

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

Federal Communications Commission

on

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

88 Fed. Reg. 20804, WC Docket Nos. 12-375, 23-62

May 8, 2023

The Electronic Privacy Information Center (EPIC) submits these comments in response to the Federal Communication Commission's (FCC or "the Commission") April 7, 2023 notice of proposed rulemaking implementing the Martha Wright-Reed Just and Reasonable Communications Act of 2022 (Martha Wright-Reed Act or "the Act").¹ The Martha Wright-Reed Act expands the FCC's jurisdiction to cover all forms of "calling device" used by incarcerated people to communicate with their families and provides new instructions to the Commission to set "just and reasonable" rates for calls.

EPIC is a public interest research center in Washington, DC seeking to protect privacy, freedom of expression, and democratic values in the information age. EPIC works to challenge and roll back unnecessary surveillance, including surveillance of incarcerated persons and their friends

¹ 88 Fed. Reg. 20804, <https://www.federalregister.gov/documents/2023/04/07/2023-07068/incarcerated-peoples-communication-services-implementation-of-the-martha-wright-reed-act-rates-for#p-88>.

and families. In addition to recent comments in this docket,² EPIC has filed amicus briefs on attorney-client privilege and petitioned the FCC for rulemaking regarding the privacy and security of phone subscriber data, as well as offered congressional testimony on the same issues.³

EPIC urges the FCC to 1) exclude the cost of surveillance from consideration for rate-setting to the maximum extent possible, 2) exclude or minimize the amount of site commission fees that providers can recoup, 3) mandate that prison telecommunications providers respect and accommodate attorney-client privilege in all forms of inmate communications including video-conferencing, and 4) consider using other authorities to regulate electronic messaging services as a part of the prison telecommunications industry.

Background

As the Commission describes it, “the Act removes the principal statutory limitations that have prevented the Commission from setting comprehensive and effective just and reasonable rates for incarcerated people's communications services.”⁴ The FCC now has explicit statutory authority to regulate not just phone calls from prisons and jails, but also video calls and other telecommunications regardless of the technology used to make the call.

² EPIC Comments WC Docket No. 12-375 (Dec. 15, 2022), <https://www.fcc.gov/ecfs/search/search-filings/filing/121545964412>

³ *See, e.g.*, Br. of Amici Curiae Electronic Privacy Information Center (EPIC) in Support of Appellant, Anibowei v. Wolf, No. 20-10059 (June 9, 2020), <https://epic.org/documents/anibowei-v-wolf/> (amicus in support of plaintiff, an attorney whose phone was searched without a warrant by border agents at Dallas airport); Report and Order and Further Notice of Proposed Rulemaking, Federal Communications Commission, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Information, FCC 07-22 (Apr. 2, 2007), <https://docs.fcc.gov/public/attachments/FCC-07-22A1.pdf> (Commission Report and Order on protecting Customer Proprietary Network Information (CPNI) initiated by EPIC petition); EPIC Letter to House Energy & Commerce Committee, Accountability and Oversight of the Federal Communications Commission (May 14, 2019), <https://epic.org/documents/accountability-and-oversight-of-the-federal-communications-commission/> (testimony regarding the FCC's oversight of robocalls, location tracking, and unnecessary collection and retention of subscriber call records).

⁴ *Id.*

The Commission is empowered to reconsider its rate caps with the touchstone of “just and reasonable” pricing instead of the “fairly compensated for each and every call” standard that existed previously. The Act was explicitly intended to aid the Commission in lowering the price of prison telecommunications services for incarcerated peoples and their loved ones.⁵ It also directed the Commission to “consider” costs associated with safety and security measures for providing telecommunications services in jails and prisons.

I. The cost of surveillance is not necessary to provide safety and security.

In response to paragraphs 61-79 Privacy and Security.

EPIC continues to endorse Worth Rises’ proposal to limit allowable costs for security to those required by law under the Communications Assistance for Law Enforcement Act (CALEA); unnecessary surveillance practices are not properly considered services to incarcerated persons or their contacts.⁶ We reiterate that such surveillance is often unnecessary, harmful, and serves to enrich prison phone providers through ancillary services sold to law enforcement when the providers act as data brokers.

