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# A DECADE-LONG CRY FOR HELP ANSWERED: THE FCC LOWERS THE RATES OF INTERSTATE PRISON PHONE CALLS

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## I. INTRODUCTION

A criminal trial that culminates in a sentence of incarceration affects the lives of many: not only the convicted individual, but also their families and loved ones. Inmates have few mediums through which they communicate with people outside of prison, one of which is the prison telephone system.<sup>1</sup> Although this may seem convenient, there have been various pricing obstacles over the years that have rendered the system problematic.<sup>2</sup> A 2012 study from the Government Accountability Office found that “the quality of the interaction between an inmate and family can positively affect an inmate’s behavior in prison and aids an inmate’s success when returning to the community.”<sup>3</sup> However, those familial contacts, along with their positive effects, are diminished when relatives are unable to afford the inflated rates of collect calls coming from prisons.<sup>4</sup> For instance, Fannie McKnight, an elderly woman whose

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<sup>1</sup> ANN ADALIST-ESTRIN, JAIL AND PRISON PROCEDURES: INFORMATION FOR FAMILIES 1–2 (Jim Mustin ed. 2003), available at <http://commens.org/1kau5pJ>.

<sup>2</sup> See The Plain Dealer Editorial Bd., *FCC Finally Tackling the Problem of Costly Prison Phone Calls*, CLEVELAND.COM (Feb. 13, 2013, 7:24 PM), <http://commens.org/1fnwCOH> (“Thanks to monopoly deals and lax regulation, prison inmates often have to pay premium prices to keep up all-important phone contacts with loved ones while behind bars.”).

<sup>3</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-743, GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE 21 (2012).

<sup>4</sup> See *In re Rates for Interstate Inmate Calling Services, Report and Order and Further*

son was incarcerated in the Orleans Parish Prison, had to make the heart wrenching decision of terminating communication with her own child, because she could not afford the hefty phone charges.<sup>5</sup> Families have been forced to “choose between keeping in touch with a relative behind bars and, in some cases, putting food on the table,” a decision that no one should ever have to make.<sup>6</sup>

In response to years of public outcry, The Federal Communications Commission (“FCC”) finally began to consider modifying the rules that control interstate interexchange inmate calling services (“ICS”) through the December 2012 Notice of Proposed Rulemaking (“NPRM”).<sup>7</sup> Not only did the inflated prices of prison phone calls negatively affect the inmates themselves, but they were also a detriment to the many people who yearn to stay in contact with their incarcerated loved ones.<sup>8</sup> Due to the recognition of these negative effects, the FCC implemented a lengthy voting process culminating on August 9th, 2013 with the enactment of brand new rules.<sup>9</sup>

This Note begins by detailing the history of how the issue of prison phone call rates gained enough support to get the FCC’s attention. It starts by laying out examples of previously unsuccessful attempts to resolve the issue through the court system, and then discusses the story of Martha Wright, who spear-headed the creation of two petitions that the FCC referenced in making its NPRM. After providing the historical background, this Note then discusses the elements of prison phone calls, detailing how they are functionally operated and what parties are involved in such operations. Next, the Note describes the FCC’s decision-making process in its entirety. First, it explains the impressions of various FCC Commissioners prior to undergoing the voting process. Then the Note enumerates relevant portions of the NPRM itself and goes on to describe the FCC’s voting timeline. Next, the Note discusses the outcome of the vote by describing the newly-selected rules. Then, the Note sets out the various arguments for why the decision to lower the rates of prison phone calls was necessary. The discussion begins with various policy arguments, and then ad-

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*Notice of Proposed Rulemaking*, FCC 13-113, WC Docket No. 12-375, ¶ 42 (Sept. 26, 2013) [hereinafter RIICS Report & Order].

<sup>5</sup> Katy Reckdahl, *State PSC Considers Lowering ‘Sinful’ Prison Phone Rates*, THE LENS (Nov. 15, 2012, 2:47 PM), <http://commcns.org/1dGBxDs> (“McKnight, 72, deposited money into a phone account that was debited every time they talked. But because the per-minute rates were so high, the account emptied faster than she could fill it up. ‘So I told my son that he can’t call me anymore,’ she said.”).

<sup>6</sup> Editorial, *Costly Phone Calls for Inmates*, N.Y. TIMES, Sept. 24, 2012, at A22.

<sup>7</sup> *In re Rates for Interstate Inmate Calling Services*, *Notice of Proposed Rulemaking*, 27 F.C.C.R. 16,629, 16,629–30 (Dec. 28, 2012) [hereinafter RIICS Proposed Rulemaking].

<sup>8</sup> See generally RIICS Report & Order, *supra* note 4.

<sup>9</sup> See RIICS Report & Order, *supra* note 4, ¶¶ 1-8.

dresses the unjust enrichment, arbitrariness, and recent state trend arguments. Lastly, the Note gives examples of foreseeable concerns that may arise given the implementation of the new rules, as well as next steps for the FCC to take in regards to such.

## II. HISTORY

For years, plaintiffs attempted to lower prison phone rates through the court system, rather than the FCC.<sup>10</sup> However, litigation proved to be unsuccessful.<sup>11</sup> Advocates against the high rates for prison phone calls took an alternative approach, filing two petitions with the FCC, on behalf of Martha Wright, which sought to lower the call rates.<sup>12</sup> This section will illustrate the events that occurred leading up to the FCC's recognition of the issues detailed in those petitions.

### A. Unsuccessful Court Attempts

Lawsuits challenging the overly expensive phone-rates have been unsuccessful.<sup>13</sup> In *Daleure v. Kentucky*, for example, the plaintiffs' claims brought under the Sherman Act were undermined by the filed rate doctrine.<sup>14</sup> The filed rate doctrine provides that "any entity that is required to file tariffs governing the rates, terms, and conditions of service must adhere strictly to those

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<sup>10</sup> See, e.g., *McGuire v. Ameritech Servs., Inc.*, 253 F. Supp. 2d 988, 988 (S.D. Ohio 2003) (deciding a lawsuit filed by the recipients of prisoners' collect telephone calls, where the recipients challenged the excessive rates and surcharges on said calls); *Miranda v. Michigan*, 168 F. Supp. 2d 685, 685 (E.D. Mich. 2001) (hearing a challenge to the "excessive and discriminatory surcharges and fees" in connection with inmate telephone calls); *Daleure v. Kentucky*, 119 F. Supp. 2d 683, 687 (W.D. Ky. 2000) (noting that the "Plaintiffs can also seek rate relief from the FCC, although to the best of this Court's knowledge they have not chosen to do so").

<sup>11</sup> See *McGuire*, 253 F. Supp. 2d at 988 (dismissing plaintiff's antitrust claims based upon the 11th Amendment, state action doctrine, and the filed rate doctrine); see also *Miranda*, 168 F. Supp. 2d at 685 (noting that although the plaintiffs had standing under the Sherman Antitrust Act, the state action doctrine and the filed rate doctrine barred their claims); *Daleure*, 119 F. Supp. 2d at 689-90.

<sup>12</sup> RIICS Proposed Rulemaking, *supra* note 7, at 16,629-30, 16,634-35.

<sup>13</sup> See John E. Dannenberg, *Nationwide PLN Survey Examines Prison Phone Contracts, Kickbacks*, PRISON LEGAL NEWS, <http://commens.org/1dGAcfV> (last updated Oct. 23, 2012).

<sup>14</sup> *Daleure v. Kentucky*, 119 F. Supp. 2d 683, 690 (W.D. Ky. 2000) ("Recognizing the application of the filed rate doctrine to this case has several ramifications. All Plaintiffs' damages claims under the Sherman Act and Section 1983 are dismissed. Plaintiffs may, however, still be entitled to some form of injunctive relief.").

terms.”<sup>15</sup> The *Daleure* court explained that, pursuant to this doctrine, regulatory bodies have required that telephone companies adhere to the already approved rates.<sup>16</sup>

In *McGuire vs. Ameritech Services, Inc.*, the plaintiffs raised an Equal Protection claim to attack prison phone-calls.<sup>17</sup> In order for a claim to succeed on the basis of an equal protection violation, the court must find that the state treated “two groups of similarly situated people differently.”<sup>18</sup> Plaintiffs argued that people who receive higher priced calls from inmates are similarly situated to those who do not receive calls from inmates. However, the Court held to the contrary:

This Court agrees that because the status of inmates cannot be considered similar to that of non-inmates, it necessarily follows that at those times when Plaintiffs communicate via telephone with inmates, they cannot expect to be treated in similar fashion as they and others expect to be treated at those times when they communicate with non-inmates via telephone.<sup>19</sup>

A second ground for the *McGuire* plaintiffs’ opposition to prison phone call rates was an alleged violation under section 1 of the Sherman Act.<sup>20</sup> The plaintiffs argued that Ohio restricted trade by denying competition in the inmate-initiated phone call market.<sup>21</sup> However, in rejecting that argument, the court applied the state action doctrine, which establishes that monopolistic actions of independent states are exempt from antitrust attack, in declaring that “[a]n otherwise monopolistic restraint of trade will not give rise to a Sherman Act violation where it stems from a clearly articulated and affirmatively expressed state policy.”<sup>22</sup>

A final example illustrating an unsuccessful court challenge is *Miranda v. Michigan*.<sup>23</sup> In *Miranda v. Michigan*, the plaintiffs contested prison phone rates by alleging a violation under section 201(b) of the Federal Telecommunica-

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<sup>15</sup> Request for Public Comment, 70 Fed. Reg. 28,902, 28,905, *Comments of U.S. Telecom Assoc.* (Antitrust Modernization Comm’n May 19, 2005), available at <http://commens.org/1kayfhj>.

<sup>16</sup> *Daleure*, 119 F. Supp. 2d at 689.

<sup>17</sup> *McGuire*, 253 F. Supp. 2d at 992.

