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

In the Matter of
Incarcerated People’s Communications Services; Implementation of the Martha Wright-Reed Act
Rates for Interstate Inmate Calling Services

WC Docket No. 23-62
WC Docket No. 12-375

OPENING COMMENTS

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May 8, 2023
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Summary

United Church of Christ Media Justice Ministry and Public Knowledge proudly submit these comments in response to the Commission’s Notice of Proposed Rulemaking.

The Martha Wright Act establishes Commission authority over all rates for incarcerated people for all audio and video communication and restores the Commission’s authority to establish rates using time-tested and long-standing techniques and ensures the Commission can establish backstop rate caps for both intrastate and interstate calls.

UCC Media Justice and Public Knowledge urge the Commission to recognize the dysfunctional and consolidated market for carceral communications, interpret the new “just and reasonable” standard to exclude site commissions, and to reject calls that “fairly compensated” requires an increase in rates.

As part of its effort to adopt just and reasonable rate caps for this sector, the Commission must take clear, direct and complete action to remove any question that “site commissions” –no matter by what name they may be called and no matter by what artifice they may be assessed— are barred and may not be included in a rate for any reason. Concomitantly, the Commission must clearly and definitively preempt any state or local entity that attempts to include in communications rates unregulated and/or undocumented fees given to any carceral institution.
COMMENTS

United Church of Christ Media Justice Ministry and Public Knowledge proudly submit these comments in response to the Commission’s Notice of Proposed Rulemaking.¹ UCC Media Justice is proud of its decades of effort and UCC members to push for just and reasonable rate regulation for incarcerated people and their families.²

I. Strong Regulation is needed to address a monopolistic, non-competitive marketplace.

A. The carceral communications market offers no choices to consumers footing the bills.

Unlike any other consumer for whom the Commission acts today, people who communicate to and from carceral institutions have no choices in the companies they use to communicate: no choices at all. The Commission in years past often confronted markets where consumers could use only a regulated wired telephone to communicate with each other. This began to change in the 1970s.³ In the 1980s the Justice Department broke up AT&T. In 1996, Congress put forward legislation intending to create more local wired telephone competition. During that time period, the Commission and Congress developed policies they hoped would, and intended to, permit wireless services, cable television infrastructure and broadband infrastructure to provide more and more choices to consumers. Even with all this competition the FCC

¹ Incarcerated People’s Communications Services; Implementation of the Martha Wright-Reed Act and Rates for Interstate Inmate Calling Services, Notice of Proposed Rulemaking, Docket Nos. 23-62 and 12-375 (rel. March 17, 2023) (“Notice”).
has still often found some existing markets to be less than competitive. For example, the FCC found the wireless 5G market “has been reshaped in recent years by multibillion-dollar horizontal and vertical acquisitions.”

“[M]illions of Americans lack access to high-speed broadband or can only access high-speed broadband through a single provider.” The Commission views access to multiple providers as a key aspect of competition analysis and details its conclusions with respect to access to multiple broadband providers. The Competition Report found that, in 2021, 8.5% of U.S. households had only 1 choice of a provider offering 25/3 Mbps and 30.5% had only one provider for 100/20 Mbps.

Even in these cases, after decades of FCC decisions, Congressional action, business investment, and other efforts, we often see analyses demonstrating that lower income people receive poorer service for more money. We see wireless and broadband marketplaces that do not produce the lowest prices or the best service. Residents in U.S. cities pay more for broadband than other cities worldwide; the average U.S. consumer broadband bill increased 19 percent from 2017 through 2019; a 2019 Consumer Reports study found that fees imposed by cable and broadband providers can increase monthly bills by as much as 24 percent.

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5 Id. at ¶ 4.
6 Id. at ¶ 57, Fig. II.A.28.
9 Kevin Taglang, Benton Foundation, Broadband Prices are Soaring. Competition is the Answer (2021), https://www.benton.org/blog/broadband-prices-are-soaring-competition-answer.
And yet none of these markets bears even the slightest resemblance to the marketplace faced by a grandmother whose beloved grandchild can only be reached at the other end of a line, and at costs completely controlled by the state and other interested parties and/or institutions –some of whom often don’t have the best interests of that person at heart yet can choose to permit that person to use communications devices—or not; to receive medical care—or not; to obtain fair legal representation—or not. No marketplace the Commission has regulated at any time since perhaps the 1970s can come close to the ICSP marketplace the Commission is faced with in 2023.

