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Ms. Marlene H. Dortch
Federal Communications Commission
45 L Street NE
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Re: Setting an appropriate maximum facility cost recovery amount to ensure jails and prisons are incentivized to pursue quality, affordable phone services. Incarcerated People's Communications Services; Implementation of the Martha Wright-Reed Act, WC Docket No. 23-62; Rates for Interstate Inmate Calling Services, WC Docket No. 12-375

Dear Ms. Dortch,

Please accept this *ex parte* filing in response to the June 7, 2024 filing by Pay Tel Communications, Inc. ("Pay Tel"). Pay Tel's letter is right on the principle that the FCC's rules must incentivize facilities to ensure fair phone rates in the short and long term. However, the company's specific suggestion of an 8-cent per minute charge for facility cost recovery is based on a deeply flawed methodology that inflates the actual costs incurred by facilities for the provision of incarcerated people's communications services ("IPCS").

Current rate caps allow providers of telephone service at prisons and large jails to charge consumers up to 2 cents per minute for the purpose of recovering correctional-facility costs.¹ But, in a critical omission, current rules do not prohibit providers from sharing additional profits with correctional facilities. This omission undermines the FCC's objectives. Many people agree that phone service is an essential part of running a correctional facility,² and inflating the price that families must pay in order to displace onto them the costs of running correctional facilities is not the approach the Prison Policy Initiative would have taken. For that reason, the Prison Policy Initiative supports those parties that have argued to eliminate site commissions under the Martha Wright-Reed Act.³

¹ 47 CFR § 64.6030(d).

² Third Report and Order, Order on Reconsideration, and Fifth Further Notice of Proposed Rulemaking, Dkt. No. 12-375 (May 24, 2021), archived at <https://docs.fcc.gov/public/attachments/FCC-21-60A1.pdf>, footnote 100 on pages 16-17.

³ Reply Comments of the Wright Petitioners, Benton Institute for Broadband & Society, National Consumer Law Center (On Behalf of its Low-Income Clients), Prison Policy

However, the FCC has provided – on an interim basis – that facilities may recover their “costs” of providing phone services.⁴ Assuming that the FCC adheres to its previous policy of allowing facility cost-recovery through IPCS rates, the question then becomes, what should be the appropriate limit to such charges? Based on the record developed since the FCC’s 2021 IPCS order, we propose that if rates include a cost-recovery component, such a component be capped at 2 cents per minute of use. This amount is sufficient for facilities to recover these costs and the FCC should simultaneously prevent providers from making other payments unrelated to facility costs that are directly attributable to the provision of IPCS. This will encourage facilities to stop choosing phone providers on the basis of who can find the most ways to charge for *unregulated* services to fund ever-increasing kickbacks on *regulated* services. Instead, it will move us to a new world in which providers are selected on the basis of who can provide the service that results in the highest volume of calls.

Below, we will:

- Discuss the flaws in Pay Tel’s survey.
- Review the evidence on how facilities use the funds intended for the “general welfare” of incarcerated people that they collect from phone and other revenue.
- Make a specific proposal for how the FCC can correct the omission of a profit-sharing prohibition in its current approach, ensure facilities are compensated for their legitimate costs, *and* properly align the incentives so that the facilities can assist the FCC in bringing order to this market.

Pay Tel’s survey is too flawed for rate-setting

The Report of Don J. Wood (the “Wood Report”),⁵ compiled on Pay Tel’s behalf, is a well-intentioned effort to fill gaps in public knowledge created by facilities’ refusal to provide data. However, its average cost estimate of 8 cents per minute of use does not accurately reflect facility phone costs. This is because the survey suffers from a small sample size, contains a host of methodological problems, fails to provide actual data as required for producing federal regulation, and derives its estimate from an inappropriately expansive list of phone tasks.

Initiative, Public Knowledge, Dkt. Nos. 23-62, 12-375 (July 12, 2023), archived at <https://www.fcc.gov/ecfs/document/10712916402481/1>, pages 12-16; Opening Comments of United Church of Christ Media Justice Ministry and Public Knowledge, Dkt. Nos. 23-62, 12-375 (May 8, 2023), archived at <https://www.fcc.gov/ecfs/document/105091636628717/1>, pages 16-21.

