

**UNITED STATES
FEDERAL COMMUNICATIONS COMMISSION**

Incarcerated People's Communications
Services, Implementation of the Martha
Wright-Reed Act; Rates for Interstate
Inmate Calling Services

WC Docket No. 23-62;
WC Docket No. 12-375

EX PARTE SUBMISSION OF
THE U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION

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Pursuant to § 1.206(b)(1) of the Commission’s rules of practice and procedure, the U.S. Department of Justice submits the following *ex parte* filing as part of the above-captioned proceeding.¹

I. INTRODUCTION AND DIVISION’S INTEREST

The Antitrust Division of the U.S. Department of Justice (“the Division”), which is responsible for enforcing the federal antitrust laws and other competition statutes, writes to provide its views on the Federal Communication Commission’s (“the FCC” or “Commission”) rulemaking entitled “Incarcerated People’s Communications Services, Implementation of the Martha Wright-Reed Act; Rates for Interstate Inmate Calling Services.”² The Division applauds the Commission’s efforts to build on its work over the past decade to ensure that rates and charges for communications services between incarcerated people and their loved ones are fair, just, and reasonable. The Division writes to provide its views on competition for the provision of incarcerated people’s communications services (“IPCS”).³

The federal antitrust laws represent the legal embodiment of our nation’s commitment to competition and the competitive process. For more than 100 years, the Supreme Court has reaffirmed that competition is a core organizing principle of the U.S. economy.⁴ This is for good reason. Vigorous competition yields myriad benefits across the U.S. economy, including lower prices, higher quality goods and services, increased access to goods and services, and greater innovation.⁵ The Division has a strong interest in promoting and protecting competition across the economy, including in the IPCS market. Additionally, the Division and the Commission have a long-standing policy of cooperation in reviewing communications matters, including merger review.

The Division recognizes that communications services for incarcerated people provide an important lifeline between incarcerated people and their loved ones,⁶ the

¹ 47 CFR § 1.206(b)(1) (*amended* Jan. 17, 2024).

² 88 Fed. Reg. 20,804 (Apr. 7, 2023) (to be codified at 47 C.F.R. § 64).

³ The Division would like to acknowledge the contributions of longtime staff attorney Deborah Roy, who was instrumental in developing the Division’s views on competition in this industry.

⁴ *See, e.g., N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1110 (2015) (referencing “the Nation’s commitment to a policy of robust competition”); *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) (“The heart of our national economic policy long has been faith in the value of competition.”).

⁵ *See, e.g., Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978) (noting that the antitrust laws reflect “a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.”).

⁶ Approximately 1.7 million adults are in the custody of state and federal prisons and local jails. *See* U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Correctional Populations in

benefits of which serve other important non-economic values. Nonetheless, this comment is focused on the benefits of improving competition, the policy area where the Division has unique expertise.

II. COMPETITION IN THE IPCS MARKET

IPCS markets across the country suffer from a lack of competition, which harms both incarcerated people and those who purchase communications services to communicate with them. In most cases, correctional facilities select a sole-source communications provider with which the facility negotiates rates and charges for communications services. The scope and terms for these services are memorialized in long-term contracts between the facilities and the communication services provider. These contracts provide all incarcerated people in a correctional facility and those wishing to communicate with them a sole source of communication services. And although correctional facilities *negotiate* rates and charges for communication services, incarcerated people and their families *pay* the negotiated rates and charges for the services they use. Therefore, incarcerated people and their loved ones face an effective monopoly after the correctional facility selects a provider for its communications services.⁷ This process imposes long-term, structural barriers to competition and deprives consumers the benefits of a robust, competitive IPCS market.

In the Division's experience, the markets to provide IPCS services to facilities are highly concentrated.⁸ Two providers, Securus and Global Tel*Link Corporation d/b/a Viapath Technologies ("GTL") have controlled well over half of the overall market for more than a decade. Other market participants have not been able to win significant market share from Securus and GTL or discipline their prices. Additionally, there are significant barriers to entry and expansion in this market. For example, a new entrant must first gain access to capital for upfront costs such as installing infrastructure. Companies that do not have a strong track record of serving other correctional facilities face a chicken-and-egg problem of not being able to win business because they lack significant experience. In addition, the terms of IPCS contracts are generally several

the United States, 2021-Statistical Tables at 14 (Feb. 2023). A critical mode of communication between incarcerated parents and their children is phone calls, which can be prohibitively expensive making it difficult for parents to regularly speak with their children. U.S. Department of Justice, National Institute of Corrections, Model Practices for Parents in Prisons and Jails: Reducing Barriers to Family Connections at 59 (July 2019).