While competition is non-existent for a consumer trying to call their incarcerated loved one, the companies that provide communications services are making extreme profits. For example, Worth Rises found that, in 2020:

Securus’ revenues grew 10 percent, or $69.5 million, to $767.5 million, compared to just 2 percent in 2019. During the pandemic, every business line – phone calls, video calls, tablets, payment services, and electronic monitoring – experienced growth. .... Even more incredibly, Securus’ operating income more than doubled to $80.3 million, EBITDA (a key financial metric) grew 41 percent to $209.2 million, and net cash flow from operating activities grew nearly five-fold to $133.5 million between 2019 to 2020.10

Similarly, a financial analyst projection based on a potential merger by GTL, concluded that the prison phone firm could be valued “at more than USD 1.5 billion.”11 The market is extremely consolidated, when Securus attempted to acquire ICSolutions in 2018,

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estimates concluded that GTL and Securus controlled approximately 70 percent of the market.12 Today, that estimate is up to 79 percent.13

Every element of the Commission’s analysis must be premised on this knowledge of this marketplace. The companies and carceral institutions have no incentive to bring down prices or improve service—in fact they have the opposite incentive. The only pressure to improve the circumstances for the people subject to the whims and exploitation of the entities in such a market are FCC rules (and sometimes state or local regulation) and public outrage.

Therefore, we strongly urge the Commission to conduct and solicit anti-trust and marketplace analysis to undergird its findings. The FCC should include an analysis of the market serving incarcerated people in its biennial Communications Marketplace report. The market for the services under consideration in this proceeding face virtually no market pressure—only regulatory and public pressure. Even when various carceral facilities solicit RFPs, when site commissions are part of the equation—no matter how they enter the equation—the system grants no power to the people who are incarcerated or the people who are trying to support them via communication.

As so often has been said in the FCC’s carceral communications dockets, the market is completely dysfunctional, not only for family members and incarcerated people who have no choices of the companies they use, but also for the entities that contract for services.14 The carceral communications industry is characterized by the

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14 E.g., Rates for Interstate Inmate Calling Services, Report and Order on Remand, WC Docket No. 12-375 at ¶5 (2020) (“Unlike virtually every other American, however, incarcerated people and the
economic term, a “moral hazard.” A moral hazard occurs when a person “use[s] more resources than he otherwise would have used, because he knows, or believes he knows, that someone else ... will provide some or all of these resources.” 15 A moral-hazard problem appears if person A is able to use person B's resources against B's will and if he knows this:

Laymen would call A's incentives a “temptation to steal” or a “temptation to act irresponsibly.”... [T]he essential feature of moral hazard is that it incites some people to expropriate other people.... Many economists have therefore concluded that moral hazard entails market failures; it brings about a different allocation of resources than the one that would exist in the absence of moral hazard.16

In the marketplace under consideration in this docket, decision-makers rarely spend their own money, and the consumers spending their own money have no choices available to them.

B. Communications reform implicates other human rights.

Not just marketplace analysis, but protection of constitutional rights and promotion of public safety will result from clear, accurate, and just FCC regulation. The Commission correctly concludes that regulation of rates is important for, and promotes, public safety. Studies consistently show that incarcerated people who have regular contact with family members are more likely to succeed after release and have lower individuals they call have no choice in their telephone service provider. Instead, their only option is typically an inmate calling services provider chosen by the correctional facility that, once chosen, operates as a monopolist.”); Rates for Interstate Inmate Calling Services, Report and Order, WC Docket No. 12-375 at ¶ 3 (2013) ([T]his market, as currently structured, is failing to protect the inmates and families who pay these charges. Evidence in our record demonstrates that inmate phone rates today vary widely, and in far too many cases greatly exceed the reasonable costs of providing the service.”)

16 Id.
recidivism rates. Formerly incarcerated people with support networks and can more successful rejoin their communities upon release. For example, “A 2014 study of incarcerated women found that those who had any phone contact with a family member were less likely to be reincarcerated within the five years after their release. In fact, phone contact had a stronger effect on recidivism compared to visitation, which the study also examined.”