⁴ Third R&O, paragraphs 100-168.

⁵ Report of Don J. Wood on behalf of Pay Tel Communications, Inc. [hereinafter “The Wood Report”], WC Docket No. 12-375 (June 7, 2024).

First, as the Wood Report concedes, the survey sample of 30 facilities is too small to be representative. As you know, there are over 6,000 prisons and local jails in the United States. Additionally, as the Wood Report also concedes, the sample is not representative because all respondent facilities are Pay Tel's clients. To be sure, these are understandable limitations, but that doesn't change the fact that they make the data far less useful.

Second, the Wood Report has several serious flaws in its data collection strategy:

- The facilities are incentivized to overestimate their costs to preserve higher commissions — a situation exacerbated by Pay Tel directly telling respondent facilities the data they provide will be used to “establish a reasonable compensation amount;”⁶
- None of the task categories bear any relationship to the cost of providing phone services (more on this below);
- Pay Tel asked facilities to self-report weekly time investments for a group of vaguely defined tasks rather than collect data and sort it into appropriate tasks themselves — obscuring precisely which activities are counted as costs of phone service.

Third, we note that the data Pay Tel used to reach its conclusions are not provided for public inspection. Pay Tel's verbal instructions to the facilities — which could provide valuable insight into how both parties understood the survey questions — are unavailable as well. Such basic transparency, as you know, is required when a federal agency uses data to set regulations.⁷

Fourth, the survey acknowledges concerns with overestimating costs by directing facilities to exclude “time spent by investigators researching and building a case for prior criminal activity.” However, this guidance is rendered moot because Pay Tel queried facilities about tasks that almost exclusively pertain to security functions — tasks properly understood as general corrections overhead funded by departments, not callers. These tasks may be *indirectly* related to communications in that they involve phones, but they are not tasks required to make the phones work. Yet these costs make up the majority of Pay Tel's 8-cent per minute average cost estimate. We are deeply

⁶ Exhibit DJW-1 in the Wood Report. (At the bottom of the survey form, Pay Tel writes that the “Goals for gathering and presenting data” are to “demonstrate and validate justifiable need for facility compensation, establish a reasonable compensation amount.”)

⁷ Comments of Prison Policy Initiative, Inc. on Fifth Further Notice of Proposed Rulemaking, Dkt. No. 12-375 (September 27, 2021), archived at <https://www.fcc.gov/ecfs/document/10927169148487/1>, page 14; Reply Comments of Prison Policy Initiative, Inc. on Fifth Further Notice of Proposed Rulemaking, Dkt. No. 12-375 (December 17, 2021), archived at <https://www.fcc.gov/ecfs/document/12171576121872/1>, page 25.

concerned that their use in rate-setting will displace core financial responsibilities of incarceration onto incarcerated people and their families.

In a 2021 letter to the FCC, we explained how the National Sheriffs' Association 2015 "survey" of jail telephone costs (the "NSA 2015 Survey") padded their cost analysis by factoring in tasks unrelated to making phone services available to incarcerated people.⁸ That letter advanced a framework to help the FCC distinguish between the direct costs facilities incur to provide phone services and general corrections overhead that incidentally involves phones. We apply this approach of determining the legitimacy of various costs in the table below, which compares the phone task categories on Pay Tel's survey to their relationship to phone services:

**Which phone tasks from Pay Tel's survey
are directly related to providing phone services?**

Phone task category in Pay Tel's survey	Is that task directly related to providing phone service?
Routine preventative call monitoring	No. These are all security costs (some related to law-enforcement activities outside the actual correctional facility) that are only indirectly related to telecommunications. Security functions are properly viewed as overhead in a correctional environment, and recovering such costs from ratepayers is inequitable and contrary to the policy.
Responding to IPCS system alerts	
Call recording review	
Enrolling inmates for voice biometrics	
Blocking and unblocking numbers	
Investigating potential PIN theft	
Researching fraud impacts on victims	
Other (assistance with log-ins/PINS, assistance with account issues)	No. Issuing PINs to incarcerated customers is part of orienting new admittees to the facility — no different than assigning an inmate number or explaining the disciplinary process. This is not directly related to the provision of telecommunications. As for assisting with logins and account issues, it is dubious that facilities provide any regular or substantial support to non-incarcerated customers, since carriers advertise on the basis of taking over this function.

