

CAPTIVE AUDIENCES: A CASE STUDY OF PHONE RATES FOR INCARCERATED PERSONS



BY COLEMAN BAZELON & PAROMA SANYAL¹



¹ Dr. Coleman Bazelon is a Principal with The Brattle Group and co-leader of the Intellectual Property Practice; corresponding author, Dr. Paroma Sanyal (Paroma.Sanyal@brattle.com), is a Senior Consultant with The Brattle Group and co-leader of the Telecom, Internet, Media & Entertainment Practice. For the past decade, Brattle has been supporting the Wright Petitioners on a Pro Bono basis and has authored numerous reports supporting the lowering of rates. This article reflects the perspectives and opinions of the authors and does not necessarily reflect those of The Brattle Group, its clients or other consultants. We would like to thank Michelle Cleary, Branko Jovanovic, Renée Duplantis, Andrea Helfant and others who have provided comments on the draft.

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Phone calls from prisons and jails are extremely costly for inmates and their families. In this article, we examine the market structure of inmate calling services and the inherent market failures that lead to such high calling rates. We determine that there is a classic anticompetitive problem involving vulnerable populations captive to a monopolist service provider, and discuss the Federal Communications Commission's attempts to lower these rates. In addition to phone call expenses, we discuss other costs such as the disproportionate effects on People of Color and lower-income individuals, the impact on recidivism and inmate mental health, and other welfare harm, and show that lowering these rates would further the goal of inclusive competition.

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The concept of Inclusive Competition means that antitrust should not improve or preserve competitive dynamics to the benefit of only certain parts of the population, but rather, takes into account how competitive dynamics may be improved for the benefit of all segments of the population. Indeed, it might look particularly at vulnerable populations captive to certain providers of goods or services or market dynamics, who are not reaping the benefits of competition that antitrust seeks to provide. In this article, we discuss our experience analyzing the competitive dynamics that impact one such captive audience.

Market power is always a concern when customers are captive to a single provider. And few customers are more captive than U.S. prisoners and their families trying to make phone calls. Unlike regular citizens who have access to numerous calling services, including via mobile phones, inmates in correctional facilities “only have [permitted] access to payphones operated by a single provider,” as all prisons and jails contract with a sole phone provider to serve their inmate populations, creating a monopoly in inmate calling services.² Furthermore, many facilities receive “commissions” in return for awarding these contracts, making the competition for the contracts largely about the size of the commissions. In terms of the captive audience, there are nearly 2.2 million Americans who are incarcerated today.³ The U.S. inmate population also skews heavily toward People of Color. For example, in 2019, Blacks and Hispanics accounted for only 31 percent of the U.S. population, but made up 56 percent of the incarcerated population.⁴ Addressing this monopoly and inherently anticompetitive market not only corrects a market failure, but one that disproportionately affects non-white Americans.

Phone calls from prisons and jails usually require inmates to create accounts with a private phone company that serves the facility, and to hold money in these accounts for prepaid calls. What they are charged for these calls is significantly more than a comparable call outside of the correctional facilities.⁵ The high charges paid by inmates and their family and friends for inmate calling services (“ICS”) has made it difficult for incarcerated people to communicate with their families, friends and other support networks. A 2018 survey found that a 15-minute call for inmates could cost as much as \$25, with the first minute billed at \$5.34 and the rest billed at a rate of \$1.39 per minute.⁶ Not all calls are this expensive, but most are significantly overpriced. Although there are some additional costs to providing phone service in prisons and jails – call recording and other security functionality – they do not explain why these rates are so much higher than the rates the rest of us pay to make phone calls.

Communication between incarcerated people and their families is important for reducing recidivism, maintaining inmate mental health and a host of other related benefits.⁷ This has become even more important due to COVID-19 lockdown restrictions – often visitations are not possible.⁸ As to recidivism alone, small reductions in reincarceration rates can translate to large savings. In our past research, we found that if lower ICS calling rates led to even very modest reductions in recidivism (less than a 1 percent reduction in reincarceration rates) the lost revenues to the correctional facilities from lower commissions from ICS providers that would result from lower calling rates would be more than offset by the savings from the lower prison population.⁹

2 FCC, “In the Matter of Rates for Interstate Inmate Calling Services,” WC Docket No. 12-375, Notice of Proposed Rulemaking, DA/FCC No. FCC 12-167, Docket/RM No. 12-375, ¶ 5, adopted December 24, 2012, <https://docs.fcc.gov/public/attachments/FCC-12-167A1.pdf>, (“FCC ICS 2012 NPRM”).

