

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

In the Matter of: )  
**Rates for Interstate Inmate Calling** ) WC Docket No. 12-375  
**Services** )

**Comments of**

**Helping Educate to Advance the Rights of Deaf Communities (HEARD)**  
**Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI)**

**National Association of the Deaf (NAD)**

**Hearing Loss Association of America (HLAA)**

**National Disability Rights Network (NDRN)**

**Association of Late-Deafened Adults (ALDA)**

**Cerebral Palsy and Deaf Organization (CPADO)**

**Deaf Seniors of America (DSA)**

**National Cued Speech Association (NCSA)**

**Cuesign, Inc.**

**American Deafness and Rehabilitation Association (ADARA)**

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## Summary

Incarcerated people with communications disabilities are unjustly marginalized in carceral facilities. Inmate calling services (ICS) providers and facility officials often treat access to telecommunications, which facilitates contact with family, loved ones, and legal representatives, as an afterthought. As a result, many incarcerated people with communications disabilities, especially those who are negatively racialized or who have other marginalized identities, remain cruelly isolated from outside contact at a time when technology has long existed to bridge this gap.

The injustice perpetuated by the refusal of facilities and ICS to provide access to telecommunications services and equipment is not only pervasive, but multifaceted. Communications services should be free to incarcerated people with communications disabilities—and in the case of relay services, must be under the Communications Act. But ICS providers continue to charge unconscionably high rates for access to basic services. Moreover, communications equipment in carceral facilities—often limited to antiquated, nonfunctional teletypewriters (TTYs)—is often obsolete or simply does not work. And when it does work, carceral facilities deny access for arbitrary or unjust reasons while not enforcing any similar restrictions on non-disabled incarcerated people.

The Commission has not done enough to address this injustice. Although advocates for incarcerated people with communications disabilities have painstakingly developed an elaborate and thorough record over the past decade explaining why and how the Commission must make carceral communications accessible and equitable, the Commission essentially ignores that record here and returns to square one. **The Commission must act now to address communications accessibility for incarcerated people with communications disabilities**

To overcome the intransigence of carceral facilities and inmate calling service (ICS) providers to ensuring effective communication capabilities for incarcerated people with communications disabilities, the Commission must update its rules to require the

provision of VRS, IP CTS, RTT, and other modern accessible communications services and associated equipment, including videophones and captioned and amplified telephones and associated training, repair and maintenance, and related costs.

In doing so, the Commission must contend with the urgent and ongoing transition away from antiquated TTY systems that in many cases no longer even work as a result of the years-long Internet Protocol (IP) transition, blessed and overseen by the Commission with little attention to the impact on incarcerated people. The Commission must ensure that carceral facilities and ICS providers can no longer deny incarcerated people who use American Sign Language, other sign languages, or rely on captioning or other modalities of relay service the ability to connect loved ones on the functionally equivalent terms demanded by the Americans with Disabilities Act. As part of this effort, the Commission must adopt rules for wireline RTT support and amend its enterprise prohibition for IP CTS to allow its use in the context of carceral facilities.

Additionally, the Commission must take more aggressive action to limit unfair access charges to incarcerated people who are deaf or hard of hearing. It is unjust and illegal for ICS providers to charge incarcerated people with disabilities extra to access the same—or, more often than not, worse—services as other incarcerated people. The Commission must reaffirm and enforce the statutory prohibition on fees for relay calls from carceral facilities. Because of the opacity behind ICS fee and charge structures, the Commission must also reinstate its mandate that ICS providers report the fees and charges they assess to disabled and non-disabled users for accessing and using their calling services—and act to eliminate those fees and charges assessed to disabled users.

Finally, the Commission cannot resolve these access issues unilaterally. The Commission must collaborate with the Department of Justice (DOJ), the Department of Homeland Security, the Federal Bureau of Prisons, and other state and local agencies with oversight over carceral facility operations to ensure equal access for incarcerated people with communications disabilities, including those with additional disabilities.

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## Discussion

The above-signed incarcerated deaf/disabled people and their advocates, consumer groups, and accessibility researchers comment on the Commission's Fourth Notice of Proposed Rulemaking ("Fourth FNPRM") in the above-referenced docket. The Fourth FNPRM addresses the critical issue of reforming the dire state of access to communications services for all incarcerated people.

These comments respond to the Commission's request for comment on the accessibility of the phone system for incarcerated people who are deaf, hard of hearing, DeafBlind, speech disabled, or who have other disabilities.<sup>1</sup> Advocates—particularly Helping Educate to Advance the Rights of Deaf Communities (HEARD), together with disabled incarcerated people and their loved ones—have urged the Commission on numerous occasions over the past decade to update its rules to ensure basic access to telecommunications services and equipment for incarcerated people with disabilities.<sup>2</sup>

The Commission has failed to sufficiently address these concerns,<sup>3</sup> and now, following the remand of its 2015 and 2016 proceedings by the D.C. Circuit, is essentially

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<sup>1</sup> *Rates for Interstate Inmate Calling Services*, Report and Order on Remand and Fourth Further Notice of Proposed Rulemaking, WC Docket No. 12-375, FCC 20-111, 35 FCC Rcd. 8485, 8534, ¶ 137 (2020) ("Fourth FNPRM"), <https://www.fcc.gov/document/fcc-seeks-reduce-rates-and-charges-inmate-calling-services-0>.

