon. denied*, 19 FCC Rcd 9108 (2004) (competitive local exchange carriers (“CLECs”) did not submit any data to justify their rates, relying only on “generalized assertions that their rates are justified by higher costs.”); *BTI*, 16 FCC Rcd at 12333. See Dawson Alt. Reply ¶¶ 14-16.



Another mistaken approach to the comparable rates analysis is represented by comments of a number of parties to the effect that commercial payphone operator service rates or other long distance collect rates are the appropriate comparison in determining reasonable inmate interstate service rates.<sup>40</sup> Mr. Dawson points out that commercial payphone rates and other long distance collect calling rates are not an appropriate comparison because commercial payphone callers and other collect callers have other options and use payphones or make collect calls as a matter of choice.

As the Commission explained, “[i]nmate calling is economically different than other payphone services. . . . [I]nmates have none of the alternatives available to non-incarcerated payphone customers.”<sup>41</sup> Commercial payphone and other operator service rates do not reflect actual costs but, rather, the convenience of using special features or not having to make alternative arrangements. Prisoners use collect calling services because they have no choice, not because they perceive any value to collect services. Because there is no showing that these collect calling service rates are cost-based, they serve no purpose in a comparable rates analysis.<sup>42</sup>

**D. Wide Variances In Costs Of Serving Different Customers Do Not Preclude Rate Averaging.**

Although opponents make no attempt to distinguish among different state prison systems, they argue that the cost of serving local and county jails is higher than the cost of serving large state systems and that this variety of cost characteristics precludes “one size fits all” uniform

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<sup>40</sup> CCA Comments at 9-10.

<sup>41</sup> *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, 3253 (2002) (“*Inmate Payphone Order*”). The Order on Remand will be cited as the *Inmate Payphone Order*, and the Notice of Proposed Rulemaking will be cited as the *Inmate Payphone Rulemaking*.

<sup>42</sup> Dawson Alt. Reply ¶ 17.

benchmarks.<sup>43</sup> Some opponents go so far as to suggest that each prison facility should have its own individualized cost-based rate.<sup>44</sup> It may be that smaller facilities have higher costs, but, as Mr. Dawson explains, that does not justify inaction. All carriers have customers that are more expensive to serve than others, but that has never precluded regulation or required different rates for each customer.<sup>45</sup> Typically, carriers provide each service at a rate that averages the cost of serving all of the customers of that service.<sup>46</sup> The Commission has “repeatedly rejected the proposition that rates . . . must be based on . . . the costs of actual facilities used to provide service to a particular customer.”<sup>47</sup>

As Mr. Dawson also notes, Pay Tel’s data shows that interstate calls constitute an extremely small percentage of all inmate calls from local and county jails, but a much larger percentage of the inmate calls from larger prison systems (although still a minority of all inmate calls). Given the much greater number of prisoners in state and federal prison facilities, relative to the number of prisoners in local and county correctional facilities, it can be assumed that the

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<sup>43</sup> GEO Group Comments at 10. *See also* Global Comments at 15; CCA Comments at 3, 5. CCA argues, at 6-7, that the Commission previously declined to limit inmate service rates because of the variety of prison facilities. In fact, that decision was based largely on the Commission’s prediction that the market would ultimately reduce inmate rates, which has not occurred. *See* Alternative Proposal at 12-15.

<sup>44</sup> GEO Group Comments at 10.

<sup>45</sup> *See FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979) (agency is not required “to adhere rigidly to a cost-based determination of rates, much less to one that bases each producer’s rates on his own costs”).

<sup>46</sup> *See New Valley Corp. v. Pacific Bell*, 15 FCC Rcd 5128, 5130 & n.10, 5136-38 (2000) (“*New Valley*”); *Private Line Rate Structure Guidelines*, 97 F.C.C.2d 923, 937-38 (1984) (“*Private Line*”).

<sup>47</sup> *New Valley*, 15 FCC Rcd at 5130 (citing *Private Line*, 97 F.C.C.2d at 934-41, for the proposition that “rate development should reflect average cost of providing service, not cost of equipment/facilities used to provide service to a particular customer”).

overwhelming majority of interstate inmate calls are made from state and federal prisons<sup>48</sup> Even assuming that inmate service costs are higher in the smaller facilities, averaging the costs of the relatively few interstate calls made from higher cost facilities with the costs of the vast majority of all interstate inmate calls made from lower cost prison systems will not have a significant impact on the average cost of interstate inmate calls. Thus, given the pattern of inmate calling in different types of facilities, there is no need to differentiate among types or sizes of prison facilities in establishing interstate benchmarks under the Commission's traditional average rate principles.<sup>49</sup>

**E. Inmate Service Providers Enjoy Significant Economies Of Scale.**

T-NETIX/Evercom, relying on its expert, also argues that there are no economies of scale in providing inmate calling services, implying that the size of the served facility is the sole determinant of the cost of service.<sup>50</sup> As Mr. Dawson explains, that cannot be the case. It is ludicrous to suggest that the cost of serving a given prison facility would be the same irrespective of the size and scope of operations of the service provider. Large carriers that serve hundreds or thousands of facilities, such as T-NETIX/Evercom, enjoy tremendous economies of scale. Even T-NETIX/Evercom admits that it “pioneered[] significant technological advances that have made service provisioning more efficient for facilities and less costly to carriers,” *i.e.*, it has realized economies of scale through the use of technology.<sup>51</sup> As in the case of other telecommunications

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<sup>48</sup> See Pay Tel Comments at 5-6, Exh. 1, 2 (showing that 34.1 percent of adult prisoners were held in local and county jails as of the end of 2005, and only 3.7 percent of inmate calls from local and county jails were interstate, whereas 12.3 percent of inmate calls from federal and state prisons are interstate).

<sup>49</sup> Dawson Alt. Reply ¶¶ 18-20. If a service provider could show that it carried a disproportionate percentage of interstate inmate calls from smaller, higher-cost facilities, it could seek a waiver of the benchmarks.

<sup>50</sup> T-NETIX/Evercom Comments at 6-8.

<sup>51</sup> *Id.* at 3.

carriers, most of the functions performed by inmate service providers, such as billing and collections, management, marketing, and customer support, are centralized.<sup>52</sup>

T-NETIX/Evercom attempts to disclaim any economies by stressing that “[t]he principal reason that economies of scale are difficult to attain is that the secure calling platforms for inmate services are necessarily provided based on the individual requirements of each correctional facility served” and that it therefore has to support “several different calling platforms.”<sup>53</sup> Even “several” platforms spread over thousands of served facilities, however, yield tremendous economies of scale.<sup>54</sup> Pay Tel apparently has more faith in T-NETIX and Evercom than they do. It states that “Evercom and T-NETIX merged in 2004 to form Securus Technologies, Inc. to provide better economies of scale.”<sup>55</sup> Similarly, Global states that it is constantly looking for ways to innovate in equipment, systems and centralization to reduce its costs,<sup>56</sup> *i.e.*, to improve its economies of scale. Claims that inmate service providers, especially those of the size of Securus Technologies or Global, do not enjoy economies of scale cannot be taken seriously and must be rejected.<sup>57</sup>

#### **F. Opponents’ Other Cost Arguments Should Be Rejected.**

Mr. Dawson also responds to several challenges to other aspects of the cost analysis provided in his Alternative Declaration. None of the Oppositions presents any reason to question the proposed benchmarks.

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<sup>52</sup> Dawson Alt. Reply ¶¶ 21-23.

<sup>53</sup> T-NETIX/Evercom Comments at 6-7.

<sup>54</sup> Dawson Alt. Reply ¶ 22.

<sup>55</sup> Pay Tel Comments at 8.

<sup>56</sup> Global Comments at 9-10.

<sup>57</sup> Dawson Alt. Reply ¶ 23.

**1. Dawson Used More Representative, Reliable Industry Data Than Did The Opponents.**

Pay Tel criticizes Mr. Dawson's reliance on 1999 inmate service provider data.<sup>58</sup> The 2002 service provider data that Pay Tel claims is more reliable, however, is actually less relevant than the 1999 data. As Pay Tel concedes, the 1999 data was based on costs from "all jail facilities in selected states, not just marginal facilities," whereas the 2002 data was derived exclusively from small, "marginal" county jails.<sup>59</sup> As Mr. Dawson explains, the 1999 data tended to yield higher than average costs because it was derived from jail facilities, but, for that reason, it provided a conservative analysis. The 2002 data, however, is far less representative than the 1999 data because it is derived only from the smallest, most "marginal" facilities. The resulting excessive cost estimate of \$0.329 per minute for a local call is an outlier that should not be taken into account in determining reasonable interstate inmate calling benchmarks, especially given the small volumes of interstate inmate traffic from small jail facilities.<sup>60</sup>

Mr. Dawson's use of industry data derived from inmate services provided to local and county jails also disproves the T-NETIX/Evercom assertion that Petitioners have ignored smaller, higher cost facilities.<sup>61</sup> Because Mr. Dawson considered the costs of serving a range of facilities, his overall cost conclusions are representative of the average cost of providing interstate inmate calling services.<sup>62</sup> T-NETIX/Evercom mischaracterizes his statement that state prison contracts with "higher inmate service rates" can be ignored.<sup>63</sup> That statement was in the context of his comparable rates analysis, which, as discussed above, focused on the inmate

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<sup>58</sup> Pay Tel Comments at 9-10.

