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October 15, 2015

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-B204
Washington, DC 20554

RE: Rates for Inmate Calling Services: WC Docket No. 12-375

Dear Secretary Dortch,

The New York University School of Law Immigrant Rights Clinic (IRC) and the New Jersey Advocates for Immigrant Detainees (NJAID), along with the New Jersey Institute for Social Justice, the American Civil Liberties Union of New Jersey, and LatinoJustice PRLDEF file a joint comment in the above-referenced proceeding.¹ IRC is a leading institution in both local and national struggles for immigrant rights, representing immigrants and immigrant rights organizations in their cases and campaigns. NJAID is a coalition of civic and religious organizations whose goals include bringing attention to the plight of immigrant detainees in New Jersey correctional facilities and working to improve the conditions of those institutions.

IRC and NJAID have consistently investigated the New Jersey county jails' phone plans and find that the high rates create debilitating burdens for the people held in the facilities as well as their families. The burden is especially heavy for immigrant detainees who lack the right to counsel and rely heavily on phone communication to gather evidence and testimony in order to fight their cases *pro se*. Given the continued sacrifices made by millions of families to pay unreasonable

¹ The views expressed herein represent the views of the Immigrant Rights Clinic and not necessarily those of New York University or its affiliates. This comment was written by Andrea Savdie '16 and Sonya Chung '17 under the supervision of Alina Das, Associate Professor of Clinical Law, for IRC and NJAID. Coalition Members include American Friends Service Committee (AFSC) Immigrant Rights Program; Casa de Esperanza; the Episcopal Immigration Network; Lutheran Office of Governmental Ministry in NJ; NJ Association on Correction; NJ Forum for Human Rights; Pax Christi NJ; Middlesex County Coalition for Immigrant Rights; Monmouth County Coalition for Immigrant Rights; People's Organization for Progress- Bergen County Branch; the Reformed Church of Highland Park; Sisters of St. Joseph of Chestnut Hill ESL; Unitarian Universalist Congregation at Montclair; IRATE & First Friends.

phone bills, the 2013 Order by Federal Communications Commission (“FCC” or “Commission”) capping interstate ICS rates provided much needed relief leading to significant progress both in New Jersey and around the country. Yet, as FCC Commissioner Clyburn has stated herself², interstate caps were only a first step. These caps plugged a gaping hole in the rights of incarcerated persons and their families, but left the economic abuse to leak through other holes, namely intrastate and international calls, commissions, and ancillary fees.

The Commission’s proposed rule will therefore come as welcome relief to the many families who still pay exorbitant rates for instate calls and are price-gouged on international calls as well, despite the Commission’s previous step to regulate interstate calls. At the same time, the Commission should take note that some states and localities have taken positive steps and have negotiated contracts with ICS providers at far lower rates than the rates proposed in this rule, which indicates that the Commission can go even further than it has proposed. As explained below, we see both examples in New Jersey, where after the Commission’s first order and a community campaign, the state entered into a contract with no commissions that offers a rate of 4.5 cents per minute for all domestic calls – a significantly lower rate than those proposed in the rule. Yet several counties within New Jersey continue to negotiate exorbitant commissions and rates higher than even the Commission’s new order would permit. Their actions demonstrate that without comprehensive regulation, bad actors will continue to place profits over the needs of families and the community as a whole.

We therefore submit these comments in support of the Commission’s proposed order while also urging the Commission to go further and to ensure that any state or local actions that have negotiated lower rates than those proposed are not eroded.

Summary of Comments

These comments are a result of findings from continued engagement with local New Jersey leaders, regular visits meeting with people held in county jails and facilities, and conversations with families who have been and continue to be affected by high phone rates in New Jersey.

The comments below are divided into two parts. First, we provide current information on phone rates in New Jersey facilities, showing how counties have negotiated lower rates for families than those in the FCC proposed rule, as well as other counties with rates that continue to strain families. Second, we discuss the effects of the new FCC proposal in New Jersey, highlighting the four counties that will most benefit from the FCC proposed rate caps, and raise concerns on behalf of families living in counties that have already gone further in providing phone justice. In summary, the benefits and concerns are as follows:

² Mignon Clyburn, “Another Step Toward Fairness in Inmate Calling Services,” FCC.gov (Sept. 30, 2015, 12:46 PM), <https://www.fcc.gov/blog/another-step-toward-fairness-inmate-calling-services>.

