

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider
Regulating Telecommunications Services
Used by Incarcerated People

R. _____

ORDER INSTITUTING RULEMAKING**Summary**

In this Order Instituting Rulemaking, the California Public Utilities Commission (Commission) will consider how to ensure incarcerated people and their families have access to intrastate telecommunication service at just and reasonable rates. To that end, the Commission will consider whether it should exercise its jurisdiction over the telephone corporations that provide that service and, if so, how.

1. Jurisdiction

The California Constitution and Public Utilities Code vest in the California Public Utilities Commission (Commission) regulatory authority over public utilities, including telephone corporations.¹ The Public Utilities Code defines

¹ Cal. Const., art. XII, §§ 3, 6; *see also* Pub. Util. Code, § 216, subd. (b) (“Whenever any . . . telephone corporation . . . performs a service for, or delivers a commodity to, the public or any portion thereof for which any compensation or payment whatsoever is received, that . . . telephone corporation . . . is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part.”).

“telephone corporations” as “every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state”² and, in turn, defines “a telephone line” to include “all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires.”³ This is a broad definition and, for purposes of this Order Instituting Rulemaking (OIR), the Commission has preliminarily determined that the companies providing communications services to people incarcerated in California are telephone corporations within the meaning of the Constitution and Public Utilities Code, and thus subject to the Commission’s jurisdiction. Additionally, at least some of the companies that provide communications services to incarcerated people hold Certificates of Public Convenience and Necessity (CPCN). This Commission has the statutory authority to grant and to revoke CPCNs, to condition the grant of CPCNs, and to regulate CPCN holders.⁴

The Commission has a statutory mandate to ensure that a public utility’s rates, terms, and services are just and reasonable,⁵ and has plenary authority to carry out this mandate.⁶

² Pub. Util. Code, § 234, subd. (a).

³ Pub. Util. Code, § 233.

⁴ Pub. Util. Code, §§ 1001-1013.

⁵ Pub. Util. Code, § 451.

2. Background

The criminal justice system places an undue financial burden on low income families and communities of color who face disproportionate rates of incarceration, in particular through costs imposed on incarcerated people and their families as part of being in prison or in jail. “Due to a variety of market failures in the prison and jail payphone industry . . . inmates in correctional facilities, or those to whom they placed calls, incurred prohibitive per-minute charges and ancillary fees for payphone calls.”⁷ As the Federal Communications Commission (FCC) has explained:

Excessive rates for inmate calling deter communication between inmates and their families, with substantial and damaging social consequences. Inmates’ families may be forced to choose between putting food on the table or paying hundreds of dollars each month to keep in touch. When incarcerated parents lack regular contact with their children, those children—2.7 million of them nationwide—have higher rates of truancy, depression, and poor school performance. Barriers to communication from high inmate calling rates interfere with inmates’ ability to consult their attorneys, impede family contact that can “make[] prisons and jails safer spaces,” and foster recidivism.⁸

Even the industry that provides these services admits that “calling rates [for incarcerated people] often exceed, sometimes substantially, rates for

⁶ Pub. Util. Code, § 701. The Commission may not, of course, exercise its authority where pre-empted by federal law, *see* U.S. Const., art. VI, cl. 2, or where to do so would expressly contradict state law, *see Assembly v. Pub. Util. Com.* (1995) 12 Cal. 4th 90, 103.

⁷ *Global Tel*Link v. FCC* (D.C. Cir. 2017) 866 F.3d 397, 401.

⁸ *Id.* at 405 (quoting the FCC’s brief; internal citations omitted).

ordinary toll calls”⁹ Nor do incarcerated people in this State fare especially well: According to the Prison Phone Justice campaign, the average cost of a fifteen-minute intrastate phone call placed from one of California’s jails or prisons is \$1.23, the 28th most expensive in the nation.¹⁰ By comparison, the same phone call in New Hampshire costs twenty cents.¹¹ Within California, the cost of a 15-minute phone call with a young person incarcerated in a juvenile facility varies from county to county. In some counties, these calls are free, but a 15-minute call from a youth to their family can range from \$2.40 in Solano County, to \$6.00 in San Mateo County to \$13.65 in San Benito County.¹² Despite these rates being unreasonable, the Commission has not previously regulated the rates of telephone services provided to incarcerated people in California’s jails and prisons, allowing telephone corporations to provide services pursuant to contracts the Commission does not review. Similarly, the FCC has not overseen provision of interstate communications services to prisons and jails.

