Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	WC DOCKET 12-375
Rates for Interstate Inmate Calling Service	)	*[FCC 13-113]*

COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

The National Association of Regulatory Utility Commissioners (NARUC) respectfully submits these comments responding to the October 22, 2014 Federal Communications Commission (Commission) *Second Further Notice of Proposed Rulemaking (FNPRM) on inmate calling services* (ICS).[1] On September 26, 2013, the FCC issued a Report and Order that addressed the reasonableness and affordability of *INTER*state rates charged by ICS providers.[2] Reasoning that "the [ICS] current market structure is not operating to ensure that rates … are just, reasonable and fair,"[3] that order established an interim rate cap and required "interstate ICS rates, including per-minute charges, per-call charges,

[1] In the Matter of Rates for Interstate Inmate Calling Services, WC Docket No. 12-375), FCC 14-158, *Second Further Notice of Proposed Rulemaking*, (*Second Further Notice*) (rel Oct 22, 2014), available online at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-158A1.docx.

[2] In the Matter of Rates for Interstate Inmate Calling Services, WC Docket No. 12-375), *Report and Order and Further Notice of Proposed Rulemaking*, September 26, 2013 (ICS Reform Order), available online at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-13-113A1.docx.

[3] *Id.* at ¶ 12.

ancillary charges and other fees charged in connection with [inmate calling] service [to] be cost-based."[4] NARUC filed comments[5] in the lead-up to the September 26 decision, that:

> [1] Commended the FCC for acting expeditiously to issue the rulemaking,
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> [2] Continued to urge the FCC to act expeditiously "to prohibit unreasonable ***interstate*** rates and charges for inmate telephone services,"
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> [3] Expressed appreciation for [a] the NPRM's acknowledgement that intrastate ISC rates are "set by the States," [b] the NRPM's focus on the establishment of a benchmark rate for domestic ***interstate*** interexchange inmate collect calling services," and
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> [4] Generally opposed arguments that would expand the FCC's jurisdiction to intrastate toll rates or unnecessarily supplant existing State Public Service Commission decisions over this service.

Those comments agreed with the National Association of Utility Consumer Advocates (NASUCA) and others that the FCC's authority with respect to INTRAstate, long-distance calls and/or operator services is not clear. NARUC requested that "if the FCC considers any significant expansion of existing authority, NARUC respectfully requests it issue a further notice of proposed rulemaking outlining the FCC's proffered legal rationale to give the association and other interested stakeholders a fair opportunity to respond." The September 2013 *FNPRM* raised just such issues, seeking comment on the need for

[4] *Id.* at ¶ 50.

[5] See, *Reply Comments of the National Association of Regulatory Utility Commissioners,* filed in CC Docket 12-375, at 4 (April 22, 2013), available online at: http://apps.fcc.gov/ecfs/document/view?id=7022289729.

"INTRAstate" reform and possible legal theories to expand FCC authority to regulate intrastate ICS rates.[6] NARUC filed comments responding to that September proposal.[7] The 2014 *Second Further Notice* also focuses, in part, on legal theories to preempt INTRAstate rate options, in ways, the record suggests might cause undesirable outcomes.[8] NARUC appreciates the additional opportunity to comment.

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[6] Specifically, the FCC sought comment on whether it should adopt a rate regime for intrastate rates including safe harbors, rate caps, or all distance rates. *FNPRM* at ¶¶ 154-56.

[7] See December 20, 2013 *Comments of the National Association of Regulatory Utility Commissioners*, available online at: http://apps.fcc.gov/ecfs/comment/view?id=6017482122.

