



WILL THIS MARK THE END OF A FINANCIAL ASSAULT ON THE INCARCERATED AND THEIR FAMILIES?



BY
MIGNON CLYBURN

Mignon L. Clyburn served as a member of the Federal Communications Commission (FCC) from 2009 to 2018.

BRAVE NEW WORLD?

By Stephen Kinsella & Karla Perca Lopez



UPPING THE "ANTE" ON COMPETITION REGULATION: GAMBLING WITH THE FUTURE OF BIG TECH?

By Ben Bradshaw, Peter Herrick & and Sheya Jabouin



EX ANTE REGULATION IN AN ERA OF FAST-PACED INNOVATION - CONNECTING THE TIME AND LOCUS OF REGULATION

By Alberto Quintavalla & Leonie Reins



BEWARE EX ANTE REGULATION: INTRODUCING "CUT AND PASTE" EX ANTE REGULATIONS IN CANADA AGAINST SELECT BIG TECH COMPANIES IS JUST BAD ECONOMIC AND LEGISLATIVE POLICY

By John Pecman & Huy Do



WILL THIS MARK THE END OF A FINANCIAL ASSAULT ON THE INCARCERATED AND THEIR FAMILIES?

By Mignon Clyburn



BRUSSELS EFFECT? CONVERGENCE AND DIVERGENCE ON PLATFORM REGULATION IN TRANSATLANTIC COMPETITION POLICY

By Will Leslie & John Eichlin



REGULATORY SANDBOXES: EX ANTE REGULATION OR COMPETITION POLICY?

By Cristina Poncibò & Laura Zoboli



Visit www.competitionpolicyinternational.com for access to these articles and more!

WILL THIS MARK THE END OF A FINANCIAL ASSAULT ON THE INCARCERATED AND THEIR FAMILIES?

By Mignon Clyburn

This paper examines the consequences of an exploitative prison payphone regime and the devastating financial, emotional, and social burdens forced upon the loved ones of incarcerated persons. These families often face numerous economic and social vulnerabilities, including income inequality and alienation trauma experienced by children of the incarcerated. In reviewing the history of the prison payphone industry and its actions, as well as the federal and state responses to these actions, this article presents readers with an inside view of prison payphone providers' dispassionate actions, the institutions that enabled these actions, and regulatory actions over decades tackling prison payphone reform. This article reveals the moment in the payphone industry's history when profiteering over people began and when mutually enriching arrangements with jails and prisons was birthed. This commentary also provides access to the regulatory, advocate, and grass roots communities' campaigns to end the economic and social assault on families of incarcerated persons. Congressional action and the passage of the Martha Wright-Reed Just and Reasonable Communications Act have empowered the Federal Communications Commission ("FCC") to establish just and reasonable rates for both interstate and intrastate payphone services. It is unlikely, however, that prison phone providers will abandon the captive golden goose, namely the families of incarcerated persons, and will merely seek to replace lost revenues with new and creative exploitive schemes. The question is whether Congress armed the FCC with sufficient ammunition to ward off future creative attempts to extort outrageous communications fees from the families of our nation's incarcerated persons.

Scan to Stay Connected!

Scan here to subscribe to CPI's **FREE** daily newsletter.



01

INTRODUCTION

Could it be we are witnessing the beginning of the end of one of the most egregious cases of market failure I have seen during my 20 years of regulatory public service? The short and highly optimistic answer is yes with the passage last year of the Martha Wright-Reed Just and Reasonable Communications Act of 2022. Signed into law by President Joe Biden on January 5, 2023,² this long-awaited and welcomed piece of legislation requires the Federal Communications Commission to ensure that charges for payphone services, including advanced (e.g. audio or video) communications services in correctional institutions, are just and reasonable.³

Imagine, if you will, sending your sons or daughters off to camp and their only means of contacting you is calling collect using a payphone controlled by that camp. You then are charged rates set by a monopoly telecommunications provider (they have an established and mutually beneficial relationship with) at up to 90 cents per minute, on top of which is added up to a \$3 per call connect fee. What if, however, you planned well and opted to set up an account in your child's name with the chance to replenish the balance, if it runs low, only to be told it may cost up to \$3 to set up such account, another fee to add money to the account, and up to an additional \$3 to close the account when the camp ends? This scenario is not episodic for the nearly two million people held in the thousands of prisons, jails, detention, and correctional facilities in this country, it is an everyday reality.⁴

To make matters worse for those wishing to maintain a connection with their incarcerated relatives and friends, and

clients represented by public defenders, is that the cost of those collect calls may exceed your agency's budget or the family's combined monthly grocery and electricity bills. Now you are forced to make the painful "Sophie's Choice" between eating, keeping the electricity flowing, or maintaining that most prized and legally consequential connection. This is precisely the gruesome dilemma forced upon millions of households in this country.⁵ Even more tragic, within these households are approximately 2.7 million children with at least one parent in prison who wants and needs to stay in touch.⁶