In 2015, the FCC attempted to fill the regulatory gap, imposing fee caps on both interstate and intrastate inmate calling services.¹³ In 2017, however, the U.S. Court of Appeals for the D.C. Circuit struck down that portion of the

⁹ *Id.* at 405 (quoting the brief of a group of prison phone providers).

¹⁰ Prison Phone Justice, *available at* <https://www.prisonphonejustice.org/>.

¹¹ *Id.*

¹² The Financial Justice Project, Young Women’s Freedom Center and Children’s Defense Fund-California, “Price of Justice: Juvenile Phone Calls,” accessed August 24, 2020, available at <https://sfgov.org/financialjustice/>.

¹³ *Rates for Interstate Inmate Calling Services* (Nov. 5, 2015) 30 FCC Rcd. 12763.

FCC’s 2015 Order that attempted to impose intrastate rate caps as beyond the FCC’s statutory authority.¹⁴ There the matter stood until 2020.

The Covid-19 pandemic has exacerbated many pre-existing inequalities, those inequalities inherent in the criminal justice system among them. Due to the pandemic, incarcerated people are facing significant limitations on access to their families. This issue is even more troubling for those who are facing sentences of over a year and incarcerated minors.

On July 20, 2020, prompted in part by the COVID-19 pandemic, FCC Chairman Ajit Pai sent a letter to the President of the National Association of Regulatory Utility Commissioners (NARUC) “implor[ing] NARUC and state regulatory commissions to take action on intrastate inmate calling services rates to enable more affordable communications for the incarcerated and their families.”¹⁵ NARUC—of which this Commission is a member—responded three days later, asking state utility commissions to review the rates and terms under which telecommunications services are provided to incarcerated people “and act, where appropriate.”¹⁶

¹⁴ *Global Tel*Link*, 866 F.3d at 412. *See also* 47 U.S.C. § 201 (giving the FCC authority to review the rates of “every common carrier engaged in interstate or foreign communication by wire or radio . . .”).

¹⁵ Letter from Ajit Pai to Brandon Presley (July 20, 2020), *available at* <https://docs.fcc.gov/public/attachments/DOC-365619A1.pdf>.

¹⁶ Nat’l Ass’n of Reg. Util. Comm’rs, *NARUC Urges Members to Review Inmate Calling Rates* (July 23, 2020), *available at* <https://www.naruc.org/about-naruc/press-releases/naruc-urges-members-to-review-inmate-calling-rates/>.

Moreover, on August 8, 2020, the FCC released its Report and Order and Fourth Further Notice of Proposed Rulemaking in its *Rates for Interstate Inmate Calling Services* docket. Among other things, the FCC proposes to update its rate caps on interstate calls. However, the FCC recognizes that its authority does not encompass intrastate calls and “given that the vast majority of calls made by incarcerated individuals are intrastate calls, we urge our state partners to take action to address the egregiously high intrastate inmate calling services rates across the country.”¹⁷

This Commission now takes up that call.

3. Preliminary Schedule

3.1. Preliminary Scoping Memo

The Commission opens this OIR on its own motion to ensure that incarcerated people in this State pay just and reasonable rates for telecommunications service, under just and reasonable terms and conditions. In most cases, the telephone calling options for incarcerated people are limited to one or more of the following types: collect, debit account, or pre-paid account. Also, incarcerated people typically cannot choose their own calling provider. These factors, combined with unrestricted rates, have often resulted in unreasonably high phone bills for incarcerated people, including minors, and their families.