<sup>59</sup> *Id.* at 10.

<sup>60</sup> Dawson Alt. Reply ¶¶ 28-31.

<sup>61</sup> T-NETIX/Evercom Comments at 9.

<sup>62</sup> Dawson Alt. Reply ¶ 32.

<sup>63</sup> T-NETIX/Evercom Comments at 9.

service rates that would have to be matched in a competitive market. Because significantly higher *rates* would not be competitive, they could be ignored in analyzing comparable rates. Mr. Dawson did not ignore facilities with higher *costs* in his cost analysis, as T-NETIX /Evercom suggests.<sup>64</sup>

**2. There Is No Reliable Evidence That Inmate Interstate Calling Costs Have Increased In The Past Few Years.**

Pay Tel argues that, unlike other segments of the telecommunications industry, most of its costs have increased tremendously since 1999, and especially since September 11, 2001, and lists those increased costs, as well as certain cost reductions, by category.<sup>65</sup> Because no relative weightings are assigned to each cost category, however, Pay Tel's unquantified listing conveys no useful information as to the overall extent of the change in its costs or even as to the direction of its costs. Thus, its overall costs could be lower if the reductions outweighed the increases, but there is no way to know. Even more significantly, there is no support provided for any of the alleged cost increases. As Mr. Dawson observes, if Pay Tel wants to demonstrate its cost of providing interstate inmate calling service, it should file a study showing all of its costs of providing interstate service to all of its served facilities, divided by its total interstate inmate calling minutes. Such a study, tied back to Pay Tel's ledgers, would be the type of showing needed to rebut Petitioners' cost analysis.<sup>66</sup>

Pay Tel also alludes repeatedly to the increased cost of inmate calling since 9/11, but it never cites one example of a category of costs that has increased due to increased homeland security concerns. Pay Tel provides an exhaustive list of the functions that it must perform to complete prison calls, but they look just like the functions that have been required for many

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<sup>64</sup> Dawson Alt. Reply ¶ 32.

<sup>65</sup> Pay Tel Comments at 11.

<sup>66</sup> Dawson Alt. Reply ¶ 34.

years, starting long before 9/11.<sup>67</sup> For example, they closely resemble the functions required in the 1997 BOP Request for Proposals attached to Mr. Dawson's Affidavit in support of the Wright Petition.<sup>68</sup> Inmate calling services have long included security measures to protect the public from fraud and other inmate conduct and did not arise suddenly after 9/11. Pay Tel does not explain how some service providers are able to perform all of these functions at interstate inmate rates, net of commission payments, that are lower than the requested benchmarks.

### **3. Petitioners Properly Analyzed The Differences Between Inmate Collect And Debit Calling.**

Pay Tel argues that Petitioners are too "simplistic" in analyzing the cost differences between inmate debit and collect calling.<sup>69</sup> As Mr. Dawson explained, however, in the prison environment, the main cost difference between these two services is how they are billed and paid. All of the differences between the two services that Pay Tel discusses relate to validation, billing and collections -- *i.e.*, how calls are billed and paid -- which is consistent with Mr. Dawson's statement.<sup>70</sup> Consolidated Communications Public Services, Inc. ("CCPS") also elaborates on the types of costs incurred in deploying a debit calling system, which also relate to validation, billing and collections.<sup>71</sup> The security requirements that generate the primary additional costs of inmate calling services, relative to other long distance services, are common to both types of calls.

Pay Tel is correct in pointing out that there are different features in the billing process for both types of calls. Debit calling requires verification of the caller's identity and that there are

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<sup>67</sup> See Pay Tel Comments at 18-24.

<sup>68</sup> Affidavit of Douglas A. Dawson, Exh. 3, *Section C, Statement of Work* (Oct. 29, 2003) (attached to Wright Petition).

<sup>69</sup> Pay Tel Comments at 14-16.

<sup>70</sup> *Id.* at 14.

<sup>71</sup> CCPS Comments at 10-12.

sufficient funds in the caller's account for the call. For collect calling, the primary additional cost, as Pay Tel and Mr. Dawson agree, is uncollectibles and bad debt, since so many collect calls are never paid by the receiving party. As CCA points out, bad debt accounts for as much as 25 percent of inmate collect call billings.<sup>72</sup> The additional collection and bad debt costs of inmate collect calling are much greater than the verification and accounting costs of inmate debit calling. Thus, as Mr. Dawson explained previously, the benchmark rate for inmate collect calling ought to be based on the benchmark rate for inmate debit calling, with an adjustment for the greater collection costs of collect calling. No party has seriously questioned that analysis.<sup>73</sup>

In fact, Pay Tel claims, with no support, that the billing and collections costs of collect calling add ten cents per minute.<sup>74</sup> PCS describes the additional billing and other costs incurred in providing inmate collect calling service, but does not offer a per minute figure that factors in these costs.<sup>75</sup> CCPS emphasizes the types of costs incurred in installing debit calling, but does not say what those costs are, relative to the collection and other additional costs of inmate collect calling.<sup>76</sup> Mr. Dawson previously demonstrated that the additional cost of collect calling is about five cents per minute. Even if the difference were closer to ten cents, however, the derived cost of inmate interstate collect calling would be less than the requested benchmark rate of 25 cents per minute.<sup>77</sup>

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<sup>72</sup> CCA Comments at 14.

<sup>73</sup> Dawson Alt. Reply ¶¶ 38-39.

<sup>74</sup> Pay Tel Comments at 13 (attributing \$1.00 of the cost of a ten-minute inmate call to billing and collection, validation, uncollectibles, unbillables and "post-billing adjustments").

<sup>75</sup> PCS Comments at 8-9.

<sup>76</sup> CCPS Comments at 10-12.

<sup>77</sup> Dawson Alt. Reply ¶ 40 & n.36.



#### **4. The Elimination Of Per-Call Charges Will Not Significantly Raise The Per-Minute Costs Of Interstate Inmate Collect Calls.**

CCPS and Pay Tel assert that without a set-up or other per-call charge, collect calls will be shorter but more frequent, which will raise the per minute cost of such calls.<sup>78</sup> It is not clear from the data presented that interstate collect calls will, in fact, be shorter but more frequent if there is no per-call charge. CCPS and Pay Tel both refer to their experiences with calls from county jails as a point of comparison, and Pay Tel also provides data relating to prepaid calls, without providing any information as to the jurisdiction or type of facilities generating the data.<sup>79</sup> It may be that interstate calling patterns are different from local and intrastate patterns, irrespective of whether there is a per-call charge. For most callers, interstate calls by their nature tend to be longer than intrastate calls. Without better data focusing on interstate inmate calls exclusively, no conclusions as to average call duration or frequency are possible.<sup>80</sup>

Moreover, even if there were reliable proof that interstate inmate collect calls would be shorter but more frequent in the absence of a per-call charge, CCPS and Pay Tel have provided no evidence to support the conclusion that per-minute costs will be greater as a result. Given the automated nature of collect calling services, opponents have not demonstrated that there are per-call costs independent of the total number of minutes of traffic. As explained in the Dawson Alternative Reply, the first minute of a call does not cause any greater cost than each subsequent minute, and the average length of a call does not affect costs.<sup>81</sup>

Pay Tel suggests that billing costs will increase if calls are shorter but more frequent.<sup>82</sup> Whatever impact shorter but more frequent calling might have on billing costs, however, such

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<sup>78</sup> CCPS Comments at 14-17; Pay Tel Comments at 13-14.

<sup>79</sup> CCPS Comments at 14; Pay Tel Comments at 13 n.28.

<sup>80</sup> Dawson Alt. Reply ¶ 25.

<sup>81</sup> *Id.* ¶ 26.

<sup>82</sup> Pay Tel Comments at 13.

impact will be dwarfed by the impact of more reasonable rates on uncollectible costs, which comprise a tremendous share of inmate collect calling costs. If the Commission imposes the requested inmate interstate collect calling benchmark of \$0.25 per minute, call recipients will be more able to pay their monthly long distance bills, greatly reducing uncollectibles. All of the service providers are likely to experience much lower uncollectibles with more reasonable collect calling rates. Those collections cost savings will far outweigh any potential impact of shorter more frequent calling on billing costs.<sup>83</sup>

Mr. Dawson also points out that there have been widespread reports of interrupted and dropped inmate collect calls, causing called parties to have to incur additional set-up charges for reinitiated calls. These problems, coincidentally, are not nearly as common in the case of inmate debit calls, which typically have no per-call charges. If the Commission were to include a per-call charge option in any interstate collect calling benchmark, it should also require that such a per-call charge be waived for any collect call reinitiated by the same prisoner to the same number within two minutes of the end of the previous call.<sup>84</sup>

**5. The Consolidation Occurring In The Inmate Calling Services Industry Does Not Demonstrate Low Interstate Inmate Calling Earnings Or High Interstate Inmate Calling Costs.**

Global and Pay Tel assert that large carriers are selling their inmate calling operations because they are so unprofitable and argue that their unprofitability reflects the high costs of interstate inmate services.<sup>85</sup> There is no evidence, however, that the inmate calling service industry consolidation that is occurring has anything to do with interstate inmate service costs or earnings. The combining of T-NETIX and Evercom under Securus Technologies in order to realize “better economies of scale” is hardly symptomatic of an industry in its final death

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<sup>83</sup> Dawson Alt. Reply ¶ 27.

