



March 25, 2013

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Re: Rulemaking No. 12-375 on the Rates for Interstate Inmate Calling Services

Dear Commissioners:

The American Civil Liberties Union (ACLU), on behalf of its more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide, appreciates the opportunity to comment on the Notice of Proposed Rulemaking regarding the Rates for Interstate Inmate Calling Services. The ACLU is part of a coalition of civil rights and criminal justice reform organizations submitting a comment through this rulemaking to urge the Federal Communications Commission to adopt a final rule limiting predatory prison phone rates, but these comments are submitted separately to address specifically the equal access concerns for prisoners who have communication disabilities, such as prisoners who are Deaf, hard of hearing, or with a speech impediment such as aphasia or stuttering.

Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act (ADA) – as well as simple equity – require that prisoners with communication disabilities have the same opportunity to converse with the outside world as the rest of the prison population. Yet, in many prisons and jails, such prisoners have limited or no access to telecommunications – and what access they do have comes at a higher price than the hearing prisoner population pays.

Both the Rehabilitation Act and the ADA require equal access to government programs and services. Access to the telephone – or communicating with the outside world – is a key government service within correctional facilities. One of the most important factors in a prisoner's successful re-entry into society is the prisoner's ability to maintain healthy relationships with his family and support system. Strong ties with the outside community have been shown to reduce recidivism, and increase the

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likelihood that a prisoner will be able to find housing and work upon release.¹ Thus, being able to have regular consistent conversations with family and friends is an essential component of a prisoner's rehabilitation. Prisons must provide this access to a prisoner's family and support in a non-discriminatory way. Under disability rights laws, that means not only ensuring access to the service, but also ensuring access that is equal to the service others enjoy, and as effective as that provided to others.²

Currently, few prisons have adopted the standard and accepted technologies used outside of prison for people with communication disabilities. TTY machines are generally the only alternative option to a telephone that prisons provide to prisoners with hearing or speech disabilities – and frequently even these are provided on a limited basis. This comment will highlight the key barriers to communications, along with the recommendations we believe are necessary to provide equal access to prisoners who have hearing or speech disabilities.

Barrier #1 – TTY's are an antiquated and ineffective means of communication.

People with hearing disabilities use a range of technologies to communicate – videophones, captioned telephones, text messaging, and TTY's. All of these technologies are also used with relay operators who are trained to be the link between the accessible technology and standard audio phones.

According to the FCC's own data from its Emergency Access Advisory Committee, TTY use has steadily decreased over the past several years. TTY's are now only used in about 12% of relay calls and in about 9% of all calls made with assistive technologies.³ There are good reasons for this decline in use:

- TTY's are not a comfortable means of communication - Most people who are culturally Deaf communicate with sign language, not written English. TTY's require typing on a modified keyboard, so knowledge of written English and decent spelling skills are necessary, along with some typing skills. A significant number of Deaf people have extremely limited literacy, and cannot write or read with reliable accuracy. Thus, for many people who are Deaf, using the TTY is analogous to speaking in a foreign language. The TTY is simply not an equal or effective

¹ THE URBAN INSTITUTE, UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY: RESEARCH FINDINGS FROM THE URBAN INSTITUTE'S PRISONER REENTRY PORTFOLIO 8 (2006), *available at* http://www.urban.org/UploadedPDF/411289_reentry_portfolio.pdf.

² 28 CFR § 35.130 General prohibitions against discrimination –(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity. (b) (1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability— (i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service; (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; (iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.

³ EMERGENCY ACCESS ADVISORY COMMITTEE, FED. COMM'N COMM'N, REPORT ON TTY TRANSITION 13 (2013).

means of communication for them. TTY's are primarily useful for people who have speech impediments, and people who have lost their hearing late in life, who are fluent in writing and reading English, and who are comfortable typing.

- TTY's are extremely slow – standard TTY's transmit only about 6 characters a second; this is slower than most people type and much slower than people speak or communicate via Sign Language.
- TTY's are frequently garbled – small transmission errors are common and such an error can create incorrect messages for up to 72 characters after the error.