<sup>2</sup> HEARD informed the Commission in 2013 that TTYs are incompatible with modern telecommunications and requested the Commission mandate ICSs provide access to all forms of TRS. See HEARD Comments at 9 (Mar. 25, 2013), <https://www.fcc.gov/ecfs/filing/6017169675>. HEARD again outlined the obsolescence of TTYs and requested the Commission update rules to mandate ICSs provide all TRS in 2015. See HEARD Comments at 15-16 (Jan. 12, 2015), <https://www.fcc.gov/ecfs/filing/60001008206>. HEARD once again pleaded in 2016 for the Commission to mandate all forms of TRS, including VRS and videophones, be provided by ICSs. See HEARD Comments at 9 (Jan. 19, 2016), <https://www.fcc.gov/ecfs/filing/60001380029>.

<sup>3</sup> See *Rates for Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking, WC Docket No. 12-375, FCC 15-136, 30 FCC Rcd. 12,763, 12,876-77, ¶ 230 (2015) ("2015 Order"),

attempting to start from square one. This failure now also stands against the backdrop of the fading of teletypewriter (TTY) communications, currently mandated by the Commission,<sup>4</sup> from obsolescence and ineffectiveness to literal non-functionality—because they do not work on the modern IP networks to which many phone companies have transitioned under the Commission’s watch.<sup>5</sup>

Incarcerated people with communications disabilities are effectively trapped in a “prison within a prison,”<sup>6</sup> routinely facing marginalization even relative to other incarcerated people because of their disabilities. Incarcerated people with communications disabilities who are negatively racialized often are marginalized even further.<sup>7</sup> Many simply cannot contact their loved ones and families, sometimes for years

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<https://www.fcc.gov/document/fcc-releases-inmate-calling-services-second-ro-and-third-fnprm> (reaffirming the FCC’s policy of merely encouraging carceral facilities to provide access to TTY and TRS).

<sup>4</sup> See *id.* at 12,875, ¶ 227 (“At present, the Commission mandates two forms of TRS: TTY-based TRS and speech-to-speech (STS) . . .”).

<sup>5</sup> *Transition from TTY to Real-Time Text Technology*, Report and Order and Further Notice of Proposed Rulemaking, CG Docket No. 16-145, GN Docket No. 15-178, FCC 16-169, 13,568, 13,574-75, ¶ 8 (2016) (“RTT Order”), <https://www.fcc.gov/document/adoption-real-time-text-rtt-rules> (recognizing that TTY is an ineffective technology to operate over IP networks).

<sup>6</sup> Sara Novic, *Deaf Prisoners Are Trapped in Frightening Isolation*, CNN (June 21, 2018), <https://www.cnn.com/2018/06/21/opinions/aclu-georgia-deaf-abuse-lawsuit-novic/index.html> (“Being a deaf inmate is often referred to by disability-rights advocates as a ‘prison within a prison,’ with little to no human interaction among fellow inmates, guards or their families.”); HEARD Comments at 12 (Jan. 12, 2015).

<sup>7</sup> See Talila A. Lewis, *In Georgia, Imprisoned Deaf and Disabled People Don’t Stand a Chance*, ACLU (June 20, 2018), <https://www.aclu.org/blog/disability-rights/disability-rights-and-criminal-legal-system/georgia-imprisoned-deaf-and> (“At every stage — arrest, interrogation, trial, sentencing, prison, and parole — deaf people are more susceptible to going to prison more often, staying longer, suffering more, and returning to prison faster. Deaf people with other marginalized identities — including those who are LGBTQ and come from communities of color—fare even worse.”).

or even decades on end,<sup>8</sup> and then, only with obsolete and ineffective technology and at great expense.<sup>9</sup>

**This is unjust. The Commission must act.** Specifically, the Commission should:

- Use its authority under Title IV of the Americans with Disabilities Act (ADA)<sup>10</sup> to require Inmate Calling Service (ICS) providers to offer modern relay and accessible communications services including video relay service (VRS), Internet Protocol Captioned Telephone Service (IP CTS), Real-Time Text (RTT), and other services upon which people with communications disabilities rely, as well as associated equipment, including videophones, captioned telephones, amplified phones, and other devices;
- Reinforce and enforce its mandate that ICSs provide connectivity to relay services without charge and revitalize recordkeeping requirements of carceral facilities and ICS providers to ensure compliance; and
- Form a task force with the Department of Justice (DOJ), the Department of Homeland Security (DHS), the Federal Bureau of Prisons (BOP), state and local

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<sup>8</sup> John Wilson, Jr., a Black deafdisabled man was only provided a videophone less than one month before his set release date in January 2019. The Federal Bureau of Prisons (BOP) denied him telecommunications access for a quarter century. He was also deprived of access to interpreters and other communication during his incarceration. Mr. Wilson and HEARD petitioned BOP for years to rectify his access needs. His actual innocence case could not be effectively investigated, he could not maintain contact with his loved ones, and he tragically died only six months after release in large part due to the traumatic effects of prolonged deprivation of basic communication. BEHEARDDC, *John Wilson, Jr.'s Long Journey Home*, YouTube (Sep. 1, 2020), <https://youtu.be/9rwo44gem0g?t=731>.