<sup>18</sup> *Daleure*, 119 F. Supp. 2d at 691.

<sup>19</sup> *McGuire*, 253 F. Supp. 2d at 1001.

<sup>20</sup> *Id.* at 993. Section 1 of the Sherman Act states, “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.” Sherman Act § 1, 15 U.S.C. § 1 (2006).

<sup>21</sup> *McGuire*, 253 F. Supp. 2d at 993, 1006.

<sup>22</sup> *Id.* at 1006. More specifically, the Supreme Court has refused to construe the Sherman Act as intending to “restrain state action or official action directed by a state.” *Parker v. Brown*, 317 U.S. 341, 350–51 (1943).

<sup>23</sup> *See generally* *Miranda v. Michigan*, 168 F. Supp. 2d 685 (E.D. Mich. 2001).

tions Act.<sup>24</sup> Section 201(b) states that telephone call rates “shall be just and reasonable” and any rate that is “unjust or unreasonable” is unlawful.<sup>25</sup> The *Miranda* court dismissed the plaintiffs’ section 201(b) argument against Michigan, because Michigan was not a “common carrier” and was, therefore, outside the purview of section 201(b).<sup>26</sup> Further, the *Miranda* court dismissed plaintiffs’ section 201(b) claim against the telephone companies, because of the filed rate doctrine and because the FCC had primary jurisdiction over inmate calling services.<sup>27</sup>

#### B. Martha Wright

Ulandis Forte, convicted of manslaughter in 1994, was initially incarcerated in a prison facility located in Lorton, Virginia.<sup>28</sup> Forte was later transferred to an Arizona prison in 1998, and then to the Federal Bureau of Prisons in 2001.<sup>29</sup> Martha Wright, Forte’s grandmother and a Washington D.C. resident, was able to visit with Forte weekly while he was incarcerated at Lorton.<sup>30</sup> Upon his transfer however, Wright became disconcerted that she was paying approximately \$200 per month in order to communicate with her incarcerated grandson by telephone.<sup>31</sup> According to Wright, prior to her grandson’s relocation, she had only been paying roughly \$50 a month to receive phone calls from him while at Lorton.<sup>32</sup> Overall, Wright “estimates that she spent almost \$1,000 per year on phone calls limited to 15 minutes or less.”<sup>33</sup> Wright had no other choice but to communicate with her grandson by phone, because she was blind and eighty-years-old.<sup>34</sup> Being blind made it even more important that rates were

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<sup>24</sup> *Id.* at 692.

<sup>25</sup> 47 U.S.C. § 201(b) (2006).

<sup>26</sup> *Id.* at 692–93. *Far E. Conference v. United States*, 342 U.S. 570, 574 (1952) (The primary jurisdiction doctrine explains that, “in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.”).

<sup>27</sup> *Miranda v. Michigan*, 168 F. Supp. 2d 685, 692–93 (E.D. Mich. 2001).

<sup>28</sup> Matthew Fleischer, *Will ‘Middle of Nowhere’ Convince the FCC to Do the Wright Thing on Prison Phone Rates?*, TAKEPART (Sept. 21, 2012), <http://commcns.org/KVII9P>.

<sup>29</sup> Justin Moyer, *After Almost a Decade, FCC Has Yet to Rule on High Cost of Prison Phone Calls*, WASH. POST (Dec. 2, 2012), <http://commcns.org/1eMEVYS>.

<sup>30</sup> *Id.*

<sup>31</sup> Suzanne Choney, *FCC: Prison Phone Rates Far Too High*, NBC NEWS (Jan. 3, 2013), <http://commcns.org/19ZMh12>.

<sup>32</sup> Moyer, *supra* note 29.

<sup>33</sup> *Id.*

<sup>34</sup> Ugonna Okpalaoka, *Families Fight the Cost of Prison Phone Calls*, THE GRIO (Sept. 28, 2012), <http://commcns.org/1ey0Ysy>.

affordable for Wright, since communicating via written letters was not an option for Wright and her grandson.<sup>35</sup> Forte said, “[m]y grandmother has been blind for 17 years. How was I supposed to write to her? She needed to hire someone just to read the letters. When I called, we could only afford 2-3 minutes.”<sup>36</sup>

In February of 2000, inmates, family members, legal counsel, and other recipients of telephone calls from inmates at prison facilities operated by the Corrections Corporation of America, Inc. (“CCA”) filed a class action suit to challenge the rates and terms of long-distance telephone calls.<sup>37</sup> The suit alleged several violations including, but not limited to, the infringement of their rights to due process, equal protection, free speech and association, and freedom of contract.<sup>38</sup> Despite these attempts, however, and in keeping with the rationale described above in *Miranda v. Michigan*, District Judge Gladys Kessler dismissed the complaint and referred the case to the FCC on primary jurisdiction grounds.<sup>39</sup> Mediation between the parties took place over the next two years but unfortunately no compromise was reached.<sup>40</sup> As a result, on November 3, 2003, petitioners filed the first “Wright Petition” as a request for rulemaking with the FCC.<sup>41</sup> The request asked the FCC to “prohibit exclusive inmate calling service agreements and collect call-only restrictions at privately-administered prisons and require such facilities to permit multiple long distance carriers to interconnect with prison telephone systems.”<sup>42</sup> Subsequently, in March 2007, the petitioners filed the “Alternative Wright Petition,” requesting a debit calling requirement, rate-caps, and a prohibition against per-call charges.<sup>43</sup>

Tens of thousands of individuals contacted the FCC, urging it to act on the two Wright petitions and lower inmate phone call rates.<sup>44</sup> Many advocates formed or joined campaigns for a cap on prison phone-call rates,<sup>45</sup> such as the

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<sup>35</sup> Brooks Boliek, *FCC Could Cut Inmates' Phone Rates*, PARTICIPANT MEDIA (Sept. 24, 2012), <http://commens.org/1m0zlez>.

<sup>36</sup> Amalia Deloney, *Let's Make History. FCC, Make It (W)right to Call Home!*, CENTER FOR MEDIA JUST. (Sept. 12, 2012), <http://commens.org/KcSkq3> (quoting testimony of Ulandis Forte before the FCC).

<sup>37</sup> *Wright v. Corrections Corp. of Am.*, Civil Action No. 00-293 (GK), at 1 (D.D.C. Oct. 7, 2003).

<sup>38</sup> *Martha Wright v. Corrections Corp. of Am.*, CENTER FOR CONST. RTS., <http://commens.org/1cifAjR> (last visited Aug. 8, 2013).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> RIICS Proposed Rulemaking, *supra* note 7, at 16,634.

<sup>42</sup> *Id.* at 16,629 (internal quotation marks omitted).

<sup>43</sup> *Id.* (internal quotation marks omitted).

<sup>44</sup> *Id.* at 16,660 (statement of Comm'r Clyburn).

<sup>45</sup> See, e.g., *Middle of Nowhere's Campaign for Prison Phone Justice*, TAKE PART,

Campaign for Prison Phone Justice.<sup>46</sup> This Prison Phone Justice campaign garnered support from numerous organizations including the Center for Media Justice, Prisoners and Families for Equal Rights & Justice, Prison Action Network, and the Human Rights Defense Center.<sup>47</sup> After ten years of petitioning, campaigning, and protesting, the advocates for a phone-rate cap finally got the FCC's to address the issue.<sup>48</sup> The process that the FCC took in deciding which of the proposed rules to implement will be discussed later in this Note.<sup>49</sup>

### III. ELEMENTS OF PRISON PHONE CALLS

In a large number of states, certain telephone companies offer profitable commissions to state contracting agencies in return for monopolistic contracts in that state's prison phone services.<sup>50</sup> In the inmate calling services industry, the providers compete fiercely for the contracts to provide services to correctional facilities.<sup>51</sup> Once the provider acquires the contract, that successful provider has a monopolistic hold over the inmate calling services at that facility.<sup>52</sup> The inflated rates that the telephone companies decide to impose not only produce a profit for the telephone companies themselves, but must also account for the commission payments charged by state agencies.<sup>53</sup> On average, these

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<http://commcns.org/KVISbG> (last visited Aug. 31, 2013); *The Campaign for Prison Phone Justice: Who We Are*, NATION INSIDE, <http://commcns.org/1c77cNk> (last visited Aug. 31, 2013).

<sup>46</sup> *The Campaign for Prison Phone Justice: Lowering the Cost of and Ending Kickbacks on Prison Phone Calls*, MAG-NET BLOG, <http://commcns.org/1ey17fQ> (last visited Aug. 31, 2013).

<sup>47</sup> NATION INSIDE, *supra* note 45.

<sup>48</sup> RIICS Proposed Rulemaking, *supra* note 7, at 16,629-30 (The FCC has noted the increased attention:

[T]here has been substantial renewed interest and comment in this docket highlighting both the wide disparity among interstate interexchange ICS rate levels and significant public interest concerns. We believe it is appropriate to seek comment to refresh the record and consider whether changes to our rules are necessary to ensure just and reasonable ICS rates for interstate, long distance calling at publicly- and privately-administered correctional facilities.)

<sup>49</sup> See discussion *infra* Part IV.

<sup>50</sup> Dannenberg, *supra* note 13 (Dannenberg observes that “[p]rison phone service providers are free to bid on contracts at the maximum rates allowed by regulatory agencies, and upon winning such bids are effectively granted a monopoly on phone services within a given prison or jail system.”).

<sup>51</sup> Choney, *supra* note 31.