The TTY is now such an out-of-date technology that many Deaf households do not even own one. People who are Deaf or hard of hearing are not trained in how to use a TTY, and the family and friends they need to reach are also not equipped with a TTY. While a sufficient number of people still use a TTY to support the continued presence of the technology in prisons, it is a woefully insufficient means of providing communication access, and cannot be the only assistive technology offered.

Recommendation #1: Prisons should, as a standard practice, have a range of assistive technologies for prisoners who have hearing or speech disabilities. These technologies must include: videophones, captioned telephones, and amplified phones.

The vast majority (about 75%) of all accessible calls made in the U.S. are made by videophone.⁴ The videophone allows a prisoner who uses sign language to communicate directly with a signing relative, friend or attorney. It also allows prisoners with children who sign to be able to converse with them directly. (Most children raised in Deaf households grow up communicating in Sign – long before they are able to read, write, or type on a TTY. A videophone may be the only means for a prisoner to be able to speak directly with his or her child.) The videophone is a genuinely equal form of access, and provides real-time conversation similar to a phone conversation.

States as diverse as Wisconsin, Texas and Virginia have successfully installed videophones,⁵ demonstrating there are no real barriers to their use based on feasibility, cost, or security issues. CapTel phones are a key means of communication for people who have lost hearing and can speak, but who do not sign. They connect with an off-site captioning service. The person with the hearing disability speaks directly into the phone, and then reads the captioned response from the person on the other end of the line. This is a much more efficient and reliable means of communication than a TTY machine. Though a relatively new technology, CapTel calls already account for about 8% of all accessible calls made in the U.S. – making them as common a means of communication as TTYs.⁶

⁴ *Id.* at 13.

⁵ WISCONSIN OFFICE FOR THE DEAF AND HARD OF HEARING, 2012 ANNUAL REPORT 9 (2013); Jordan Smith, *Not So Tone Deaf? City settles suit brought by deaf resident*, AUSTIN CHRON., Aug. 21, 2012; *Virginia prison gets videophones for the deaf*, ASSOC. PRESS, Nov. 19, 2010.

⁶ EMERGENCY ACCESS ADVISORY COMMITTEE, FED. COMM'C'N COMM'N, *supra* note 3, at 13.

Additional auxiliary aids to provide equal access to telecommunications include amplified phones and phones that are compatible with hearing aids.

While the 2010 ADA Standards specifically include videophones and captioned telephones in the definition of auxiliary aids and services,⁷ most prisons have resisted providing such technology. For example, the California Department of Corrections recently rejected a Deaf prisoner's request for access to a videophone since current prison guidelines "do not currently identify Video telephones as an approved means of communication for hearing-impaired inmates."⁸ A clear statement from the FCC that prisons and jails should provide a range of assistive technologies for prisoners who have hearing or speech disabilities, including videophones, would help ensure equal and effective access for disabled prisoners, and compliance with the law.

Barrier #2 – Prisoners are often charged more to use a TTY than a standard phone.

Because TTY's transmit information so slowly, a TTY call takes much longer to convey the same amount of information as a standard phone call. Thus, prisoners with communication disabilities may pay significantly more for a call than their non-disabled counterparts. Some TTY calls are made using a relay operator. (The relay operator has both a TTY and a standard audio phone. The operator reads the TTY message to the person on a standard phone, and then types back the spoken response to the TTY user.) Prisons charge both for the use of the relay operator and for the additional time the communication requires.⁹

Recommendation #2: Prisons should equalize costs for all accessible means of communication. Prisoners should not pay more because of a disability.

The ADA prohibits public entities from levying surcharges¹⁰ for the cost of auxiliary aids or services that are necessary in order to provide a person with equal access to a program or service. This rule must apply not only to TTY usage, but also to videophones, CapTel phones and any auxiliary aid or service a prisoner needs for effective communication.