Benefits

- The FCC proposal as it stands now will grant welcome relief to the four New Jersey counties with independent contracts with ICS providers where phone rates currently exceed the caps proposed by the FCC.
- The FCC proposal will significantly decrease phone rates for international calls in New Jersey immigration detention facilities.

Concerns

- The FCC proposal does not reflect the lowest possible rates in light of recent state and local victories where commissions have been eliminated. New Jersey's current state contract with Global Tel*Link sets the domestic phone rate to approximately 4.5 cents per minute, or 66 cents for a 15-minute domestic call, which is a lower rate than the capped rate proposed by the FCC. This discrepancy demonstrates that ICS providers can and will offer lower rates than what some providers have argued during this rulemaking process, particularly where commissions have been eliminated.
- This discrepancy also highlights the importance of preventing ICS providers from using the higher FCC rates as a reason to deviate from hard-fought victories in states or counties that currently have better rates when a new contract is negotiated. For example, in addition to the discrepancy with the New Jersey State contract, the FCC proposed caps are higher than the current rates for local calls from Bergen County Jail. Should Bergen County Jail, or any similarly-situated institution, re-negotiate their contract with an ICS provider, the FCC cap would not serve its purpose of encouraging more affordable rates.

Recommended Improvements

Lower caps. We urge the FCC to set lower caps, and at minimum, emphasize and encourage states that have already negotiated more affordable rates to keep those rates. The rates ultimately proposed by the Commission will be considered an adequate standard, especially by counties that will have to lower their rates to be in compliance. In all likelihood, those localities will set rates as high as the cap. However, the New Jersey rates show that lower caps would be feasible for the jails and service providers, while granting greater relief to people held in the facilities and their families. Though the current FCC proposed rates should be considered a safeguard to encourage the most affordable rates, actually setting lower caps would compel counties, who otherwise would not be motivated to do so, to negotiate for the lower, feasible rates.

Commissions should be altogether banned. The FCC's proposal can go further in providing relief for New Jersey families and others across the country by banning commissions. Phone companies pay millions of dollars in commissions to win contracts. This inevitably drives up the cost of phone calls as the companies then charge fees to pass on the price of commissions to consumers. An outright ban on commissions would remove the profit motive from re-negotiating higher rates. Jails and phone companies argue that the fees are legal and are used to pay a range of expenses for jails and prisons, as well as local governments. However, the vulnerable families

of people held in jails should not be required to shoulder such expenses. The Commission has the statutory authority to ban commissions altogether, pursuant to sections 201(b) and 276 of the Telecommunications Act of 1996. At a minimum, the FCC should ensure that states and localities set rates that are cost-based, so that commissions may not be considered when negotiating the rate for consumers, even if that means that the cost-based rates falls well below the applicable rate cap.

Comments

I. New Jersey Phone Rates and Commissions

A. Intrastate Overcharges

All state facilities and many county jails in New Jersey chose Global Tel*Link (GTL) to provide phone services either through a contract entered into by the State of New Jersey or independently. Following the FCC's initial 2013 Order, the New Jersey State Department of Corrections eliminated the 41 percent commission from their phone contract in February 2014. New Jersey took an important step to ensure fairer and more affordable ICS rates in April of 2014, by transitioning to a new contract, No. 88935³, which reduced jail phone rates to approximately 4.5 cents per minute. Unlike the last contract, the new state contract only allows county jails to opt in at the same rate and terms as state facilities, and as of last month, 17 of 21 New Jersey county jails were opted in to the state contract. The four counties that contract for their phone services independently – Bergen County, Cape May, Passaic, and Salem – continue to charge exorbitantly high rates and collect unjustifiable commissions.

As shown in Table 1 below, the counties that did not opt in to the state contract demonstrate the arbitrary results of uneven ICS regulation that only addressed interstate rates without similarly capping intrastate and international rates. For example, Bergen County, which has an independent contract with GTL, currently collects a commission of 60.5% and charges \$7.50 for a 15-minute call to another New Jersey area code. Cape May, Passaic, and Salem counties, which contract with Securus and receive commission ranging from 50% to 70.1%, charge \$4.25 for the same fifteen-minute call. Compared to the 66 cents for 15 minutes rate in the state contract, the rates in these independently contracting counties are highly inflated. The state contract demonstrates that it is feasible to offer rates that are affordable and cost-based, but far too many detainees are nonetheless facing inflated rates in counties that have not opted in to the state contract.