<sup>52</sup> *Id.*

<sup>53</sup> Dannenberg, *supra* note 13. See also DREW KUKOROWSKI, PRISON POLICY INITIATIVE, THE PRICE TO CALL HOME: STATE-SANCTIONED MONOPOLIZATION IN THE PRISON PHONE INDUSTRY 3 (2012), available at <http://commcns.org/1eycXIW>.

commissions amount to approximately 42% of gross revenues, which is an indication that the prison phone call industry is estimated to gross \$362 million or more annually.<sup>54</sup>

There are a variety of security considerations to which phone companies attempt to attribute the heightened cost of prison phone calls.<sup>55</sup> Examples of such security considerations include: an automated voice processing system, blocking mechanisms so that inmates are not able to make restricted calls, listening and recording capabilities, and voice overlay features that allow for the identification of the call as coming from a correctional facility.<sup>56</sup> However, because those features are considered to be standard in prisons, the counter argument is that the price inflation can only truly be due to other factors such as increases in the commission payments,<sup>57</sup> or profits the phone companies and the contracting agencies are trying to make off of the inflated rate.<sup>58</sup> In fact, in New York, where commission payments have been banned, the charge for local, intrastate, and interstate prison phone calls is a mere \$0.05 per minute, which *includes* the costs for the aforementioned security considerations.<sup>59</sup>

Typically, a contracting agency issues a request for proposal (“RFP”),<sup>60</sup> which begins a bidding process for providers of phone services.<sup>61</sup> The RFP specifies “the number of phones, locations and technical performance standards required by the contracting agency.”<sup>62</sup> From the RFP, phone companies can determine what their cost exposure will be when bidding for contracts, but they also need to consider the kickbacks to the contracting agencies.<sup>63</sup> The three major companies that primarily control prison phone contracts are: Global Tel\*Link (“GTL”), which is the largest; Securus Technologies; and CenturyLink.<sup>64</sup> According to The Prison Policy Initiative, “90 percent of the nation’s prisoners make calls through three companies.”<sup>65</sup> Once these contracts are secured, the types of calling methods available to inmates are either collect calls

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<sup>54</sup> Dannenberg, *supra* note 13.

<sup>55</sup> RIICS Proposed Rulemaking, *supra* note 7, at 16,632; Cecelia Kang, *FCC to Vote on Lowering Prison Phone Call Costs*, WASH. POST (Aug. 9, 2013), <http://commens.org/1dGAJyp>.

<sup>56</sup> RIICS Proposed Rulemaking, *supra* note 7, at 16,629.

<sup>57</sup> Moyer, *supra* note 29; KUKOROWSKI, *supra* note 53, at 5.

<sup>58</sup> Dannenberg, *supra* note 13.

<sup>59</sup> *Over 60 Organizations File Joint Letter with FCC Urging Cap on Exorbitant Prison Phone Rates*, NATION INSIDE, <http://commens.org/1aSk5v3> (last visited Aug. 31, 2013).

<sup>60</sup> *See* Dannenberg, *supra* note 13.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> KUKOROWSKI, *supra* note 53, at 2; *see also* Aaron Smith, *FCC Votes to Reduce Rates for Prison Phone Calls*, CNNMONEY (Aug. 9, 2013), <http://commens.org/1fnvE50>.

<sup>65</sup> KUKOROWSKI, *supra* note 53, at 2.

or debit-based calls.<sup>66</sup> Collect calls, paid by the receiver of the phone call, incur a “per-call set up charge” as well as a “per-minute charge,” while debit-based calling deducts funds from an inmate’s account by a per-minute charge only.<sup>67</sup> Per-call charges range anywhere from \$0.50 to \$3.95, and per-minute charges from \$0.05 to \$0.89.<sup>68</sup>

#### IV. THE FCC DECISION-MAKING PROCESS

##### A. Outlooks of the Commissioners Prior to Voting

As previously discussed, the December 2012 NPRM was the start of the FCC’s direct action in response to the decade of public outcry pleading for lower prison phone call rates.<sup>69</sup> FCC Commissioners were ready and willing to take on the task of figuring out the most appropriate direction to take in proposing new rules.<sup>70</sup> When addressing why the public should care, Acting Chairwoman Mignon Clyburn stated that “[m]aintaining contact with family and friends during incarceration not only helps the inmate, but it is beneficial to our society as a whole.”<sup>71</sup> Similarly, Commissioner Jessica Rosenworcel stated, “[t]his is not just an issue of markets and rates; it is a broader issue of social justice,” and that “[w]hen a single phone call may cost as much as a month of unlimited phone service, the financial burden of staying in touch may be too much for inmates’ families to bear.”<sup>72</sup> Commissioner Ajit Pai, while acknowledging that he would consider possibilities for lowering prison phone call rates, noted that “choice and competition are not hallmarks of life behind bars.”<sup>73</sup> Regardless, the decision to open a rulemaking was a unanimous one.<sup>74</sup>

##### B. The December 2012 Notice of Proposed Rulemaking

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<sup>66</sup> RIICS Proposed Rulemaking, *supra* note 7, at 16,630.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 16,629.

<sup>70</sup> Choney, *supra* note 31.

<sup>71</sup> RIICS Proposed Rulemaking, *supra* note 7, at 16,660 (statement of Comm’r Clyburn).

<sup>72</sup> *Id.* at 16,661 (statement of Comm’r Rosenworcel).

<sup>73</sup> *Id.* at 16,662 (statement of Comm’r Pai).

<sup>74</sup> Press Release, U.S. House of Representatives Energy & Commerce Comm. of Democrats, Rep. Waxman Statement on FCC Proposal to Lower Prison Phone Rates (Dec. 28, 2012), available at <http://commcns.org/1m0zyhN>; see also Paul Barbagallo, *FCC Proposes Cap on Prison Phone Rates, Explores Two Companies’ Market Dominance*, BLOOMBERG BNA (Jan. 2, 2013), <http://commcns.org/1abXHA3>.

This section outlines some relevant portions of the NPRM that outline exactly what the Wright petitioners were asking for. The FCC requested comments, information, and answers in response to the NPRM from the public, specifically “state departments of corrections and state officials responsible for prison telecommunications decision making.”<sup>75</sup> The FCC sought these comments to help it determine if the then-existing rates were just and reasonable and, if not, how those goals could be achieved.<sup>76</sup>

### 1. *How Much to Charge?*

The petitioners requested a rate cap of \$0.20 per minute for debit calling and \$0.25 per minute for collect calling, for interstate long distance inmate calling services.<sup>77</sup> The FCC sought comment on the elements of rate caps in general, and the appropriate criteria to use in determining a particular rate cap.<sup>78</sup> More specifically, the FCC requested comment on their reasonableness.<sup>79</sup> The FCC wanted to know what factors should determine the per-minute rate caps, whether the caps should be applied to both public and private institutions, and if there are other rate cap options available besides the per-minute rate cap.<sup>80</sup> The FCC wished to gather any opinions on proper implementation of the per-minute rate caps and any foreseeable benefits or consequences resulting from such implementation.<sup>81</sup> The petitioners also proposed that all per-call charges be terminated and replaced solely by per-minute charges.<sup>82</sup> The FCC sought comment regarding the exact costs that are associated with per-call charges, and whether the elimination of such charges would result in reasonable rates.<sup>83</sup> The FCC intended to gather information on dropped calls since inmates may incur a second charge upon redial.<sup>84</sup> Petitioners suggested that this second charge be voided as long as a dropped call is reinitiated within two minutes of

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<sup>75</sup> RIICS Proposed Rulemaking, *supra* note 7, at 16,635.

<sup>76</sup> *Id.* at 16,636.

<sup>77</sup> *Id.* at 16,635.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 16,630–33.

<sup>80</sup> *Id.* at 16,637–38.

<sup>81</sup> *Id.*

<sup>82</sup> *In re* Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, *Petitioners’ Alternative Rulemaking Proposal*, CC Docket No. 96-128, at 5 (Mar. 1, 2007) [hereinafter Pay Telephone Reclassification and Compensation Provisions].

<sup>83</sup> RIICS Proposed Rulemaking, *supra* note 7, at 16,637.

<sup>84</sup> *Id.*

the drop.<sup>85</sup>

ICS providers use Marginal Location Methodology to calculate proposed ICS rates.<sup>86</sup> Using this methodology, telephone service providers argued that per-call charges are necessary in order to continue funding “equipment costs and monthly line charges.”<sup>87</sup> For debit calls, the implementation of this methodology yields a fixed \$1.56 per-call charge in conjunction with an additional \$0.06 charge per minute.<sup>88</sup> Collect calls yield a fixed charge of \$2.49 per-call and \$0.07 per minute.<sup>89</sup> Similar to the per-minute rate cap inquiries, the FCC sought comment in regards to the reasonableness of this methodology in hopes of discovering whether or not alternative methodologies should be used.<sup>90</sup>

There are also several issues surrounding commissions on which the FCC wanted clarification.<sup>91</sup> Commissions from ICS providers are sometimes used to fund inmate services, and the FCC sought comment on what specific inmate services these commissions fund.<sup>92</sup> The FCC also requested responses to the petitioners’ argument that rates are unreasonable under Section 201(b) of the Communications Act.<sup>93</sup> Pursuant to this charge, the Commission wanted to know “how much these site commissions are and how much they add to per-call costs.”<sup>94</sup> Lastly, the FCC sought comment on how a state’s decision to reduce or eliminate commissions affects the rates and the ICS market.<sup>95</sup> The FCC sought evidence as to a correlation between decreased rates and increased call volume to determine whether ICS-rate reductions encourage greater communication between inmates and families.<sup>96</sup>

## 2. Method of Charging

The only two methods of charging for prison phone calls are collect calls and debit calls, and the NPRM describes a collect call as “a call in which the called person pays for the call,” whereas a “debit call deducts the cost of the

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 16,638–39.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

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

<sup>90</sup> *Id.* at 16,639.

<sup>91</sup> *Id.* at 16,642.

<sup>92</sup> *Id.* at 16,642–43.

<sup>93</sup> *Id.* at 16,642–43; *see also* Pay Telephone Reclassification and Compensation Provisions, *supra* note 82, at 22–23.

<sup>94</sup> *Id.* at 16,642–43.

<sup>95</sup> *Id.* at 16,643.