3 Tara O’Neill Hayes & Margaret Barnhorst, “Incarceration and Poverty in the United States,” American Action Forum, June 30, 2020, <https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states/>, (“Incarceration and Poverty in the United States”).

4 For the U.S. population see, U.S. Census Bureau, “Quick Facts,” July 1, 2019, <https://www.census.gov/quickfacts/fact/table/US/PST045219>, (“U.S. Census Bureau Quick Facts, 2019”). For the incarcerated population figures see, E. Ann Carson, “Prisoners in 2019,” Table 3, U.S. Department of Justice, October 2020, <https://www.bjs.gov/content/pub/pdf/p19.pdf>.

5 FCC, “Telephone Service for Incarcerated Individuals,” accessed March 21, 2021, <https://www.fcc.gov/consumers/guides/telephone-service-incarcerated-individuals>.

6 Prison policy Institute, “2018 Phone Rate Survey,” Original Survey November 2018, Updated April 2019, accessed March 15, 2021, https://www.prisonpolicy.org/phones/appendix_table_2.html.

7 Kelle Barrick, Pamela K. Lattimore & Christy A. Visher, “Reentering Women: The Impact of Social Ties on Long-Term Recidivism,” *The Prison Journal*, Vol. 94(3), June 11, 2014, pp. 279 – 304, <https://journals.sagepub.com/doi/10.1177/0032885514537596>.

8 Avi Asher-Schapiro, “Locked Up During COVID-19: Costly Phone Calls Strain Families,” Reuters, September 23, 2020, <https://www.reuters.com/article/us-usa-prisons-tech-idUSKCN26E3DQ>.

9 Declaration of Coleman Bazelon, “In the Matter of Rates for Interstate Inmate Calling Services,” WC Docket No. 12-375, filed March 25, 2013, ¶ 55, <https://ecfsapi.fcc.gov/file/7022134794.pdf>. Note – that the lost revenues to prisons and jails would arise from the fact that with lower calling rates, the ICS service providers would potentially offer lower site commissions to the facilities, thus lowering the revenues to the facilities. The cost savings would come from the lower number of incarcerated people.

I. THE MARKET FOR ICS SERVICES

In the ICS market, the telecommunications provider typically competes for the contract to serve a facility, or a set of facilities, and is granted exclusive rights to serve the facility if it wins the contract.¹⁰ A key aspect of the competition for contracts is the size of the payment the correctional facility will receive from the telecommunications provider for awarding the exclusive contract. Therefore, ICS providers in each facility have a monopoly over all the communication services for the length of their contract period, with inmates having only one choice if they want to call their loved ones.

One might imagine that competition for obtaining the contract would result in lower prices. However, the Federal Communications Commission (“FCC”) has previously found that “competition during the competitive bidding process for ICS does not exert downward pressure on rates for consumers.”¹¹ Winners of the contract are not always the lowest price competitor. Rather it is often the opposite. As noted, to obtain these exclusive monopoly service rights, the contracts often include a site commission paid to the correctional facility, and the bidder providing the highest site commission, i.e. a side payment paid to the correctional facility, often wins the contract.¹² These site commissions for ICS are not trivial. In 2013, the Commission calculated an average per-minute cost for interstate calls of \$0.12 per minute with site commissions and \$0.04 per minute without site commission – i.e. the inclusion of the site commission results in a three-fold increase in average per minute costs.¹³

Providers recover site commissions through higher charges to inmates and their families.¹⁴ The FCC has previously stated, “under most contracts, the commission is the single largest component affecting the rates for inmate calling service” and “because the bidder who charges the highest rates can afford to offer the confinement facilities the largest location commissions, the competitive bidding process may result in higher rates.”¹⁵ This finding is in line with what economists have learned from the early years of the cable industry where authorities can “craft rent-seeking competitions” in which “cities were more likely to award franchises to firms with high output prices and concluded that political agents acted to maximize politically-appropriable rents, not welfare.”¹⁶ With the consumer – cable customers decades ago or inmates and their families today – not being a party to the negotiation, their interests – lower prices – are not considered.

The market failures of the prison payphone market – prisoners’ lack of choice of service providers and no mechanism to moderate rates – means that the prices charged are almost certainly not efficient and that alternative rates could improve social welfare. Absent competitive pressures or effective regulation, the current price of most prison calling is far above the costs of providing the call. Consequently, the price does not properly signal the costs of the resources used when making a phone call from a prison.