<sup>9</sup> *Id.* (describing the plight of Ricardo Harris, an incarcerated person who is deaf in Georgia, who had been “effectively barred from communication with attorneys, advocates, and loved ones, including a young child” from 2013 until the publication of the article in 2018).

<sup>10</sup> Section 225 of the Communications Act, which empowers the Commission to regulate telecommunications relay services, was added to the Commission’s authority with the passage of the ADA. Pub. L. No. 101–336 § 401, 104 Stat. 327 (1990).

correctional agencies, and other agencies responsible for carceral facility operations to root out the widespread failure of local officials to comply with their obligations under Title II and Title III of the ADA and other disability laws to ensure the functionally equivalent communications services offered by ICS providers are actually usable by incarcerated people.

**I. The Commission has failed to ensure equitable access to telecommunications services for incarcerated people who are deaf or hard-of-hearing.**

Despite its foundational duty to ensure fair access to communications without discrimination for all people of the United States,<sup>11</sup> the Commission has failed to effectively ensure functionally equivalent access for incarcerated people with communications disabilities.<sup>12</sup> Although the Commission has at least raised the issue of accessibility in the FNPRM, it has done so only summarily and largely without regard to the broad and deep record on the urgent necessity of access for incarcerated people with communications disabilities, or even the Commission’s own inadequate rules from 2015.

Over the last decade, disability advocates, civil rights organizations, and concerned citizens have petitioned the Commission to improve the accessibility of the carceral phone system. The general questions upon which the Commission now seeks input have largely been addressed by these various organizations in past filings.<sup>13</sup> Since the initial

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<sup>11</sup> Communications Act of 1934 ∞§ 1, 47 U.S.C. § 151 (1934) (mandating the creation of a Commission to ensure that all people of the United States have access to telecommunications without discrimination).

<sup>12</sup> *Contra* 47 U.S.C. § 225(a)(3).

<sup>13</sup> *See, e.g.*, HEARD Comments at 8-9 (Jan. 19, 2016) (“HEARD suggests that the Commission mandate . . . that all ICS companies provide—at minimum—access to both videophones and TTYs for incarcerated individuals who are deaf or who use ASL to communicate.”); NAD Comments at 3 (Jan. 4, 2015), <https://www.fcc.gov/ecfs/filing/60001007270> (“Correctional facilities should be required to install and provide access to the telecommunications equipment required by deaf and hard of hearing inmates – whether it’s a TTY, videophone, captioned telephone, or even an amplified telephone . . . ”); NDRN Comments at 7 (Dec. 17, 2015),

NPRM in this docket in 2012, groups including HEARD, the National Association of the Deaf (NAD), and the National Disability Rights Network (NDRN) have provided comments and feedback concerning the abysmal state of telecommunications access for incarcerated people who are deaf or hard of hearing.<sup>14</sup> Notably, HEARD organized hundreds of incarcerated people with disabilities—most of whom were deafdisabled<sup>15</sup>—to offer comment directly to the Commission on this matter.

Advocates and affected people have repeatedly explained, for example, that legal representatives could not reach or maintain communications with their deaf and hard of hearing clients in carceral facilities due to the denial of access to functional, accessible equipment<sup>16</sup>—a clear violation of their constitutional rights.<sup>17</sup> In one case, a class action lawsuit was filed in Kentucky when several incarcerated people with communications disabilities could not communicate with “attorneys, doctors and family members nor . . .

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<https://www.fcc.gov/ecfs/filing/60001386298> (“Mandate that all ICS providers should—at minimum—provide access to both videophones and TTYs for prisoners who are deaf, hard of hearing, or have communication disabilities, and access should be granted to the same extent telephones are available to all other prisoners.”).

<sup>14</sup> See, e.g., HEARD Comments at 1 (Dec. 22, 2013), <https://www.fcc.gov/ecfs/filing/6017581627> (“[D]eaf prisoners in hundreds of prisons across the nation cannot communicate with their loved ones who no longer use outmoded TTY technology.”).

<sup>15</sup> “Deafdisabled” refers to people who are deaf and also have a co-occurring disability. See National Deaf Center, *Including Deaf Students With Co-Occurring Disabilities in the Accommodations Discussion*, <https://www.nationaldeafcenter.org/sites/default/files/Including%20Deaf%20Students%20With%20Co-Occurring%20Disabilities%20in%20the%20Accommodations%20Discussion.pdf> (last visited November 22, 2020).