³ New Jersey Department of the Treasury, Division of Purchase and Property, Notice of Award for Term Contract, Index No. T-1934: Inmate/Resident Telephone Control Service, Contract No. 88935 (May 4, 2015), available at http://www.state.nj.us/treasury/purchase/noa/contracts/t1934_14-x-22648.shtml.

Comprehensive regulation is necessary to ensure that counties do not independently contract for much higher rates in order to collect commissions. Phone companies have sought to compensate for lost profits resulting from the FCC's regulation of interstate rates. In New Jersey, Global Tel*Link offered to explore how to recover lost revenue in a letter informing Bergen county of the need to lower interstate rates to comply with the FCC's 2013 hard caps.⁴ The only available route to compensate for such lost profits would be to increase the rates and commission on intrastate or international calls. Without regulatory action on intrastate and international rates, New Jersey families could spend even more than the high prices detailed below for calls with loved ones in New Jersey county jails.

⁴ Letter from Timothy Miller, Reg'l Sales Manager, Global Tel*Link, to Phil Lisk, IT Dir., Bergen Cnty. Sheriff's Office (Feb, 25, 2014) (stating "GTL would be pleased to conduct a study to explore rate and fee increases to make your Department and GTL whole and recover any possible revenue lost to the Sheriff's Department.").

Table 1: Rates in New Jersey Counties Independently Contracting with ICS Providers⁵

NJ County⁶ & Authorized Jail Capacity	Distance	Current Cost of 15 Minute Call⁷	Commission	New Cost of 15 Minute Call with FCC Proposed Cap⁸
<i>Bergen-1259⁹</i>	Local	\$1.65 (debit) \$1.75 (collect)	60.5%	FCC cap: \$2.10
	Intra LATA	\$4.80 \$4.95		
	Inter LATA	\$7.30 \$7.50		
	Interstate	\$3.15 \$3.75	None	FCC cap: \$2.10
<i>Cape May-276</i>	Intrastate	\$4.25	70.1%	FCC cap: \$3.30
	Interstate	\$3.15 \$3.75	None	
<i>Salem-464</i>	Intrastate	\$4.25	50%	FCC cap: \$2.40
	Interstate	\$3.15 \$3.75	None	
<i>Passaic-1283</i>	Intrastate	\$4.25	53%	FCC cap: \$2.10
	Interstate	\$3.15 \$3.75	None	

⁵ Prepared October, 2015 by Karina Wilkinson of NJAID, based on research by Rebecca Hufstader and Zachary Dorado, NYU School of Law Immigrant Rights Clinic, Roberto Concepción of LatinoJustice PRLDEF and Karina Wilkinson. Contracts on file with NYU IRC.

⁶ New Jersey Department of Corrections (DOC) “authorized capacity” is based on Appendix A of the Drug Policy Alliance Report *NJ Jail Population Analysis 15* (2013), available at: https://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf.

⁷ Two prices in a single row indicate, first, the debit price, and second, the collect call price. In our June 30, 2015 Comment, we noted that the Bergen County Sheriff has proposed a new rate of 21 cents per minute for intrastate calls and 50 cents per minute for international calls with an 8% “validation” fee. The implementation of the proposed contract with GTL has been delayed, in part because of the FCC’s expected vote on October 22, 2015.

⁸ The FCC proposed caps depend on the size of facility. We are basing our assessment of facility size on the NJ DOC’s “authorized capacity” numbers or jail official’s reports.

⁹ Bergen County capacity was reported to NJAID on an October 29, 2014 tour of the facility by jail officials.

It is necessary to eliminate the disparities between intrastate and interstate rates. In all the counties that have not opted in to the state contract, detainees and other individuals held in the jails are forced to pay higher rates to make intraLATA and interLATA calls within the state than to other states. The fact that most intrastate calls are far more expensive than interstate calls from numerous county jails demonstrates the need for the Commission to implement caps on all rates.

B. International Rates at New Jersey Facilities

As shown in Table 2 below, the international phone rates in county facilities and federally-run facilities¹⁰ in New Jersey are unreasonably high, requiring many families to make difficult choices between contacting their loved ones or basic daily necessities. The population that NJAID serves, immigrant detainees, is particularly vulnerable to the high international calling rates in the county jails. Immigrant detainees are from different countries around the world, and need to contact family and friends, as well as institutions and experts, in other countries to gather evidence for immigration proceedings. Individuals seeking refuge in the United States often need to rely on international phone calls to gather the necessary documentation to prove hardship, past persecution, and country conditions. With no right to government-appointed counsel, detainees often also have to call internationally to raise money for legal assistance or even prepare for placement in another country after deportation.