Applying any reasonable standard, it is morally shameful that the costs of telephone calls to incarcerated people in the United States is well beyond what most people in our country pay for telephone service and what too many can afford. It is often cheaper to call Singapore from a cell phone than it is to speak to someone in our nation's prison or jail.⁷ Just how high can these charges be? In 2015, it was reported that one call from a pro bono attorney in Florida was \$56 with all the fees for a 4-minute conversation, and even if this is an extreme case, the fact that it's possible tells you the system is broken.⁸ While many of these exorbitant payphone charges are accurately representative of prison and jail calling rates over the previous five to 10 years and earlier, and recent data suggests that prison and jail calling rates have marginally moderated, most still hover around a meteoric nationwide average of \$5 for a 30 minute call.⁹ At these levels, the rates and fees continue to place an onerous burden on incarcerated people and those that care for and about them.

One might ask just how did we get here and why are we still here? In a flat-rate environment where most are enjoying decreasing calling rates, how is it that incarcerated persons and their families are faced with payphone rates at such high levels? After all, we are talking about families that are, in large part, the most economically challenged of all Amer-

2 Martha Wright-Reed Just and Reasonable Communications Act of 2022, S.1541, 117th Congress (2021-2022)(enacted). <https://www.congress.gov/bill/117th-congress/senate-bill/1541>.

3 *Id.*

4 Wendy Sawyer and Peter Wagner, Prison Policy Initiative Report (March 14, 2022).

5 Mignon L. Clyburn, Commissioner, Federal Communications Commission ("FCC"), Another Step Toward Fairness in Inmate Calling Services (September 30, 2015). <https://www.fcc.gov/news-events/blog/2015/09/30/another-step-toward-fairness-inmate-calling-services>.

6 Mignon L. Clyburn, Commissioner, Federal Communications Commission ("FCC"), FCC's Inmate Calling Workshop Prepared Remarks of Commissioner Mignon L. Clyburn (July 9, 2014). <https://www.fcc.gov/document/remarks-chairwoman-mignon-clyburn-fcc-inmate-calling-workshop>.

7 Leanza, Cheryl. "Theory Applied: Walking the Halls of Power and the Streets in the Successful Campaign to End Predatory Long Distance Prison Phone Rates." *Journal of Civil Rights and Economic Development*, Vol 28. Issue 2, Article 5 (Fall 2015): Page 185. <https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1773&context=jcred>.

8 Clyburn, *supra* note 5.

9 Juliana Kim, Biden signs a bill to fight expensive prison phone call costs, NPR (January 6, 2023), <https://www.npr.org/2023/01/01/1146370950/prison-phone-call-cost-martha-wright-biden>.

icans. Given the disproportionate confinement of African Americans and Latinos, the high cost of phone calls creates a de-facto community destabilization policy that chronically and negatively impacts the overall health and well-being of communities of color.¹⁰

Prison.org sees the prison and jail communications industry as being rife with problems – from sky-high phone rates to inexplicable consumer fees to expensive and unnecessary “premium services” – and most of these problems can be traced to a single moment in the industry’s history: *When the companies decided to offer facilities a percentage of their revenue to provide a competitive edge when they answer a request for proposal* (“RFP”).¹¹ Prison.org asserts the genesis of payphone provider profiteering is a simple collusion with jails and prisons, where, before long, facilities began to prioritize commissions over the then low rates.¹² From these fateful beginnings where competing phone companies enthusiastically agreed to submit bids that included the payment of fees or commissions to facilities, they solidified a model that for decades has imposed financial hardship for the families and legal representatives of incarcerated individuals.

While it is inconsequentially whimsy today, it is with curious speculation that I wonder whether any bidding payphone provider CEO ever paused to consider the societal and financial harm this regime would cause. If providers never offered site fees or commissions, millions of incarcerated people would likely have been afforded the opportunity to have established a much stronger and regular connection to family and community to which he or she would one day return. Of course, fortunes would not have been made and prison and jail equipment, unrelated to the provision of phone service, would not have been purchased. That, in a nutshell, is the tradeoff – stronger families and communities with reduced recidivism versus good old fashion profiteering.

When I was appointed to the Federal Communications Commission in 2009, there were many, critical issues that immediately demanded my attention. Some were particularly technically challenging and adversarial while others were admittedly administratively thorny. There were very few issues in my view, however, that were so obviously inequitable and unjust as Inmate Calling Services (“ICS”) – an issue that lingered and went unaddressed at the FCC for over a decade. After educating myself and learning more

about the complexities of this regime, I decided that if ever there were a time to stand up for fundamental fairness in the telecommunications industry, this was it. In all my years as a public servant and policy maker at both the state and federal levels, I have never been exposed to such a clear case of market failure as what I witnessed with ICS. As a communications regulator, it was the most glaring type of regulatory malpractice I’d ever seen.

