

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 - REPLY

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

June 6, 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. After filing initial comments in this docket on May 8, 2023,² EPIC now submits comments in reply.

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> [hereinafter "NPRM"].

² EPIC Comments to FCC on Martha-Wright Reed Act Implementation, WC Docket Nos. 12-375, 23-62 (May 8, 2023), <https://epic.org/documents/epic-comments-to-fcc-on-martha-wright-reed-act-implementation/>.

and families. In addition to recent comments in this docket,³ 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.⁴

EPIC urges the FCC to 1) adopt a “used and useful (to ratepayers)” standard for calculating allowable pass-through costs to ratepayers instead of a “necessary” standard, 2) recognize that so-called “video visitation” is a telecommunications service and should not be associated with in-person visitation, 3) adopt a broad interpretation of covered institutions including secure mental health, immigration detention, and juvenile detention facilities 4) not to rely on precedents that are no longer binding in light of the Martha Wright-Reed Act.

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.”⁵ 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.

³ EPIC Comments WC Docket No. 12-375 (Dec. 15, 2022), <https://www.fcc.gov/ecfs/search/search-filings/filing/121545964412>

⁴ *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).

⁵ NPRM at 3.

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.⁶ It also directed the Commission to “consider” costs associated with safety and security measures for providing telecommunications services in jails and prisons.

I. The Commission Should Adopt A “Used and Useful” Standard Because Surveillance Tools Are Not Necessary to Connect Calls, Nor Are They Useful to Ratepayers.

In response to comments of the National Sheriff’s Assn., NCIC

The Commission has for decades applied a “used and useful” standard in its’ general telecommunications dockets to identify which costs to service providers can fairly be passed on to consumers, and which costs are excessive or unfair to consumers.⁷ EPIC urges the Commission to apply this standard in this docket to properly allocate costs between ratepayers, prison telecommunications providers, and jails and prisons themselves.

The Martha Wright-Reed Act requires that the Commission “shall consider costs associated with any safety and security measures necessary to provide a [telephone or advanced communications] service”⁸—which as one commenter has already noted would include tools that protect IPCS systems from malicious online threats, but not tools that facilitate law enforcement investigation (of any crime that might be discussed on any call).⁹ Other commenters document

⁶ 88 Fed. Reg. 20806.

⁷ See e.g., 47 CFR § 65.800; AT&T Application for Review; Sandwich Isles Communications Inc. Petition for Declaratory Ruling, Memorandum Opinion and Order, 31 FCC Rcd 12977, paras 20-46 (2016).

⁸ Martha Wright-Reed Act § 3(b)(2)

⁹ Stephen Raher <https://www.fcc.gov/ecfs/search/search-filings/filing/10509037027510> (“The Commission should narrowly define the types of security costs that are properly recoverable from IPCS ratepayers. A leading example of properly recoverable expenses is the cost of protecting networked IPCS systems from malicious online threats—such costs are necessary to the provision of IPCS because without such security,

multiple instances in which these services cannot be considered necessary by virtue of the fact that they are not utilized universally.¹⁰ Additionally, to the extent that the Commission has historically made any determinations about what surveillance tools are necessary to the provision of these services, Congress has mandated that the Commission “consider” the issue anew, as we discuss further below in Section IV.

EPIC agrees that there is compelling evidence that these tools are not necessary for the provision of telephone (or advanced communications) service, and urges the Commission to employ its “used and useful (to ratepayers)” standard when determining what should be paid by incarcerated persons and by those who wish to remain in contact with them—this will further avoid conflating what the facility deems is necessary to its safe and secure operation with what is technologically necessary to connect a phone call or other communication safely and securely.

systems might fail and thus be unable to connect calls. In contrast, law enforcement surveillance systems are designed to detect and document criminal activity (both real and imagined), and calls can be completed whether or not these systems are in place. If correctional agencies believe these systems provide value, then the agencies can pay for such technology from their budgets. To fund such systems through involuntary transfers from ratepayers is neither just nor reasonable.”)