[8] See, e.g., September 30, 2014 *Alabama Public Service Commission Reply to Comments*, at pages 3 -5, available online at, http://apps.fcc.gov/ecfs/comment/view?id=60000869674 ("Following implementation of the Commission's rate caps, any subsequent sharing of net profit by a provider with their investors or with confinement facilities has no direct or indirect bearing on the prices paid by inmates and inmate families. Consequently, any claim that site commissions paid after implementation of the rate caps somehow "drives up the prices paid by inmates and their families" is completely fallacious and any assertion that precluding site commissions somehow benefits inmates and inmate families is likewise flawed. In fact, the opposite is true. Since the Commission excluded site commission profits when it set the rate caps, the preclusion of such payments now serves no justifiable purpose. Such action needlessly penalizes confinement facilities and deprives prisons and jails of revenue needed to ensure safety and security of inmates inside the facilities. . . .Parties to the Proposal seek the Commission's cooperation to reduce or eliminate not only their exposure to site commission payments; they demand the Commission hold their competitors to the same standard. At the same time, the Proposal provides for increases in both non-commissionable and commissionable revenue. Therefore, the Proposal offers significant increases in provider profits at the expense of not only state prisons and local jails but the inmates and their families. Essentially, the parties to this Proposal seek to acquire the Hope Diamond from the Commission in exchange for a bag of wooden nickels.") (emphasis added) December 22, 2014 *Comments of Williamson County Sheriff's Office,* at 2, online at: *http://apps.fcc.gov/ecfs/document/view?id=60001011698 ("The reduction or elimination of commissions solely increases the profit margin of providers while reducing or eliminating funding for inmate welfare programs.");* December 29, 2014 Comments of the Montana Department of Corrections, *at 2, online at:* http://apps.fcc.gov/ecfs/document/view?id=60001011569 ("The absence of commission payments through ICS leaves MDOC without alternative mechanisms to provide valuable equipment and services to inmates."); December 6, 2014 *Comments of the Kansas Department of Corrections*, at 2, online at: http://apps.fcc.gov/ecfs/document/view?id=60001011536 ("The FCC acknowledges in the Notice that, according to a Department of Justice study, 66% of inmates released are rearrested within three years of release. The FCC further states that "[a]s a nation, we need to take all actions possible to reduce these recidivism rates." The KDOC utilizes site commissions to finance an array of programs ranging from sex offender treatment, QED and vocational education, substance abuse treatment, transitional housing, and cognitive skills development. As a result of these programs, Kansas has achieved a three-year recidivism rate of 34.8 %--nearly half the rate cited by the Department of Justice. Losing programs funded by site commissions would result in 302 more admissions to Kansas prisons per year at a cost of over $3.2 million annually. For a small state whose prison system is already over capacity, 302 more admissions means over 300 more victims, capacity expansion, and increased cost to taxpayers in the form of increased operational costs. KDOC has taken the lead in balancing the need to make calls more affordable for inmates and their families and providing inmates with the skills and treatment needed for successful reintegration into society. Increased call volume and any corresponding reduction in recidivism that can be attributed to such increases will not offset the increase in recidivism resulting from the lack of effective offender programming.")

While NARUC has specifically endorsed FCC action on INTERstate rates, our resolution and comments have been very clear that individual States remain in the best position to oversee and investigate matters relating to ICS INTRAstate rates and service quality.

NARUC has not taken specific positions on the mechanisms outlined in the *Second Further Notice*, but State authority in this context is clear. Any additional federal orders are unlikely to survive judicial review[9] and are likely to undermine existing State actions to address this issue. Id. In support of these comments, NARUC states as follows:

NARUC'S INTEREST

NARUC is a nonprofit organization founded in 1889. Its members include the government agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the activities of telecommunications,[10] energy, and water utilities.

[9] Indeed, many of even the INTERstate provisions were stayed by the D.C. Circuit on January 13, 2014, and one of the three judges would have granted a stay of the entire rule. *SecurusTechnologies, Inc. v. FCC, et al,* D.C. Cir., No. 13-1280, *per curiam order filed* 1/13/14). Specifically, the Court stayed the FCC's safe harbor rates of $0.12 per minute debit calls and $0.14 per minute collect calls. The court also stayed the FCC's cost basis requirements and reporting requirements which include transaction fees.

[10] NARUC's member commissions have oversight over intrastate telecommunications services and particularly the local service supplied by incumbent and competing local exchange carriers (LECs). These commissions are obligated to ensure that local phone service is provided universally at just and reasonable rates. They have a further interest to encourage LECs to take the steps necessary to allow unfettered competition in the intrastate telecommunications market as part of their responsibilities in implementing: (1) State law and (2) federal statutory provisions specifying LEC obligations to interconnect and provide nondiscriminatory access to competitors. See, e.g., 47 U.S.C. § 252 (1996).