<sup>96</sup> *Id.* at 16,639.

call from a prepaid account.<sup>97</sup> The FCC requested information about setting different rate-caps for debit and collect calling.<sup>98</sup> Hinting at the implementation of more debit calling systems following public comment, the FCC's questions primarily surrounded debit calling.<sup>99</sup> The FCC wanted to determine exactly how many facilities already implement debit calling, and how the safety concerns that accompany the implementation of debit calling have been handled at those facilities.<sup>100</sup> In addition, the FCC solicited public comment on whether prepaid calling should replace both collect calling *and* debit calling, as previous commenters have suggested.<sup>101</sup> Prepaid calling differs from debit calling because it allows families to purchase minutes in advance, as opposed to deducting money from the inmate's account.<sup>102</sup>

Petitioners in the First Wright Petition also requested that the market for ICS calls be opened up to competition, which, in turn, would "prohibit collect call only restrictions in privately-administered correctional facilities."<sup>103</sup> The FCC sought comments from the public in order to figure out how these exclusive contracts affect ICS rates, and how opening up the market to competition could procedurally be accomplished.<sup>104</sup> Also, the FCC needed clarification regarding the rationale behind the collect-calling restriction because petitioners in the First Wright Petition argued that the inflated costs are "not outweighed by corresponding benefits."<sup>105</sup>

### 3. *Other Features*

In the Alternative Wright Petition, petitioners suggested that inmates should receive a certain number of "no-cost" calls each month, in exchange for phone company discretion to increase the per-minute rate cost of such calls.<sup>106</sup> Specifically, petitioners proposed that if caps of \$0.275 per minute for collect calling and \$0.22 per minute for debit calling occur, then phone companies should be required to give each inmate 20 minutes of free calling per month.<sup>107</sup> The FCC solicited public comment about the proposal generally and whether or not legal

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<sup>97</sup> *Id.* at 16,640.

<sup>98</sup> *Id.* at 16,643.

<sup>99</sup> *Id.* at 16,640–41.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 16,641.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 16,642.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 16,643.

<sup>107</sup> *Id.*

issues arise with the implementation of this type of system.<sup>108</sup>

In addition, the FCC also sought comment regarding Billing-Related Call Blocking, which involves ICS providers whom are either unwilling or unable to reach agreements with Local Exchange Carriers (“LECs”) in providing billing services to customers who receive collect calls from prisons.<sup>109</sup> Due to this failure or unwillingness, those companies block calls that go out to customers of LECs in locales where billing agreements have yet to be reached.<sup>110</sup> Petitioners argue that implementation of debit calling will avoid the necessity to block calls.<sup>111</sup> The FCC sought comments from the public to clarify the accuracy of that argument, they sought information on how many calls are actually blocked on a monthly basis, and if there are any ways other than debit calling where billing-related call blocking can be prevented.<sup>112</sup>

Lastly, it has been suggested that calls made by inmates with hearing disabilities via teletypewriter equipment technologies (“TTY”) are four times longer than calls made via telephone from inmates without disabilities.<sup>113</sup> Therefore, inmates with hearing disabilities, as well as their families, have to pay even more than their “hearing counterparts.”<sup>114</sup> For example, the family of a deaf person incarcerated in Maryland paid \$20.40 for a call placed via Telecommunications Relay Service (TRS), a type of TTY telephone service, that lasted a mere nine minutes.<sup>115</sup> In addition, the record shows that TTY phone calls are accompanied by yet another fee for having to connect to the TTY operator.<sup>116</sup>

The FCC sought comment to determine whether inmates with hearing disabilities really are paying more for ICS services, and, if so, for what reasons.<sup>117</sup> The Commission also drew attention to Section 276(b)(1)(A),<sup>118</sup> which exempts hearing-disabled TTY calls from the Commission’s “per call compensation plan,” seeking comment regarding how this exemption will affect the examination of rates for disability inmates.<sup>119</sup>

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 16,643–44.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 16,644–45.

<sup>114</sup> RIICS Proposed Rulemaking, *supra* note 7, at 16,644–45.

<sup>115</sup> RIICS Report & Order, *supra* note 4, ¶ 3; Telecommunications Relay Service (TRS), FCC, <http://commens.org/1ehNyTV> (last visited Jan. 29, 2014).

<sup>116</sup> RIICS Proposed Rulemaking, *supra* note 7, at 16,644–45.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* (citing Telecommunications Act of 1996 § 276(b)(1)(A), 47 U.S.C. § 276(b)(1)(A) (2006)).

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

## C. The Voting Process

### 1. Legal Framework

The FCC not only sought public comment relating to the issues and inquiries present in the NPRM described above, but it is also sought comment on its ability to exercise authority under the relevant laws: Section 276 of the Communications Act of 1934 (the “1934 Act”), specifically section 276(b)(1)(A), as well as section 201(b).<sup>120</sup> Section 276(b)(1)(A) governs the Commission’s regulation of payphone services, detailing specifically how to proscribe regulations that promote competition among payphone service providers:

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, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation.<sup>121</sup>

The FCC sought comment to establish the extent of its authority to address ICS matters under this section of the 1934 Act.<sup>122</sup> Similarly, the FCC sought the same insight with regard to its authority to regulate ICS under section 201(b) of the 1934 Act, which states that “[a]ll 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.”<sup>123</sup> The new rules will only apply to interstate ICS rates since states have regulatory power over calls within their own state.<sup>124</sup> However, the FCC requested comment on ways to encourage states to also reconsider their intrastate ICS rates.<sup>125</sup>

### 2. Voting Timeline

Having released the NPRM in December 2012, the FCC accepted public comment until March 25, 2013.<sup>126</sup> Commenters were permitted to submit reply

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<sup>120</sup> *Id.* at 16,647.

<sup>121</sup> Telecommunications Act of 1996 § 276(b)(1)(A), 47 U.S.C. § 276(b)(1)(A) (2006).

<sup>122</sup> RIICS Proposed Rulemaking, *supra* note 7, at 16,647.

<sup>123</sup> RIICS Proposed Rulemaking, *supra* note 7, at 16,647; § 201(b).

<sup>124</sup> Trish Anderton, *High Price of Prison Phone Calls Gets Attention from FCC*, GIMBY BLOG (Jan. 25, 2013), <http://commens.org/1ddtVMc>.

<sup>125</sup> RIICS Proposed Rulemaking, *supra* note 7, at 16,647.

<sup>126</sup> Comment Cycle Established For Commission’s Notice of Proposed Rulemaking Regarding Rates for Interstate Inmate Calling Services, *Public Notice*, DA 13-79, WC Docket No. 12-375 (Jan. 22, 2013).

comments in response to those submitted before the March deadline until April 22, 2013.<sup>127</sup> To facilitate the decision-making process, the FCC conducted a day-long workshop on July 10, 2013 to discuss public policy implications, how individual states have handled rate reform thus far, possible implementation procedures, amongst other things.<sup>128</sup> On August 9, 2013 the FCC Commissioners voted on the new rules, releasing an official Order (“the Order”) detailing the rules on September 26, 2013.<sup>129</sup> The rules go into effect 90 days after their publication in the Federal Register.<sup>130</sup>

## V. THE FINAL DECISION

In implementing these new rules, the FCC “took long-overdue steps to ensure that the rates for interstate long-distance calls made by prison inmates are just, reasonable and fair.”<sup>131</sup> The Commission adopted the Order, which strikes a balance between addressing security concerns, ensuring fair compensation for service providers, while also keeping the rates reasonable for consumers.<sup>132</sup> The FCC is now requiring that prison phone call rates be based solely on the cost of providing the service.<sup>133</sup> Therefore, correctional facilities are no longer permitted to accept commission payments from phone companies, factoring the amount of commission into the decision of which company will obtain a contract.<sup>134</sup> The Order adopted rate caps for both debit/pre-paid calls and collect calls, imposing a rate of no more than \$0.21 and \$0.25 per minute respectively.<sup>135</sup> With these rates, debit and pre-paid calls can be no more than \$3.15 for a 15-minute call, and collect calls can be no more than \$3.75. If any company wishes to charge in excess of the rate caps, a request for a waiver showing good cause has to be filed and granted.<sup>136</sup> Despite implementing the cap, the FCC goes on to suggest that \$0.12 and \$0.14 are the truly “just, reasonable and

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

<sup>128</sup> See FCC Provides Further Details On Agenda For July 10 Workshop On Inmate Calling Services, *Public Notice*, DA 13-1518, WC Docket No. 12-375 (July 3, 2013).

<sup>129</sup> See generally RIICS Report & Order, *supra* note 4.

<sup>130</sup> *FCC Votes to Cap, Slash Prison Phone Rates*, OMAHA.COM (Aug. 9, 2013), <http://commens.org/1b6XjmS>.

<sup>131</sup> *FCC Bars High Rates For Long Distance Phone Calls in Jails and Prisons Nationwide*, FCC (Aug. 9, 2013), <http://commens.org/1j0uleG>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*; Inmate Telephone Systems for Alaska Correctional Institutions, Alaska RFP 2008-2000-7549, at 1 (Dec. 19, 2007), available at <http://commens.org/1ey2gUu>.

<sup>135</sup> *FCC Bars High Rates For Long Distance Phone Calls in Jails and Prisons Nationwide*, FCC (Aug. 9, 2013), <http://commens.org/1j0uleG>.