¹⁰ See, e.g., Worth Rises <https://www.fcc.gov/ecfs/search/search-filings/filing/105092861411581> (“We have explained how such measures are separable from IPCS and differ from one jurisdiction to another negating their indispensability, have historically been and still are marketed independently from communication services, have a separate and distinct consumer base from IPCS ratepayers that has penal interests rather than an interest in communication, and are used to appeal to that consumer base, corrections administrators, rather than IPCS ratepayers.”); id. (“Global Tel Link’s own IPCS contracts outline elective, optional rates for safety and security measures, such as Voice Biometrics, Word Search (call transcription), Data IQ (data analytics), and even investigative staff, that it tells the Commission are necessary. IPCS at its core is no different from communication services outside carceral settings and does not require special safety and security for adaptation.”) (internal citations omitted); id. (“Furthermore, the use of off-the-shelf advanced communication technologies that do not have the safety and security bells and whistles should cause the Commission to question traditional IPCS providers and corrections administrators and their claims about the necessity of such measures. How could these safety and security measures or any safety and security adaptation be necessary for the provision of IPCS when incarcerated people are currently using communication services that do not support these measures? They cannot be.”); Wright Petitioners et al., <https://www.fcc.gov/ecfs/search/search-filings/filing/1050883878528> (“It should also be clear that safety and security features that are not universally used across facilities suggests that they cannot be “necessary,” as some providers do offer IPCS without needing to use such features.”)

Many of these surveillance tools are actively harmful to incarcerated persons and to their loved ones and to others they communicate with. While the reality of this harm may not outright preclude a facility from deploying these tools (as the facility has other equities), such harms should preclude facilities and service providers from charging the callers and called parties themselves for the costs of these tools. The ratepayer should not be charged for functionality that is neither used nor useful by them in the course of their call or advanced communication, and functionality that is harmful to them (e.g. voiceprinting,¹¹ keyword alerting,¹² etc.) is presumptively neither used nor useful to the ratepayer. Multiple commenters have made similar observations.¹³ Comments that focus on the Commission’s lack of authority over safety and security mechanisms in facilities covered by the Martha Wright-Reed Act have conflated the Commission’s clear authority over what the facility and its service providers may charge to ratepayers with the Commission’s less clear

¹¹ George Joseph and Debby Nathan, Prisons Across the U.S. Are Quietly Building Databases of Incarcerated People’s Voiceprints, *The Intercept* (Jan. 30, 2019), <https://theintercept.com/2019/01/30/prison-voice-prints-databases-securus/>

¹² Akela Lacy et al., Prisons Launch “Absurd” Attempt to Detect Coronavirus in Inmate Phone Calls, *The Intercept* (Apr. 21, 2020), <https://theintercept.com/2020/04/21/prisons-inmates-coronavirus-monitoring-surveillance-verus/>

¹³ See, e.g., UCC and PK <https://www.fcc.gov/ecfs/search/search-filings/filing/105091636628717> (“The FCC also recognized “the equitable principle that the ratepayers may not fairly be forced to pay a return except on investment which can be shown directly to benefit them.” As the Commission has explained elsewhere, “[t]he used and useful and prudent investment standards allow into the rate base portions of plant that directly benefit the ratepayer, and exclude any imprudent, fraudulent, or extravagant outlays.” Virtually all payments to carceral facilities will fall outside of that standard.”) (internal citations omitted); Wright Petitioners, Benton, PPI, PK <https://www.fcc.gov/ecfs/search/search-filings/filing/1050883878528> at appendix: Brattle report (“Based on our findings, we believe that the FCC should be clear about what costs are allowed (or “used and useful”), what magnitudes should be reasonable, and only those cost elements and magnitudes that are just and reasonable should be incorporated in the model carrier construct.”); Stephen Rahe <https://www.fcc.gov/ecfs/search/search-filings/filing/10509037027510> (“Indeed, when read in conjunction with § 4 of the Wright-Reed Act (which clarifies that the law does not “prohibit the implementation of any safety and security measures related to [IPCS] at [correctional] facilities”), Congressional intent comes into focus: the Commission cannot dictate what lawful security measures correctional facilities may deploy in connection with IPCS, but it may define the type of security costs that are recouped through user-paid rates and fees”); Worth Rises <https://www.fcc.gov/ecfs/search/search-filings/filing/105092861411581> (“Law enforcement support services are not useful to incarcerated people and their loved ones, but instead used and useful to law enforcement.”); Wright Petitioners et al., <https://www.fcc.gov/ecfs/search/search-filings/filing/1050883878528> (“Security and safety costs may be necessary for the operation of a correctional facility, but that does not mean the costs should be shifted to the incarcerated person.”)