Communication is essential to protect other human rights. As one scholarly piece explains, applying traditional regulatory consumer protections has the potential to address issues that, all too often, escape when constitutional suits are brought. An incarcerated person who is not receiving medical care or proper legal representation, or is suffering other kinds of abuse often cannot get help without communication outside the facility. Where many efforts at reform brought relying upon constitutional protections, ordinary regulatory protection may be more relief.

II. Technical Corrections to Section 276 of the Act

The Commission seeks comment on the changes in Section 276, including: 1) impact of the Act as a whole; 2) the addition of “just and reasonable,” and the proper

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interpretation of the “used and useful” standard; and 3) the meaning of the term “fairly compensated.”

A. Martha Wright Act and GTL

The Commission correctly concludes in its Notice that the Martha Wright-Reed Just and Reasonable Communications Act of 2022 (“Martha Wright Act” or “Act”) was a Congressional response, and rebuke, of the poorly reasoned and outlier decision rendered by the D.C. Circuit in Global Tel*Link v. FCC. The legislation directly responds to several elements of the decision and corrects the incorrect interpretation of the court. The timing of the legislation’s introduction and the bill’s original findings, as introduced, made clear it responded to GTL.

The Commission is correct that Congress, in passing the Martha Wright Act, focused on bringing the protections of the Communications Act to all consumers, including those consumers who are incarcerated and the people who communicate with them. Notice ¶14-15. When she introduced the bill, Senator Duckworth described it as intended to address the court decision which deprived the FCC of authority to take action. She discussed the bill during confirmation hearings with the then-FCC Chair and with Commissioner nominees and the materials describing the bill’s introduction make the connection between GTL and the proposed bi-partisan solution.

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21 Notice at ¶¶ 13-38.
23 S. 1541 (as introduced), https://www.congress.gov/bill/117th-congress/senate-bill/1541/text/is
B. Just and reasonable rates.

As the Commission explained, just and reasonable rates under Section 201 of the Communications Act are “focused on recovering prudently incurred investments and expenses that are ‘used and useful’ in the provision of the regulated service for which rates are being set. In applying this framework, the Commission considers whether the investment or expense ‘promotes customer benefits, or is primarily for the benefit of the carrier.’” The Commission recognized that the “used and useful concept is designed, in part, based on the principle that regulated entities ‘must be compensated for the use of their property in providing service to the public.’” The FCC also recognized “the equitable principle that the ratepayers may not fairly be forced to pay a return except on investment which can be shown directly to benefit them.” As the Commission has explained elsewhere, “[t]he used and useful and prudent investment standards allow into the rate base portions of plant that directly benefit the ratepayer, and exclude any imprudent, fraudulent, or extravagant outlays.” Virtually all payments to carceral facilities will fall outside of that standard.

1. Site commissions do not belong in just and reasonable rates.

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word ‘fair’ and that the legislation is "precisely targeted at clarifying existing law in light of the U.S. Court of Appeals decision and to permit the FCC to use its traditional procedures and authority to address unjust and unreasonable rates."); S. 2520, The Inmate Calling Technical Corrections Act was introduced on March 8, 2018 and the amended GTL decision was released approximately six months before on August 4, 2017.
26 Id., ¶129.
28 In a few instances, it is possible that, in an arm’s length transaction a provider could contract with a facility for a market-rate service, such as leasing a portion of a communications network. Such situations are rare and must be tested to avoid ‘sweetheart deals.’
As UCC Media Justice and Public Knowledge have explained in prior dockets, existing FCC precedent does not permit the Commission to include site commissions in just and reasonable rates. Existing Commission precedent treats payments between payphone or communications service providers and locations as monopoly rents. As the FCC explained in the Fourth Notice, “Allowing inmate calling services providers to treat all their site commission payments as ‘costs’ would almost inevitably result in unjust and unreasonably high rates for incarcerated individuals and their loved ones to stay connected.”\textsuperscript{29} This is true.