EPIC encourages the Commission to conclude that the Act’s direction to “consider the costs of safety and security measures” does not require the Commission to pass those costs on to consumers. Jails and prisons are responsible for the safety and security of inmates, but those costs are not generally passed on to inmates or their loved ones. The case should be no different with telecommunications. As we described in our filing re Securus’s Petition for Waiver of the Inmate Calling Services Per-Minute Rate Requirement, asserted costs for security services are often a cover for unnecessary inmate surveillance.⁷

⁵ 88 Fed. Reg. 20806.

⁶ See Worth Rises Reply Comment to Fifth FRPRM (Dec. 17, 2021), <https://www.fcc.gov/ecfs/search/search-filings/filing/1218927308676>.

⁷ EPIC Comments WC Docket No. 12-375 (Jan. 7, 2022), <https://epic.org/documents/epic-comments-on-securus-technologies-petition-for-prison-phone-services-alternative-pricing-scheme/>.

II. The Commission should exclude from consideration or minimize the amount of site commission fees that providers can recoup.

In response to paragraphs 8-11, 66, 79.

The DC Circuit directed the Commission to determine “which portions of site commissions might be directly related to the provision of [inmate calling services] and therefore legitimate, and which are not.”⁸ We urge the Commission to consider how site commissions benefit inmates and their loved ones, and posit that they do not. We applaud the Commission for asking directly about the impact of security and surveillance services on end-user rates, as well as their relationship to site commission payments (including site commissions that take the form of “in-kind” contributions).

Where a facility collects a site commission for provision of inmate calling services (ICS) that include communications surveillance, this amounts to loved ones paying the prison for their conversation to be surveilled, either financially or through data mined from their conversations. Site commissions additionally exacerbate already-questionable anti-competitive behavior amongst ICS vendors: “[u]nsurprisingly, among states that charge incarcerated people to send e-messages, prison systems that say they do not receive site-commission revenue have some of the lowest prices.”⁹

III. The Commission should require prison telecommunications providers to respect attorney-client privilege in all forms of communication, not just traditional telephone calls.

In response to paragraphs 64, 90.

As the Commission moves to further regulate video calls and other forms of communication, EPIC urges the Commission to provide protections for attorney-client communications over all forms of prison telecommunications. With the closure of jails and prisons to visits during the

⁸ NPRM at para 11 <https://www.federalregister.gov/d/2023-07068/p-25>

⁹ SMH: *The rapid & unregulated growth of e-messaging in prisons*, Prison Policy Initiative (Mar. 2023), <https://www.prisonpolicy.org/reports/emessaging.html>

COVID-19 pandemic, video calls became a much larger part of communication between incarcerated persons and people outside, including lawyers. But the repeated failure of prison telecommunications companies to protect attorney-client communications by and decisions not to create portals for lawyers to securely use video-conferencing services places limits on how lawyers communicate with their clients. And providers' track record of actually protecting tagged attorney-client privileged phone calls is weak, even where providers claimed to have an adequate system in place.¹⁰

In the absence of regulation, prison telecommunications providers have not created portals for lawyers to securely video-call their clients without being recorded. Recordings or transcripts of video calls are often searchable by jail and prison officials and are often disclosed to law enforcement and district attorneys.¹¹ Providing a means for lawyers to flag their videocalls as privileged is a start, but it is not enough. In light of the repeated wrongful disclosure of attorney-

¹⁰ Ella Fassler, *Prison Phone Companies Are Recording Attorney-Client Calls Across the US*, Vice News (Dec. 13, 2021), <https://www.vice.com/en/article/7kbbey/prison-phone-companies-are-recording-attorney-client-calls-across-the-us> (noting violations occurring in 2019, and linking to lawsuits against Securus for similar behavior in seven states); Jordan Smith, *Securus Settles Lawsuit Alleging Improper Recording of Privileged Inmate Calls*, The Intercept (Mar. 16, 2016), <https://theintercept.com/2016/03/16/securus-settles-lawsuit-alleging-improper-recording-of-privileged-inmate-calls/> (Securus settled in Austin in 2016), Dan Margolies, *Leavenworth Inmates Reach \$1.45 Million Settlement Over Taped Attorney-Client Phone Calls*, NPR News (<https://www.kcur.org/news/2019-08-26/leavenworth-inmates-reach-1-45-million-settlement-over-taped-attorney-client-phone-calls> (Securus and the prison services provider Civic Core allegedly continued recording attorney-client calls even after a District Court ordered the prison to immediately halt the practice); Douglas Ankey, *Attorney-Client Privilege Under Attack in Jails Across the Nation*, Prison Legal News (May 2, 2019), <https://www.prisonlegalnews.org/news/2019/may/2/attorney-client-privilege-under-attack-jails-across-nation/>; Samantha Hogan, *Recording of 837 attorney-client phone calls 'borders on the ridiculous'*, Maine Monitor (Jul. 9, 2020), <https://www.themainemonitor.org/recording-of-837-attorney-client-phone-calls-borders-on-the-ridiculous/>.