¹⁰ These facilities may be considered federal prisons, as contracted by the federal government. If considered a federal prison, costs for international calls at Delaney Hall and Elizabeth Detention Center would be 11 cents per minute for all calls.

Table 2: International ICS Calling Rates in NJ Immigration Detention Facilities¹¹

Facility Operator & Capacity	Current Cost of a 15 Minute Call	FCC Proposed Cap
<i>Bergen-1259</i> Capacity for 195 detainees in ICE custody	\$19.80 (proposed \$8.10)	\$2.10
<i>Essex-2434</i> Capacity for 800 detainees in ICE custody	\$17.85	\$2.10
<i>Hudson¹²-2080</i> Capacity for 450 detainees in ICE custody	\$45.00	\$2.10
<i>Delaney Hall (private facility contracted with Essex County)</i> Capacity for 450 detainees in ICE custody	\$4.00	\$2.40
<i>Elizabeth Detention Center (private facility contracted with ICE)</i> Capacity for 300 detainees in ICE custody	\$2.25 (to landlines) \$5.25 (to mobile phones)	\$1.65

II. Response to Proposals

A. Lower Rate Caps

As mentioned above, while the 2013 FCC Order led to significant progress, detainees and other individuals held in county jails are still facing prohibitively expensive intrastate and international rates. For these compelling reasons, NJAID and IRC support the FCC’s decision to impose caps on all rates.

1. Intrastate Rates with FCC Caps

As Table 1 shows, the FCC proposal as it stands now will grant welcome relief to four New Jersey counties where phone rates currently exceed the caps proposed by the FCC. It currently costs *more than minimum wage* for a resident in Bergen County, Cape May, Salem, or Passaic to call a loved one in jail. These rates are not only an abuse of an already vulnerable population, they are detrimental to the community at large, making it more difficult for individuals who are

¹¹ We are assuming that Delaney Hall falls under the rate cap for a jail since it is run by Essex County and that Elizabeth Detention Center falls under the cap for prisons since it is a private facility run under a contract with the Department of Homeland Security.

¹² Hudson County provides international phone service through phone cards sold by GTL. Some detainees have reported lower rates for calls to certain countries.

in jail to maintain community ties and reintegrate successfully into society upon their release. Under the proposed FCC rule, a 15-minute interLATA, intrastate call will go down from \$7.50 to \$2.10 in Bergen County, and all intrastate calls will go down from \$4.25 to \$3.30 in Cape May, from \$4.25 to \$2.40 in Salem, and from \$4.25 to \$2.10 in Passaic.

2. International Rates with FCC Caps

International calling is a particularly important telephone service for individuals held in facilities to communicate with family members who live abroad. For many immigrant detainees, international calls are the only way to reach their family to prepare necessary elements of their case in immigration proceedings.

As shown in Table 2, the FCC proposal will significantly decrease phone rates for international calls in New Jersey immigration detention facilities to the lowest ever, granting greater access to phone use for unfairly burdened families.

The New Jersey state contract demonstrates that it is feasible for phone companies to offer these calls at far lower rates. The discrepancy between the New Jersey state contract rate of 4.5 cents per minute and the FCC caps of 14 to 22 cents per minute highlights the importance of preventing bad actors from using the higher FCC rates as a reason to deviate from the hard-fought victories in the state of New Jersey. Even in the counties that have not opted in to the state contract, there could be incentives to raise certain rates as a result of the proposed FCC caps. For example, the FCC proposed caps are higher than the current rates for local calls from Bergen County Jail. If institutions in New Jersey re-negotiate their contracts with ICS providers and have any incentive (see below) to increase their rates where the FCC cap is actually higher than previously negotiated rates, the FCC cap would not serve its purpose of encouraging more affordable rates.

For these reasons, while we commend the FCC's efforts to address intrastate and international rates, we urge the FCC to set lower caps. The New Jersey state contract shows that it is feasible for phone companies and jails to offer rates far below the proposed FCC caps, while granting greater relief to the people held in the facilities and their families.

While there is no substitute for setting lower caps that ensure affordable and fair rates, we propose that the FCC at minimum emphasize and encourage states that have already negotiated more affordable rates to keep those rates. The FCC caps should be considered a safeguard to bring rates down and should not set the new standard for rates that facilities will charge if they could otherwise negotiate more affordable rates.