<sup>16</sup> See HEARD Comments at 3 (Jan. 19, 2016) (describing the lack of legal access).

<sup>17</sup> See *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (holding that incarcerated people have a constitutional right to receive legal assistance).

take part in educational or work opportunities within the prison system.”<sup>18</sup> In yet another example, a deaf incarcerated person was unable to have regular telephonic contact with his attorney and could only communicate with him on the occasions when the attorney would physically go to the jail and bring an interpreter.<sup>19</sup> *These examples are not exceptional; they are the norm.*

Advocates have repeatedly explained these issues to the Commission with sincere and urgent appeals to rectify the ongoing injustice, but little has changed. In 2015, the Commission decided not to impose modern relay service or equipment mandates on ICS providers despite an extensive record justifying more direct action.<sup>20</sup> The Commission merely reiterated its “existing policy of strongly encouraging correctional facilities to provide . . . access to TTYs, as well as equipment used for advanced forms of TRS, such as videophones and captioned telephones.”<sup>21</sup>

The Commission promised then that it would take “additional action if inmates with communications disabilities continue to lack access to functionally equivalent service.”<sup>22</sup> We confirm to the Commission here that this terrible injustice persists. It is long past time for the Commission to take the promised “additional action,” as the communication challenges imposed on incarcerated people with communications disabilities have

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<sup>18</sup> Brett Barrouquere, *Deaf Inmates Sue Ky. Prisons Over Accommodations*, Courier Journal (Jan. 3, 2014), <https://www.courier-journal.com/story/news/local/2014/01/03/deaf-inmates-sue-ky-prisons-over-accommodations-/4311357/>.

<sup>19</sup> See Natalie Johnson, *Discrimination Alleged by Deaf Inmate at Lewis County Jail*, Daily Chronicle (Oct. 8, 2015), [http://www.chronline.com/crime/discrimination-alleged-by-deaf-inmate-at-lewis-county-jail/article\\_a823c6b8-6de2-11e5-9d42-973f74a732b0.html](http://www.chronline.com/crime/discrimination-alleged-by-deaf-inmate-at-lewis-county-jail/article_a823c6b8-6de2-11e5-9d42-973f74a732b0.html).

<sup>20</sup> 2015 Order at 12,875-76, ¶¶ 228-30.

<sup>21</sup> *Id.* at 12,875-76, ¶ 230.

<sup>22</sup> *Id.*

become even more acute and access to outside resources even more urgent during a pandemic that is ravaging carceral facilities.<sup>23</sup>

## **II. The Commission must require ICS providers to ensure access to modern relay services and equipment.**

The Commission must now remedy the failure of the last decade's half-measures and address the fundamental injustice posed by the lack of communications access for incarcerated people with communications disabilities.<sup>24</sup> Access to even the most basic forms of communications services for incarcerated people with communication disabilities has precipitously dropped since the Commission first inquired about this issue in 2012.<sup>25</sup> As Commissioner Starks has noted, "incarcerated people should have access to affordable communications with their loved ones and attorneys because that is a critical element of restorative justice which impacts both the incarcerated and our larger society."<sup>26</sup>

With the exception of a handful of states that have adopted VRS and videophones and other relay services for their carceral facilities,<sup>27</sup> incarcerated people with

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<sup>23</sup> See BEHEARDDC, *How the Criminal Legal System can Slow the COVID-19 Pandemic (Focusing on Deaf/Disabled in Prison)*, YouTube (Apr. 8, 2020), <https://www.youtube.com/watch?v=v1mCoRbRERI>.

<sup>24</sup> Statement of Commissioner Starks, Fourth FNPRM, at 8577 ("The item before us today is but one long overdue step in the approach to treating people behind bars with the dignity they deserve.").

<sup>25</sup> See *Transition from TTY to Real-Time Text Technology*, Notice of Proposed Rulemaking, CG Docket No. 16-145, GN Docket No. 15-178, FCC 16-53, 31 FCC Rcd. 6247, 6255, ¶ 12 (2016) ("RTT NPRM"), <https://www.fcc.gov/document/real-time-text-nprm> ("[O]ver the past 7½ years, [the TRS Fund's] monthly filings show a drop of nearly 80 percent in the number of minutes attributed to TTY-initiated relay calls.")

<sup>26</sup> Fourth FNPRM at 8577.