NARUC is recognized by Congress in several statutes[11] and consistently by the Courts[12] as well as a host of federal agencies,[13] as the proper entity to represent the collective interests of State utility commissions. In the Telecommunications Act,[14] Congress references NARUC as "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities.[15]

The Association's interest in this proceeding is clear. FCC action to expand its authority to affect INTRAstate toll rates can interfere with existing State programs and undermine State jurisdiction to handle related complaints and revise programs.

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[11] See 47 U.S.C. §410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Board to consider issues of common concern); See also 47 U.S.C. §254 (1996); See also *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where this Court explains "Carriers, to get the cards, applied to…(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system).

[12] See, e.g., *U.S. v. Southern Motor Carrier Rate Conference, Inc*., 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985) (where the Supreme Court notes: "The District Court permitted (NARUC) to intervene as a defendant. Throughout this litigation, the NARUC has represented the interests of the Public Service Commission's of those States in which the defendant rate bureaus operate." 471 U.S. 52, n. 10. See also, *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976); Compare, *NARUC v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007); *NARUC v. DOE*, 851 F.2d 1424, 1425 (D.C. Cir. 1988); *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985).

[13] NRC Atomic Safety and Licensing Board *Memorandum and Order* (Granting Intervention to Petitioners and Denying Withdrawal Motion), LBP-10-11, *In the Matter of U.S. Department of Energy (High Level Waste Repository)* Docket No. 63-001-HLW; ASLBP No. 09-892-HLW-CABO4, mimeo at 31 (June 29, 2010) ("We agree with NARUC that, because state utility commissioners are responsible for protecting ratepayers' interests and overseeing the operations of regulated electric utilities, these economic harms constitute its members' injury-in-fact.")

[14] *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. §151 *et seq*., Pub.L.No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) ("Act" or "1996 Act").

[15] See 47 U.S.C. § 410(c) (1971) (NARUC nominates members to FCC Joint Federal-State Boards which consider universal service, separations, and related concerns and provide formal recommendations that the FCC must act upon; Cf. 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). Cf. *NARUC, et al. v. ICC,* 41 F.3d 721 (D.C. Cir 1994) (where the Court explains "…Carriers, to get the cards, applied to…(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system.)

Whatever the merits of any proposed FCC policy, the *Second Further Notice* proposes actions that should be rejected as outside the FCC's authority.

The *Second Further Notice* discusses the FCC's legal authority in two places – ¶ 29 and ¶ 85.[16] But both have the same basic flaws.

At the heart of this, as with every statute, is the question of Congressional intent. Congress, in 47 U.S.C. § 276, provided the FCC with authority to protect independent payphone providers - nothing more.[17]

[16] In ¶ 85-6, the states: "[I]n the *Order* the Commission asserted in regard to ICS generally that "[o]ur exercise of authority under sections 201 and 276 is further informed by the principles of Title I of the Act. We seek comment on whether this assertion also encompasses the Commission's regulation of services ancillary to the provision of ICS to the extent that ICS may be considered an IP-enabled service. We seek comment on whether this assertion also encompasses the Commission's regulation of services ancillary to the provision of ICS to the extent that ICS may be considered an IP-enabled service." The short answer is – no. Unfortunately for the FCC, "payphone service" and "payphone service providers" are both specified in the statute. Moreover, the FCC's authority with respect to "payphone service" and "payphone service providers" is also specified. The concept of ancillary jurisdiction simply does not apply. Moreover, the technology used to provide the voice service is irrelevant. The statute is, on its face, technology neutral in its terms. There is no question but that the voice component of "Inmate telephone service" are "telecommunication services." The FCC has yet to specifically classify Internet Protocol or IP-based voice communications – though in the 10th Circuit litigation, the agency effectively conceded their status as "telecommunication services." See the detailed arguments in NARUC's November 25, 2014 ex parte filing and, in particular, the attachment, at: http://apps.fcc.gov/ecfs/document/view?id=60000988515 and http://apps.fcc.gov/ecfs/document/view?id=60000988516. To the extent the FCC chooses to base any authority on the technology used to provide "Inmate Telephone Service" – then NARUC respectfully requests that the arguments outlined in that ex parte concerning the classification of IP services be incorporated by reference in the record of this proceeding.