authority over what measures the facility and its service providers may choose to employ at their own expense.¹⁴

The reality that surveillance services are not necessary to ratepayers and do not benefit them underscores the importance of adopting a “used and useful” standard. While many, if not all, of these systems would fail under a strict interpretation of the “necessary” standard, the used and useful standard better accounts for the interests of ratepayers.

II. Video Calls Are Not Visitation

In support of comments from Civil Rights Corps.

Video calls—including on-site video calls—are distinct from in-person visitation; as such, the term “video visitation” should not be used. The record supports this, in comments such as those of Securus and of Civil Rights Corps.¹⁵ Video calling services can be an important way to help incarcerated persons and their loved ones connect. When used frequently, video visitation can be an important factor in reducing recidivism and the negative impacts of incarceration on inmates’ mental health.¹⁶ The expansion of video calling services is a net good, but only if 1) calls are reasonably priced or free and 2) video calls do not displace in-person visits.

¹⁴ See, e.g., Natl Sheriffs Assoc <https://www.fcc.gov/ecfs/search/search-filings/filing/10508621303592> (“Section 4 of the MWRA states that the Commission cannot prohibit any security and surveillance mechanisms in connection with the provision of IPCS in jails.”); Securus <https://www.fcc.gov/ecfs/search/search-filings/filing/10509775016702> (“Correctional authorities, who are in a far better position than the Commission to assess the features necessary to protect incarcerated persons, correctional personnel, and the public generally, require as a condition of providing communications service that providers include safety and security features.”)

¹⁵ Civil Rights Corps <https://www.fcc.gov/ecfs/search/search-filings/filing/10509288112410> at 2 (“While we acknowledge that certain advancements in technology have created valuable opportunities to expand access to communications, there is no equivalent to seeing a parent, child, or friend in person. As such, we urge the rejection of the phrase ‘video visitation.’ ”); Securus <https://www.fcc.gov/ecfs/search/search-filings/filing/10509775016702> at 7 (“On-site video visitation service should be viewed as complementary to, and not in lieu of, in person site visits.”).

¹⁶ Grant Duwe and Susan McNeely, *Just as Good as the Real Thing? The Effects of Prison Video Visitation on Recidivism*, Minnesota Dep’t. of Corrections (Jun. 2020), https://mn.gov/doc/assets/Video%20Visit%20Evaluation_tcm1089-438546.pdf.

In addition to the observable deficits of on-site video visitation like reduced intimacy and lack of person contact, video calls also expose incarcerated persons and their loved ones to more surveillance than in-person visits. Video calls are recorded by default, while in-person visits may or may not be.

Onsite video visitation is a poor substitute in-person visits, with demonstrably fewer benefits and often higher costs.¹⁷ For years, jails and prisons have slowly replaced in-person visitation with on-site video calls, a trend that accelerated dramatically during the Covid-19 pandemic.¹⁸ While many facilities have returned to some amount of in-person visitation, the Commission should be careful not to endorse video visitation as a substitute for in-person visitation. Treating both in-person and remote video visitation as the same type of service would support this goal.