¹⁷ Report and Order and Fourth Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, WC Docket No, 12-375 (rel. Aug. 7, 2020), at ¶ 4.

This rulemaking will be conducted under Article 6 of the Commission's Rules of Practice and Procedure, "Rulemaking."¹⁸ As required by Rule 7.1(d), this OIR includes a preliminary scoping memo, a schedule for this rulemaking, preliminarily determines the category of this proceeding and the need for hearings, and addresses other matters that are customarily the subject of scoping memos as set forth below, and preliminarily determines the category of this proceeding and the need for hearing.

3.2. Initial Questions and Information

The main issue to be addressed in this proceeding is how should the Commission regulate the rates, terms, and conditions of telecommunications services provided to incarcerated people in California to ensure they are just and reasonable. Within 30 days of Commission adoption of this OIR, we direct the respondents named in Section 4 below and invite others to respond to the following questions:

1. Should the Commission exercise its authority to regulate the companies that provide those telecommunications services to incarcerated minors and people in California and, if so, how?
2. Should the Commission set rate caps for intrastate calling for incarcerated people, including video calls?
3. Should the Commission limit the types of additional fees providers can charge users of calling services for incarcerated people?

¹⁸ All references to "Rules" are to the Commission's Rules of Practice and Procedure unless otherwise indicated.

4. Should the Commission act to protect calling services for incarcerated people with communications disabilities by limited charges for inmate calling services calls involving the use of text telephones (TTY)?

The precise issues to be addressed and the process for addressing those issues will be set forth in an Assigned Commissioner's Scoping Memo.

3.3. Categorization; *Ex Parte* Communications; Need for Hearing

The Commission's Rules of Practice and Procedure require that an order instituting rulemaking preliminarily determine the category of the proceeding. As a preliminary matter, we determine that this proceeding is ratesetting because while our consideration and approval of this matter would establish policy or rules affecting a class of regulated utilities we may also consider and/or establish rates for communication services for incarcerated people. Accordingly, *ex parte* communications with the Assigned Commissioner, other Commissioners, their advisors and the Assigned Administrative Law Judge (ALJ) are permitted only as described at Public Utilities Code § 1701.3(h) and Article 8 of the Rules.¹⁹

We are also required to preliminarily determine if hearings are necessary. We preliminarily determine that hearings may be necessary.

3.4. Preliminary Schedule

The preliminary schedule is:

SCHEDULE

¹⁹ Interested persons are advised that, to the extent that the requirements of Rule 8.1 et seq. deviate from Public Utilities Code sections 1701.1 and 1701.3 as amended by Senate Bill 215, effective January 1, 2017, the statutory provisions govern.

EVENT	DATE
Comments on OIR filed and served	November 9, 2020
Reply comments on OIR filed and served	November 19, 2020
Prehearing conference	December 10, 2020
Scoping memo	Q1 2021
Information Gathering (To be determined, TBD)	TBD
Proposed Decision	Q2- Q3 2021
Commission Decision	Q2 -Q3 2021

A telephonic prehearing conference (PHC) will be held for the purposes of (1) taking appearances, (2) discussing schedule, scope and process, and (3) informing the scoping memo. The telephonic PHC shall be held beginning at 1:00 p.m. on December 10, 2020. The call-in number for this PHC is: 1-877-715-0719; participant code: 721-383. The Assigned ALJ or Assigned Commissioner may issue additional guidance on pre-PHC statements.

The Assigned Commissioner or the Assigned ALJ may change the schedule to promote efficient and fair administration of this proceeding. Today's decision sets a PHC and the due date for comments on the OIR. The schedule for the remainder of the proceeding will be adopted in the Assigned Commissioner's Scoping Memo.

It is the Commission's intent to complete this proceeding within 18 months of the date this decision is adopted. This deadline may be extended by order of the Commission.²⁰

²⁰ Cal. Pub. Util. Code, § 1701.5(a).