[17] See, e.g., *Rates for Interstate Inmate Calling Services,* WC Docket No. 12-375, *Second Further Notice of Proposed Rulemaking*, FCC 14-158 (October 22, 2014) (Statement of Commissioner Michael O'Reilly, Concurring in Part and Dissenting in Part,) ("Section 276 was intended to protect payphone providers that had been unable to receive fair compensation for their service, not to dictate, for example, whether they charge per minute or per call, or how they recover legitimate fees.")

Individual States remain in the best position to oversee and investigate matters relating to ICS INTRAstate rates and service quality.

States that filed in this docket have taken a consistent view on this issue and NARUC generally endorses those comments. For example, the Massachusetts Department of Telecommunications and Cable specifies that "individual States are in the best position to oversee and investigate matters relating to ICS intrastate rates and service quality."[18] Similarly, the Public Service Commission of the District of Columbia[19] urges the FCC "to encourage states to reform intrastate inmate calling rates without preempting [S]tate authority to do so since preemption would discourage [S]tates from devising innovative solutions to ensure that intrastate inmate calling rates are just, reasonable and fair." And the Alabama commission also pointed out that "[g]iven the differences in confinement facilities…States are in the best position to regulate intrastate ICS."[20]

The FCC lacks authority to address intrastate ICS rates.

The *Second Further Notice*, like the 2013 *FNPRM,* invites comment on a new interpretation of § 276 – one that is both inconsistent with the text of the statute and also the Commission and Court precedent. As a preliminary matter, there is at least one rule of statutory construction Congress specified that both the FCC and any reviewing Court must

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18 *Id*. at 5

19 *Comments of the Public Service Commission of the District of Columbia*, filed in CC Docket 12-375, at 1, (December 11, 2013), available online at: http://apps.fcc.gov/ecfs/document/view?id=7520961515.

20 *Comments of the Alabama Public Service Commission,* filed in CC Docket 12-375, at 1, (December 11, 2013), available online at. http://apps.fcc.gov/ecfs/document/view?id=7520962279.

consider. On top of the general jurisprudential rule establishing a heavy presumption against a finding that a federal statute preempts State authority,[21] Congress imposes an explicit rule of statutory construction in § 601(c)(1): where a provision can be read in several ways, it must be construed to avoid preemption.[22] Until this proceeding, the FCC has consistently interpreted this section in a much less preemptive fashion. It has never been expanded to give the FCC authority to establish intrastate toll rates – which are not always provided by the payphone equipment owner at specific locations.

Moreover, the plain text of § 276 specifies a purpose that is inconsistent with the *FNPRM's* proposed new interpretation of that provision. The rules under § 276 are to assure that Bell Operating Companies do not "discriminate in favor of its payphone services" or "subsidize its payphone services directly or indirectly."

Section 276 has to be read in *pari materia* with 47 U.S.C. § 152's[23] express reservation of State authority over the toll service rates of calls that originate and terminate within the boundaries of that State. The Supreme Court applied Section 152 strictly, refusing even to permit federal prescription of limits on the cost inputs that factor into

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[21] When addressing questions of express or implied federal preemption, Courts begin their analyses "with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States. *Metronic v. Lohr,* 518 U.S. 470 at 485 (1996). *Altria Grp. Inc. v. Good,* 555 U.S. 70 at 77 (2008).

[22] Section 601(c)(1) provides that "[t]his Act and the amendments by this Act *shall not be construed to modify, impair, or supersede* Federal, *State*, or local *law unless expressly so provided in such Act or amendments*." (emphasis added). Cf. 47 U.S.C. § 261(b)&(c) (1996).