<sup>84</sup> *Id.* ¶¶ 24, 28.

<sup>85</sup> *See, e.g.*, Pay Tel Comments at 8-9.

throes.<sup>86</sup> Large multi-service carriers like the Regional Bell Operating Companies sell operations for a variety of reasons. For example, Verizon is seeking approval to sell its northern New England landline properties to Fairpoint Communications. Most observers agree that, while the rural northern New England market is not important to Verizon and does not fit within its plans to become more of a large cap growth company, it would be quite significant to Fairpoint, which would have more incentive to invest in that market.<sup>87</sup>

Similarly, neither Pay Tel nor Global has suggested any reason to believe that the purchasers of the inmate payphone divisions being “unloaded” by other carriers were motivated by charitable or other non-economic goals. Presumably, Global bought the former MCI inmate calling operations from Verizon because it believes they can be profitable for Global.<sup>88</sup> Pay Tel’s woeful account of hard times for the inmate calling industry has to be discounted in the face of the reality that these units are being purchased. Moreover, no party has presented any data or other evidence that the supposed poor performance of any of the inmate service providers is caused even partly by earnings on interstate calling. As Pay Tel points out, interstate calling accounts for a small percentage of inmate traffic.<sup>89</sup> Also, given the disproportionate revenue contribution provided by the service providers’ interstate calling volumes, it is quite likely that the interstate traffic is a profit center for most of them, albeit a small one. The industry trends thus provide no clues as to the reasonableness of the proposed interstate benchmarks.<sup>90</sup>

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<sup>86</sup> *Id.* at 8.

<sup>87</sup> *Multiple Sticking Points Possible in Verizon-Fairpoint Deal*, State Telephone Regulation Report, Vol. 25, No. 2, Jan. 26, 2007.

<sup>88</sup> *See* Pay Tel Comments at 8.

<sup>89</sup> *Id.* at 6.

<sup>90</sup> Dawson Alt. Reply ¶¶ 43-44.

## **6. Opponents' Other Quarrels With Petitioners' Showings Are Not Credible.**

Opponents quibble about other aspects of the cost showing in the Dawson Alternative Declaration, such as claims that research and development costs were not taken into account and that the cost estimates were based entirely on the assumption of 20-minute inmate calls, but those assertions are directly contradicted by a review of the Dawson Alternative Declaration and should be rejected.<sup>91</sup> Pay Tel also asserts that Mr. Dawson misunderstood the role of local service charges in his cost analysis using industry data. Pay Tel claims that he failed to realize that local exchange line costs are an element of any inmate payphone service cost, including the cost of interstate services, and that he should have included those costs in his analysis instead of substituting "long distance retransmission costs" for them.<sup>92</sup>

As Mr. Dawson points out, however, large facilities typically use high-volume special access circuits to interconnect with the local exchange carrier central office for long distance traffic. It is the cost of those special access circuits that he correctly substituted for local line costs in his analysis.<sup>93</sup> In short, opponents have essentially confirmed Petitioners' cost showing and have presented no contrary data regarding inmate interstate service costs that conflict with the requested benchmarks.

### **III. DEBIT CALLING SHOULD BE A REQUIRED INMATE CALLING OPTION.**

#### **A. The Widespread Use Of Inmate Debit Calling Belies Its Claimed Security Risks And Administrative Burdens.**

The opponents repeat their previous dire predictions as to the potential security risks and administrative costs if debit calling is a required inmate calling option.<sup>94</sup> Petitioners previously

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<sup>91</sup> *Id.* ¶¶ 37, 41.

<sup>92</sup> Pay Tel Comments at 15-16.

<sup>93</sup> Dawson Alt. Reply ¶ 42.

<sup>94</sup> *See, e.g.*, GEO Group Comments at 15; T-NETIX/Evercom Comments at 13-14; CCPS Comments at 9-12; CCA Comments at 11-19.

addressed these arguments at pages 26-29 of their Reply Comments in support of the Wright Petition, relevant portions of which are appended hereto as Attachment B (“Reply Comments”).<sup>95</sup> Opponents assert that it is more difficult than Petitioners realize to apply a personal identification number (“PIN”) program in a prison environment, while admitting that more and more correctional facilities are providing debit calling.<sup>96</sup> In fact, one service provider reports that the majority of RFPs that it has responded to recently include provisions for debit services.<sup>97</sup> PCS points out that the often-expressed concern that debit cards or debit time can become contraband in prisons has not proven to be a major problem at prison facilities offering debit calling service.<sup>98</sup> The states of Colorado and Idaho are now providing the option of debit calling in their correctional facilities, which the Colorado Department of Corrections considers “a much better alternative” to collect calling,<sup>99</sup> and the Kentucky Department of Corrections reports that it is “aggressively pursuing a debit calling *card* program which achieves many of the same goals addressed by the Petitioners.”<sup>100</sup>

T-NETIX/Evercom, at 14, attempts to downplay its SecureVoice technology as a solution to the supposed security risks of debit calling, but it does not explain why the Commission

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<sup>95</sup> Petitioners’ Reply Comments at 26-29, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (April 21, 2004) (“Reply Comments”) (appended hereto as Attachment B).

<sup>96</sup> *See, e.g.*, Global Comments at 9.

<sup>97</sup> PCS Comments at 3. *See also* CCA Comments at 13 (debit calling available at more than half of its facilities).

<sup>98</sup> PCS Comments at 6-7.

<sup>99</sup> Letter from Brent D. Reinke, Director, Idaho Department of Correction, to FCC Commissioners, CC Docket No. 96-128, at 1 (Apr. 2, 2007); Letter from Sue Grisenti, Colorado Department of Corrections Inmate Phone System Coordinator, to Clyde Greene (June 7, 2007) (appended hereto as Attachment C).

<sup>100</sup> Letter from John D. Rees, Commissioner, Kentucky Department of Corrections, to Marlene H. Dortch, Secretary, FCC, at 3, CC Docket No. 96-128 (Mar. 22, 2007) (“Kentucky DOC Letter”) (emphasis in original).

should no longer trust its previous statements that T-NETIX's earlier PIN-LOCK® system “makes it practical for all correctional facilities to assign PIN numbers to inmates,” including high turnover institutions, and that “SECUREvoice works with existing inmate telephone systems to authenticate an inmate's [PIN] . . . with no administrative responsibility for the staff.”<sup>101</sup> The supposed cost and burden of a PIN system also cannot necessarily be attributed to debit calling, as some opponents suggest, since PINs are also used in connection with inmate collect calling to ensure that a prisoner's calls are restricted to an approved list of telephone numbers.<sup>102</sup> Opponents' concerns regarding debit calling thus are even less credible than they were three years ago.

Some of the opponents once again stress the supposed burden on prison staff of administering a debit card or debit account system.<sup>103</sup> They have never explained, however, why the service provider cannot handle the administration of the system, without prison “staff time, maintenance or cost,” as in the case of the Maryland inmate debit/prepaid calling service provided by T-NETIX.<sup>104</sup> Many of the prison staff functions described at pages 25-27 of Pay Tel's Comments, for example, such as responding to customer inquiries and administration of the PIN system, could be handled by the service provider instead.

For example, the Vermont and Missouri inmate calling service contracts discussed in the Proposal and Dawson Alternative Declaration provide for coordination between the calling service provider, PCS, and the prison commissary vendor selling debit account time, thereby

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<sup>101</sup> See Alternative Proposal at 24-25 (citation omitted).

<sup>102</sup> See CCPS Comments at 10 (arguing against debit calling because of the need to keep track of list of approved telephone numbers to call).

<sup>103</sup> See, e.g., Pay Tel Comments at 16.

<sup>104</sup> Maryland Department of Budget and Management Action Agenda, Information Technology Contract, Item 3-IT, at 26B (Dec. 17, 2003), attached as Exhibit 16 to Dawson Alternative Declaration.

relieving the prison administration of these functions.<sup>105</sup> In the case of the Missouri contract, PCS has entered into a teaming agreement with the prison canteen system manager “to create” a “seamless interface” “between the canteen system and the offender telephone system for the purpose of debit implementation.”<sup>106</sup> The canteen system manager also manages the PIN system.<sup>107</sup> Under this contract, “[t]here is no requirement for human intervention” in an inmate’s purchase of debit account time, and the automated system “DOES NOT require the purchase of physical debit cards.”<sup>108</sup> Similarly, under the Vermont contract, the canteen system manager selling debit account time is a subcontractor to PCS.<sup>109</sup>

PCS also notes that prison commissary vendors sometimes are reimbursed by inmate service providers for the cost of handling the sale of debit account time,<sup>110</sup> which is another way of offloading the administration of debit calling accounts onto the service providers. Opponents stress the cost of setting up debit accounts and selling debit account time as a factor that would

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<sup>105</sup> See Proposal at 19; Dawson Alternative Declaration ¶¶ 32, 42.