Fortunately, we must note the FCC does not need Pay Tel's data to move forward. The FCC has *already* considered data and analyses regarding the

⁸ Comments of Prison Policy Initiative, Inc. on Fifth Further Notice of Proposed Rulemaking, Dkt. No. 12-375 (September 27, 2021), archived at <https://www.fcc.gov/ecfs/document/10927169148487/1>, pages 13-16.

narrow set of facility costs in question, all of which are available on record, and which informed its previous decision to set the interim rate maximum of 2 cents per minute. These data and analyses are far more reliable for determining an appropriate rate cap than the Wood Report. Contrary to the report’s assertion that facilities carry a significantly higher cost burden, the FCC’s own analysis shows this cap can potentially be pushed *even lower*.⁹ Unless and until facilities provide meaningful data showing their costs are indeed higher, this should be considered a settled debate and the FCC should permanently extend the 2-cent per minute recovery component to rates at all correctional facilities.

Facilities routinely abuse and misuse commissions meant for the “general welfare” of incarcerated people

In nearly every state in the country, a portion of the funds spent on phone calls, video calls, e-messaging, money transfers, and commissary purchases flow into so-called “Inmate Welfare Funds” set aside for the general welfare of incarcerated populations. This includes, for example, funding educational, recreational, and social opportunities above and beyond what department budgets generally encompass. In reality, these lucrative and opaque revenue streams lack basic safeguards and oversight. As a result, facilities often spend this money on department overhead and general staffing expenses instead of enriching the lives of incarcerated people. In this light, it’s not difficult to imagine why facilities are reluctant to share data on how they have spent thousands if not millions of commission dollars, and why they are keen to participate in data collection only when it’s on their terms.

In our recently published in-depth report, *Shadow Budgets*,¹⁰ the Prison Policy Initiative found numerous examples of jails and prisons misusing, abusing, or simply sitting on large amounts of cash stashed in welfare fund accounts:

- The Fulton County Jail (Ga.) welfare fund purchased \$40,000 in gift cards from The Honey Baked Ham Company for a staff holiday party, while spending \$5,000 on a Thanksgiving giveaway and \$2,600 on florists. It also spent commission dollars meant for incarcerated people on a face painting booth, DJ services, a tropical bounce house, and more “linked to employee appreciation and community diversion.”

⁹ Third Report and Order, Order on Reconsideration, and Fifth Further Notice of Proposed Rulemaking, Dkt. No. 12-375 (May 24, 2021), archived at <https://docs.fcc.gov/public/attachments/FCC-21-60A1.pdf>, paragraph 136.

¹⁰ “Shadow Budgets: How mass incarceration steals from the poor to give to the prison.” Prison Policy Initiative (May 6, 2024), archived at <https://www.prisonpolicy.org/reports/shadowbudgets.html>.

- The Dauphin County Jail (Pa.) used welfare funds to expense only \$45,000 in recreational equipment, program supplies, and library books for incarcerated people, while spending \$1.64 million on bodycams, gun range memberships, consultants, uniforms, vehicles, employee appreciation meals, a new fridge for the breakroom, and fitness trackers for officers, according to records covering 2019 to 2023.
- The Butte County Board of Supervisors (Ca.) attempted to use \$650,000 from their jail’s welfare fund to build a new facility before the American Civil Liberties Union sued to stop them in 2016.
- A 2021 investigation revealed that Sacramento’s (Ca.) sheriff spent more than \$15 million in welfare fund dollars on staff salaries; \$1.45 million to purchase a camera system; \$1 million for parking lot improvements; \$900,000 for radio leases, surveillance cameras, and software to track incarcerated people; and \$150,000 for perimeter fences.
- Arizona’s Department of Corrections argued that limiting commissions would lead to “reduced educational and job training opportunities...[which would]...have potentially life-altering negative impacts on inmates and their families, not to mention public safety in the community.” Meanwhile, Arizona sat on funds explicitly for those purposes: the department reduced spending on education and programming by nearly 48% in four years — from \$3.2 million in 2010 to \$1.7 million in 2014 — while phone revenues steadily increased by 12% — from nearly \$3.7 million in 2010 to \$4.1 million in 2014.