[23] Section 152(b) states, in pertinent part:
> [N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier … .

intrastate rate setting. "Section 152(b) constitutes, as we have explained above, a congressional ***denial*** of power to the FCC to require state commissions to follow FCC depreciation practices for intrastate ratemaking purposes."[24] Even after the 1996 amendments, where Congress expanded the FCC's authority into intrastate telecommunications matters*, the FCC itself never construed its authority under Section 276 to extend to intrastate **toll** services*. In the *Second Further Notice*, the FCC again relies on Section 276 which states:

> [T]he Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that (A) 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.[25]

On its face, this provision focuses on owners of payphone equipment. It entitles these "Payphone Service Providers" (PSPs) to compensation for use of that equipment. Section 276 creates a federal regime specific to the payphone, where previously "[S]tates …regulated payphones as part of the LEC's network-based service."[26] The section permitted the FCC to preempt State regulations that "prohibit the provision of payphone

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[24] *Louisiana Pub. Serv. Commission v. FCC*, 476 U.S. 355, 374 (1986) (emphasis added)

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[25] 47 U.S.C. § 276(b)(1)(A) (emphasis added). See *Second Further Notice* at ¶ 29.

[26] CC Docket No. 96-128, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, FCC 96-388, 11 FCC Rcd. 20541, 20546 ¶ 9 (1996) ("*First Payphone Report and Order*"). This order famously was reversed and remanded, with several remands to follow, with regard to the per-call PSP compensation rate.

service by any entity other than the incumbent LEC."[27] This new framework separated payphone equipment from the telecommunications services provided, including, as the FCC has previously specified, *the operator services provided to payphones which are independently regulated under the Telephone Operator Consumer Services Improvement Act* ("TOCSIA").[28] Congress was focused on introducing competition for the provision of payphone equipment and specified that Payphone Service Providers have a right to be paid by the carriers whose calls are initiated by their payphones. The FCC viewed Section 276 to require the agency to ensure "that all calls are fairly compensated, including those for which the PSP currently receives no revenue."[29]

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[27] *First Payphone Report and Order* ¶ 13.

[28] Pub. L. No. 101 435, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226).

[29] *First Payphone Report and Order* ¶ 48 (emphasis added). The FCC's § 64.1300 Payphone compensation obligation implementing rules make that distinction clear:

> (a) For purposes of this subpart, a Completing Carrier is a long distance carrier or switch-based long distance reseller that completes a coinless access code or subscriber toll-free payphone call or a local exchange carrier that completes a local, coinless access code or subscriber toll-free payphone call.
> (b) Except as provided herein, a Completing Carrier that completes a coinless access code or subscriber toll-free payphone call from a switch that the Completing Carrier either owns or leases shall compensate the payphone service provider for that call at a rate agreed upon by the parties by contract.
> (c) The compensation obligation set forth herein shall not apply to calls to emergency numbers, calls by hearing disabled persons to a telecommunications relay service or local calls for which the caller has made the required coin deposit.
> (d) In the absence of an agreement as required by paragraph (b) of this section, the carrier is obligated to compensate the payphone service provider at a per-call rate of $.494.

Significantly, Section 276 does not apply to long-distance calling rates. PSPs have no right to impose long-distance rates.[30] Rather, it is the interexchange carrier who gets paid by the calling or called party for the completed telephone call itself. Section 276 simply ensures that the PSP gets its fair share for providing the handset that allowed the call to occur. Congress's focus cannot be ignored simply because Section 276 defines "payphone service" as "the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services."[31]

[30] In ¶ 33, the *Second Further Notice* takes text out–of-context asking about § 276's "requirement that regulations adopted by the Commission ensure that payphone service providers are compensated" on a "per call" basis and for "each and every completed intrastate and interstate call"? As discussed, *infra*, that text has to be read in context. The thrust of § 276 is obvious. The "per call" compensation plan for PSPs does not apply to telecommunications relay services or emergency calls. Such a ban is logical in the context of a plan to assure that the Bell Operating Companies were not finding ways to favor their own payphones over others. It is not logical in this context. Note, the FCC has not suggested any "per call" compensation plan will require an "inmate" service provider to include free TRS services as this part of the statute seems to require. See *FNPRM* ¶¶ 134-144 (discussing interrelationship between ICS calls and TRS access). What about § 276's requirement to assure that BOCs "have the same right" that independent payphone providers do "to negotiate with the location provider…unless the FCC determines its not in the public interest." Note - there is no provision in that section to make similar rules for the referenced "independent" payphone providers – a category, which under the FCC's jurisdictional proposal, necessarily includes most of the companies providing inmate calling services. *There is no default requirement for the FCC to block non-BOC negotiations with location service providers as not in the public interest.* Indeed the only similar provision for non-BOC/independent PSP - § 276(e) - lacks that limiting language, specifying only that the FCC "shall" provide regulations that "provide for all payphone service providers to have the right to negotiate with the location provider on the location providers' selecting and contracting with, and subject to the terms of any agreement with the location provider, to select and contract with the carriers that carry intraLATA calls from their payphones." Specifying that the FCC must create rules to allow all "payphone service providers" to "negotiate" such terms seems directly at odds with the regulations the FCC is proposing in this proceeding as does the requirement in § 276(a) that the Bell Operating Companies cannot subsidize its payphone service directly or indirectly from its "basic exchange" (local) and "exchange access" (toll) operations.