The FCC correctly and thoroughly considered the impact of competition and the relationship between locations of payphones and payphone providers when it considered Section 276 as applied to traditional payphones in its Fourth Notice.\textsuperscript{30} In particular, the FCC found that in a competitive payphone market where additional payphones would be added until the demand and supply of payphones were in equilibrium.\textsuperscript{31} But this outcome was not expected because locational monopolies limit where payphones could be placed. As the FCC explained in its Third Payphone Order:

[An] important characteristic of the payphone market is that many of the payphone locations are controlled by owners that can limit the entry of competing payphones. .... [W]e would expect the location owner to attempt to limit entry to increase the profitability of payphones and then demand at least a share of the profits in the form of a location rent. This phenomenon is frequently described as a "locational monopoly" that generates location rents. Where demand is higher than average, and the premises owner can limit entry, it is possible that some payphones would generate a higher-than-average number of calls, and thus positive profits. .... This profit would be split between the owner of the locational monopoly and the payphone provider.\textsuperscript{32}

\textsuperscript{30} Id.
\textsuperscript{32} Third Payphone Order, 14 FCC Rcd. at 2562, ¶37. See also id. at 2561-63, ¶¶36-39, 2615-16 ¶154.
The phenomenon is exactly what occurs in carceral facilities. The carceral facility permits no competition whatsoever in service provision. The customer is literally captive and that permits the location provider to request the high location rents from the service provider.

The FCC rejected the argument that these locational payments could be treated as costs. The FCC explained payments are not costs because the ability to charge purely anti-competitive location payment occurs “only when a particular payphone location generates a number of calls that exceeds the break-even number of calls, given the prices of various types of payphone calls.”\(^3\) In other words, if the provider possesses additional inefficient profit from which to pay location payments, it has covered its costs and is now paying those location payments out of non-competitive rates.

Thus, the FCC thoroughly considered the situation in which anti-competitive practices prevented competition in location-based communications services and found that payments between a communications provider and a locational monopoly should not be included in the rate. It would be arbitrary and capricious under the Administrative Procedure Act to treat the costs of communications providers for incarcerated people differently from the costs of communications providers via payphones when the economic incentives and factual circumstances are nearly identical, and both are governed by the same statute.

Not only was the commission’s economic analysis correct, but the incentives set up by a contrary determination are also present in the case of carceral communications and are highly relevant. Specifically, if payments are permitted, the locational

\(^3\) Id., n.72.
monopolist has the ability and incentive to demand increased payments and the resulting higher prices to end users. Creating such a structure requires more close regulation and monitoring by the FCC because the structure sets up the economic incentives to impose unjustified costs on consumers.

2. *Facilities that house communications provided by payphones or carceral communications providers are not communications providers themselves; security is a separate service.*

The FCC must reject its incorrect and isolated conclusion in 2016 that carceral facilities “likely incur costs that are directly related to the provision of ICS.” The costs cited by the FCC in the 2016 Reconsideration Order are not costs related to the provision of communications services that can be distinguished from the costs rejected by the FCC in the Payphone Orders. Specifically, the premises that housed payphones faced costs related to those premises and the functions performed on those premises and those costs were never considered part of offering a service. For example, a hotel or a bus station would pay janitors and security staff to maintain their lobbies, including the areas where payphones are located, but that does not transform a bus station into a communications provider just because it maintains the facility designed for another purpose and also houses the payphone. The service a customer of a payphone receives is communication between themselves and the called party. The payphone customer, by virtue of using a payphone in a bus station, does not become a bus patron. A bus depot, by virtue of housing a payphone, does not become a communications provider even if the bus depot incurs costs that would not occur except for the existence of the payphone.

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34 *Fourth Further Notice* at ¶101.
Similarly, as explained by Worth Rises, the function of a carceral facility is to provide security and safety for incarcerated persons. The need for surveillance, correctional officers, janitorial staff and other services do not transform a carceral facility into a communications service provider. Just because a carceral facility contracts for security and monitoring services with the same provider that it chooses for the provision of the underlying communications service in order to perform its function as a carceral facility, does not mean that it has become a communications provider entitled to pass on those costs to telephone customers.

The very services considered in the 2016 Reconsideration Order—monitoring costs, blocking and unblocking numbers and enrolling inmates in voice biometrics service—are security costs that are part of carceral functions, not communications functions. The customer of carceral functions is the carceral institution. The customers of the communication are the two people using a service to communicate with each other.