Global Tel*Link Corporation dismissed *Shadow Budgets* in a letter to the FCC dated June 13, 2024.¹¹ The company stated that these findings have “no bearing” on whether commissions should be considered as costs when setting rates because the companies are required to pay them as a condition of doing business, and they have no control over how the funds are used. We strongly urge the FCC to reject this line of reasoning and recognize that, to the contrary, this information goes directly to the heart of determining the appropriate rate for cost recovery. Where and how facilities use their discretionary funds is relevant to both (1) the industry’s claims that commission income is necessary *and* (2) the discussion of exactly which alleged costs are related to enabling phone service. It is impossible to determine an appropriate cost recovery rate without getting specific about how the money is spent, and the relationship that spending has (if any) to phone services.

¹¹ Global Tel*Link Corporation d/b/a ViaPath Technologies Written Ex Parte Submission and Report of Secretariat Economists, Dkt. Nos. 23-62, 12-375 (June 13, 2024), page 6.

These expenditures — which are made using money incarcerated people and their families must pay to make phone and video calls, purchase goods at the commissary, and deposit money (among other things) — are not remotely related to recouping the costs of providing those services, much less the “general welfare” of incarcerated people. They are squarely matters of facility operations, which are not the financial responsibility of fee-payers. Though welfare funds are a relatively small segment of corrections budgets, they have balances in the tens of thousands and millions of dollars, and departments have grown fond of the extra cash. We hope that the FCC will take seriously not just what callers can afford, but what gross misconduct it is giving license to if it sets rates beyond actual cost.

Proposal: Setting a reasonable cap on facility cost recovery and prohibiting commission payments

To the extent that the FCC intends to retain a cost-recovery charge within its allowed rates, the Prison Policy Initiative proposes the FCC take two simultaneous and interrelated actions:

1. Set the maximum facility cost recovery fee of 2 cents per minute of use.
2. Declare commission payments exceeding 2-cents per minute of use as outside the legitimate costs of providing telephone service when determining rate caps and ideally prohibit the companies from making payments exceeding that amount to the facilities.

By capping facility cost recovery at 2 cents per minute of use, the FCC can ensure that facilities can recover their legitimate costs that are directly related to the provision of IPCS, which is one of the FCC’s stated objectives. Noting that the agency has repeatedly over a period of years asked facilities to provide reliable data but have not received it, now is the time to create a permanent rule. That said, it would be reasonable for the FCC to revisit in the near future whether the 2-cent cap is too high, particularly for prisons and large jails. To do so, the FCC may wish to give guidance to facilities using the principles on pages 16-19 of our 2021 filing.¹² Additionally, the annual cost data submitted by the carriers may also show the frequency at which facilities of different sizes admit during the contracting process that the 2 cents cost recovery is excessive.

¹² Comments of Prison Policy Initiative, Inc. on Fifth Further Notice of Proposed Rulemaking, Dkt. No. 12-375 (September 27, 2021), archived at <https://www.fcc.gov/ecfs/document/10927169148487/1>, pages 16-19.

The FCC also needs to clarify that commission payments and other financial incentives paid to facilities beyond the 2-cent facility cost recovery fee are not legitimate costs of providing the service, and should exclude those payments when reviewing cost data and setting rate caps. By going just slightly further and explicitly prohibiting the companies from making any payments to facilities other than the cost recovery fee discussed above, the FCC would:

- Lower the amounts that incarcerated people and their families must pay under future contracts.
- Ensure that the facilities pick providers on the basis of who will be able to provide the highest quality service and the most minutes of use.
- Give facilities an incentive to reject contracts and behaviors that drive up the prices families pay for bundled but unregulated products.
- Protect the provider's regulated profits from inappropriate demands by the facilities.

In lieu of the Prison Policy Initiative's preferred approach of banning commissions entirely, the FCC can realign the incentives in this broken marketplace by taking both actions — capping the size of facility cost recovery and prohibiting other payments — to ensure fair rates, fair profits, and fair cost recovery.

Sincerely,



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