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January 15, 2009

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW Room TW-A325
Washington, D.C. 20554

Dear Secretary Dortch and Commission Members:

Pursuant to Federal Communications Commission Rule § 1.1206, the American Bar Association (ABA) submits the following *ex parte* presentation in support of a comprehensive resolution of issues related to prisoner telephone services. *Alternative Rulemaking Proposal Related to Inmate Calling Services* submitted by *Martha Wright, et al.* (Petitioners) on March 1, 2007, CC Docket No. 96-128. Specifically, the ABA writes to direct the Commission's attention to a proposal filed on 29 October 2008 that sets forth a basis for fair and final resolution of the several complex issues under consideration in this proceeding.

Description and Mission of the American Bar Association

The ABA is the largest voluntary professional association in the world. With more than 400,000 members, the ABA provides law school accreditation, continuing legal education, information about the law, programs to assist lawyers and judges in their work, and initiatives to improve the legal system for the public.

The Mission of the American Bar Association is to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law.

Statement of Interest

For over twenty-five years, the ABA steadfastly has maintained that any limitations placed on "prisoners' communications should be the least restrictive necessary to serve the legitimate interests of institutional order and security and the protection of the public."¹ Indeed, as recently as 2005, the ABA House of Delegates voted unanimously to adopt a resolution that provides:

RESOLVED, That the American Bar Association encourages federal, state, territorial and local governments, consistent with sound correctional management, law enforcement and national security principles, to afford prison and jail inmates reasonable opportunity to maintain telephonic communication with the free

¹ *ABA Standards for Criminal Justice, Legal Status of Prisoners*, Standard 23-6.1. (a)(1981)(communication rights).

community, and to offer telephone services in the correctional setting with an appropriate range of options at the lowest possible rates.

By letter dated January 31, 2006, the ABA wrote U.S. Representative Bobby L. Rush to express strong support for legislation to amend the Communications Act of 1934 to require the Federal Communications Commission to consider, *inter alia*, prescribing prisoner telephone rates. In the following year, we wrote on May 1, 2007 to encourage the Federal Communications Commission (FCC) to “take meaningful action to address excessive inmate phone service rates and ensure the broadest possible range of calling options” in the *Wright* Proceeding.

The subject presented in the Alternative *Wright* Petition and the broader issues implicated in these proceedings are directly related to ABA policy and have a potentially adverse impact on pretrial detainees and prisoners across the country, as well as their families.

Comments of the American Bar Association Regarding the Proposal For a Comprehensive Resolution of Issues Related to the Alternative *Wright* Petition

As described by the ABA in its letter of May 2007, telephone access is increasingly important in the operation of correctional facilities (as a control mechanism), in the lives of prisoners² and their families, in the capacity of prisoners to confer with counsel,³ and in the ability of prisoners to maintain ties with their communities, maximizing the chance of a successful transition after release from prison.

However, in the past 20 years, practices have developed in the prison telephone industry which raise questions of propriety of correctional professionals, when they enter into non-competitive, profit-sharing contracts with telephone providers that provide for extremely high-cost telephone service for prisoners,⁴ a vulnerable and impoverished segment of society.

² Approximately 40% of the national prison population is functionally illiterate. The Center on Crime, Communities & Culture, *Education as Crime Prevention: Providing Education to Prisoners*, Research Brief: Occasional Paper Series 2 (Sept. 1997).