<sup>27</sup> See 2015 Order at 12,880, ¶ 239 (noting Vermont, Virginia, and Wisconsin as states where carceral facilities have adopted videophones); HEARD Reply Comments at 3 (Jan. 12, 2014) (describing the impact on deaf incarcerated people's communication access after the Wisconsin Department of Corrections installed videophones at the Oshkosh Correctional Institution). More states have since installed videophones. See, e.g., Anthony

communications disabilities typically have access, at most, to TTYs. In practice, these TTYs are not only obsolete, but simply no longer functional at many carceral facilities.<sup>28</sup> With upgrades to IP-enabled networks, TTYs, designed to operate over analog networks, simply do not work.<sup>29</sup> As a result, many incarcerated people with communications disabilities have effectively been denied the ability to communicate with family, loved ones, and legal counsel, sometimes for years.<sup>30</sup>

Likewise, immigration detention facilities typically lack basic communications equipment sufficient to enable disabled people held there to contact their families and attorneys.<sup>31</sup> TTY-based relay services are also particularly ineffective for many people in these facilities because they presume that users will be English literate.<sup>32</sup> With the TTY obsolete and largely nonfunctioning, carceral facilities of all kinds that only provide TTY,

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Bambocci, Chief Marketing Officer for Global Tel\*Link Corporation, *How Technology Is Changing Deaf Inmates' Ability to Connect With the Outside World*, Morning Consult (Sept. 19, 2016), <https://morningconsult.com/opinions/technology-changing-deaf-inmates-ability-connect-outside-world/> (noting that additional states, such as Maryland, Kentucky, and California, have also installed videophones in their carceral facilities).

<sup>28</sup> See RTT Order at 13,574-75, ¶ 8.

<sup>29</sup> See Emergency Access Advisory Committee (EAAC) Report on Procedures for Calls Between TTY Users and NG9-1-1 PSAPs, at 5 (June 14, 2013), <https://www.fcc.gov/general/emergency-access-advisory-committee-eaac>.

<sup>30</sup> See HEARD Comments at 2 (Jan. 19, 2016) (“[P]eople across this nation continue to spend months, and even years, with no communication with their children, loved ones or attorneys—simply because of their disability.”)

<sup>31</sup> Cindy Knoebel & Jo Seck, *Deaf & In Detention: Challenges To Outreach, Advocacy & Support*, Imm-Print (Dec. 20, 2018), <https://imm-print.com/deaf-in-detention-challenges-to-outreach-advocacy-support-bed693de35f2/> (recounting examples of deaf immigrants denied access to telecommunications equipment and the consequences of those denials).

<sup>32</sup> See generally *Telecommunications Relay Service – TRS*, FCC (last updated Apr. 8, 2020), <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs> (describing different TRS systems for interlanguage communication with English being the predominant language and Spanish offered on some systems).

regardless of language skills or translation support, are violating the civil rights of incarcerated people.

Incarcerated people with communication disabilities do not have functionally equivalent communications under a TTY-dominated telecommunications regime for another reason: TTYs are based on obsolete technology that does not work reliably over an IP-enabled network. The provision of videophones connected to VRS and other devices, including captioned phones, that provide access to modern relay services such as IP CTS, would resolve many of the communications problems inherent to reliance on archaic TTYs.

While RTT could provide a viable solution to replace TTY, the Commission has yet to provide rules mandating support to that service on wireline networks, interconnection with wireless networks, or address the ongoing lack of RTT support on many rural and other smaller wireless networks.<sup>33</sup> Because the Commission's rules currently do not enable functionally equivalent phone conversations for incarcerated people who are deaf or hard of hearing, the Commission must update its rules to require access to modern relay services and equipment.

**A. TTYs no longer facilitate functionally equivalent conversations for people who are deaf or hard of hearing.**

TTYs, invented in the 1960s,<sup>34</sup> are designed to work on analog systems, facilitating communication between two users of two separate TTY devices. Any other user

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<sup>33</sup> Ex Parte of TDI, et al., CG Docket No. 16-145, at 1-2 (Nov. 4, 2020), <https://www.fcc.gov/ecfs/filing/1104003906838> (noting that some rural wireless carriers have yet to comply with a June 2020 mandate to support RTT, leaving people with hearing disabilities in covered areas without reasonable text capability to reach emergency services on their cell phones).

<sup>34</sup> National Association of the Deaf, *TTY and TTY Relay Services*, <https://www.nad.org/resources/technology/telephone-and-relay-services/tty-and-tty-relay-services/> (last visited Nov. 22, 2020).

configuration, including a relay operator that signs to a deaf caller and speaks to a hearing caller, requires the use of a relay system to facilitate the call. Depending on the particular relay service, the conversation between the user of the TTY and the other user on the line can be prolonged, garbled, mistranslated, poorly translated, or unreadable.<sup>35</sup> Now, with the conversion of most telephone networks to IP-based systems, TTY is effectively obsolete.<sup>36</sup>

Even before the transition to modern networks, most people with communications disabilities had moved on from TTYs.<sup>37</sup> In a 2015 survey of more than 500 non-incarcerated people with communications disabilities, fewer than 14% reported using a TTY at least once per year, with half indicating usage of only once per year.<sup>38</sup>

Moreover, these statistics were derived from a population largely consisting of people with extremely high English literacy rates.<sup>39</sup> Many incarcerated people who are deaf or hard of hearing use signed languages, such as ASL, as their only or primary language.<sup>40</sup> ASL is a complete and wholly distinct language from English, with its own

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<sup>35</sup> See HEARD Comments at 53-57 (Mar. 25, 2013), <https://www.fcc.gov/ecfs/filing/6017169673> (relaying a letter from an inmate who shows through call printouts that the TTY at his facility misinterprets words through a TRS and returns unreadable and incomprehensible gibberish).