In most other markets, obtaining an exclusive franchise to operate as a monopoly would have garnered antitrust scrutiny, especially if prices were seen as extraordinarily high. In the early years of the cable industry for instance, when municipalities granted exclusive geographic franchises to cable companies, who then became monopoly providers in their area, there was a lot of criticism about the resulting market structure and possible remedies.¹⁷ Lawsuits by other potential entrants can often remedy the monopoly situation. For instance, in 1987, the Cable Commission stopped monopoly franchise agreements in the Sacramento market after a jury found that “the claim of ‘natural monopoly’ was a sham used by defendants as a pretext for granting a single cable television franchise . . . to promote the making of cash payments and provision

10 “FCC ICS 2012 NPRM,” ¶ 5.

11 FCC, “In the Matter of Rates for Interstate Inmate Calling Services,” WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 12-375, ¶ 41, adopted August 9, 2013, <https://docs.fcc.gov/public/attachments/FCC-13-113A1.pdf>, (“FCC ICS 2013 R&O & FNPRM”). The 1996 Communications Act gives the FCC jurisdiction for regulating communications services. For inmate calling services it “empowers the Commission to regulate interstate and international communications services and preserves for the states jurisdiction over intrastate communications services.” See FCC, “In the Matter of Rates for Interstate Inmate Calling Services,” Order on Remand and Fourth Further Notice of Proposed Rulemaking, WC Docket No. 12-375, FCC 20-111, Fact Sheet, adopted August 6, 2020, <https://docs.fcc.gov/public/attachments/DOC-365581A1.pdf>, (“FCC ICS 2020 FNPRM”).

12 “FCC ICS 2013 R&O and FNPRM,” ¶ 41.

13 “FCC ICS 2013 R&O and FNPRM,” ¶ 26.

14 “FCC ICS 2013 R&O and FNPRM,” ¶ 41.

15 “FCC ICS 2012 NPRM,” ¶ 37.

16 Thomas W. Hazlett, “Duopolistic Competition in Cable Television: Implications for Public Policy,” Yale Journal of Regulation, Vol. 7(65), 1990, pp. 74, 116, <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1151&context=yjreg>, (“Duopolistic Competition in Cable Television”).

17 “Duopolistic Competition in Cable Television,” pp. 66, 102-103.

of ‘in-kind’ services.”¹⁸ In other industries, such as utilities, the issue of higher than efficient prices from a monopoly provider is solved by rate regulation.¹⁹ Given the structure of costs and revenues in the ICS industry, is antitrust scrutiny needed to bring down rates, or are there other remedies that can lower the very high calling rates faced by the incarcerated population?

II. POSSIBLE REMEDIES

In the past twenty years, the FCC has made several attempts at reforming the ICS rates. In 2000, a landmark civil rights case, *Martha Wright v. Corrections Corporation of America*, challenged the high ICS rates charged by the Correction Corporation of America, and in 2001, the case was referred to the FCC.²⁰ After several rounds of orders at the FCC and court proceedings, in 2013, the FCC decreased rates to \$0.21 per minute for debit and prepaid calls and to \$0.25 per minute for collect calls.²¹ In 2020, the FCC proposed reducing the rates further to “\$0.14 per minute for debit, prepaid, and collect calls from prisons and \$0.16 per minute for debit, prepaid, and collect calls from jails.”²²

Over the years, there have been discussions about introducing competition within the ICS market. The Commission has sought comments on “whether there are ways to promote competition within the ICS market.”²³ This proposal has met resistance as various commenters have pointed to security concerns if there are multiple providers.²⁴ There have also been concerns about fixed costs at facilities, suggesting that multiple providers may be inefficient.²⁵ The greatest impediment to introducing competition, however, may be that neither providers nor facilities have much of an economic interest in competing given the current market structure. Without the current market structure, providers would not be able to charge prices high enough to offer commissions and other inducements to jails and prisons.

Although the technical barriers to competition may be declining, the practical and regulatory barriers – and disincentives to fix them – persist.

In the absence of market discipline, the obvious remedy is regulating the rates paid by the inmates by capping how much the ICS providers can charge for calls. From an economic perspective, reducing prison phone rates is expected to improve welfare. Reducing the price of prison calls closer to an economically efficient rate has two primary benefits. First, any reduction in costs of calls from prisons would directly benefit prisoners and those they call in the form of lower phone bills. Second, to the extent these savings lead to additional phone calling (more and/or longer calls), the prisoners and their families will certainly benefit, but so will society overall through the positive externality of the reduced recidivism that results from keeping prisoners connected to their families and communities. As noted previously, even small reductions in recidivism would likely pay for themselves, but, of course, would have much greater benefits to society overall.

18 “Duopolistic Competition in Cable Television,” pp. 102-103.