B. Commissions

Counties in New Jersey continue to collect unreasonable commissions at the expense of the vulnerable jail populations and their families.

Commissions to correctional facilities create perverse incentives akin to “reverse competition,” where facilities seek out companies that will charge higher rates in order to share a greater portion of their profit with the state or local government. Facilities are essentially incentivized to select the rate structures that put the most strain on incarcerated persons and their families. The New Jersey state contract entirely eliminates commissions. However, the possibility of commissions continues to provide an incentive for counties to opt out of the state contract and independently contract for higher rates that will allow them to collect commissions at the expense of detainees and others held in the jails. For example, Bergen County currently collects a commission of 60.5% and is seeking to increase this to 65%. Cape May collects a commission of 70.1%, the highest in the state of New Jersey. These commissions are essentially kickbacks to the counties that take advantage of the people held in the facilities and their families.

To justify the prohibitively expensive rates and the high commissions contained in the proposed GTL contract, Bergen County jail administrators have claimed that the revenue generated from the telephone system is deposited into an “inmate welfare” account. However, they have presented no evidence showing where the revenues are being deposited and to our knowledge, there is no regulation of how the funds are used. Bergen County Jail should not be entitled to implement a commission of 65 percent, the second highest in the state, based on this justification, especially considering the fact that the State of New Jersey has eliminated commissions entirely from their phone contract and the FCC is strongly discouraging them. Furthermore, the costs of financing inmate welfare should be shared across the board, not fall on those who can least afford them and their families.

The Commission has the statutory authority to ban commissions pursuant to sections 201(b) and 276 of the Telecommunications Act of 1996 (“Act”). Section 201(b) of the Act sets the service and charges provisions for common carriers, and states in relevant part:

“All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful...”¹³

The commissions sought by counties and other facility operators in New Jersey are unjust and unreasonable. Without an absolute ban on commissions, counties and other facility operators will continue to set higher phone rates in order to reap the rewards of higher site commissions. The re-routing of profit from rates paid by consumers to commissions renders the Commission’s

¹³ 47 U.S.C.A. § 201 (West)

efforts to achieve the statutory mandate of “just and reasonable” ICS rates nearly impossible. In addition to section 201(b), section 276 delineates provisions of payphone service and states in relevant part:

“In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public... the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that –

(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone. . . .”¹⁴

This provision gives the Commission authority to ensure “fair compensation” over intrastate calls. The Commission has treated the concept of fairness to encompass both the compensation of ICS providers and the cost paid by the user.¹⁵ Prohibiting site commissions would be a direct and effective way to ensure fair compensation, as required of the Commission. As such, the practice of charging site commissions is an appropriate object of regulation under this statutory provision.

While the FCC Proposal properly discourages commission payments by providers to institutions, it has the authority to and should go further in providing relief for families and communities by banning commissions. Phone companies pay millions of dollars in commissions to win contracts. This inevitably drives up the cost of phone calls as the companies then charge fees and higher rates to recover the investment. As mentioned above, there is a risk that counties offering rates *below* the FCC caps will mistakenly view the FCC caps as a standard to meet instead of a safeguard to encourage the most affordable rates. These counties may be negatively incentivized to re-negotiate higher rates as a result of the FCC caps in order to collect a commission. An outright ban on commissions would remove this adverse profit motive to renegotiate higher rates. If an outright ban is not possible, then at a minimum the FCC’s order should specify that rates must be cost-based and that commissions cannot be considered in determining relevant costs.

CONCLUSION

NJAID and IRC celebrate the Commission’s next step to providing greater relief to families who continue to pay exorbitant rates for instate calls and international calls. Several counties within New Jersey continue to maintain unreasonable commissions and rates higher than the Commission’s new order would permit. Their actions demonstrate that without comprehensive regulation, bad actors will continue to place profits over the needs of families and the community as a whole.

¹⁴ 47 U.S.C.A. § 276 (West)

¹⁵ *Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14115, para. 14.

At the same time, the Commission should take note that some states and localities have taken positive steps and have negotiated contracts with ICS providers at far lower rates than the rates proposed in this rule, which proves that the Commission can go even further than it has proposed. Therefore, we encourage the Commission to go further by setting lower caps and banning commissions altogether, while also working to ensure that any reductions in prison and jail phone rates negotiated by state or local governments are not eroded.