¹¹ Matt Ferner, *Confidential Inmate Calls With Lawyers Recorded Illegally In California Jail For Years*, Huffington Post (Aug. 17, 2018), https://www.huffpost.com/entry/california-jail-recording-inmate-calls_n_5b771e73e4b0a5b1febb18eb; Carrie Johnson, *When It Comes To Email, Some Prisoners Say Attorney-Client Privilege Has Been Erased*, NPR (Mar. 31, 2021), <https://www.npr.org/2021/03/31/982339371/when-it-comes-to-email-some-prisoners-say-attorney-client-privilege-has-been-era>; Stephanie Clifford, *Prosecutors Are Reading Emails From Inmates to Lawyers*, N.Y. Times (Jul. 22, 2014), <https://www.nytimes.com/2014/07/23/nyregion/us-is-reading-inmates-email-sent-to-lawyers.html>.

client protected communications to law enforcement and district attorneys, prison phone providers must provide conspicuously displayed portals for lawyers to use that do not record the call at all.

IV. The Commission should not ignore electronic messaging services even if they are beyond the scope of this rulemaking.

EPIC urges the Commission to consider how it may be able to regulate electronic messaging services as part of the prison telecommunications industry. Electronic messaging services have become a major part of prison telecommunications and an important part of incarcerated peoples' lives.¹² These messaging services are important for incarcerated persons and their families, but are also clunky, prone to failure, unnecessarily limiting, and very expensive. And messaging services routinely fail to accommodate attorney-client privileged communications even though both attorneys and clients would benefit from the service.

Messaging services often cost both inmates and their families. The outside user often pays a per-message fee that can range from five cents to fifty cents, with most messages costing between twenty-five and forty cents.¹³ Messages are often subject to a character limit. For example, messages through GTL's Getting Out service to Oregon are capped at 2,000 characters (including spaces) and cost twenty-five cents apiece.¹⁴ Inmates in Oregon prisons meanwhile pay five cents per minute to use the tablets where messages are received. Incarcerated people often pay by the minute to use tablets, including time spent reading and writing messages, or may be charged directly for each message they send¹⁵ Charging incarcerated people by the minute is effectively a literacy tax, penalizing people who read more slowly.¹⁶ Although messaging allows for more contact between incarcerated people and their friends and families, the high cost of messaging and frequent glitches

¹² Mike Wessler, *SMH: The rapid & unregulated growth of e-messaging in prisons*, Prison Policy Initiative (Mar. 2023), <https://www.prisonpolicy.org/reports/emessaging.html>.

¹³ *Id.*

¹⁴ Based on an EPIC attorney using Getting Out on May 6, 2023.

¹⁵ Wessler, *supra* note 12.

¹⁶ *Id.*

are serious concerns. As of May 8, 2023, GTL's Getting Out app had a 2.6 out of 5 star rating on Google's App store accompanied by frequent complaints of glitches and lacking compatibility with popular cellphone models.¹⁷

Messaging services are also a rich data source for prison telecommunications companies to exploit and monetize for surveillance services. GTL/ViaPath includes searchable content of e-messages in its Data IQ surveillance product.¹⁸ Millions of messages between incarcerated people and their friends and families can be sold to data brokers, provided to law enforcement without a warrant, and otherwise abused. Absent regulation, the potential for exploitation is virtually unchecked.