[31] 47 U.S.C. § 276(d).

"Inmate telephone service" obviously refers to the provision of the equipment, and not calling service, else Congress would have used the term "inmate telecommunications services".[32] Congress provided an explicit definition of "telecommunications services" in 47 U.S.C.S 153.

The earlier 2013 *FNPRM* cites *Illinois Public Telecommunications Association v. FCC*, 117 F.3d 555 (D.C. Cir. 1997),[33] as supporting this revisionist reading of Section 276. It does not. *Illinois Public Tel*. did not involve intrastate toll rates. It focused on rates for local calls made from a payphone and paid with coins. The FCC adopted a "'market-based' surrogate" for the local coin rate in order to ensure that PSPs receive the per-call compensation to which they are entitled.[34] As the D.C. Circuit observed, "The Commission emphasized, however, that the local coin rate would be only the default rate, from which the PSPs and IXCs could negotiate a departure."[35]

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[32] "Congress' choice of words is presumed to be deliberate … ." *University of Texas Southwestern Med. Ctr. v. Nassar*, __ U.S. __, 133 S. Ct. 2517, 2529 (2013) (citing *Gross v. FBL Financial Svcs., Inc*., 557 U.S. 167, 177 n.3 (2009)).

[33] FNPRM ¶ 137.

[34] 117 F.3d at 560.

[35] 117 F.3d at 560.

The Court's decision was clear. The "market-based surrogate" was upheld:

> Because the only compensation that a PSP receives for a local call (aside from the subsidies from CCL charges that LEC payphone providers enjoy) is in the form of coins deposited into the phone by the caller, and there is no indication that the Congress intended to exclude local coin rates from the term "compensation" in § 276, we hold that the statute unambiguously grants the Commission authority to **regulate the rates for local coin calls**.[36]

Illinois Public Tel. is distinguishable on both the facts and the law. The appeal was in the context of local coin calls, relies on the context of public payphones in a multi-carrier environment; and protects the right of those who provide payphones – and nothing else – to be compensated for use of their equipment.

Inmate Telephone Service has none of these characteristics, as they cannot be paid with coins, are provided pursuant to exclusive public contracts, and are carried by the owner of the payphone (assuring the equipment owner is compensated for the use of its equipment).

It is clear in this context, though clearly well-intentioned, the FCC's jurisdictional reach, well exceeds its statutorily-authorized grasp.

This *Second Further Notice* also implicates intrastate ICS and access for long-distance ICS calls through intrastate telecommunications relay services (TRS). *See generally FNPRM*, ¶¶ 133-144, at 54-58. States are the traditional providers and/or administrators of intrastate TRS access services, e.g., through the operation of State-

[36] 117 F.3d at 562 (emphasis added).

specific TRS centers that utilize calling assistants and other assistive technologies to serve the communications needs of persons with disabilities.

The FCC must assure that any rules it chooses to implement do not disturb or negatively impact the various arrangements — and associated compensation mechanisms for access and call completion via TRS centers — between various States and providers of intrastate TRS access services.