Not only are the costs not communications costs, but even if they were communications costs, by permitting these costs to be included in the rate the FCC creates a complex situation in which common costs between the facility and the provider not only increase but require allocation. Sound regulatory policy should steer away from rules that inevitably increase costs and require complex and difficult division of common costs. This creates regulatory burdens on the providers and the facilities, which must account for a precise amount of a common cost that might be used in the provision of service, and which reduces the reliance on incentives and structures an increased

reliance on careful auditing of cost allocations in its place. No party in this proceeding prefers additional detailed cost submissions and allocations. The Commission’s proposal to estimate this cost at 2 cents per minute has already been questioned in this record. But a proper cost analysis would be highly burdensome.

3. *Any data included in the rate must be produced pursuant to a Commission data collection and must be auditable.*

If the Commission were to erroneously permit companies to include commission paid to jails and prisons, the Commission is obligated to treat this cost data with the same care and detailed analysis as the cost data covering provider costs. Carceral facilities seeking to include their costs in the rate should comply with the same cost data as providers and, if necessary, whatever cost data is necessary to support the allocations as a proportion of the total costs. If the FCC believes it cannot require submission of such data, this is a good indicator that the services provided and the entities providing them are not communications providers regulated by the FCC. Indeed, the Commission’s inability to require complete supporting and confirming data would put the Commission in the awkward and potentially illegal position of having to justify compensation to ICS providers and rates to incarcerated persons without full access to the underlying data. Accordingly, the Commission cannot impose these costs on ratepayers or include them as part of the compensation for providing services under Section 276.

C. **Fairly compensated**

The *GTL* decision contained many flaws, not least of which was the court’s consideration of the Commission’s previous interpretations of “fairly compensated.” The court used the Commission’s failure to serve people without protection for decades as an
excuse to prevent the Commission from taking action. Specifically, although consumers negatively impacted by the dysfunctional prison phone market sought the Commission’s help as early as 2001, the Commission refused to even begin a proceeding until 2012. And yet the D.C. Circuit found the Commission’s failure to act offered an excuse for continuing with an unjust interpretation of the Communications Act.\textsuperscript{36}

Section 276, even before it was amended, did not require “fair” compensation for each and every call, as UCC Media Justice and Public Knowledge explained in the prior docket.\textsuperscript{37} “In using ‘each and every call,’ the intent of the statute was to be inclusive of all categories of calls made using the facilities and service for which the payphone provider would otherwise go uncompensated. There was no expression of any intent to ensure that any single call taken on its own was fully compensatory.”\textsuperscript{38}

Section 276, as the Commission correctly explained in its Notice, was intended to address the situation, in the past, where payphone providers were receiving no compensation because of the rise of dial-around services, which mean that customers could use a physical payphone but never insert coins in the phone.\textsuperscript{39} Therefore, Congress provided for the FCC to create a plan to compensate payphone providers. This problem and solution have no bearing whatsoever on the current providers of

\textsuperscript{36} \textit{GTL}, 866 F.3d at 401.
\textsuperscript{37} As noted by the Commission, the original Section 276 was designed to “ensure that payphone providers were compensated for all calls (except for two categories specifically mentioned in the statute). Among the calls were so-called “dial around calls,” where the caller at a payphone dialed a toll free call to reach the caller’s long distance company rather than using the long distance carrier chosen by the payphone provider, or the caller dialed a toll free number for which no coin deposits were permitted. In either event, the payphone provider was left uncompensated for the use of the payphone. There were also other calls the payphones were required to allow but for which they were uncompensated. Congress wanted to address this issue by requiring some form of compensation.” This also was clear from the law that preceeded Section 276. Ex Parte Letter from Albert Kramer and Cheryl A. Leanza to Marlene Dortch, Docket No. 12-375 at 6-7 (filed March 28, 2021).
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Notice} at ¶15, n.50.
communications services for incarcerated people. Therefore, the Commission is fully capable of making a factual finding that existing providers are not in the same financial position as payphone providers at the time this statute was originally adopted and implemented. For the Commission to use the “fairly compensated” wording to apply to the current marketplace for carceral communications would be a fundamentally arbitrary and capricious decision. In Section 276, Congress clearly aimed to “promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public.” 47 U.S.C. § 276(b)(1).