19 Richard A. Posner, “Natural Monopoly and Its Regulation,” Cato Institute, Washington, D.C. April 1, 1999, <https://books.google.com/books?hl=en&lr=&id=Nv6QAAAAQ-BAJ&oi=fnd&pg=PR5&dq=natural+monopoly,+utilities,+rate+regulation&ots=Su6ikOnOLs&sig=yOrn7v5dXOaTQKDJbETLOOQIX4M#v=onepage&q=natural%20monopoly-%2C%20utilities%2C%20rate%20regulation&f=false>.

20 Fuchs, Zachary, “Behind Bars: The Urgency and Simplicity of Prison Phone Reform,” *Harvard Law & Policy Review* (2020), p. 206; *Wright v. Corr. Corp. of Am.*, No. 1:00-CV-00293(GK), 2016 U.S. Dist. LEXIS 6855, (D.D.C. Jan. 21, 2016).

21 “FCC ICS 2020 FNPRM,” ¶ 3.

22 “FCC ICS 2020 FNPRM,” ¶ 3. Note that the prison and jail rates are different as these are two distinct types of correctional facilities with different cost structures, with jails having higher costs, on average, compared to prisons. Jails are usually run by local government/ law enforcement and are for short-term incarcerations or those awaiting trials. Prisons are larger and are typically run by the state or federal government. There are far fewer prisons than jails. For the difference between prisons and jails, see <https://www.hg.org/legal-articles/what-is-the-difference-between-jail-and-prison-31513>. Also note that there are three types of calls, Pre-paid, debit and collect calls, that an inmate can make, and these are classified by their payment method. Some inmates set-up pre-paid accounts or use debit calling facilities, while some use the collect call feature where the calling charges are paid by the person they are calling, i.e. the friends and families of the prisoner.

23 FCC, “In the Matter of Rates for Interstate Inmate Calling Services,” Second Report and Order and Third Further Notice of Proposed Rulemaking, WC Docket No. 12-375, ¶ 291, adopted October 22, 2015, <https://www.fcc.gov/document/fcc-releases-inmate-calling-services-second-ro-and-third-fnprm>, (“FCC ICS 2015 Second R&O and Third FNPRM”).

24 “FCC ICS 2015 Second R&O and Third FNPRM,” ¶ 293.

25 “FCC ICS 2015 Second R&O and Third FNPRM,” ¶ 293.

Access to phone calls in jails is important because it allows people to contact support for getting bail, have their children taken care of (so as to avoid losing custody), contacting an employer so as not to lose their job, etc.²⁶ In prisons, studies have shown that calls are important for mental health, promote good behavior, and help with transitions back into society that reduce recidivism rates. While reducing prison phone rates makes sense from a purely economic perspective, the case is only reinforced when we recognize the direct beneficiaries of this policy. As discussed earlier, prisoners and their families are disproportionately People of Color. They also tend to be low income individuals. The Brookings Institute found, for example, that only half the men incarcerated were employed in the three years before incarceration, and of those working, the annual median income was approximately \$6,000 compared to a national per capita income of \$34,000 in 2019.²⁷ In terms of impact on income, this means on average that a dollar saved in paying for phone calls to incarcerated loved ones is worth more, much more, than a dollar to the average American. In general, as you have more and more of a good, you value each successive unit less and less (the law of diminishing marginal utility). The corollary is that the marginal utility is higher, the less of a good you have. Thus, for the families of inmates, whose income is so much lower than the general U.S. population, the value of a saved dollar is much higher than for the average person.

III. CONCLUSION

Given the market failures in the provision of ICS, the agency – here the FCC – has an important role in ensuring that inmates and families of the incarcerated do not pay “unconscionable rates” just to keep in touch.²⁸ The twenty-year struggle to lower prison phone rates is still ongoing, and the opposition from the ICS providers continues to prevent the Commission from helping one of the most vulnerable segments of society. The economic, real world evidence points to a market failure with direct and unequal effects on a captive – and particularly vulnerable – segment of customers. Inclusive Competition should include exactly this type of captive audience.

26 Wendy Sawyer, “Why Expensive Phone Calls Can Be Life-Altering For People in Jail – and Can Derail the Justice Process,” Prison policy Initiative, February 5, 2019, <https://www.prisonpolicy.org/blog/2019/02/05/jail-phone-calls/>.

27 For the income figures of incarcerated population see, Adam Looney & Nicolas Turner, “Work and Opportunity Before and After Incarceration,” The Brookings Institution, March 2018, p. 4, https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf. For the U.S. statistics see “U.S. Census Bureau Quick Facts, 2019.”

28 Statement of Commissioner Jessica Rosenworcel on “FCC ICS 2020 FNPRM.”

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