⁷ The Commission has recognized that providers of telephone services to incarcerated people have monopoly power in the facilities they serve. *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Third Report and Order, Order on Reconsideration, and Fifth Further Notice of Proposed Rulemaking, ¶ 31 (May 20, 2021).

⁸ The Division last investigated the IPCS industry in 2019, when Securus Technologies Inc. attempted to acquire Inmate Calling Solutions LLC. Securus abandoned the transaction after the Division expressed concern that the merger would eliminate important competition in IPCS. See Press Release, U.S. Dep't of Justice, Securus Technologies Abandons Proposed Acquisition of Inmate Calling Solutions After Justice Department and the Federal Communications Commission Informed Parties of Concerns (Apr. 3, 2019).

years in length and renew automatically, thereby limiting the opportunity for competitors to challenge the established incumbents.⁹

Incarcerated people and their families have benefited from FCC regulatory initiatives that have brought reforms to this market. As the FCC recognizes, however, there is more work to be done. ICPS markets are characterized by unreasonably high rates, ancillary service fees, and abusive provider practices such as the seizure of unused funds in incarcerated people's accounts without notice or refund.¹⁰ The lack of robust competition in IPCS markets disincentivizes product improvements, service, and innovation.

III. The Division's Recommendations

Many vulnerable consumers depend on this important market that has an oligopolistic structure. It is important that the FCC's forthcoming rules better align incentives between correctional facilities and the incarcerated people and their families who pay for IPCS. To that end, the Division encourages the FCC to consider whether site commissions ought to be included as costs of providing service when determining just and reasonable rates. Because commissions operate as a transfer of funds from the IPCS vendors to the correctional facilities, the inclusion of site commissions in bids for IPCS contracts may inhibit the competitive process from directing contracts to the lowest-priced bidders (from the point of view of the ultimate consumers of the services) by giving correctional facilities mixed incentives in choosing a vendor. Some correctional facilities may prefer vendors who pay higher site commissions, but when site commissions serve to increase the rates that incarcerated people and their families pay, they work directly against the FCC's mandate to ensure that such rates be just and reasonable.

Finally, the FCC should ensure that providers do not evade rate regulation by steering customers from regulated to unregulated communications services such as electronic messaging, which would cause competitive harm and dilute the intended benefits of the Martha Wright-Reed Act.¹¹ IPCS providers offer a bundle of services including phone communications that are rate-regulated, as well as electronic messaging

⁹ Comments of Prison Policy Initiative, Inc., *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 at 19-20 (September 27, 2021) (observing that contract durations are long and incumbent carriers frequently evade competitive rebidding through serial contract extensions).

¹⁰ *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Fourth Report and Order and Sixth Notice of Proposed Rulemaking, ¶¶ 71-75 (Sept. 30, 2022).

¹¹ The FCC found that the Martha-Wright-Reed Act does not give it jurisdiction over e-messaging. *Incarcerated People's Communications Services, Implementation of the Martha Wright-Reed Act*, WC Docket No. 23-62, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, ¶ 29.

applications that are not regulated.¹² As documented by the Prison Policy Initiative, the rates that incarcerated people pay for e-messaging are unreasonably higher than the rates paid by people who reside outside of correctional facilities.¹³

IV. CONCLUSION

The Division applauds the Commission for its diligent efforts to reform the provision of communications services to enhance competition in communications markets for incarcerated people. As always, the Division looks forward to continuing to work with the Commission in protecting and promoting competition and achieving affordable communications services for incarcerated people and their families. The Division will continue to review the provision of services to incarcerated people and further competition through merger enforcement and prosecution of anticompetitive behavior.

Respectfully Submitted,

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¹² See, e.g., Comments of NCIC Inmate Communications, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 at 15 (Sept. 27, 2021) (noting that almost all bids include proposals for remote video visitation, messaging and premium tablet content (movies, games, music, books)).

¹³ Prison Policy Initiative, *SMH: The rapid & unregulated growth of e-messaging in prisons* (March 2023) (the cost for an incarcerated person to send one e-message ranges from being free in Connecticut to a high of 50 cents in Alaska and Arkansas, with prices most often between 27 cents to 30 cents).