It is overwhelmingly clear that Congress adopted the MWA to bring rates down. On the floor of the House when the Martha Wright Act was adopted, Rep. Pallone explained, “due to a broken system, it can sometimes cost as much as $1 a minute to make a call to or from a prison, jail, or other confinement facility.” Mr. Pallone continued, “[i]t is no coincidence that incarcerated persons are subjected to these exorbitant rates. In most if not all cases, one company has a monopoly in the facilities it serves. Unfortunately, kickbacks, not competition, are often the deciding factor in which company is selected.” He emphasized, “It is my hope that this bill will help reduce financial burdens that prevent people from being able to communicate with loved ones and friends.” Rep. Jackson Lee explained on the floor, “We have heard over and over again how exorbitant the cost is for grandmothers, mothers and fathers, and sisters and brothers to keep connections” with incarcerated individuals. She described Martha

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41 Id.
42 Id.
43 Id.
Wright-Reed’s plight as someone who “who wanted to be involved with her grandson and wound up spending thousands of dollars to be able to communicate....”

Rep. Jackson Lee stated explained Ms. Wright-Reed’s situation is “the plight of many of my constituents and those around the Nation who have loved ones incarcerated, who are blocked because of the exorbitant cost that really takes their mortgage or their ability to buy food because the cost is so high.” She endorsed S. 1541, saying “it will be fair to those families who cannot afford to spend this amount of money just to communicate with their loved ones.”

Similarly, Rep. Rush, who led a decades-long campaign to lower the rates paid by incarcerated people and their families decried multiple times in his remarks the problems with high rates. He described “astronomically high rates,” “prohibitively expensive fees,” “the extreme costs of making a phone call—as much as $25 for a 15–minute call,” he praised the 2017 FCC effort to “lower costs.”

Almost every element of every aspect of the public debate regarding this issue points to costs that are too high. It is impossible that Congress intended the Martha Wright Act to increase rates for consumers.

III. Preemption

The Commission seeks comment on how it should address preemption of state and local rules. In this docket, the issue of preemption is essential, and thus far the FCC failed acknowledge that its decisions preempt state and local carceral facilities’ actions when they contravene the Commission’s decisions. As explained here, this failure to acknowledge basic conflict preemption has led to unnecessary losses in court

44 Id.
45 Id.
46 Id. at H10028.
47 Notice at ¶¶ 22-23, 71-72.
and confusion around the country. Providers have argued that they are required to pay site commissions even when the Commission excludes those payments from authorized rates. But this is not the case. FCC decisions preempt conflicting state and local decisions, regardless of whether the Commission makes an express finding. State and local governments cannot pass laws or adopt policies that mandate some consumers suffer unjust and unreasonable rates based on who they are calling. The Commission should make that express finding to make sure that no consumer fails to receive the protection of the Communications Act.

A. Congress did not preserve any state or local authority to force unjust and unreasonable rates on consumers.

To summarize, federal preemption can be express or implied. Congress can expressly provide for preemption of state or local law. In addition, federal law impliedly preempts state or local law even without express preemption language in two cases: 1) when federal law preempts the field or 2) when there is a conflict—a conflict occurs when it is impossible to comply with both federal and state or local law, or, when state or local law poses an “obstacle” to Congress’ objectives.48

In this case, Congress expressly provided for preemption of state and local law extremely clearly. Section 276(c) states: “To the extent that any State requirements are inconsistent with the Commission’s regulations, the Commission’s regulations on such matters shall preempt such State requirements.”49 Further, Congress directly amended Section 152, which otherwise preserves State authority over intrastate rates.50 And finally, the Martha Wright Act provides that the Act shall not be construed to “require

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49 47 U.S.C. § 276(c).
telephone service or advanced communications services at a State or local prison, jail, or detention facility or prohibit the implementation of any safety and security measures related to such services at such facilities.”\textsuperscript{51} While this provision demonstrates that the Act does not affirmatively require any additional service offering or prohibit safety and security measures, it also makes clear that no additional local or state authority is preserved.