Messaging services also do not allow lawyers to communicate privately with their clients. Getting Out, for example, displays the message below upon login. Securus, for example, considers it a violation of their Terms of service for lawyers to use their Messaging Solutions product for privileged communications, and attempts to assert that lawyers and clients waive any claims.¹⁹ Lawyers then cannot ethically message with clients about their cases. But the ability to message would be a benefit for both lawyers and clients.²⁰ Lawyers provide more frequent updates, ask or

¹⁷ <https://play.google.com/store/apps/details?id=com.telmate.TelmateGettingout>;

¹⁸ Wessler *supra* note 12.

¹⁹ Securus, General Terms and Conditions Version 1.6: Messaging Solutions (March 31, 2023), <https://securustech.net/friends-and-family-terms-and-conditions/index.html> (“You understand and agree that each message and, if applicable, attached media you send will be reviewed, monitored, and preserved by us and the applicable correctional facility, and that you waive any privacy or other confidentiality rights you may have in the contents of your messages and, if applicable, attached media. If you are an attorney, you agree you will not use the Messaging Solutions to transmit any confidential or privileged communications, and (on behalf of yourself and your clients) you waive any claim against us or our Facilities for violation of the attorney-client privilege.”).

²⁰ Elizabeth Choi, *The Pandemic of Intrusion into Privileged Communications between Incarcerated Clients and Their Attorneys*, Georgetown J. Legal Ethics (2021), <https://www.law.georgetown.edu/legal-ethics-journal/wp-content/uploads/sites/24/2022/08/GT-GJLE210047.pdf>; *Preserving Incarcerated Persons' Attorney- Client Privilege in the 21st Century: Why the Federal Bureau of Prisons Must Stop Monitoring Confidential Legal Emails*, NACDL and Samuelson Clinic (2020), <https://www.law.berkeley.edu/wp-content/uploads/2020/12/20201210-NACDL-SamuelsonClinic-PrivilegedEmailReport.pdf>.

address quick questions, and avoid the time, difficulty, and expense of scheduling visits or phone calls. For years, the American Bar Association has urged the Federal Bureau of Prisons to stop monitoring incarcerated persons emails with their lawyers, stating “the BOP’s Policy Frustrates the Ability of Attorneys to Promptly Communicate with Incarcerated Clients as Required Under Rule of Professional Conduct 1.4.”²¹

Agreements

Your relationship with Telmate

- I have read, and agree to the [Terms of Service](#) and [Privacy Policy](#)
- If applicable, the only method of communication which offer the protection of privileged attorney-client communication is telephone communications. A number of facilities offer privileged attorney-client communications. Attorneys must inquire and confirm with the facility staff before utilizing any Telmate system. Any and all other content or information shared, transmitted, or sent using any messaging or video visitation system or any other method, may be accessed, reviewed, searched, used, recorded, copied, viewed, listened to, displayed, or distributed by Telmate correctional facility staff, or agents of law enforcement, as permitted by law.

You hereby acknowledge your awareness of, understand, and consent to all such activity.

Figure 1: Notice from GTL upon logging in to Getting Out messaging service.

If the Commission fails to adequately regulate rates and privacy standards for electronic messaging, it should anticipate that inmate calling services (ICS) providers will increase friction for

²¹ Am. Bar Ass’n, Resolution 10A and Report 3 (Feb. 8, 2016), <https://www.law.berkeley.edu/wp-content/uploads/2020/05/2016-Midyear-ABA-Resolution-10A-Report-Proposed-Resolution.pdf>, archived at <https://perma.cc/9H8R-2QD6>.

users of audio and video communications and reduce friction for users of the more profitable electronic messaging.

Conclusion

EPIC applauds the Commission for reading the Martha Wright-Reed Act to confer broad authority to regulate prison telecommunications. We urge the Commission to take all possible steps to reduce the cost of calls, video calls, and messaging services while acting swiftly to protect inmates from privacy violations and provide better access for lawyers to attorney-client privilege protected communications. Specifically, EPIC urges the FCC to exclude the cost surveillance from consideration for rate-setting to the maximum extent possible, exclude or minimize the amount of site commission fees that providers can recoup, mandate that prison telecommunications providers respect and accommodate attorney-client privilege in all forms of inmate communications including video-conferencing, and consider using other authorities to regulate electronic messaging services as a part of the prison telecommunications industry. Please reach out with any questions to EPIC Counsel Jake Wiener at wiener@epic.org or EPIC Law Fellow Christopher Frascella at frascella@epic.org.

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