<sup>136</sup> *FCC Votes to Cap, Slash Prison Phone Rates*, *supra* note 130.

cost-based” rates for debit/prepaid and collect calling respectively.<sup>137</sup> Therefore, any company that charges at or below that standard will be exempt from enforcement actions under the Order.<sup>138</sup> The aforementioned rates still will allow prison facilities to implement various security precautions such as call-blocking, call verification, recording systems, and restrictions on three-way calling and forwarding.<sup>139</sup> The FCC also clarified that users with hearing and speech disabilities may not be charged higher rates.<sup>140</sup> Lastly, the FCC has implemented requirements mandating data collection, annual certification, and the enforcement of other provisions that will ensure that the Order is complied with.<sup>141</sup> The Order was decided upon in a 2-1 vote, with Acting Chairwoman Clyburn and Commissioner Rosenworcel in favor of the Order and Commissioner Pai dissenting.<sup>142</sup> Ulandis Forte, Martha Wright’s grandson, sat in the audience as Chairwoman Clyburn and Commissioner Rosenworcel delivered the results of the vote.<sup>143</sup> Overcome with emotion, “[h]e wiped tears from his eyes when the vote was taken.”<sup>144</sup>

## VI. THE FCC’S DECISION TO LOWER RATES WAS IMPERATIVE

There are a myriad of arguments in support of the FCC’s decision to lower prison phone call rates. As a policy matter, rates should have been lowered because it will alleviate a heavy economic burden from the families of inmates,<sup>145</sup> facilitate continued relationships between incarcerated parents and their children,<sup>146</sup> and reduce recidivism rates and negative prison behaviors.<sup>147</sup>

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<sup>137</sup> *FCC Bars High Rates For Long Distance Phone Calls in Jails and Prisons Nationwide*, FCC (Aug. 9, 2013), <http://commcns.org/1j0ulcG>.

<sup>138</sup> *FCC Votes to Cap, Slash Prison Phone Rates*, *supra* note 130.

<sup>139</sup> *FCC Bars High Rates For Long Distance Phone Calls in Jails and Prisons Nationwide*, *supra* note 137.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *FCC Votes to Cap, Slash Prison Phone Rates*, *supra* note 130.

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

<sup>145</sup> *See* Choney, *supra* note 31.

<sup>146</sup> Nekima Levy-Pounds, *Children of Incarcerated Parents: Silent Victims of Prison Phone Injustice*, MAG-NET BLOG (June 22, 2012), <http://commcns.org/1e97Uaf>.

<sup>147</sup> KUKOROWSKI, *supra* note 53, at 5; *see also* Stan Donaldson, *FCC Considers Limiting Costs of Long-Distance Calls for Families of Prisoners in Ohio*, CLEVELAND.COM (Feb. 12, 2013), <http://commcns.org/1nnEjWo> (quoting FCC Commissioner Clyburn discussing phone contact and recidivism rates); *see also* Choney, *supra* note 31; N.Y. Prisons Make Millions Profiteering on Inmate Phone Calls, NAT’L ASS’N CRIM. DEF. LAWS. (Dec. 6, 2006), <http://commcns.org/1ddvRVh>.

In addition to the policy arguments, the FCC made the right decision in lowering the rates because high rates not only unjustly enrich telephone companies and state agencies,<sup>148</sup> but are also arbitrary in nature.<sup>149</sup> Lastly, the FCC should have felt compelled to regulate the rates because there was already trend emerging among states to implement lower rates.<sup>150</sup>

#### A. General Societal Policy Arguments

##### 1. *Decreasing the Burden on Family Members*

Not only do the high costs of prison phone calls negatively affect the inmate, but they also cost their families and loved ones millions of dollars every year.<sup>151</sup> This is especially true in situations where the inmate is using collect calling services to contact their loved ones because, unlike debit calling where the charges are deducted from the inmate's personal account, with collect calling, the charges stemming from the prison phone call are paid directly by the family.<sup>152</sup> Often times, prisons are located hundreds of miles away from an inmate's hometown.<sup>153</sup> Therefore, low-income families suffer the most; since they cannot afford to travel, phone communication is often their only option.<sup>154</sup> This puts families in extremely compromising positions because they have to choose between spending their already limited funds on unnecessarily exorbitant phone call rates, and simply not speaking to their incarcerated loved ones at all.<sup>155</sup> Grappling between the desire to answer phone calls from incarcerated family members, and the lack of funds to support the costs of such phone calls, families have suffered the unfortunate consequence of losing their telephone service due to unpaid phone bills.<sup>156</sup> Similarly, some families "had . . . been evicted from their apartments," while "[o]thers took second jobs merely to afford the cost of the collect calls coming from prison."<sup>157</sup> Civil liberties advo-

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<sup>148</sup> Dannenberg, *supra* note 13. *See generally* RIICS Report & Order, *supra* note 4.

<sup>149</sup> Dannenberg, *supra* note 13.

<sup>150</sup> Choney, *supra* note 31. *See also* Dannenberg, *supra* note 13.

<sup>151</sup> *See* RIICS Report & Order, *supra* note 4, ¶ 1.

<sup>152</sup> RIICS Proposed Rulemaking, *supra* note 7, at 16,640.

<sup>153</sup> Donaldson, *supra* note 147.

<sup>154</sup> *Id.*

<sup>155</sup> Letter from Paul Wright, Exec. Director, Human Rights Defense Center, to Marlene H. Dorstch, Secretary, FCC, Joint *Ex Parte* Comment for CC Docket No. 96-128 ("Wright Petition") at ¶ 8 (on file with author) ("In short, high prison phone rates are a form of price gouging that mainly affects prisoners' family members – who have no other option but to pay the rates if they want to hear the voice of their incarcerated loved one, due to the monopolistic nature of the prison phone industry.").

<sup>156</sup> *See* ADALIST-ESTRIN, *supra* note 1, at 2.

<sup>157</sup> Reckdahl, *supra* note 5.

cates have argued that the burden of coping with the pain of having a loved one incarcerated is enough to deal with, and that families should not be saddled with the extra problems that these phone rates bring.<sup>158</sup> With these new rules having been implemented, families will be more able and willing to accept collect calls from prisons, instead of feeling like they are doing themselves an economic disservice simply by staying in contact with their incarcerated relatives.<sup>159</sup>

## 2. *Maintaining Relationships With Children*

Children of incarcerated individuals are disadvantaged in more ways than one.<sup>160</sup> The Vera Institute of Justice conducted a study where it found that children with incarcerated parents suffer from “ambiguous loss,” a grieving process similar to that experienced by children with deceased parents.<sup>161</sup> This problem affects over 2.7 million children nationwide.<sup>162</sup> Sadly, many children who have an incarcerated parent lash out in school, use drugs to cope, and often commit crimes themselves.<sup>163</sup> In addition to that, “[l]ack of regular contact with incarcerated parents has been linked to...homelessness, depression, [and] aggression...in children.”<sup>164</sup> Arguably, the aforementioned problems are exacerbated when children are not able to maintain contact with an incarcerated parent.<sup>165</sup> Given the fact that most inmates come from a family of low economic means, traveling to visit a parent in prison is not always a reasonable option.<sup>166</sup> Therefore, telephone communication may be the only primary way that children can salvage any type of consistent connection with their incarcerated parents.<sup>167</sup> However, if prison phone rates are too expensive for families to afford, communication between incarcerated parents and their children will be either inconsistent, or completely non-existent.<sup>168</sup> Therefore, “the ability to

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<sup>158</sup> Choney, *supra* note 31.

<sup>159</sup> See RIICS Report & Order, *supra* note 4, ¶ 2.

<sup>160</sup> See Levy-Pounds, *supra* note 146 (“It is not difficult to imagine that children of incarcerated parents suffer mentally, emotionally and psychologically as a result of a parent’s incarceration.”).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*; see also PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 18 (2010), available at <http://commens.org/1iNA4TF>.

<sup>163</sup> Levy-Pounds, *supra* note 146.

<sup>164</sup> RIICS Report & Order, *supra* note 4, ¶ 2.

<sup>165</sup> Levy-Pounds, *supra* note 146.

<sup>166</sup> *Id.* See also Donaldson, *supra* note 147.

<sup>167</sup> Levy-Pounds, *supra* note 146.

<sup>168</sup> *Id.* (“Unfortunately, the exorbitant cost of telephone calls to and from prisons make it difficult, and in some cases nearly impossible, to maintain contact by phone.”). See also

have regular telephone contact could mean the difference between a child having hope or a child experiencing anguish during a parent's incarceration. It could also mean the difference between a child who feels loved in spite of a parent's incarceration and a child who feels abandoned."<sup>169</sup> Therefore, the FCC's new rules will give each and every child a chance to reap the benefits of remaining connected to their parents, despite them being behind bars.<sup>170</sup>

### 3. *Reducing Recidivism Rates & Negative Prison Behaviors*

The new rates will not only benefit the inmates and their families, but society at large as well.<sup>171</sup> "High phone rates reduce incarcerated persons' ability to communicate with family, and family contact has been consistently shown to lower recidivism."<sup>172</sup> Additionally, a 2004 Urban Institute study found that inmates who maintain close family relationships were more likely to secure employment and less likely to use drugs after release than those without such relationships, based on higher mean scores of 3.51 versus 3.34, and 3.31 versus 3.18, respectively.<sup>173</sup> The Federal Bureau of Prisons declared that maintaining ties to the community affects an inmate's personal development, and an inmate's family is an instrumental part of that development.<sup>174</sup> In fact, the community impact and recidivism studies, which originally uncovered the correlation between family contact and inmate recidivism, were the very reason for introducing the prison phone call system in the first place.<sup>175</sup>

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Dannenberg, *supra* note 13.

<sup>169</sup> Levy-Pounds, *supra* note 146.

<sup>170</sup> See RIICS Report & Order, *supra* note 4, ¶ 2.

<sup>171</sup> KUKOROWSKI, *supra* note 53, at 5. See also N.Y. Prisons Make Millions Profiteering on Inmate Phone Calls, NAT'L ASS'N CRIM. DEF. LAWS. (Dec. 6, 2006), <http://commcns.org/1ddvRVh>; Brief of Amici Curiae Betsy Gotbaum, et. al in Support of Appellants, at 4-5, Walton, et al. v. N.Y. State Dept. of Corr. Serv., et al., 25 A.D.3d 999, 2006 WL 4070253 (N.Y. 2006) (No. 2007-0012).