III. “Jail” Includes Secure Mental Health, Immigration Detention, and Juvenile Detention Facilities

In opposition to comments from the National Sheriffs Assn.

The Commission should standardize definitions of “jail” between dockets. EPIC supports the Commission’s adoption of an amended interpretation of “jail” in 47 CFR § 64.6000(m)(3)—which took effect earlier this year—to include secure mental health facilities, immigration detention centers, and juvenile detention centers;¹⁹ this is in opposition to the comments of the National

¹⁷ See Bernadette Rabury and Peter Wagner, Screening Out Family Time: The for-profit video visitation industry in prisons and jails, Prison Policy Initiative (Jan. 2015), <https://www.prisonpolicy.org/visitation/report.html>.

¹⁸ Timothy Lee, NOFACETIME- Jails are replacing visits with video calls—inmates and families hate it, ArsTechnica (May 14, 2018), <https://arstechnica.com/tech-policy/2018/05/jails-are-replacing-in-person-visits-with-video-calling-services-theyre-awful/>;

¹⁹ <https://www.federalregister.gov/d/2022-25192/p-19> (para 11); <https://www.federalregister.gov/documents/2022/12/09/2022-25192/rates-for-interstate-inmate-calling-services#p-165>

Sheriffs' Association,²⁰ but seems to align with the comments of the California Public Utilities Commission.²¹ The Commission's rate-making authorities apply equally to communications made to or from these types of facilities. We urge the Commission to standardize its definitions so that this is consistent within this docket and across related dockets. We also note that many of the same providers operate in each of these markets, and many consumers of communications services are participants in each of these markets, further counseling towards consistency in regulation.

IV. Congress Mandated the Commission to Perform a Re-Accounting of Necessary Costs

EPIC strongly disagrees with commenters who argue that the Martha-Wright Reed Act requires safety and security costs to be included, as the language of the statute suggests that Congress intended for the Commission to make a fresh accounting of its position. We agree with commenters who argue that the Commission must consider safety and security but is not required to include them as recoverable costs. Indeed, the fact that Congress is calling for a fresh accounting seems to suggest a departure from the status quo.

The Martha Wright-Reed Act reflects an unambiguous Congressional intent to reduce the costs of prison phone services by directing the FCC to implement new rulemakings accounting for "industry-wide average costs of telephone services and advanced communications services and the

²⁰ <https://www.fcc.gov/ecfs/document/10508621303592/1> NSA at 11 ("As NSA has said previously, the Commission should not expand the definition of correctional facility, prison and/or jails to include these types [civil commitment facilities, residential facilities, group facilities, and nursing facilities in which people with disabilities, substance abuse problems, or other conditions are routinely detained] of facilities."); id. at 12 ("because these additional facilities are not jails or prisons or for criminal offenders, it is unlikely that calling services in these facilities have the same cost characteristics of providing calling services in jails and prisons")

²¹ <https://www.fcc.gov/ecfs/search/search-filings/filing/10508214070640> CPUC at 2 ("The FCC now has the authority to determine just and reasonable IPCS rates for correctional and detention facilities, which should extend to prisons, jails, and juvenile facilities of all types.") (internal citations omitted).

average costs of service of a communications service provider”.²² We urge the Commission not to rely on now non-binding precedents mandating the inclusion of security costs. This rulemaking should reflect a new vision on prison telecommunications where the Commission has the Congressional authority to reduce the price of prison communications to the greatest extent possible.

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. 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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²² Martha Wright-Reed Act § 3(b)(1); Sen. Tammy Duckworth, Duckworth-Portman’s Bipartisan Martha Wright-Reed Just and Reasonable Communications Passes House and Senate, Awaiting President Biden’s Signature (Dec. 22, 2022), <https://www.duckworth.senate.gov/news/press-releases/01/03/2023/duckworth-portmans-bipartisan-martha-wright-reed-just-and-reasonable-communications-passes-house-and-senate-awaiting-president-bidens-signature>.