³ Courts have long recognized that the ability to communicate privately with an attorney by telephone is essential to the exercise of the constitutional rights to counsel and to access to the courts. *Murphy v. Waller*, 51 F.3d 714, 718 & n.7 (7th Cir. 1995)(“Restrictions on a detainee’s telephone privileges that prevented him from contacting his attorney violate the Sixth Amendment right to counsel. . . . In certain limited circumstances, unreasonable restrictions on a detainee’s access to a telephone may also violate the Fourteenth Amendment.”); *Tucker v. Randall*, 948 F.2d 388, 390-91 (7th Cir. 1991)(denying a pre-trial detainee telephone access to his lawyer for four days would implicate the Sixth Amendment); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051 (8th Cir.1989)(holding that inmates’ challenge to restrictions on the number and time of telephone calls stated a claim for violation of their rights to counsel); *Miller v. Carlson*, 401 F. Supp. 835 (M.D. Fla. 1975), *aff’d & modified on other grounds*, 563 F.2d 741 (5th Cir. 1977)(granting a permanent injunction precluding the monitoring and denial of inmates’ telephone calls to their attorneys). Courts have also held that, when a prison’s collect call-only policies interfere with the ability of incarcerated people to communicate with their lawyers, correctional officials may be in violation of the Constitution. *See, e.g., In re Ron Grimes*, 208 Cal. App. 3d 1175, 1178 (1989)(holding that switch by Humboldt County (California) Jail from coin operated to collect-only calls violated the constitutional rights of people incarcerated there because the public defender’s office, other county departments, and some private attorneys did not accept collect calls).

⁴ “Commissions,” a profit-sharing arrangement between prison phone service providers and correctional facilities for exclusive rights to operate phone systems, create monopolies and fuel ever-increasing fees and rates for consumers. “Commissions” in some jurisdictions now reach 60% of revenue, a cost that is born by those who pay for prisoner phone calls. Collect-only policies ensure that such calls are billed at the highest calling rate. Three-way call detection

The *ex parte* proposal for a comprehensive resolution of issues related to the Alternative *Wright* Petition is directly related to ABA policy. The pernicious practices described elsewhere in this presentation have an adverse impact on pretrial detainees and prisoners, impair the capacity of counsel to represent their incarcerated clients, and, for the families of prisoners, are extortionate.

A Comprehensive Resolution of These Abuses is Required

According to a recent report filed with the FCC on behalf of seven prison phone service providers, the “benchmark” rates demanded by petitioners in this proceeding are readily achievable, given a mechanism for service providers to recoup the costs of calls of short duration.⁵ Thus, the FCC should establish a comprehensive, fair rate (derived from the lower rates outlined in the *Wood Report*) for all intra-state and inter-state prisoner collect, pre-paid, and debit telephone calls that covers legitimate costs, provides a reasonable rate of return to prison phone providers, eliminates “commissions,” forecloses alternative means to unjustifiably inflate the cost of prisoner phone calls, and defers to state public service commission’s to address requested cost adjustments – all toward the end of providing fair and reasonable rates for the widest possible range of prisoner-initiated telephone calls.

In this way, the FCC can fairly and definitively resolve these issues, fulfilling its mandate to regulate telephone services for all consumers throughout the 50 states. The ABA urges the Commission to adopt such an approach promptly in the interest of the public.

Respectfully submitted,



Thomas M. Susman
Director

cc: Chairman Kevin J. Martin
Commissioner Jonathan S. Adelstein
Commissioner Michael J. Copps
Commissioner Robert M. McDowell
Commissioner Deborah Taylor Tate.

often results in an improper disconnection, requiring the caller to inquire first-minute charges (including “set-up” fees) a second time. Moreover, additional fees are billed to consumers who wish to establish pre-paid accounts; charges are assessed to process customers’ payments,⁷ and funds held in accounts without activity for as little as 3 months are confiscated. These “tack-on” charges dramatically increase the cost of communicating with incarcerated loved ones, but they do not appear as a part of the cost of the call reflected on a telephone bill. Such charges should be prohibited.

⁵ See, Don J. Wood, “Inmate Calling Services – Interstate Call Cost Study” (filed 15 August 2008)(hereafter, *Wood Report*); see also cost analysis at pp. 15 – 18, Michael S. Hamden *Ex Parte Proposal - Martha Wright, et al.*(29 October 2008)(hereafter, *Hamden Proposal*).