If there are any workshops in this proceeding, notice of such workshops will be posted on the Commission's Daily Calendar to inform the public that a decision-maker or an advisor may be present at those meetings or workshops. Parties shall check the Daily Calendar regularly for such notices.

4. Respondents

Telephone corporations holding current CPCNs approved by this Commission providing wireline service are named as respondents to this proceeding. These are identified as Competitive Local Carriers, Competitive Local Resellers, Local Exchange Carriers, Interexchange Carriers, and Interexchange Resellers. Digital Voice Service Registrants that do not require a CPCN are also named as respondents.

5. Service of OIR

This OIR shall be served on all respondents.

In the interest of broad notice, this OIR will be served on the official service lists for the following proceedings:

- R.11-03- 013 (California Lifeline).
- R.18-07-006 (Affordability of Utility Service).

In the interest of broad notice, this OIR will be served on the following non-profit organizations concerned with incarcerated peoples' and/or consumer advocates for communications services:

- #Cut50
- Access Support Network
- ACLU NorCal
- Amealio
- Anti-Recidivism Coalition

- APLA Health
- California Catholic Conference
- California Coalition for Women Prisoners
- California Immigrant Policy Center
- California Low-Income Consumer Coalition
- California Public Defenders Association
- Center on Juvenile and Criminal Justice
- Children's Defense Fund
- Community Housing Partnership
- Drug Policy Alliance
- Ella Baker Center for Human Rights
- Essie Justice Group
- Financial Justice Project
- Freedom for Immigrants
- Friends Committee on Legislation of California
- Initiate Justice
- Lawyers' Committee for Civil Rights of the San Francisco Bay Area
- Legal Services for Prisoners with Children
- Media Alliance
- MILPA
- Monterey Peace and Justice Center
- Pangea Legal Services
- Prison Phone Justice
- Prison Works Focus
- Prisoners with Children
- Public Policy Research & Consulting

- Returning Home Foundation
- San Francisco Financial Justice Project
- San Francisco Public Defender
- TGI Justice Project
- The Center for Accessible Technology
- The Greenlining Institute
- The Utility Reform Network
- TransLatin@ Coalition
- Urban Peace Institute
- Western Center on Law and Poverty
- Women's Policy Institute (WPI)
- Worth Rises
- Young Community Developers
- Young Women's Freedom Center
- Youth Law Center

In the interest of broad notice, this OIR will be served on the to the following state and local agencies concerned with prison communications services contracts:

- California State Association of Counties
- California Department of Corrections

Service of the OIR does not confer party status or place any person who has received such service on the Official Service List for this proceeding, other than respondents. Instructions for obtaining party status or being placed on the official service list are given below.

6. Filing and Service of Comments and Other Documents

Filing and service of comments and other documents in the proceeding are governed by the Commission's Rules of Practice and Procedure.

7. Addition to Official Service List

Addition to the official service list is governed by Rule 1.9(f) of the Commission's Rules of Practice and Procedure.

Respondents are parties to the proceeding (see Rule 1.4(d)) and will be immediately placed on the official service list.

Any person will be added to the "Information Only" category of the official service list upon request, for electronic service of all documents in the proceeding, and should do so promptly in order to ensure timely service of comments and other documents and correspondence in the proceeding. (See Rule 1.9(f).) The request must be sent to the Process Office by e-mail (process_office@cpuc.ca.gov) or letter (Process Office, California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, California 94102). Please include the Docket Number of this rulemaking in the request.

Persons who file responsive comments thereby become parties to the proceeding (see Rule 1.4(a)(2)) and will be added to the "Parties" category of the official service list upon such filing. *In order to ensure service of comments and other documents and correspondence in advance of obtaining party status, persons should promptly request addition to the "Information Only" category as described above; they will be removed from that category upon obtaining party status.*

8. Subscription Service

Persons may monitor the proceeding by subscribing to receive electronic copies of documents in this proceeding that are published on the Commission's website. There is no need to be on the official service list in order to use the subscription service. Instructions for enrolling in the subscription service are available on the Commission's website at <http://subscribecpuc.cpuc.ca.gov/>.