<sup>36</sup> Securus, one of the two largest carceral communications companies, has operated on a voice over internet protocol (VoIP) network since 2016. See, e.g., Securus Technologies, Inc., *Securus Technologies Completes an Industry Record 30 Million Inmate Calls in March, 2016 on Voice Over Internet Protocol (VoIP) Securus Calling Platform*, PR Newswire (Apr. 29, 2016), <https://www.prnewswire.com/news-releases/securus-technologies-completes-an-industry-record-30-million-inmate-calls-in-march-2016-on-voice-over-internet-protocol-voip-securus-calling-platform-300260160.html>.

<sup>37</sup> So has the Commission, at least as far as facilitating wireless emergency calls for people who are deaf or hard of hearing outside of carceral facilities. See RTT Order at 13,576, ¶ 11 (allowing IP-based wireless carriers to drop support for TTY).

<sup>38</sup> HEARD Comments at 4 (Jan. 12, 2015).

<sup>39</sup> *Id.*

<sup>40</sup> See HEARD Comments at 3 (Jan. 12, 2015) (“One Gallaudet Research Institute study revealed a median Reading Comprehension subtest score for deaf and hard of hearing

grammar and syntax.<sup>41</sup> Text-based services like TTY are insufficient to facilitate communications for individuals who exclusively sign, though modern text-based technologies including IP CTS and RTT are essential to serve people who rely extensively on text for communication and others still who rely on transliteration or other modes.

The Commission itself has acknowledged the overall downward trend in use of TTY.<sup>42</sup> In 2016, the Commission noted that usage had dropped by 80% from the previous seven and a half years and amounted to approximately 170,000 minutes in January of that year.<sup>43</sup> Four years later (in January 2020), that number had dropped to 120,000 minutes.<sup>44</sup>

In recognition of the ongoing transition from analog to an IP-based voice communications network, many carriers have recognized the shortcomings of TTYs

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high school seniors to be around a 4.0 grade level. Yet more Research indicates that the average deaf prisoner's reading comprehension is closer to a 2.0 grade level.”).

<sup>41</sup> National Institute on Deafness and Other Communication Disorders, *American Sign Language*, <https://www.nidcd.nih.gov/health/american-sign-language> (last visited Nov. 22, 2020) (“ASL is a language completely separate and distinct from English. It contains all the fundamental features of language, with its own rules for pronunciation, word formation, and word order.”); National Association of the Deaf, *Position Statement on American Sign Language*, <https://www.nad.org/about-us/position-statements/position-statement-on-american-sign-language/> (last visited Nov. 22, 2020) (“ASL is the recognized sign language of the deaf community in the United States of America. As is the case with standardized spoken, written, and signed languages worldwide, ASL conforms to linguistic principles (e.g., semantics, syntax, morphology, phonology, and pragmatics). The complex visual-spatial linguistic structure of ASL is distinct from English, a linear, sequential language based on auditory processes.”).

<sup>42</sup> Emergency Access Advisory Committee (EAAC) Report on TTY Transition, at 12 (Mar. 11, 2013), <https://www.fcc.gov/general/emergency-access-advisory-committee-eaac> (“The rate of use of the TTY is being reduced by approximately 10% per year. This results in half the current volume in 7 years, 1/4th the usage in 14 years etc., unless something changes.”).

<sup>43</sup> RTT NPRM at 6255, ¶ 12.

<sup>44</sup> Interstate TRS Fund Performance Status Report, January 2020, Rolka Loube, <http://www.rolkaloube.com/programs/forms-reports/> (last visited Nov. 22, 2020)

relative to newer technologies.<sup>45</sup> The Commission has consistently pointed to RTT as the modern solution for real-time interactive text- and voice-based communication over IP-enabled networks.<sup>46</sup> The Commission has adopted specific rules to transition support from TTY to RTT on wireless networks.<sup>47</sup>

However, the Commission has refrained from enforcing these provisions, and some rural and other smaller wireless carriers have not made any progress on the implementation of RTT.<sup>48</sup> Conversely, the Commission has announced no plans to spur wireline RTT access, nor interconnection between wired and wireless RTT networks. Because carceral communications systems generally rely on wired networks, the absence of rules in this regard makes RTT an unviable replacement for TTY until the Commission establishes appropriate rules.

**B. Modern relay services and equipment are effective means of fulfilling Section 225's functional equivalence mandate.**

Videophones were invented around the same time as TTYs.<sup>49</sup> While poor data distribution over analog lines initially thwarted their adoption, the migration to IP-based

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<sup>45</sup> RTT NPRM at 6252, ¶ 9.

<sup>46</sup> See RTT Order at 13,573, ¶ 6 (“Reliev[ing] wireless service providers and equipment manufacturers of all TTY support obligations, including TTY support on legacy wireless networks, to the extent they support RTT on IP facilities in accordance with Commission rules.”).