<sup>106</sup> State of Missouri Office of Administration, Notice of Award, Offender Telephone Service, Contract No. C205070001, Public Communications Services, Inc. (May 19, 2006) (“Missouri OTS Contract”), attachment, Letter from Joseph Pekarovic, Vice President of Inmate Sales, PCS, to John Stobbart, State of Missouri Office of Administration (Dec. 13, 2005), attaching *Points for clarification*, Sec. 3.4.2.c. The relevant portions of the Missouri contract are appended hereto as Attachment D.

<sup>107</sup> Missouri OTS Contract, attachment, Letter of Transmittal from Tommie Joe, Chief Operating Officer, PCS, to Ted Wilson, State of Missouri Office of Administration, responding to RFP (Sept. 16, 2005) (“Response to RFP”), Executive Summary at 9, and attachment, Teaming Agreement between Public Communications Services, Inc. and Huber and Associates (Aug. 1, 2005), Exh. A, Statement of Work at 1 (appended hereto as Attachment D).

<sup>108</sup> Missouri OTS Contract, Response to RFP, at 3-33 (appended hereto as Attachment D).

<sup>109</sup> Contract between State of Vermont, Department of Corrections, and Public Communications Services for Inmate Services, Contract No. 10314, Att. A, at 2, 5 (eff. Oct. 1, 2006). Relevant portions of the Vermont contract are appended hereto as Attachment E.

<sup>110</sup> PCS Comments at 6.

make a debit calling benchmark unworkable, but those costs become minuscule on a per-minute basis.<sup>111</sup>

**B. Prepaid Calling Would Not Be An Acceptable Option To Debit Calling In The Absence Of Stringent Consumer Safeguards.**

CCPS suggests prepaid calling, with call recipients prepaying for calls, instead of debit calling, as a way of avoiding call blocking and to secure the benefits of debit calling without the security risks.<sup>112</sup> Petitioners are aware of various prepaid inmate calling services, some of which hold some promise, but prepaid services have some drawbacks. Prepaid inmate calling service would not be an acceptable alternative to debit calling unless the Commission imposed stringent safeguards to prevent the abuses that often accompany the provision of prepaid inmate services.

Most importantly, interstate inmate prepaid calling service would have to be offered at the benchmark rate proposed for debit calling, with no additional billing or other fees. The additional monthly service charge that is often assessed for prepaid accounts or prepaid billing would have to be eliminated.<sup>113</sup> Prepaid accounts provide a significant billing and collections cost savings to service providers, and those savings should be passed on to the prepaid account bill payers. In fact, CCPS concedes that no per-call charge is necessary with a prepaid option, implicitly conceding that billing costs are not a problem with prepaid accounts.<sup>114</sup>

The Commission also should ensure that the service providers are completely responsible for informing inmates of the prepaid option and establishing the accounts, so that called parties do not have to contact the prison administrators and service providers repeatedly to set up the accounts. There should be no minimum amount required to set up a prepaid account, or at least

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<sup>111</sup> PCS Comments at 7; Dawson Alt. Reply ¶ 45.

<sup>112</sup> CCPS Comments at 12-13. *See also* CCA Comments at 20.

<sup>113</sup> *See* Letter from Clyde Greene to Colorado Department of Corrections (May 21, 2007) (appended hereto as Attachment F) (complaining of \$5.00 per month prepaid billing fee).

<sup>114</sup> CCPS Comments at 13.



no minimum above \$20, and parties should be able to fund or replenish accounts using credit cards, checks or money orders. The credit card option should be available by Internet. Also, the called party setting up the account should be automatically notified at the beginning of each call how much time remains in the account and should be able to access, by means of touch tones, the amount remaining at any time. With these conditions, inmate prepaid service would be a feasible alternative to inmate debit calling service.

#### **IV. OPPONENTS' LEGAL ARGUMENTS ARE IRRELEVANT AND INCORRECT.**

##### **A. Opponents' Legal Arguments Are Precluded By The Court's Referral.**

Opponents, once again, argue that their unreasonable rates and practices are clothed with state penal authority and are thus untouchable, especially before this Commission. For example, CCA, various inmate calling service providers and state correctional authorities argue that courts and this Commission have traditionally deferred to prison administrators in the area of inmate telephone services and that the Commission should continue to do so and “should not substitute its judgment for that of the correctional facilities and state and local governments.”<sup>115</sup> Similarly, CCPS argues that the Commission “should not attempt to regulate states’ exercise of their police powers to operate correctional facilities.”<sup>116</sup>

Petitioners have already responded to these distractions at length in their previous Reply Comments in support of the Wright Petition and incorporate by reference the relevant portions thereof, appended hereto as Attachment B. As Petitioners explained, the district court in the *Wright* case already found that the Commission is the appropriate forum to address all of the telecommunications-related issues presented by the *Wright* plaintiffs’ challenge to inmate

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<sup>115</sup> CCA Comments at 12. *See also* GEO Group Comments at 14; Global Comments at 4.

<sup>116</sup> CCPS Comments at 1-2.

telephone service arrangements, and the Commission must view every issue through the lens of the *Referral Order* and *Referral Opinion* in the *Wright* case.<sup>117</sup>

The court was quite detailed in its endorsement of the Commission's expertise and jurisdiction relevant to inmate calling service issues, finding that the Commission "has already developed the necessary specialized expertise on the underlying telephone technology, the telephone industry's economics, practices and rates" and has the "explicit statutory authority to regulate inmate payphone services in particular," including the "authority to consider the reasonableness of Plaintiffs' request to have access to other calling options," and the "security" implications of alternative options.<sup>118</sup> Having sought referral to the Commission,<sup>119</sup> CCA and Global cannot now attack the court's *Referral Order* by suggesting that the Commission may not resolve the issues referred to it.

In effect, the "division of functions between court and agency" "dictate[d]" in any referral to an expert agency<sup>120</sup> precludes the Commission from avoiding the "functions" assigned to it by the court. The effect of the court's specific and detailed findings as to the Commission's expertise and authority is very much like law of the case.<sup>121</sup> The Commission should not act "without regard to"<sup>122</sup> those findings by following opponents' jurisdictional advice.

The court's referral specifically addressed the opponents' arguments as to each aspect of the relief requested in the Alternative Proposal. Thus, the court concluded that "the FCC is clearly in the best position to resolve the core issues in this case, namely the reasonableness of

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<sup>117</sup> Reply Comments at 3-9 (appended hereto as Attachment B).

<sup>118</sup> *Referral Opinion* at 8.

<sup>119</sup> *Id.* at 4.

<sup>120</sup> *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 498 (1958).

<sup>121</sup> *Cf. United Gas Pipe Line Company*, 1985 FERC LEXIS 2521 at \*\*19 (June 19, 1985) (court's instructions to agency in remanding agency order constitute "law of this case").

<sup>122</sup> *Far East Conference v. United States*, 342 U.S. 570, 575 (1952).

the rates charged and the feasibility of alternative telephone arrangements in [prison] facilities.”<sup>123</sup> The court added that “the costs associated with serving inmate facilities” constitute one of the “factual issues” as to which the Commission could “assist the Court.”<sup>124</sup> The Alternative Proposal also requests that commission payments continue to be treated as profit, rather than a cost of providing service,<sup>125</sup> and the *Referral Opinion* found that the Commission is authorized “to reject inclusion in [service providers’] cost-basis of the . . . commissions received by [service providers].”<sup>126</sup>

Opponents also reprise their tired arguments against the Commission’s authority to require debit calling as a mandatory inmate service option. The court found, however, that “whether the alternative telephone arrangements Plaintiffs seek are technologically feasible given the exigencies of the prison environment” is one of the “issues that have been and continue to be best addressed by the FCC.”<sup>127</sup> Specifically, the court included issues presented by the use of “debit cards” and the “feasibility of other billing options” within the category of “factual issues” that the Commission should consider on referral.<sup>128</sup>

Even if the Commission were otherwise inclined to defer to private prison administrators in matters of inmate telephone services, it must still provide the expert advice requested by the court in any order it releases concerning these issues. Where a proceeding before the Commission “derives from a primary jurisdiction referral . . . the Commission’s discretion is

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<sup>123</sup> *Referral Opinion* at 10-11.

<sup>124</sup> *Id.* at 13 & n.12.

<sup>125</sup> Proposal at 20, 22-23.

<sup>126</sup> *Referral Opinion* at 7.

<sup>127</sup> *Id.* at 6.