<sup>172</sup> KUKOROWSKI, *supra* note 53, at 1. See also Creasia Finney Hairston, *Family Ties During Imprisonment: Do They Influence Future Criminal Activity*, 52 FED. PROBATION 48, 49 (1988) (positive correlation between in-prison contact and post-release success); URBAN INSTITUTE, *Returning Home: Understanding the Challenges of Prisoner Reentry, Maryland Pilot Study*, at 121 (2004), available at <http://commcns.org/1gvm50k> (barriers to in-prison contact with family can have a negative effect on reentry).

<sup>173</sup> URBAN INSTITUTE, *Returning Home: Understanding the Challenges of Prisoner Reentry, Maryland Pilot Study*, at 116-19 (2004), available at <http://commcns.org/1gvm50k>. See also Dannenberg, *supra* note 13 ("[F]amily support . . . is a strong asset . . . in the reentry planning process.")

<sup>174</sup> U.S. Dep't of Justice, Fed. Bureau of Prisons, Program Statement No. 5264.07 ¶1 (Jan. 31, 2002) (codified at 28 C.F.R. § 540.100(a) (2013)), available at <http://commcns.org/1hPriAQ>; see also KUKOROWSKI, *supra* note 53, at 2.

<sup>175</sup> Steven J. Jackson, *Ex-Communication: Competition and Collusion in the U.S. Prison*

Acting Chairwoman Clyburn addressed this issue by commenting that “[w]ith seven hundred thousand individuals released every year from these institutions, it is crucial that we do whatever we can to strengthen family ties before these individuals return home.”<sup>176</sup> Even prison officials have expressed disapproval when companies attempt to increase rates notwithstanding the potential for their own personal benefit through kickbacks.<sup>177</sup> For example, in 2002, when GTL wanted to increase rates in Tennessee, the Department of Corrections’ Commissioner at the time explained that “maintaining contact with family and friends in the free world is an important part of an inmate’s rehabilitation and preparation to return to the community. . . . [Rate increases] would hinder . . . the aforementioned departmental objectives.”<sup>178</sup> The state of Wisconsin is headed in the appropriate direction with regard to assisting inmates in this rehabilitation process: it has a law that *requires* that prison officials promote communication between an inmate and his or her support system because doing so leads to successful reintegration.<sup>179</sup>

Reduction in recidivism rates not only benefits the public for safety reasons, but monetary ones as well.<sup>180</sup> Recidivism is an extremely expensive behavioral trend, and it is the taxpayers who are responsible for footing the bill.<sup>181</sup> Any potential profits that will be lost as a result of lowering prison phone call rates are far outweighed by the costs repeat offenders produce.<sup>182</sup> Therefore, it would

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*Telephone Industry*, NAT’L COMM’N ASSOC., 22 CRITICAL STUDS. MEDIA COMM’N 263, 272 (2005); Dannenberg, *supra* note 13.

<sup>176</sup> RIICS Proposed Rulemaking, *supra* note 7, at 16,660 (statement of Comm’r Clyburn); *see* Barbagallo, *supra* note 74.

<sup>177</sup> *See* Dannenberg, *supra* note 13.

<sup>178</sup> Dannenberg, *supra* note 13.

<sup>179</sup> *Id.*

<sup>180</sup> RIICS Proposed Rulemaking, *supra* note 7, at 16,661 (statement of Comm’r Rosenworcel).

<sup>181</sup> *Id.* at 16,660 (statement of Comm’r Clyburn). As one commenter noted:

Communication with families will combat recidivism, which is extremely expensive. A report by the Pew Center on the States found that more than four in ten offenders return to state prisons within three years of being released and reducing recidivism by just ten percent could save the states more than \$653 million in one year. While communication is not a silver bullet, evidence shows it helps to reduce recidivism.

*Id.* at 16,646 n.155 (quoting the Leadership Conference); THE PEW CENTER ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS 26 (Apr. 2011), *available at* <http://commons.org/1cx6EVT>. *See also* KUKOROWSKI, *supra* note 53, at 3 (“High prison phone rates . . . function as a regressive tax on communities that experience higher incarceration rates.”).

<sup>182</sup> KUKOROWSKI, *supra* note 53, at 5. *See also* Barbagallo, *supra* note 74 (“The overall costs of [not providing affordable prison phone service] are too great, for those who re-offend [represent] a substantially higher economic [taxpayer] burden than any lost proceeds that would result . . .”).

seem, as a matter of a simple cost-benefit analysis, that it is more economically efficient to have lowered the rates.<sup>183</sup> All in all, “[o]vercharging inmates is not just unfair but also counterproductive, because it discourages inmates from keeping in touch with a world where they will be expected to fit in.”<sup>184</sup> The new rules that the FCC have implemented will help decrease recidivism and its associated costs—yet another reason why the FCC should have implemented them.<sup>185</sup>

With regard to inmate behavior while incarcerated, Congress found that those inmates who were able to interact with their families were less likely to be involved in negative incidents within the prison, and were more susceptible to having their sentences reduced.<sup>186</sup> Moreover, maintaining connections with family, particularly parent-child relationships, gives the inmate a “greater stake in good behavior.”<sup>187</sup>

From a prison security standpoint, high phone rates are also associated with

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<sup>183</sup> See KUKOROWSKI, *supra* note 53, at 3.

<sup>184</sup> *Costly Phone Calls for Inmates*, *supra* note 6, at A22. See also Steven J. Jackson, *Ex-Communication: Competition and Collusion in the U.S. Prison Telephone Industry*, NAT'L COMM'N ASSOC., 22 *Critical Studies in Media Comm'n* 263, 272 (2005) (“[A] reliable way of increasing the likelihood that prisoners will re-offend is to break all ties with the outside world and then place them back on the street years later, with little reentry support, in a community to which they have become a stranger.”).

<sup>185</sup> The ability of prisoners to affordably maintain contact with family during incarceration reduces recidivism. See KUKOROWSKI, *supra* note 53, at 4 (“Lowering excessive prison phone rates will decrease future prison costs because fewer released prisoners “will find themselves back in prison.”).

<sup>186</sup> Second Chance Act of 2007: Community Safety Through Recidivism Prevention, PL 110-199, § 3(b)(6), 122 Stat. 657 (2008) (codified at 42 U.S.C. § 17501 (2008)); see also KUKOROWSKI, *supra* note 53, at 2.

<sup>187</sup> Todd Shields, *Prison Phones Prove Captive Market for Private Equity*, BLOOMBERG (Oct. 4, 2012), <http://commcns.org/1n3YuuB>. “[Parent-child] relationships are particularly vulnerable during incarceration.” Creasie Finney Hairston, *Family Ties During Imprisonment: Important to Whom and For What?*, 18 J. SOC. & SOC. WELFARE 87, 88 (1991). Incarcerated parents fear that their “relationships with [their] children [will] be irrevocably lost” while they are in prison. *Id.* at 94. Maintaining parent-child communication is “vital in maintaining parent-child attachment and enabling [parents] to maintain their parental roles and carry out their parental responsibilities and commitments.” *Id.* at 91. When family ties are maintained, benefits include not only an “increased probability of reunification of the family household” but also overall “improved mental health of inmates” during incarceration. *Id.* at 87-88. As one professor suggests, “for inmates the ‘speech process’ may [consist] of the use of language to resist or free oneself from the dehumanizing institutional identity which a prison [seeks] to impose. Speech [is] a mode of shedding the purely institutional self and attaining a different character, one with links to community, however far-removed. . . . [and] possibilities of humanizing relationships and even constructive action.” Madeleine Severin, *Is there a Winning Argument Against Excessive Rates for Collect Calls from Prisoners*, 25 CARDOZO L. REV. 1469, 1538 (2004) (alterations in original) (quoting Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L.L. REV. 443, 457 (1998)).

inmates resorting to illegal means of contacting their families.<sup>188</sup> Contraband cell phone usage has become a widespread problem in prisons, and ironically, “the market for cell phones behind bars is driven in part by the exorbitant rates charged by prison phone companies; prisoners use illegal – but much more affordable – cell phones to stay in touch with their families and friends.”<sup>189</sup> The new rates will therefore, in turn, lower the probability of contraband cell phone usage in prisons as well as the accompanied security risks.<sup>190</sup>

#### B. Prevents Unjust Enrichment

There is a fairness argument supporting the rationalization to lower prison phone call rates.<sup>191</sup> Essentially, the phone companies that acquire monopolistic contracts from state agencies and prison facilities are being unjustly enriched as a result of “charging much higher rates than those paid by the general public.”<sup>192</sup> Similarly, the commissions received from phone companies in return for granting those contracts unjustly enrich the agencies.<sup>193</sup> As discussed previously, companies and agencies facing backlash from this accusation primarily argue that “the higher rates are due to the security features their technology has, such as monitoring phone calls and blocking numbers.”<sup>194</sup> However, the fact that these features are standard and so readily available to the public is in direct opposition to the notion that they are the cause of the inflated prices.<sup>195</sup> In fed-

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<sup>188</sup> See Dannenberg, *supra* note 13. See also *Putting an End to Illegal Cell Phone Use in Prisons*, FCC Workshop/Webinar on Contraband Cell Phone Use in Prisons (Sept. 30, 2010), available at <http://commcns.org/1jLR50t> (“Contraband cell phones have been used by inmates to arrange the murder of witnesses and public safety officers, traffic in drugs, and manage criminal enterprises. This illegal practice jeopardizes the safety of America’s communities and public safety officials.”).

<sup>189</sup> Dannenberg, *supra* note 13.

<sup>190</sup> RIICS Report & Order, *supra* note 4, ¶ 44.