<sup>47</sup> See RTT NPRM at 13,582-83, ¶ 22.

<sup>48</sup> See *Consumer and Governmental Affairs Bureau Seeks Comment on Petitions by Certain Mobile Service Providers for Waivers of Deadline to Support Real-Time Text on IP-Based Networks*, Public Notice, CG Docket No. 16-145, GN Docket No. 15-178, DA 20-702, FCC Rcd. 6731 (2020), <https://www.fcc.gov/document/cgb-seeks-comment-three-petitions-real-time-text-waivers> (acknowledging a June 30, 2020 deadline for all wireless carriers to provide support to RTT but soliciting public input on waivers for certain carriers who failed to meet the deadline).

<sup>49</sup> *Videophone*, P.C. Mag, <https://www.pcmag.com/encyclopedia/term/videophone> (last visited Nov. 22, 2020) (“AT&T debuted its Picturephone at the New York World's Fair in 1964.”).

voice communications networks allows access to videophones and VRS, which can dramatically improve the accessibility of phone calls for incarcerated people who communicate with ASL or other signed languages. Likewise, IP CTS combined with compatible captioned phones can dramatically improve the accessibility of phone calls for incarcerated people who are deaf or hard of hearing and use captions, for example.<sup>50</sup>

With high-speed broadband, a videophone allows an ASL caller to communicate with the person on the other end in as close of an approximation to a voice call as possible. Video relay services (which facilitate the call through communications assistants who interpret ASL and communicate verbally between parties),<sup>51</sup> in turn allow deaf and hard of hearing users to communicate with anyone “much more smoothly, naturally, and faster than communicating by typing.”<sup>52</sup> Likewise, IP CTS and other services, including RTT, can facilitate multimodal communications for callers who do not sign but can read or voice for themselves.<sup>53</sup>

Many relay providers provide free accessible telecommunications equipment to carceral facilities.<sup>54</sup> Even the installation of telecommunication devices can be free under

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<sup>50</sup> Communication needs are diverse; not everyone signs, not everyone talks, and not everyone types text.

<sup>51</sup> National Association of the Deaf, *Video Relay Service*, <https://www.nad.org/resources/technology/telephone-and-relay-services/video-relay-services/> (last visited Nov. 22, 2020).

<sup>52</sup> *Id.*

<sup>53</sup> The Commission’s rules pertaining to IP CTS may need to be updated, or waived, to facilitate the adoption of that service within carceral facilities. The Commission’s enterprise rules require that IP CTS providers assign phones and seek registration information from identified individuals with hearing needs in order to receive compensation from the TRS fund. *See* 47 C.F.R. § 64.611(j)(1). In carceral facilities, no such registration is practical because incarcerated people are often transitioning in, out, or between facilities and because of the public use of telecommunications devices. Incarcerated people who are DeafBlind or who have additional disabilities may also require access to additional equipment.

<sup>54</sup> *See* Bambocci, *supra* note 27.

contractual arrangements with ICS providers.<sup>55</sup> With no-to-minimal cost to switch from outdated and poorly functioning TTYs to videophones or other accessible technology,<sup>56</sup> there is little standing in the way of their adoption, except the financial interests of ICS providers whose proprietary services and devices often cannot even be used by disabled people,<sup>57</sup> the recalcitrance of carceral administrators, and the Commission’s long-standing hesitation to act.<sup>58</sup> The Commission cannot hesitate any longer.

**C. The Commission should require ICS providers to transition to modern relay services and equipment.**

In its 2015 Order on carceral phone reform, the Commission concluded that it could not compel ICS providers to offer accessible services beyond TTY TRS and STS, and merely encouraged ICS providers to make these services available.<sup>59</sup> Yet in 2016, the Commission responded to the general consensus that TTY is an ineffective tool for emergency calls on wireless networks and moved to allow common carriers to drop support for the technology in exchange for real-time-text.<sup>60</sup>

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<sup>55</sup> See, e.g., Jennifer Osborne, *Jail to Install Video Phones*, Ellsworth American (Dec. 9, 2016), <https://www.ellsworthamerican.com/maine-news/jail-install-video-phones/> (describing the installation of a videophone system managed by Securus at no cost to a jail in Maine); Keri Blakinger, *Texas Prison System Slashes Price of Inmate Phone Calls by 77 Percent*, Houston Chronicle (Aug. 24, 2018), <https://www.chron.com/news/houston-texas/article/Texas-prison-system-slashes-price-of-inmate-phone-13180653.php?>

<sup>56</sup> For some forms of accessible telecommunications equipment, such as IP CTS, an internet connection is required which likely involves minimal access fees.

<sup>57</sup> See Zachary Fuchs, *Behind Bars: The Urgency and Simplicity of Prison Phone Reform*, 14 Harvard L. and Pol’y Rev. 205, 209 (2020) (noting that two ICS providers make up seventy percent of the market share of carceral phone services and are both owned by private equity firms intent on maximizing profits).