⁷ 28 CFR §35.104 Definitions - Auxiliary aids and services includes—(1) Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; **telephone handset amplifiers**; assistive listening devices; assistive listening systems; **telephones compatible with hearing aids**; closed caption decoders; open and closed captioning, including real-time captioning; **voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices**; videotext displays; accessible electronic and information technology; **or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing**; [emphasis added]

⁸ *In re Juan Doe*, State of Cal. Dept. of Corr. & Rehab., Third Level Appeal Decision 2 (Oct. 24, 2012).

⁹ Helping Educate to Advance the Rights of the Deaf (HEARD), Deaf & Deaf-Blind Prisoner Project Database; *see also* Letter from Helping Educate to Advance the Rights of the Deaf (HEARD) (Jan. 30, 2013), http://www.behearddc.org/images/pdf/HEARDs_FCC_Community_Engagement_Letter.pdf.

¹⁰ 28 CFR § 35.130 (f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

Barrier #3 - Access to TTY's and other telecommunications may be more limited than access to prison pay phones.

The Department of Justice has made it clear that the ADA requires that prisons and jails provide disabled prisoners with access to telephone calls under the same terms and conditions as they are provided to all prisoners.¹¹

While in many prisons and jails, standard telephones are available without reservation for long periods of time during the day, TTY machines may be located in a special area, often requiring officer transport, or special permission to enter. Prisoners have to sign up ahead of time to use the TTY, and availability is limited.

Similarly, in the few prisons that do have videophones, use has been limited only to prisoners who are Deaf or hard of hearing. But videophones should also be available to prisoners who use sign to communicate with family, friends, or others in their support network who are Deaf and communicate via sign language.

Recommendation #3 – Prisoners must have equal access to auxiliary aids in communicating with the outside world with no additional restrictions on time or ease of use.

The resources needed to provide equal access to videophones, captioned phones, amplified phones and TTY's are minimal, often requiring nothing more than an additional phone or internet line. Some prison officials nevertheless have claimed that requiring them to maintain and make available TDD's is an undue hardship. But, given how readily available these technologies are, their ease of use, and small expense, there is no reason why the FCC should not require that disabled prisoners can make calls on the same terms and conditions as all prisoners.

Recommendation #4 – Prisoners without disabilities must still have access to assistive technologies when necessary for them to communicate with family, friends and others who have hearing or speech disabilities.

It is understandable that prisons would limit access to assistive technologies to those prisoners who have been identified as needing the technology to accommodate their own disabilities. However, the ADA also protects the “companions” of individuals with disabilities.¹² When a

¹¹ DISABILITY RIGHTS SECTION, UNITED STATES DEPARTMENT OF JUSTICE, COMMONLY ASKED QUESTIONS ABOUT THE AMERICANS WITH DISABILITIES ACT AND LAW ENFORCEMENT (2006), *available at* http://www.USdoj.gov/crt/ada/q&a_law.htm (Arrestees who are deaf or hard of hearing, or who have speech disabilities, may require a TDD for making outgoing calls. TDD's must be available to inmates with disabilities **under the same terms and conditions** as telephone privileges are offered to all inmates, and information indicating the availability of the TDD should be provided) [emphasis added].

¹² 28 CFR § 35.160 General. (a)(1), A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others. (2) For purposes of this section, “companion” means a family member, friend, or associate of an individual seeking access to a service, program, or activity of a

prisoner routinely communicates with a family member, friend, or significant other using Sign language, then the videophone is the most appropriate and effective means of conversing with them from prison. Such prisoners must be allowed access to the phones even if they do not have a communication disability themselves.

Thank you for allowing us this opportunity to comment on calling services for prisoners with disabilities. We appreciate your leadership in ensuring better access for people with sensory disabilities in society, and look forward to supporting your efforts to improve communication for prisoners. If you have any questions regarding this comment, please do not hesitate to contact Jesselyn McCurdy at jmccurdy@dcaclu.org or 202-675-2307.

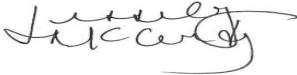
Sincerely,



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public entity, who, along with such individual, is an appropriate person with whom the public entity should communicate.