Respectfully Submitted,

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Appendix A - Resolution Urging the FCC to take Action to Ensure Fair and Reasonable Telephone Rates from Correctional and Detention Facilities

WHEREAS, Inmate telephone service contracts are exclusive agreements between detention facilities and telephone companies that provide specialized functionality to enable monitoring of inmate telephone calls; *and*

WHEREAS, Although costly specialized equipment and monitoring services are provided, the contracts for inmate telephone systems often include high connection fees and per minute rate charges which are unrelated to the cost of providing the service; *and*

WHEREAS, Contracts for inmate telephone systems are often made by the operators of detention or correctional facilities and commonly include commissions paid to the State or local contracting agencies; *and*

WHEREAS, The commissions are based on gross revenues of inmate phone calls and could provide an incentive for operators of detention and correctional facilities to contract with telephone service providers that charge higher rates and/or provide higher commissions; *and*

WHEREAS, According to a Prison Legal News survey, roughly 85% of State prison systems receive commission payments and the average commission to State and local contracting agencies is 42% of the gross revenues from inmates' phone calls resulting in annual commissions totaling over $152 million nationwide; *and*

WHEREAS, Inmate calling rates vary from State to State, however in many States, the charge for a fifteen minute telephone call from an inmate ranges from $10 to $17; *and*

WHEREAS, Most inmate calls are made as collect calls. As a result, family members and friends of inmates must bear the burden of above market per minute rates and connection fees; *and*

WHEREAS, In 2007, 52% of those in State prisons and 63% of those in federal prisons were parents of minor children according to a Prison Policy Initiative report (*The Price to Call Home: State-Sanctioned Monopolization in the Prison Phone Industry*); *and*

WHEREAS, High rates pose a significant barrier to frequent and meaningful communication between inmates and their families, in many cases forcing families to limit the frequency and length of communication with inmates; *and*

WHEREAS, Communication with the outside world is critical for inmates' successful re-entry into society so that inmates can secure housing and employment; *and*

WHEREAS, Successful reentry is critical to reducing overcrowding and high costs of maintaining prison systems; *and*

WHEREAS, A 2012 study by the Vera Institute of Justice (*The Price of Prisons: What Incarceration Costs Taxpayers*), reported the total taxpayer cost of prisons in the United States now exceeds $39 billion, the average cost of incarceration per inmate per year is $31,286 and more than four out of every ten prisoners return to custody within three years of release; *and*

WHEREAS, Due to the growing costs of prison systems, both Republican and Democratic 2012 Party Platforms explicitly recognized the importance of programs that reduce recidivism; *and*

WHEREAS, Maintaining contact with family members and community, specifically through telephone communication, has been consistently shown to reduce recidivism which saves taxpayer dollars (*Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners' Family Relationships*, Journal of Contemporary Criminal Justice); *and*

WHEREAS, The Federal Communications Commission (FCC) was asked to resolve the issue of inmate telephone rates that are much higher than rates charged to other customers by imposing price caps on long-distance prison telephone rates in the "Wright Petition" which was filed in 2003; *and*

WHEREAS, In 2007, after no final action had been taken by the FCC, the Petitioners submitted an alternative rulemaking petition seeking per-minute rate caps on interstate long-distance services, however, no decision has been made; *and*

WHEREAS, Many States have addressed this issue by limiting rates for local calling, commissions, and connection fees; *and*

WHEREAS, California, Nebraska, New Mexico, New York, Michigan, Missouri, Rhode Island and South Carolina have banned prison telephone system commissions and, as a result, the cost of prison phone calls in those States have dropped; *and*

WHEREAS, A broad coalition of groups and organizations have urged the FCC to address high phone rates in correctional institutions, including the FCC Consumer Advisory Committee and the National Association of State Utility Consumer Advocates; *now, therefore be it*

RESOLVED, That the National Association of Regulatory Utility Commissioners (NARUC), convened at its 2012 Annual Meeting in Baltimore, Maryland, and encourages the FCC to take immediate action on the "Wright Petition" by prohibiting unreasonable interstate rates and charges for inmate telephone services; *and be it further*

RESOLVED, That State and federal action should consider policies that could lower prison phone rates as a step to reduce recidivism and thereby lower the taxpayer cost of prisons.

Sponsored by the Committee on Telecommunications
Adopted by the NARUC Board of Directors, November 13, 2012
Adopted by the NARUC Committee of the Whole, November 14, 2012