<sup>128</sup> *Id.* at 13 n.12.

limited to some extent by the obligation to assist the court. . . .”<sup>129</sup> Here, the court directed the Commission to “provide . . . meaningful analysis and guidance”<sup>130</sup> on the “complex economic and technical issues” raised by the plaintiffs’ challenges to inmate calling service arrangements, which the court needs from the Commission to make the ultimate decision as to constitutional and other issues.<sup>131</sup> At the very least, the Commission could provide an advisory opinion to the court.<sup>132</sup> A failure to provide the requested advice, however, would short-circuit the dialogue contemplated by the court’s referral. The Commission should not be deterred from performing its assigned role because parties object to the scope of the referral.

**B. Opponents’ Legal Arguments Also Are Precluded By Section 201(b) And The Supremacy Clause.**

Even aside from the court’s referral, opponents’ objections based on the Commission’s authority ignore Section 201(b) of the Act and the constitution’s Supremacy Clause. Thus, CCPS complains that the Proposal seeks to “overrule states’ choice of rate structure” for inmate telephone services.<sup>133</sup> Global argues that the requested benchmarks would “encroach on broader aspects of prison governance,” “trample on local and state prerogatives” and “would implicate key questions regarding budgetary policy, prison security, and the availability of inmate calling services.”<sup>134</sup> The Kentucky Department of Corrections argues that the additional cost imposed on inmate calls by the payment of commissions is a form of “financial penalties” or “restitution”

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<sup>129</sup> *Petition of Home Owners Long Distance, Inc.*, 14 FCC Rcd 17139, 17145 (CCB 1999).

<sup>130</sup> *Referral Opinion* at 13, 15.

<sup>131</sup> *Id.* at 6.

<sup>132</sup> *Cf. Roberts Carrier Corp. v. Tamaqua Cable Products Corp. (In re Roberts Carrier Corp.)*, 157 B.R. 109, 116 (Bankr. D. Tenn. 1993) (on referral, Interstate Commerce Commission may issue advisory opinion to court).

<sup>133</sup> CCPS Comments at 3.

<sup>134</sup> Global at 11, 15.

“as part of an inmate’s sentence,” which is outside the Commission’s jurisdiction.<sup>135</sup> Embarq goes so far as to claim that “it is incontrovertible that states have the power to prohibit inmate calling altogether, so they must have the power to cause rates to be high.”<sup>136</sup>

State correctional authorities, however, have no jurisdiction over interstate telecommunications rates. As opponents concede, this Commission has the authority, and the duty, to ensure that all interstate telecommunications service rates, including inmate interstate rates, are just and reasonable under Section 201(b).<sup>137</sup> Under the Supremacy Clause of the U.S. Constitution, that federal policy overrides a state’s contrary choice of rate structure, whether that choice is ostensibly a matter of prison governance, restitution or budgetary policy. The Supremacy Clause provides:

This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>138</sup>

“The Supremacy Clause obliges the States to comply with all constitutional exercises of Congress’ power.”<sup>139</sup> State policies that “cause rates to be [unreasonably] high”<sup>140</sup> conflict with

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<sup>135</sup> Kentucky DOC Letter at 3.

<sup>136</sup> Embarq Comments at 1.

<sup>137</sup> T-NETIX Comments at 10 & n.16, 20, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (Mar. 10, 2004). *See also* Embarq Comments at 6 (acknowledging inmate service provider obligation to comply with just and reasonable rates requirement of Section 201).

<sup>138</sup> U.S. Constitution, Art. VI.

<sup>139</sup> *Bush v. Vera*, 517 U.S. 952, 991-92 (1996) (O’Connor, conc.).

<sup>140</sup> Embarq Comments at 1.

Section 201(b) -- “a conflict that the State cannot win.”<sup>141</sup> Thus, no state correctional, budgetary or other policies can stand in the way of interstate service benchmarks.

Moreover, the potential impact of federally-imposed benchmarks on state policies regarding commission payments is equally irrelevant. Just as a state policy imposing assessments against prisoners’ property “to help defray the cost of maintaining its prison system” was overridden by federal law,<sup>142</sup> state correctional policies imposing commission payments on inmate service providers need not be considered in determining whether to establish interstate inmate calling service benchmarks. Opponents’ arguments that the payment of commissions “should be resolved at the state level rather than through federal action,”<sup>143</sup> that any assertion of authority regarding commission payments would “pre-empt state jurisdiction,”<sup>144</sup> and that this Commission should not “regulate” the “assess[ment]” of commissions<sup>145</sup> accordingly are overridden by Section 201(b) and the Supremacy Clause, which preclude state nullification of federal telecommunications requirements on the basis of the ultimate cost to the state.

Furthermore, the supremacy of federal telecommunications regulation extends to all steps taken by the Commission pursuant to Section 201(b). That provision 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.”<sup>146</sup> As Petitioners explained in their previous Reply Comments, appended hereto as Attachment B, Section 201(b) was held in the *Competitive Networks* proceeding to provide ample authority to ensure reasonable rates by means other than prescribing rates,

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<sup>141</sup> *Bennett v. Arkansas*, 485 U.S. 395, 396-97 (1988) (barring state from attaching a prisoner’s Social Security benefits on the grounds that federal law exempts such benefits from attachment or other legal process).

<sup>142</sup> *Id.* at 396-97.

<sup>143</sup> CCPS Comments at 2.

<sup>144</sup> *Id.* at 7.

<sup>145</sup> *Id.* at 3.

<sup>146</sup> 47 U.S.C. § 201(b).

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.”<sup>147</sup> Similarly, the Commission required the provision of payphone call tracking by long distance carriers in order to ensure fair payphone compensation, in spite of their objections that the installation of tracking mechanisms would require significant expenditures.<sup>148</sup> Accordingly, contrary to opponents’ arguments, the Commission has the authority under Section 201(b), irrespective of any impact on state correctional and other policies, to require that debit calling be offered as an option in order to bring about more reasonable rates and to provide a “fresh look” option for inmate calling service providers needing to renegotiate their contracts to accommodate the benchmark rates.<sup>149</sup>

Even aside from the Supremacy Clause, the secondary effects of valid rate regulation within the Commission’s Section 201(b) authority on state restitutionary, penological or budgetary policies are irrelevant. As the D.C. Circuit explained in affirming the Commission’s regulation of carriers’ payments to entities not regulated by the Commission,

[N]o canon of administrative law requires us to view the regulatory scope of agency actions in terms of their practical or even foreseeable effects. Otherwise, we would have to conclude, for example, that the Environmental Protection Agency regulates the automobile industry when it requires states and localities to comply with national ambient air quality standards, or that the Department of Commerce regulates foreign manufacturers when it collects tariffs on foreign-made goods.<sup>150</sup>

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<sup>147</sup> *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983, 23000 n.85 (2000) (“*Competitive Networks*”) (citation omitted). See Reply Comments at 10-12 (appended hereto as Attachment B).

<sup>148</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541, 20588, 20590-91 (1996) (subsequent history omitted).

<sup>149</sup> See GEO Group Comments at 17 (arguing that Commission has no authority to interfere with contracts between carriers and non-carriers)

<sup>150</sup> *Cable & Wireless*, 166 F.3d at 1230.

Similarly, this Commission does not “regulate,” “pre-empt,” “overrule” or “encroach on” states’ authority over correctional, budgetary or penal policies by ensuring just and reasonable interstate rates for inmate calling services. State correctional spending may be affected by a wide variety of federal regulatory requirements, from environmental to labor to civil rights laws and regulations. That is simply a cost of doing the state’s business. Although forcing state governments to fund correctional facilities and services “through proper appropriations channels may result in a greater drain on the government’s finances, the responsibility for such [functions] does in fact rest with the government.”<sup>151</sup> There is no legitimate state security or penological interest in unreasonable rates that violate Section 201(b) of the Act.

**C. Opponents’ Legal Claims Also Are Irrelevant And Incorrect.**

Opponents raise a variety of miscellaneous legal objections that are either irrelevant or simply incorrect.

**1. The Alternative Proposal Does Not Request That Commission Payments Be Prohibited.**

Opponents’ overheated rhetoric regarding the inviolability of commission payments not only is precluded by the courts’ referral and the Supremacy Clause, but also is beside the point. Opponents argue that any relief affecting the commission payments extracted by the states from service providers would infringe on “the validity and lawfulness of states’ exercise of their police power”<sup>152</sup> to which the Commission should defer.<sup>153</sup> At least two parties misread the Alternative Proposal to request the outright prohibition of commission payments.<sup>154</sup>

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<sup>151</sup> *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994) (enjoining the use of commissary funds to finance monitoring of inmate telephone calls).

<sup>152</sup> CCPS Comments at 2.

<sup>153</sup> *See, e.g.*, Global Comments at 8.

<sup>154</sup> APCTO Comments at 2; GEO Group Comments at 16.



The Alternative Proposal, however, does no such thing. It does not request any restrictions on the payment of commissions by service providers to state correctional authorities or other entities, only on their accounting treatment in setting benchmarks. As long as service providers charge no more than the benchmark rates, they would be free to negotiate and pay commissions to state authorities. Under the Alternative Proposal, service providers would be free to negotiate and pay whatever level of commissions they choose, just as they are free to donate their revenues to charity or any other purpose (consistent with their fiduciary responsibilities to shareholders). Thus, one party's argument that the Commission may grant the requested relief only if it finds the commissions to be "unlawful or invalid" is a red herring.<sup>155</sup> The commissions may be lawful and valid, but they constitute profit.<sup>156</sup> The Alternative Proposal is based partly on the treatment of commissions as profit, not their legality.<sup>157</sup> In any

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<sup>155</sup> CCPS Comments at 4.