9. Intervenor Compensation

Intervenor Compensation is permitted in this proceeding.

Pursuant to Pub. Util. Code § 1804(a)(1), a customer who intends to seek an award of compensation must file and serve a notice of intent to claim compensation by 30 days after the prehearing conference. Parties new to participating in Commission proceedings may contact the Commission's Public Advisor.

10. Public Advisor

Any person or entity interested in participating in this rulemaking who is unfamiliar with the Commission's procedures should contact the Commission's Public Advisor in San Francisco at (415) 703-2074 or (866) 849-8390 or e-mail public.advisor@cpuc.ca.gov. The TTY number is (866) 836-7825.

O R D E R

IT IS ORDERED that:

1. This Order Instituting Rulemaking is adopted pursuant to Rule 6.1 of the Commission's Rules of Practice and Procedure.
2. The preliminary categorization is ratesetting.
3. The preliminary determination is that hearings may be needed.

4. The preliminarily scope of issues is as stated above Section 3.

5. A telephonic prehearing conference is set beginning at 1:00 p.m. on December 10, 2020.

6. Comments on the Order Instituting Rulemaking (OIR) are due no later than November 9, 2020. Reply comments on the OIR are due no later than November 19, 2020. The schedule for the remainder of the proceeding will be adopted in the Assigned Commissioner's Scoping Memo.

7. The following types of telephone corporations holding a Certificate of Public Convenience and Necessity (CPCN) approved by this Commission providing wireline service are respondents to this Order Instituting Rulemaking: Competitive Local Carriers, Competitive Local Resellers, Local Exchange Carriers Interexchange Carriers, and Interexchange Resellers. Digital Voice Registrants that do not require a CPCN are also named as respondents.

8. The telephonic corporations listed in Ordering Paragraph 7 shall, and any other person may, file comments responding to this Order Instituting Rulemaking by November 9, 2020.

9. The Executive Director will cause this Order Instituting Rulemaking to be served on all respondents and on the service lists for the following California Public Utilities Commission proceedings: Rulemaking (R.) 11-03- 013 and R.18-07-006.

10. In addition, the Executive Director will cause this Order Instituting Rulemaking to be served on the California State Association of Counties and the California Department of Corrections and the following organizations:

- #Cut50

- Access Support Network
- ACLU NorCal
- Amealio
- Anti-Recidivism Coalition
- APLA Health
- California Catholic Conference
- California Coalition for Women Prisoners
- California Immigrant Policy Center
- California Low-Income Consumer Coalition
- California Public Defenders Association
- Center on Juvenile and Criminal Justice
- Children's Defense Fund
- Community Housing Partnership
- Drug Policy Alliance
- Ella Baker Center for Human Rights
- Essie Justice Group
- Financial Justice Project
- Freedom for Immigrants
- Friends Committee on Legislation of California
- Initiate Justice
- Lawyers' Committee for Civil Rights of the San Francisco Bay Area
- Legal Services for Prisoners with Children
- Media Alliance
- MILPA

- Monterey Peace and Justice Center
- Pangea Legal Services
- Prison Phone Justice
- Prison Works Focus
- Prisoners with Children
- Public Policy Research & Consulting
- Returning Home Foundation
- San Francisco Financial Justice Project
- San Francisco Public Defender
- TGI Justice Project
- The Center for Accessible Technology
- The Greenlining Institute
- The Utility Reform Network
- TransLatin@ Coalition
- Urban Peace Institute
- Western Center on Law and Poverty
- Women's Policy Institute (WPI)
- Worth Rises
- Young Community Developers
- Young Women's Freedom Center
- Youth Law Center

11. Any party that expects to claim intervenor compensation for its participation in this Rulemaking must file its notice of intent to claim intervenor compensation within 30 days of the prehearing conference (*See* Rule 17.1(a)(2).)

This order is effective today.

Dated _____, at San Francisco, California.