The federal Communications Act intended “to make available, as far as possible, to all the people of the United States, . . . - a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges. . . .”¹³ Further still, the Commission tentatively concluded that Congress gave it express authority in Section 276, to establish a per-call compensation plan “for each and every intrastate and interstate call” and it also directs that the Commission “shall preempt” any inconsistent state regulations.¹⁴

“*When I was appointed to the Federal Communications Commission in 2009, there were many, critical issues that immediately demanded my attention*

But here we were witnessing and, by default, being complicit with a regime where egregious and exploitative rate designs could be found anywhere from federal detention centers to the smallest county jail, and the tension between this reality and my moral, ethical, equitable, and legal compass kept growing and growing. It was clear that the only way to right this wrong was for the FCC to do everything within its statutory power to correct this massive social, economic, and legal injustice. To be clear, the primary vehicle the FCC possesses to correct legal injustices is its statutory duty to set just and reasonable rates and to make basic phone calls affordable for all – a requirement in the statute that for too long had been ignored with respect to ICS rates.

Efforts to convince the FCC to reform the ICS regime, however, did not begin with me. The journey began in 2003 when petitioners led by Mrs. Martha Wright, a retired nurse from

¹⁰ Leanza, *supra* note 7, page 185.

¹¹ Peter Wagner and Alex Jones, On kickbacks and commissions in the prison and jail phone market, Prisonpolicy.org (February 11, 2019) <https://www.prisonpolicy.org/blog/2019/02/11/kickbacks-and-commissions/>.

¹² *Id.*

¹³ 47 U.S.C. §151.

¹⁴ 47 U.S.C. §276.

Washington, D.C., came before the Commission seeking relief from the hundred-dollars-a-month bills she was making significant personal sacrifices to pay so she could stay in touch with her imprisoned grandson. Over the next decade, others from around the country tried to gain traction at the FCC but on March 20, 2012, I and my legal advisor met with a large group of advocates to address “the predatory pricing of telephone calls to incarcerated people.” The asked for a reform champion, and I accepted the challenge.

In 2013, as interim Chairwoman, I shared with my colleagues a proposal to reform the exorbitant interstate prison calling regime. I was equally honored to hold the gavel when the prison calling reform Order was adopted in August 2013,¹⁵ and humbled that many of the petitioners who demanded change – including Mrs. Wright’s grandson Ulandis – were in the Commission Meeting Room that day.

“*In 2013, as interim Chairwoman, I shared with my colleagues a proposal to reform the exorbitant interstate prison calling regime*

Prior to adoption of the prison calling reform Order, the FCC engaged in discussions with legislators, ICS pay-phone providers, the prison calling reform advocacy community, sheriffs’ offices, and others. In 2015, the FCC voted to **cap** costs on *in-state* prison phone calls.¹⁶ Unfortunately, two years later the D.C. Court of Appeals stayed part of the reforms opining that the FCC had no such authority to set intrastate rate caps. The Commission’s interstate rate caps and critical findings on the nature of site commissions were left in place.

It was transparently predictable that some sheriffs’ associations and states would intervene in the appeal challenge to the FCC’s Order in an effort to maintain the flow of commission kickbacks from revenue generated from these phone calls. And, some did just that contending that caps imposed by the FCC would not cover necessary security-related costs for prison phone services. That was a red herring, though, as 11 state Department of Corrections (DOCs)

currently charge phone rates below the \$.11/min. cap in the FCC’s order, which indicates that low rates are possible without sacrificing security needs.¹⁷

I could not help but ask: Is this about pleasing shareholders or surveillance and data collection to ensure safety and the well-being of the community? Interestingly, the ICS pay-phone community would point its collective finger at prisons and jails as the profiteering culprits. According to Brian Oliver, CEO of Global Tel*Link or GTL, the biggest player in the market for prison phone calls, “if the commission really wants to do something about prison phone rates, it should go after site commissions.” Site commissions, according to Oliver, can account for as much as 60 or 70 cents of every dollar an incarcerated person’s family spends.¹⁸

Now, after years of agonizing advocacy, a decade of regulatory inaction, and years of regulatory purpose – hundreds of millions, if not billions of dollars in the transfer of wealth, legions of alienated children and loved ones, the persistence and dedication of federal legislators, FCC commissioners, and the advocacy community, Congress enacted the Martha Wright-Reed Just and Reasonable Communications Act of 2022.