<sup>156</sup> Embarq, at 3-4 n.6, tries to argue, based on the *Inmate Payphone Order*, that the commissions only constitute profit for payphone providers, not for the inmate service providers. As the Commission made clear in that order, however, the same entity is the payphone provider and the service provider in the inmate payphone context. *See Inmate Payphone Order*, 17 FCC Rcd at 3261-62. Accordingly, commissions also constitute profit for the service providers because they are "location rents . . . and represent *an apportionment of profits between the facility owners and the providers of the inmate payphone service.*" *Id.* at 3262-63 (emphasis added). *See also id.* at 3256 ("considering that [inmate calling service] providers offer commissions, prison payphones are already profitable").

<sup>157</sup> Some commenters argue that "a portion" of the commissions is also used to defray the prisons' cost of providing inmate payphone services. Pay Tel Comments at 27. *See also id.* at 24-27; GEO Group Comments at 4. The record in this proceeding shows, however, that commission payments are used primarily for other purposes. GEO Group notes that commission payments generated by inmate telephone services at its facilities are used "to reduce the costs" of operating the facilities or for inmate benefits programs. GEO Group Comments at 4-5. *See also* Global Comments at 6-7 (listing purposes to which commission payments are put without including reimbursement of prison administrative costs of inmate payphone service); Embarq Comments at 3-4 (similar listing). Without more precise data showing the breakdown in the allocation of commission payments between reimbursement for the direct costs of providing inmate payphone service and other prison administration expenses and programs, it would not be appropriate to adjust the requested benchmark rates on the basis of such alleged costs. Given the bid-driven escalation in commission rates, it is extremely doubtful that a significant portion of

event, the Commission has the authority to regulate commission payments directly if it chooses to do so, just as it has the authority to regulate domestic carriers' settlements payments to foreign carriers.<sup>158</sup> The Commission therefore certainly may set benchmarks that affect commission payments indirectly.<sup>159</sup>

## 2. Opponents Mischaracterize The *Inmate Payphone Order*.

CCPS, Global and Embarq misrepresent the Commission's finding in the *Inmate Payphone Order* that "any solution to the problem of high rates for inmates must embrace the states."<sup>160</sup> The Commission was addressing the service providers' request for *additional* compensation for *local* inmate calls, which it denied partly on the ground that local inmate rate surcharges or preemption of state local inmate rate ceilings would not necessarily provide any relief to the service providers. The Commission explained that such local inmate rate increases would likely drive up service providers' commission payments, which would then absorb the rate increases.<sup>161</sup> Thus, the Commission's finding as to a state solution in that order pertained only to the commissions on local and other intrastate calls, not the commissions on interstate calls at issue in this proceeding.

Moreover, although the Commission correctly concluded that state correctional authorities may be able to frustrate the intent of an inmate payphone *surcharge* by raising commissions to absorb the surcharge, that conclusion does not imply an ability on the part of state authorities to nullify or veto Commission action *limiting* interstate inmate service rates

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commission payments can be attributed to prison administrative costs of inmate calling service. Dawson Alt. Reply ¶ 46.

<sup>158</sup> *Cable & Wireless*, 166 F.3d at 1231.

<sup>159</sup> *See id.* at 1230.

<sup>160</sup> *Inmate Payphone Order*, 17 FCC Rcd at 3260. *See* CCPS Comments at 5; Global Comments at 4.

<sup>161</sup> *Inmate Payphone Order*, 17 FCC Rcd at 3260.

under Section 201(b). Nothing in the Commission’s comment about state solutions suggests or implies that the Commission needs to seek state approval for the requested benchmarks

**3. Section 276 Of The Act Does Not Override Section 201(b) Or Permit Cross-Subsidization.**

Some of the service providers argue that Section 276 of the Act precludes the requested relief because it would result in less than “fair compensation.”<sup>162</sup> Pay Tel points out that the small share of its inmate traffic that is interstate generates a disproportionate share of its total revenue and argues that, because state commissions have imposed caps on intrastate inmate rates, benchmarks on interstate inmate rates would result in inadequate compensation overall under Section 276. It concludes that “the Commission could not even begin to consider imposing price caps on interstate calls without also reviewing the current cost and revenue structure of intrastate calls. . . .”<sup>163</sup>

Section 276, however, did not partially repeal or modify the Section 201(b) requirement that interstate rates be just and reasonable. The Commission previously rejected pleas to permit inmate service providers and other operator service providers to use interstate revenues to subsidize intrastate rates alleged to be “unfair[ly]” low, explaining that it “would . . . be an undue burden on interstate commerce to have costs of providing intrastate service to prison inmates cross-subsidized by interstate service ratepayers.”<sup>164</sup> Opponents have not explained why this holding, which was cited approvingly in the *Inmate Payphone Order*, should be changed.<sup>165</sup>

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<sup>162</sup> See, e.g., Global Comments at 12.

<sup>163</sup> Pay Tel Comments at 7.

<sup>164</sup> *Billed Party Preference for InterLATA 0+ Calls*, 13 FCC Rcd 6122, 6154-55, 6157 (1998), *mod.*, 16 FCC Rcd 22314 (2001).

<sup>165</sup> *Inmate Payphone Order*, 17 FCC Rcd at 3258 n.63.

Accordingly, the Commission not only may, but is also required to, set the requested benchmarks without reference to intrastate costs or revenues.<sup>166</sup>

#### **4. The Commission's Nondominant Regulation Policies Do Not Immunize Unreasonable Rates.**

GEO Group and Embarq argue that imposing benchmarks would contravene the Commission's nondominant regulation policies governing the competitive interexchange market.<sup>167</sup> GEO Group also argues, inconsistently, that the inmate calling service market was never intended to be competitive.<sup>168</sup> Whether or not inmate services should be competitive, however, interstate inmate service rates must be reasonable under Section 201(b).<sup>169</sup> Inmate service providers' nominal classification as non-dominant does not exempt them from the requirements of Section 201(b) that their rates and practices be just and reasonable or any of the other requirements of the Act.

The Commission and the courts have long held that nondominant carrier rates are subject to challenge under the Act and the Commission's rules and orders.<sup>170</sup> Where an otherwise non-dominant carrier offers service that is insulated from competition because other carriers have no

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<sup>166</sup> Pay Tel's complaint about low intrastate inmate rate caps also rebuts CCPS's theory that imposition of interstate benchmarks will induce arbitrage by inmates and their call recipients seeking to disguise intrastate inmate calls as interstate calls to get the benefits of lower rates. CCPS Comments at 7-9. If interstate benchmarks have any arbitrage effects at all, it would be to negate the arbitrage effects of the current intrastate rate caps, which presumably induce inmates and their call recipients to disguise interstate calls as intrastate calls.

<sup>167</sup> GEO Group Comments at 12-13; *See also* Embarq Comments at 4.

<sup>168</sup> GEO Group Comments at 13.

<sup>169</sup> Embarq, at 1, 6, also imagines that Petitioners do not claim that service providers are earning unjust or unreasonable profits under Section 201(b) from inmate calling. In fact, the basis for the Alternative Proposal is that interstate inmate rates are unjust and unreasonable under Section 201(b), relative to costs. *See* Proposal at 6-7, 11-12, 20, 22.

<sup>170</sup> *Halprin, Temple, Goodman & Sugrue v. MCI Telecommunications Corp.*, 13 FCC Rcd 22568, 22573 (1998), *recon. denied*, 14 FCC Rcd 21092 (1999). *See also* *CCN, Inc., et al.*, 12 FCC Rcd 8547, 8550-51 & n.11 (1997).

access to its end users, such carrier exercises market power, and its rates may not be presumed to be competitive or reasonable.<sup>171</sup> For example, the Commission concluded in a rulemaking proceeding that, because competitive local exchange carriers (“CLECs”) wield monopoly power over access to their end users, CLECs’ nondominant status does not preclude the imposition of benchmarks as to their access rates.<sup>172</sup> Similarly, the remedy sought by the Petitioners in this case provides redress for “nondominant interexchange carrier . . . prices, or . . . terms and conditions, that violate Section 201 . . . .”<sup>173</sup>

**5. The *Inmate Payphone Rulemaking* Provides Adequate Notice Of The Relief Requested In The Alternative Proposal.**

Contrary to Pay Tel’s procedural argument, the Commission’s consideration of the relief requested in the Alternative Proposal is entirely consistent with the notice and comment requirements of the Administrative Procedure Act (“APA”).<sup>174</sup> The APA requires the Commission to put parties on notice of potential new or modified rules by publishing in the Federal Register a notice of proposed rulemaking (“NPRM”) that describes “the subjects and issues involved.”<sup>175</sup> Pursuant to the APA, the *Inmate Payphone Rulemaking* appropriately was published in the Federal Register to notify interested parties that the Commission was considering new or modified rules in an effort to reduce inmate calling service rates, *inter alia*.<sup>176</sup>

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<sup>171</sup> See *BTI*, 16 FCC Rcd at 12323 (once a CLEC signs up an end user as a subscriber, it possesses a bottleneck monopoly on access to that subscriber, and its access rates cannot be assumed to be reasonable irrespective of other carriers’ access rates).