<sup>191</sup> See Dannenberg, *supra* note 13. See also Madeleine Severin, *Is there a Winning Argument Against Excessive Rates for Collect Calls from Prisoners*, 25 CARDOZO L. REV. 1469 (2004) (characterizing the prison phone call rate problem as “reach[ing] out and goug[ing] someone”); *Nationwide Research Finds Excessive Prison Phone Rates Exploit Prisoners’ Families*, NATION INSIDE, <http://commcns.org/1iND2aG> (last visited Mar. 9, 2013) (characterizing the prison phone call rate problem as “gross profiteering at its worst”).

<sup>192</sup> Dannenberg, *supra* note 13 (Lucrative prison phone contracts profit not only the telephone companies, but the rates are further inflated to cover huge commission payments paid to state agencies that average forty-two percent nationwide and account for \$152 million in extra annual costs paid by the families of prisoners.).

<sup>193</sup> *Id.*

<sup>194</sup> Choney, *supra* note 31.

<sup>195</sup> *Id.* See also Ben Iddings, *The Big Disconnect: Will Anyone Answer the Call to Lower Excessive Prisoner Telephone Rates*, 8 N.C. J. L. & TECH. 159, 174-75 (2006) (suggesting that excessive rates are driven by lucrative commissions, not operating costs which have decreased with technological advances).

eral prisons, not only is technology used to monitor phone calls, but the system still makes a profit, all the while remaining affordable for consumers.<sup>196</sup> In short, the commissions and inflated prices are motivated by profits on the part of phone companies and state agencies.<sup>197</sup> In fact, in 2001, Louisiana declared that when deciding what company to award a contract to, the highest number of voting points would be awarded to the bidder that proposed the highest percentage of compensation.<sup>198</sup> Similarly, in 2007, Alaska admitted that the commission rate—also known as a “kickback”<sup>199</sup>—was the most influential factor when considering bidders for contracts.<sup>200</sup> These kickbacks increase the costs of the calls, a cost borne by the consumer.<sup>201</sup> The great expense of prison phone calls reflects the public’s unawareness of the costs of prison, and it stems from the state’s desire to have a source of revenue to fund other programs within the prison.<sup>202</sup> However, the commission payments are also used for expenses that have nothing to do with the inmates, such as employee salaries and benefits, renewal funds, personnel training, and states’ general revenue funds.<sup>203</sup> The relatives and friends who must pay for these things, more often than not, have limited means to begin with.<sup>204</sup> Therefore, instead of giving phone companies and state agencies the uninhibited discretion to set their own rates, rate caps have been rightfully mandated, which will in turn better protect the prisoners’ familial bonds.<sup>205</sup>

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<sup>196</sup> *Costly Phone Calls for Inmates*, *supra* note 6, at A22.

<sup>197</sup> Dannenberg, *supra* note 13.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* (commenting that “commissions” are the polite term for “kickbacks”).

<sup>200</sup> Inmate Telephone Systems for Alaska Correctional Institutions, Alaska RFP 2008-2000-7549, at 1 (Dec. 19, 2007), available at <http://commens.org/1ey2gUu>.

<sup>201</sup> Justin Carver, *An Efficiency Analysis of Contracts for the Provision of Telephone Services to Prisons*, 54 FED. COMM. L.J. 391, 398 (2002); *Nationwide Research*, NATION INSIDE, *supra* note 191 (“Thus, prison phone companies are able to offer lower rates but for having to pay kickbacks to the contracting government agencies.”).

<sup>202</sup> Madeleine Severin, Note, *Is There a Winning Argument Against Excessive Rates for Collect Calls from Prisoners?*, 25 CARDOZO L. REV. 1469, 1473 (2004). See also Dan Markel et al., *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1224–25 (2007); Carver, *supra* note 201, at 399 (“States use the revenue derived from the commissions in different ways. Most states claim to use the funds to offset costs of operating a prison, either by funding programs operated by the Department of Corrections, or by placing the funds in a prisoners’ welfare account.”).

<sup>203</sup> RIICS Report & Order, *supra* note 4, ¶ 53.

<sup>204</sup> RIICS Proposed Rulemaking, *supra* note 7, at 16,660 (statement of Comm’r Rosenworcel) (observing that “when a single call may cost as much as a month of unlimited phone service, the financial burden of staying in touch may be too much for inmates’ families to bear”).

<sup>205</sup> RIICS Proposed Rulemaking, *supra* note 7, at 16,661 (statement of Comm’r Clyburn) (concluding that the “provisioning of affordable phone services” is the most sure way to strengthen family ties, and that the “overall costs of not doing so are too great, for those who

### C. Addressed Arbitrariness of Rates

Prison phone rates nationwide have been described as “a patchwork of charges that simply cannot be correlated to providing the same basic telephone service.”<sup>206</sup> Not only do these rates vary greatly between different states, but within states as well.<sup>207</sup> These extreme differences remain even when the telephone services are supplied by the same company.<sup>208</sup> Additionally, the method by which customers are charged for prison calls often varies.<sup>209</sup>

As an example of these variations, the Prison Policy Initiative found that the cost for a 15-minute, interstate phone call could cost \$2.36 in Massachusetts and \$17.00 in Georgia.<sup>210</sup> Overall, most states charge a connection fee of \$3.00 or more with per-minute fees of up to \$0.89 for interstate calls.<sup>211</sup> These rates result in customers paying anywhere from \$10.00 to \$17.00 just to talk on the phone for no more than 15 minutes.<sup>212</sup> “This is a far cry from the much lower long distance rates paid by the non-incarcerated public, which typically run \$.05 to \$.10 per minute or simple flat rate monthly fees for unlimited long distance calling in the \$50.00-80.00 a month range.”<sup>213</sup> However, in polar opposi-

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re-offend place a substantially higher economic burden on taxpayers than any lost proceeds that would result from lower prison phone rates”). Others believe that reform of the prison phone-rates through the courts still serves as a viable approach. Ben Iddings, Comment, *The Big Disconnect: Will Anyone Answer the Call to Lower Excessive Prisoner Telephone Rates?*, 8 N.C. J. INT’L L. & COM. REG. 159, 163–64, 198–99 (2006) (observing that litigation “often has the ability to rally support and crystallize public opinion around an issue and that reformers must endeavor continuously to influence public opinion).

<sup>206</sup> Dannenberg, *supra* note 13. The FCC has also commented on the “wide disparity in [prison phone rates] between states,” observing that the rates’ price variance might be attributable to kickbacks, because the rates are higher in states that require commissions. RIICS Proposed Rulemaking, *supra* note 7, at 16,633 (The FCC echoes Dannenberg’s concerns: “Such record evidence raises questions about whether [prison phone] rates accurately reflect the costs of providing ICS and whether site commission payments are a reasonable cost of providing [a prison phone service] that therefore should be recovered in the . . . rates inmates are charged.”).

<sup>207</sup> *Nationwide Research*, NATION INSIDE, *supra* note 191.

<sup>208</sup> *Id.*

<sup>209</sup> Dannenberg, *supra* note 13 (For example, local calls could be free, or local calls might have a flat-rate, a per-minute charge, or a connection fee along with a per-minute charge.).

<sup>210</sup> KUKOROWSKI, *supra* note 53, at 2. See also Christine Mai-Duc, *FCC Proposes Changes to Lower Pay-Phone Rates for Prisoners*, L.A. TIMES (Dec. 28, 2012), <http://commcns.org/LqMJ09>; Barbagallo, *supra* note 74 (“The FCC found that the costs for a 15-minute interstate call were \$6.65 in California, \$6.45 in Texas, \$2.04 in Montana, and \$16.55 in Idaho.”).

<sup>211</sup> Dannenberg, *supra* note 13.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

tion to the majority, there are states such as New York, where interstate calls cost \$0.48 per minute, with no connection fee at all.<sup>214</sup> New York's rates are *one twenty-fifth* the cost of Washington's, the state with the highest interstate rate.<sup>215</sup>

Local calls differ from intrastate calls in that, while still made to recipients in the same state, they are only considered local if the recipient is in "a small area around the call's originating location,"—for example, calls within the same city.<sup>216</sup> States differ widely in the structures that they set for their local-call rates; some states implement flat rates, others impose rates that include both a connection fee as well as a per-minute charge.<sup>217</sup> These variations result in costs ranging from as low as a flat \$0.50 for 15 minutes in North Dakota, South Carolina and Florida, to \$6.20 in Colorado, which charges a \$2.75 connection fee, as well as a \$0.23 per-minute charge.<sup>218</sup> Intrastate rates vary significantly, as well.<sup>219</sup> For example, New York charges a mere \$0.048 per-minute fee for intrastate calls, amounting to \$0.72 for a 15-minute call,<sup>220</sup> while Oregon not only charges a \$3.95 connection fee, but a \$0.69 per-minute fee as well.<sup>221</sup> Effectively, New York callers and recipients are paying less than a dollar to talk to their incarcerated family members for 15 minutes, but Oregon customers are paying \$14.30 to do the exact same thing.<sup>222</sup>

The costs of prison phone calls continues to diverge widely amongst jurisdictions, even when the same company provides the services, further evidencing a revenue-driven model.<sup>223</sup> As an illustration, Rhode Island's "no kick-back commission low rates," are provided by GTL, which is the same company that charges some of the highest rates in the country in states where commissions are paid.<sup>224</sup> Even though GTL provides services in both states, it costs \$10.70 to place a 15-minute interstate collect call in Arkansas, while doing the same in

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<sup>214</sup> *Id.* (referencing table). Washington's interstate rate for prison phone calls is \$4.95 plus \$0.89 per minute, while New York's is a mere \$0.48 per minute; during the course of a fifteen-minute phone-call, the Washington rate will result in a charge of \$18.30, while the New York rate will result in a charge of \$0.72.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> Dannenberg, *supra* note 13. *See also* KUKOROWSKI, *supra* note 53, at 2 (noting that Global Tel\*Link—the prison phone company used by New York—charges the approximate \$0.05 fee for both local and long-distance calls).