This law has the potential to completely reconstruct and improve the entire prison phone call industry. It fundamentally accomplishes two crucially important objectives. Firstly, the law makes it clear that the FCC has authority to regulate in-state calls placed from correctional facilities. Secondly, the bill clarifies that the FCC has the authority to regulate video calls. So, eight years after the FCC’s vote to cap calls on in-state prison phone calls was struck down by the D.C. Circuit Court, Congress has acted and explicitly authorized the FCC to set intrastate rates for phone calls originating from correctional facilities. This grant of authority now frees the FCC to evaluate in-state fees and establish just and reasonable rates. The FCC has indicated that it will soon evaluate in-state rates and align the rates according to the just and reasonable standard.

As recently as October 2022, FCC Chairwoman Jessica Rosenworcel, explained to NPR’s *Weekend Edition* that “just and reasonable is not an abstract concept, but a legal term that the FCC has been using since the **Communications Act of 1934**.¹⁹ She went on to say that “What it means is that those rates are fair and not discriminatory. No matter who you are or where you live in this country,

15 79 FR 33709 (6/12/2014), 78 FR 67956 (11/13/2013)

16 <https://apnews.com/article/7b5f0b2b437d4b11a18a361894c3393c>.

17 D.C. Circuit Court Partially Stays FCC Order Capping Prison and Jail Phone Rates, *Prison Legal News*, 2016, <https://www.prisonlegalnews.org/news/2016/mar/31/dc-circuit-court-partially-stays-fcc-order-capping-prison-and-jail-phone-rates/>.

18 Joel Rose, FCC Moves To Cut High Cost Of Prisoners’ Calls, NPR (October 21, 2015) <https://www.npr.org/2015/10/21/450464766/fcc-moves-to-cut-high-cost-of-prisoners-calls>.

19 <https://transition.fcc.gov/Reports/1934new.pdf>.

whether you're incarcerated or not, you should be charged about the same to make some basic phone calls." We will now have the chance to see the FCC follow through on its commitment to bring much-needed rate relief to the families of incarcerated individuals. The law requires the FCC to publish regulations beginning no earlier than 18 months after the date of enactment of the Act and no later than 24 months after the date of enactment of the Act. The FCC will likely complete its charge near the end of 2024. In a [press release](#),²⁰ Chairwoman Rosenworcel committed to "expeditiously move new rules forward." Many families and advocates are looking forward to seeing new rules published and being charged rates that do not require them to make impossibly difficult financial choices.

As the FCC lines up its next actions and as states continue to consider their steps to reform intra-state correctional facility calling rates, it is unlikely that ICS payphone companies will slink quietly into the night and leave the golden goose behind. Continued wealth accrual, amassed on the backs of mostly low-income and economically vulnerable families, is an objective not easily forsaken.

Even as voice and video calling regulations become stronger, corporations that dominate the industry are expanding their business footprints inside of these facilities. Companies are growing the number of "services" they offer to prisons and jails with expensive electronic messaging products as stricter policies around [mail](#)²¹ and [in-person visits are put into place](#).²² How do we ensure that companies are not substituting equally price egregious services for another? The hope is that state legislators and regulators will follow Congress' lead and not sit idly by as new exploitative services into state correctional facilities are introduced.

As for the FCC, The Martha Wright-Reed Act represents the clearest path to date in the fight for prison and jail phone justice, but it must be accompanied by continued vigilance. Having served more than eight years at the FCC, I have no doubt that the agency's regulatory infrastructure is able to manage its legislative charge as long as the ICS policy goals are clearly articulated. The Martha Wright-Reed Act provides a sound legal basis from which policy can be formulated more seamlessly, and with the Commission's use of the just and reasonable standard together with comprehensive data collection allowing for careful consideration of total expected costs and benefits, the FCC has the tools it needs to make legally sustainable and socially conscionable decisions.

There were many days since I was summoned by advocates to that toasty, cramped room two days before my 50th birthday that I questioned if we would ever see the enactment of this life, family, and community altering legislation, but a few weeks after my 61st birthday, here we are. This single issue that failed to make it above the fold for decades finally has the legislative teeth we collectively need to make our communities better connected, safer, healthier, and more prosperous. Who knew that applying the Title 47 "just and reasonable" rate clause of the Communications Act, making "available, as far as possible, to all the people of the United States would be apropos with prison phone justice?

We did. ■

“As for the FCC, The Martha Wright-Reed Act represents the clearest path to date in the fight for prison and jail phone justice, but it must be accompanied by continued vigilance

20 <https://docs.fcc.gov/public/attachments/DOC-390396A1.pdf>.

21 <https://www.prisonpolicy.org/blog/2022/11/17/mail-scanning/>.

22 <https://www.prisonpolicy.org/visitation/report.html>.

CPI SUBSCRIPTIONS

CPI reaches more than **35,000 readers** in over **150 countries** every day. Our online library houses over **23,000 papers**, articles and interviews.

Visit [competitionpolicyinternational.com](https://www.competitionpolicyinternational.com) today to see our available plans and join CPI's global community of antitrust experts.