If the Commission compares this language with other language where Congress addresses state and local authority in the Communications Act, it becomes evident that Congress directed the Commission to act and directed it to preempt state and local law in order to achieve just and reasonable rates.

For example, in the Cable Act, Congress intended to preserve local authority because of the longstanding federal-local partnership in regulation of cable service. Section 556 is titled “Coordination of Federal, State, and local authority,” and it explicitly recognizes the preservation of local authority. For example, it states, “Nothing in this subchapter shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter.”\textsuperscript{52} It clarifies “Nothing in this subchapter shall be construed to restrict a State from exercising jurisdiction with regard to cable services consistent with this subchapter.”\textsuperscript{53} And it further preempts only the state and local rules which are

\textsuperscript{51} 136 STAT. 6157, Section 4.
\textsuperscript{52} 47 U.S.C. § 556(a).
\textsuperscript{53} 47 U.S.C. § 556(b).
“inconsistent with this chapter,” recognizing the very limited, precise and delicate intrusions on local authority.

In location regulation of wireless facilities, Congress preserves local power, stating “nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.” In Section 332, Congress lays out particular procedures and requirements for wireless facility placement but it does not grant the same kind of plenary authority granted in Section 276. Similarly in Section 253, Congress clearly preserved significant local authority at the same time as it barred state or local prohibitions of telecommunications services. In the case of Section 253, Congress protected “the ability of a State to impose, on a competitively neutral basis ... requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers” and state and local authority to “manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way ....”

Nothing comparable is present in the provisions addressing communications services for incarcerated people. The Commission retains its full “express and expansive authority to regulate” under Section 276. Except for Section 4 of the Martha Wright

54 47 U.S.C. § 556(c).
57 47 U.S.C. § 253(a)-(d).
59 47 U.S.C. § 253(c).
60 See Comcast Corp. v. Federal Communications Commission, 600 F.3d 642, 645 (D.C. Cir. 2010).
Act, which merely indicates no additional obligations on the part of state and local authorities to provide communications service, a close analysis of the statute’s text demonstrates that the FCC’s action must preempt contrary state and local authority.

**B. Action by the FCC to set just and reasonable rates inherently preempts state site commissions.**

Even if the Communications Act and the Martha Wright Act did not expressly preempt state and local authority, FCC action to adopt just and reasonable rates would impliedly preempt state and local authority. Where a federal scheme is incompatible with the local scheme, the local scheme is preempted. Such preemption would be a defense in court if a company were directed by a state or locality to pay a site commission that is properly excluded from the rate by the FCC. Thus, even if Congress had not adopted the Martha Wright Act, the *GTL* decision was incorrect that carriers would be required to pay fees that superseded just and reasonable rates set by the Commission. A Commission decision to exclude site commissions would be a defense by a carrier against a state or locality demanding payment that conflicts with a federal regulatory scheme.

Preemption of state and local authority is inherent in regulating rates for incarcerated people, as state and local entities run carceral facilities. Given the structure of the industry, where the carceral facility selects a provider of its choosing for use by

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62 *GTL*, 866 F.3d at 413 (finding ICS providers must pay site commissions).
incarcerated people and their loved ones, it is impossible to regulate communications rates without implicating the federal/state/local legal relationship.\textsuperscript{63}  

The FCC cannot let the legal status of a local government prevent regulation when the local or state government is acting as a marketplace participant in procuring communications services. For example, if a local government owned a port or airport, and contracted with a traditional payphone provider to charge $5 per call and used the supra-competitive funds to defray the cost of building or operating the facility, the FCC would have no doubt that the local government was violating the Communications Act’s just and reasonable rates mandate.

The Commission must change course and explicitly preempt any and all site commissions inconsistent with its decisions on permissible rates.

\section*{CONCLUSION}

UCC Media Justice and Public Knowledge urge the Commission to recognize the dysfunctional and consolidated market for carceral communications, interpret the new “just and reasonable” standard to exclude site commissions, and to reject calls that “fairly compensated” requires an increase in rates. The commission must further explicitly and clearly preempt states and localities given the clear statutory language and Congressional intent and the problems caused if the FCC does not preempt inconsistent state and local rules.

Respectfully submitted,

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May 8, 2023