<sup>172</sup> *CLEC Access Reform Order*, 16 FCC Rcd at 9938.

<sup>173</sup> *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 20730, 20751 (1996) (subsequent history omitted).

<sup>174</sup> See 5 U.S.C. § 553(b).

<sup>175</sup> *Id.* § 553(b)(3).

<sup>176</sup> See 67 Fed. Reg. 17036 (Apr. 9, 2002).

As the public notice seeking comment on the Alternative Proposal explained, the Alternative Proposal addresses the same issues that are raised in the rulemaking:

The Commission is currently examining long distance telephone service rates imposed on inmates and their families in an ongoing proceeding regarding the provision of inmate payphone service. The Alternative Proposal is responsive to the issues being examined in [the] *Inmate Payphone Rulemaking* and raises important questions that should be addressed in that proceeding.<sup>177</sup>

Other commenters agree that the Alternative Proposal raises the same issues that are present in the *Inmate Payphone Rulemaking*. In fact, T-NETIX/Evercom argues that the Alternative Proposal is “a belated replication” of the *Inmate Payphone Rulemaking*, which raised “precisely the issues that Petitioners have raised.”<sup>178</sup> Thus, contrary to Pay Tel’s assertion, a new rulemaking proceeding is unnecessary for the Commission to consider the Alternative Proposal.

Pay Tel erroneously claims that the *Inmate Payphone Rulemaking* only sought comment on the limited issues of local inmate calling services and how inmate calling service providers could improve their profitability and cost structures.<sup>179</sup> Pay Tel’s argument, however, ignores specific language in the *Inmate Payphone Rulemaking* indicating that the proceeding is not restricted to these issues. The Commission requested comment “on costs associated with the provision of inmate calling services” without placing jurisdictional restrictions on its inquiry.<sup>180</sup>

The Commission specifically indicated that the rulemaking was broader than just local inmate calling rates:

The cost data contained in the record of that proceeding did not establish . . . that [service providers] do not recover . . . the total costs of their *interstate* and *intrastate* calls. *We seek additional data, to the extent such data can be developed, that might overcome the problems we identified.* In particular, we seek cost and revenue data related to local collect calls made from confinement

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<sup>177</sup> *Public Notice*, *supra* note 1.

<sup>178</sup> *See* T-NETIX/Evercom Comments at 1, 5.

<sup>179</sup> *See* Pay Tel Comments at 3-4.

<sup>180</sup> *Inmate Payphone Rulemaking*, 17 FCC Rcd at 3276.

facilities, separate from data related to other services offered by payphone providers. *We also seek support and justification for any costs related to inmate calling services.* . . .<sup>181</sup>

The Commission thus doubly emphasized that it sought data regarding the costs of interstate inmate calls. In particular, the juxtaposition, in the last two quoted sentences, of “cost and revenue data related to *local* [inmate] collect calls” with the Commission’s statement that “[w]e also seek” data regarding “*any costs* related to inmate calling services” confirms that “any costs” was intended to include all jurisdictional categories of inmate services.

The Commission sought comment on multiple factors that may affect the inmate calling market, including but not limited to, the ability for inmate calling providers to recover the costs of interstate and intrastate calls.<sup>182</sup> The *Inmate Payphone Rulemaking* also discussed the BOP’s local, long distance and international inmate calling rates, further indicating that the rulemaking proceeding encompasses the interstate inmate calling service market.<sup>183</sup> Moreover, the *Inmate Payphone Rulemaking* was not focused solely on service providers’ interests, but also on the issue of “whether the current regulatory regime applicable to the provision of inmate calling services is responsive to the needs of . . . inmates, and, if not, whether and how we might address those unmet needs.”<sup>184</sup>

Other parties certainly did not take Pay Tel’s artificially crimped view of the scope of the *Inmate Payphone Rulemaking*. In response to that NPRM, the RBOC Payphone Coalition vehemently argued against Commission regulation of interstate inmate calling rates or any

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<sup>181</sup> *Id.* at 3277 (emphasis added).

<sup>182</sup> *See id.* at 3276-79.

<sup>183</sup> *See id.* at 3278 & n.178.

<sup>184</sup> *Id.* at 3276.

Commission action that might affect commission payments.<sup>185</sup> WorldCom also discussed the factors that affect interstate inmate rates and argued that commission payments do not cause higher intrastate or interstate inmate rates. WorldCom also argued that those rates did not subsidize intrastate services and that the use of debit calling would not significantly reduce interstate inmate rates.<sup>186</sup> Citizens United for the Rehabilitation of Errants (“CURE”) took the opposite side of most of these positions.<sup>187</sup> The Alternative Proposal thus does not raise any issues not already raised in the *Inmate Payphone Rulemaking*.

Even if the Commission concludes that the *Inmate Payphone Rulemaking* did not raise the precise issues addressed in the Alternative Proposal, the latter is still a “logical outgrowth” of the pending rulemaking.<sup>188</sup> As Pay Tel concedes, the *Inmate Payphone Rulemaking* raised issues relating to the costs of inmate payphone services and the effect of commissions on inmate calling rates. Even if Pay Tel were correct that the *Inmate Payphone Rulemaking* expressly addressed only intrastate inmate services, the comments discussed above demonstrate that the issue of interstate inmate calling costs and rates “was an issue ‘on the table’ and a subject ripe for comment.”<sup>189</sup> The *Inmate Payphone Rulemaking* invited “support and justification for any costs related to inmate calling services” and comment on “how we might address . . . unmet [inmate] needs.”<sup>190</sup> The open-ended nature of the *Inmate Payphone Rulemaking* and the comments filed

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<sup>185</sup> RBOC Payphone Coalition 2002 Comments at 4-5, 7-8. Comments filed in response to the *Inmate Payphone Rulemaking* in CC Docket No. 96-128 on May 24, 2002 will be cited in this abbreviated manner.

<sup>186</sup> WorldCom 2002 Comments at 7-13.

<sup>187</sup> CURE 2002 Comments at 3-10.

<sup>188</sup> See *National Exchange Carrier Association v. FCC*, 253 F.3d 1, 4 (D.C. Cir. 2001) (explaining that if an issue is a logical outgrowth of a rulemaking proceeding, a new round of notice and comment is unnecessary under the APA).

<sup>189</sup> *1998 Biennial Regulatory Review - Streamlining of Mass Media Applications, Rules and Processes*, 14 FCC Rcd 17525, 17535 (1999) (“1998 Review”).

<sup>190</sup> *Inmate Payphone Rulemaking*, 17 FCC Rcd at 3276-77.



in response make it especially clear that interstate inmate service providers and correctional facilities administrators “were put on notice that ‘their interests were at stake.’”<sup>191</sup>

In these circumstances, a new NPRM was not necessary to “provide commenters with their first opportunity to offer new and different criticisms that the agency might find convincing.”<sup>192</sup> The relief requested in the Alternative Proposal is “in character with the” matters raised in the *Inmate Payphone Rulemaking* and was “foreshadowed in proposals and comments advanced during the rulemaking.”<sup>193</sup> Such relief thus would not be “so removed from the considerations noticed in the” *Inmate Payphone Rulemaking* “that it cannot be considered their logical outgrowth.”<sup>194</sup> As long as a NPRM requests comment “on ways to accommodate” the different interests reflected in the final rule and identifies “problems surrounding” the conflicting interests, the final result is a logical outgrowth of the NPRM.<sup>195</sup>

Even prior to the filing of the Wright Petition, CURE and the Coalition of Families and Friends of Prisoners of the American Friends Service Committee (“AFSC”) urged the Commission in the same docket to impose an interim rate cap on interstate inmate calling rates until the inmate calling market became subject to meaningful competition.<sup>196</sup> CURE and AFSC

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<sup>191</sup> *1998 Review*, 14 FCC Rcd at 17534 (citations omitted).

<sup>192</sup> *Id.*

<sup>193</sup> *South Terminal Corp. v. EPA*, 504 F.2d 646, 658 (1st Cir. 1974) (“*South Terminal*”).

<sup>194</sup> *Public Service Comm’n of the District of Columbia v. FCC*, 906 F.2d 713, 717 (D.C. Cir. 1990).

<sup>195</sup> *Amendment of Part 90 of the Commission’s Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, 12 FCC Rcd 13942, 13959 (1997). See also, e.g., *South Terminal*, 504 F.2d at 658-59; *1998 Review*, 14 FCC Rcd at 17534-35.