<sup>222</sup> Dannenberg, *supra* note 13.

<sup>223</sup> KUKOROWSKI, *supra* note 53, at 2.

<sup>224</sup> Dannenberg, *supra* note 13.

Rhode Island only costs \$5.80.<sup>225</sup> “It is readily apparent that the service provided, i.e., prison-based phone calls, is profitable for GTL even at the company’s lowest rates; thus, the higher rates charged in states where GTL pays commissions amount to nothing more than price gouging and gross profiteering.”<sup>226</sup> Unfortunately, this “kickback-based business model” is commonly used since GTL provides services to the majority of prison facilities throughout the country.<sup>227</sup>

Phone companies have been charging customers at rates that generate revenue.<sup>228</sup> However, the reality of that injustice was irrelevant because once there was a contract obtained, families had no choice but to tolerate the rates even if they seemed unfair and were inflated.<sup>229</sup> The FCC can now put an end to companies’ ability to take advantage of customers with interstate calls by the institution of these new and improved rules.

#### D. New Rule Mirroring Recent Trends

Some states seem to have been one step ahead of the FCC prior to its new decision.<sup>230</sup> Several states actually voluntarily changed their own prison phone call rates and instituted new policies.<sup>231</sup> Eight states have already banned the commissions that are paid by the phone companies to state contracting agencies.<sup>232</sup> States that have banned commissions are the same states where some of the lowest rates for prison phone calls are instituted.<sup>233</sup> For example, “Missouri charges [ten] cents a minute for a long-distance phone call with a one dollar connection fee.”<sup>234</sup> By means of comparison, after banning commissions, prison phone call rates dropped 61% in California, 87% in Michigan, and 69% in New York.<sup>235</sup> Although not completely eliminated, Arkansas, Kansas, and New

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> Ian Haney Lopez, *Freedom, Mass Incarceration, and Racism in the Age of Obama*, 62 ALA. L. REV. 1005, 1007 (2011) (“States (and, with their acquiescence, private industry) generate tremendous revenue by imposing exorbitant rates on the phone calls that prisoners make to their families.”).

<sup>229</sup> Dannenberg, *supra* note 13.

<sup>230</sup> *Id.*

<sup>231</sup> See *As the FCC Deliberates, Louisiana Lowers Prison Phone Rates*, NATION INSIDE, <http://commens.org/1a2M7sV> (last visited Feb. 6, 2013).

<sup>232</sup> Choney, *supra* note 31. See also Dannenberg, *supra* note 13.

<sup>233</sup> Choney, *supra* note 31 (These states include California, Michigan, Missouri, Nebraska, New Mexico, New York, Rhode Island, and South Carolina.).

<sup>234</sup> *Id.*

<sup>235</sup> *Nationwide Research*, NATION INSIDE, *supra* note 191; see also Dannenberg, *supra* note 13.

Hampshire have reduced the commission rates used in those states while Montana, similarly, has entered into a “limited-commission contract.”<sup>236</sup> As a result, rates decreased 50% in Arkansas, 40% in Kansas, and 64.5% in Montana.<sup>237</sup> In the District of Columbia, there is a maximum rate determined by the Public Service Commission of the District of Columbia that precludes the imposition of any commissions or charges that result in customers paying in excess of that rate.<sup>238</sup>

The Louisiana Public Service Commission (LaPSC) became inspired by the efforts of the aforementioned Campaign for Prison Phone Justice and their attempts at combating against the high costs of interstate prison phone calls.<sup>239</sup> After witnessing the FCC finally start to take these concerns seriously by issuing the Notice of Proposed Rulemaking, Louisiana state officials voted to lower rates by twenty-five percent.<sup>240</sup> Foster Campbell, LaPSC’s Commissioner, declared that it was “morally wrong” to be imposing high fees on some of the poorest people in the state of Louisiana.<sup>241</sup> The LaPSC faced opposition by critics arguing that lowering costs would negatively affect public safety.<sup>242</sup> However, LaPSC found that the twenty-five percent reduction would not negatively affect the ability to screen calls.<sup>243</sup>

As a policy matter, the FCC should feel confident in the decision to lower prison phone call rates because states had already begun to jump on board.<sup>244</sup> Even other government agencies, such as the Immigration Customs and Enforcement (ICE), moved towards lowering rates.<sup>245</sup> ICE charges only \$0.12 per minute for nationwide calling, without charging commissions or any other additional fees.<sup>246</sup> Clearly, there is a societal trend emerging amongst states that points in the same direction the FCC was leaning towards prior to its decision.<sup>247</sup> This, consequently, only further supports the FCC’s decision to finally lower the prices of prison phone calls.

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<sup>236</sup> *Nationwide Research*, NATION INSIDE, *supra* note 191.

<sup>237</sup> *Id.*; Dannenberg, *supra* note 13.

<sup>238</sup> *See* RIICS Report & Order, *supra* note 4, Appendix B.

<sup>239</sup> *FCC Deliberates*, NATION INSIDE, *supra* note 232.

<sup>240</sup> *Id.*

<sup>241</sup> Reckdahl, *supra* note 5.

<sup>242</sup> *FCC Deliberates*, NATION INSIDE, *supra* note 232.

<sup>243</sup> *Id.*

<sup>244</sup> *See id.* *See also* Choney, *supra* note 31; Dannenberg, *supra* note 13.

<sup>245</sup> RIICS Report & Order, *supra* note 4, ¶ 4.

<sup>246</sup> *Id.*

<sup>247</sup> *See FCC Deliberates*, NATION INSIDE, *supra* note 232. *See also* Choney, *supra* note 13; Dannenberg, *supra* note 13.

## VII. FORESEEABLE CONCERNS AND NEXT STEPS

Dissenting Commissioner, Ajit Pai expressed concerns with implementing these new rules. Although acknowledging that the problem with prison phone call rates should have been addressed years ago, “he could not vote for the proposal because it was too complex, and he was uncertain the commission could enforce it.”<sup>248</sup> Essentially, Commissioner Pai is concerned that the Order has the potential to spark lawsuits against the FCC.<sup>249</sup> In addition to that, the FCC has admitted that in accordance with keeping rates “just and reasonable,” for the benefit of both the users and service providers, the elimination of commission payments may impede certain prison facilities’ ability from implementing social welfare programs for inmates.<sup>250</sup> In order to address and anticipate concerns, as well as ensuring that “interstate and intrastate ICS are provided consistent with the statute and public interest,” the FCC has issued a Further Notice of Proposed Rulemaking (“FNPRM”). In the FNPRM, the FCC seeks comment on reforming intrastate rates, additional issues regarding telephone services for deaf inmates, the impact of new technology on interstate rates, the possibility of implementing quality of service standards, amongst a variety of other issues.<sup>251</sup>

## VIII. CONCLUSION

Contracts that allow phone companies to profit from inflated rates, and state agencies to profit from unnecessarily high commissions are socially regressive.<sup>252</sup> These profits are often procured at the expense of economically disadvantaged families. These families are forced to decide whether to face economic hardship and pay the excessive rates, or cease contact with their loved ones who are behind bars.<sup>253</sup> Sadly, the profit-motives of contracting agencies and phone companies have taken an overwhelming priority over the known rehabilitative benefits that lowering the rates will generate.<sup>254</sup> Decreasing recidivism rates, preventing negative prison behaviors, maintaining relationships with children and removing the burden from innocent families are all factors that will positively affect a far greater number of people than would the unjust

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<sup>248</sup> *FCC votes to cap, slash prison phone rates*, *supra* note 130.

<sup>249</sup> *Id.*

<sup>250</sup> RIICS Report & Order, *supra* note 4, ¶ 8.

<sup>251</sup> *Id.*

<sup>252</sup> Dannenberg, *supra* note 13.

<sup>253</sup> *See* RIICS Report & Order, *supra* note 4, ¶ 2.

<sup>254</sup> Dannenberg, *supra* note 13.

enrichment of a couple of telephone companies and state agencies.<sup>255</sup> “Notably, the only ones satisfied with the status quo are the phone companies ... and corrections departments ... Outside of those with a financial interest in the prison phone industry, the consensus – ranging from concerned members of Congress ... to thousands of affected consumers nationwide – is for reform of exorbitant prison phone rates.”<sup>256</sup>

As a policy matter, the rules set forth in the Order are by no means an unheard of, or inconceivable course of action.<sup>257</sup> The movement towards lowering prison phone call rates has already received a substantial amount of support from advocacy organizations nationwide, and even began to manifest itself as various states decided to change their own laws in accordance therewith.<sup>258</sup> Although there are several concerns and challenges that the FCC will have to address in the near future regarding this decision, the new rules will finally give inmates a real chance at rehabilitation, while simultaneously lifting an economic burden off low-income families’ shoulders.<sup>259</sup> In the words of Acting Chairwoman Mignon Clyburn, “[i]t’s been a long time coming, and not in time to directly benefit Mrs. Wright, but a change has finally come.”<sup>260</sup>

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<sup>255</sup> KUKOROWSKI, *supra* note 53, at 2. *See also* Levy-Pounds, *supra* note 146; *Costly Phone Calls for Inmates*, *supra* note 6, at A22.

<sup>256</sup> Letter from Paul Wright, *supra* note 158, ¶ 8.

<sup>257</sup> *See FCC Deliberates*, NATION INSIDE, *supra* note 232. *See also* Choney, *supra* note 31; Dannenberg, *supra* note 13.

<sup>258</sup> *See Wright to Call Home: End Predatory Prison Phone Rates*, TAKE PART, <http://commens.org/KVISbG> (last visited Feb. 14, 2013); NATION INSIDE, *supra* note 45. *See also* Choney, *supra* note 31; Dannenberg, *supra* note 13.

<sup>259</sup> *See* RIICS Report & Order, *supra* note 4, ¶ 2.

<sup>260</sup> *Id.*