<sup>196</sup> See CURE and AFSC Comments at 9-10, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (June 21, 1999); CURE and AFSC 1999 Reply Comments at 10, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (July 21, 1999). These comments were filed in response to FCC

also provided the Commission with data regarding high intrastate and interstate inmate calling rates.<sup>197</sup> Similarly, North Carolina Prison Legal Services, Inc. (“NCPLS”) implored the Commission to take action against “unjustifiable and disgraceful” interstate inmate calling service rates that continue to increase.<sup>198</sup>

Thus, it is clear that inmate calling service providers have been on notice for several years that the issue of interstate inmate calling rates “was an issue ‘on the table’ and a subject ripe for comment.”<sup>199</sup> In fact, the issue developed out of inmate calling service providers’ own efforts to expand a previous NPRM to include inmate payphones.<sup>200</sup> The Referral Opinion that gave rise to the Wright Petition and the Alternative Proposal also concluded that:

[T]he FCC is currently considering challenges to the very same rates and practices challenged by Plaintiffs in this action. In particular, the pleadings in that proceeding raised the principle issues raised by the pleadings in this case: the reasonableness of inmate telephone rates and the feasibility of different calling options, such as debit cards. . . . The pendency of nearly identical claims before the FCC makes invocation of the primary jurisdiction in this case particularly suitable.<sup>201</sup>

Accordingly, the Commission’s consideration of the relief requested in the Wright Petition and Alternative Proposal is entirely consistent with the notice and comment requirements of the APA.

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Public Notice, *The Common Carrier Bureau Asks Parties to Update and Refresh Record for the Inmate Payphone Service Proceeding*, 14 FCC Rcd 7085 (1999) (“1999 Inmate Public Notice”).

<sup>197</sup> See Letter from Christopher R. Bjornson, Counsel to CURE, to Adam Candebub, FCC, CC Docket No. 96-128 (Dec. 18, 2000).

<sup>198</sup> Letter from Michael S. Hamden, NCPLS, to Chairman William Kennard, FCC, CC Docket No. 96-128 (May 9, 2000).

<sup>199</sup> *1998 Review*, 14 FCC Rcd at 17535 (citations omitted).

<sup>200</sup> *1999 Inmate Public Notice*, 14 FCC Rcd at 7085-86.

<sup>201</sup> *Referral Opinion* at 9-10 (citing the *1999 Inmate Public Notice*).

The cases cited by Pay Tel are not to the contrary. The *Sprint* case concluded that the Commission failed to provide adequate notice and opportunity to comment in much different circumstances.<sup>202</sup> There, the Commission completely changed the payphone compensation rules that were adopted in a previously issued rulemaking order without issuing a new NPRM.<sup>203</sup> In this case, not only does the Alternative Proposal raise the same issues on which the Commission sought comment in the *Inmate Payphone Rulemaking*, but no order has been issued in response to the latter. *Sprint* would be relevant only if the Commission had released an order resolving all of the issues raised in the *Inmate Payphone Rulemaking* and subsequently adopted the relief requested in the Alternative Proposal without a new proper notice and comment proceeding. In those circumstances, parties might not have been put on notice that the relevant issues were still in play, having seemingly been resolved in a prior rulemaking order.

*MCI* is equally inapposite.<sup>204</sup> The D.C. Circuit in *MCI* concluded that the Commission violated the APA because it did not provide parties with adequate notice that it was considering modifying or abolishing certain rules regarding access services (so called “feature groups”) that Bell Operating Carriers provided to interexchange carriers (“IXCs”).<sup>205</sup> In that case, the NPRM raised only the development of access policies for enhanced service providers, not for IXCs. The Commission only made a passing reference to IXC access services in a footnote buried in the background section of the NPRM. In contrast, the *Inmate Payphone Rulemaking* clearly provided notice that the Commission is considering changes to its rules and policies regarding the inmate calling service market, including interstate inmate calling. Moreover, the open-ended nature of the *Inmate Payphone Rulemaking* regarding inmate service rates and costs and the

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<sup>202</sup> *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003) (“*Sprint*”).

<sup>203</sup> *See id.* at 373, 375-76.

<sup>204</sup> *MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136 (D.C. Cir. 1995) (“*MCI*”).

<sup>205</sup> *See id.* at 1140-43.

comments filed before and after its release confirm that parties involved in interstate inmate service calling issues “were put on notice that’ their interests were at stake.”<sup>206</sup>

## **6. The Alternative Proposal Is Not Premature.**

Contrary to the assertions of T-NETIX/Evercom, the Alternative Proposal is not “premature” and does not “prejudge[]” the pending Family Telephone Connection Protection Act of 2007 (“FTCP Act”) introduced by Bobby Rush (D. Il.).<sup>207</sup> The FTCP Act merely states that “Congress finds it necessary and appropriate to *reaffirm* that the Commission has the authority to implement the types of relief” requested in the Wright Petition and the Alternative Proposal.<sup>208</sup> The Commission does not need to wait until the FTCP Act is enacted to assert its 70-year old authority under Section 201(b) of the Act to ensure that rates, terms and conditions for interstate inmate calling services are just and reasonable. Rather, the FTCP Act simply directs the Commission to address the issues raised in the pending *Inmate Payphone Rulemaking* proceeding within a certain period of time. The Commission has an obligation to do so in any event because of the *Referral Order*.

## **V. THE REQUESTED RELIEF IS NECESSARY NOW.**

Opponents present a variety of excuses to postpone any action by the Commission. Based on the examples of inmate calling rates supporting Petitioners’ comparable rates analysis, opponents proclaim that no further relief is necessary because “[t]he free market is working.”<sup>209</sup>

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<sup>206</sup> *1998 Review*, 14 FCC Rcd at 17534. It should also be noted that the APA’s notice and comment procedures satisfy the “hearing” requirement of Section 205(a) of the Act. *American Tel. & Tel. Co. v. FCC*, 572 F.2d 17, 22-23 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978). GEO Group’s argument, at 11-12, that the Commission could not establish the requested benchmarks in this proceeding because of the Section 205(a) hearing requirement thus must be rejected.

<sup>207</sup> T-NETIX/Evercom Comments at 5-6. *See* Family Telephone Connection Protection Act of 2007, H.R. 555, 110th Cong. (“FTCP Act”).

<sup>208</sup> FTCP Act § 2(15) (emphasis added).

<sup>209</sup> PCS Comments at 4. *See also* CCA Comments at 2.

The examples cited by Petitioners do not show that relief is unnecessary, as opponents wish, but, rather, that the requested relief is reasonable and thus must be granted to ensure just and reasonable rates under Section 201(b).

As Mr. Dawson points out, because of the nature of the inmate calling service market, competition for contracts will not lead to reduced service rates over time. Service rates are reduced because of legislation or prison administrators' or other officials' choices.<sup>210</sup> Accordingly, the great majority of prisoners and their families still pay unreasonable interstate rates and will continue to do so for the foreseeable future in the absence of relief. As GEO Group admits, the inmate payphone market will never be competitive on its own.<sup>211</sup> The enforcement of Section 201(b) cannot be left to the unfettered discretion of state and local officials.

The Commission should not be distracted by threats that service providers will discontinue inmate calling services or that correctional officials will withdraw telephone privileges if the requested benchmarks are established.<sup>212</sup> Some correctional agencies have reduced commissions on their own, belying any suggestion that the states cannot function without such commissions.<sup>213</sup> Service providers will be protected by the proposed fresh look transition, during which they can renegotiate their contracts with correctional administrators to ensure that the service providers continue to earn a reasonable profit on their interstate inmate services.

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<sup>210</sup> Dawson Alt. Reply ¶¶ 6-7; Global Comments at 9.

<sup>211</sup> GEO Group Comments at 13.

<sup>212</sup> *See, e.g.*, T-NETIX/Evercom Comments at 12; Global Comments at 17-18; Embarq Comments at 6-7.

<sup>213</sup> PCS Comments at 3.

CCA argues that imposing benchmarks “retroactively” by terminating existing contracts through a fresh look option would be arbitrary and capricious.<sup>214</sup> Given that corrections departments are increasingly renegotiating inmate calling service contract terms after the contracts have been awarded in order to reduce rates and commission payments, the proposed fresh look transition would hardly be a significant interference in correctional policies.<sup>215</sup> Moreover, because the benchmarks will not affect the vast majority of inmate traffic that is local and intrastate, inmate intrastate calling arrangements can continue and, as a practical matter, account for the great bulk of the service revenue and commission payments. Thus, interstate inmate benchmarks will not severely curtail total commission payments or cause correctional officials to have to make significant resource decisions.

## **VI. CONCLUSION**

For the reasons set forth above and in the Dawson Alternative Reply, as well as in the Alternative Proposal, Petitioners request that, in the event that the Commission does not grant the relief proposed in the Wright Petition, it establish the benchmarks requested in the Alternative Proposal, require that debit calling be offered as an option and provide a fresh look transition to enable service providers to renegotiate service contracts in light of the benchmarks. In the alternative, if the Commission determines not to order the requested relief, it should, at the very

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<sup>214</sup> CCA Comments at 21.

<sup>215</sup> See PCS Comments at 3.

least, provide the advice requested by the *Wright* referral as to the technical and economic feasibility of the relief requested in the Alternative Proposal.

Respectfully submitted,

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