<sup>58</sup> 2015 Order at 12,876, ¶ 229 (demonstrating the Commission’s past unwillingness to definitively engage on TRS availability through ICS by stating that the Commission is “only able to require ICS providers to make TTY-based TRS and STS available to inmates with communication disabilities . . .”).

<sup>59</sup> 2015 Order at 12,876, ¶ 229.

<sup>60</sup> RTT FNPRM at 13,570, ¶ 3.

As a practical matter, the IP transition has now obviated the possibility that the Commission can rely on the provision of no-longer-functional TTYs to serve the functional equivalence requirement of Section 225 for incarcerated people with hearing disabilities. The Commission must now honor its 2015 pledge to act.<sup>61</sup>

To do so, the Commission must invoke its plenary authority under Section 225(a) to “ensure that interstate and intrastate telecommunications relay services are available . . . to hearing-impaired and speech-impaired individuals in the United States” by requiring ICS to make available all forms of modern TRS qualified for reimbursement under the TRS fund to incarcerated people. To effectuate this mandate, the Commission must, in turn, require ICS to coordinate with relay service and equipment vendors to furnish accessible equipment to carceral facilities. This is the only reasonable way that the Commission can ensure that functionally equivalent communications are “available” for incarcerated people with disabilities.<sup>62</sup>

Finally, accessible equipment and services are not useful if they do not remain functional.<sup>63</sup> To meet the functional equivalence mandate, the Commission must require ICS providers to coordinate with carceral officials to promptly repair or replace nonfunctioning equipment upon notification from a carceral facility or complaint from a user. The Commission should also incorporate in its already existing reporting

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<sup>61</sup> 2015 Order at 12,877, ¶ 230 (“The Commission will monitor the implementation and access to TRS in correctional institutions and may take additional action if inmates with communications disabilities continue to lack access to functionally equivalent service.”).

<sup>62</sup> 47 U.S.C. § 225(b) (“[T]he Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.”).

<sup>63</sup> Simply having equipment will not suffice; equipment must be functional or facilities will remain out of compliance with the ADA. See Christie Thompson, *Why Many Deaf Prisoners Can't Phone Home*, Wired (Sep. 19, 2017), <https://www.wired.com/story/why-many-deaf-prisoners-cant-phone-home/> (“Prisoners report that the [TTY] machines are frequently broken or unavailable.”).

requirements that ICS must track the functionality of its communications equipment and establish reasonable notification procedures and response timeframes.

### **III. The Commission must ensure the elimination of charges for incarcerated people with communications disabilities to use relay services via ICS providers.**

Like its efforts to ensure basic service and equipment access, the Commission's measures on stemming the exorbitant rates charged to incarcerated people with communications disabilities have fallen short. The Commission must take immediate action to ensure that unjust and illegal practices that result in exorbitant charges to incarcerated people with communications disabilities and their families, friends, counsel, and others come to an end.

Under Section 276(b)(1)(A) of the Communications Act, ICS providers are prohibited from collecting compensation for relay calls.<sup>64</sup> The Commission acknowledged this reality in its 2015 order “that Congress also intended TRS calls be provided for no charge” and “prohibit[ed] ICS providers from assessing charges for ICS calls between a TTY device and a traditional telephone.”<sup>65</sup> However, ICS providers continue to charge for accessible communications services at unconscionable rates.<sup>66</sup> At a bare minimum, the Commission must now reaffirm that an ICS may not legally charge an incarcerated person with communications disabilities any fee for making relay calls.<sup>67</sup>

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<sup>64</sup> See 47 U.S.C. § 276(b)(1)(A).

<sup>65</sup> See 47 C.F.R. § 64.1330(b) (“Each state must ensure that access to dialtone, emergency calls, and *telecommunications relay service* calls for the hearing disabled is available from all payphones at no charge to the caller.”) (emphasis added).

<sup>66</sup> See, e.g., HEARD Comments at 4 (Jan. 19, 2016) (describing the charges for a deaf incarcerated person in Florida to contact their deaf partner using TTY as over \$1100 for roughly 180 minutes of call time).

<sup>67</sup> With respect to TTY-to-TTY calls, the Commission chose in 2015 to cap “the per-minute rates charged for TTY-to-TTY calls [at] no more than 25 percent of the rates the providers charge for traditional ICS.” *Rates for Interstate Inmate Calling Services*, Order on Reconsideration, WC Docket No. 12-375, FCC 16-102, 31 FCC Rcd. 9300, 9304, fn. 29 (2016), <https://www.fcc.gov/document/fcc-releases-inmate-calling-services-order->

While much of the FNPRM is concerned with the distinction between interstate and intrastate calling, the Commission’s statutory responsibilities to ensure accessibility transcend this distinction. The Commission has plenary authority under Title IV of the ADA to mandate that “users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination.”<sup>68</sup> This authority explicitly requires the Commission to ensure the provision of TRS for *both* interstate and *intrastate* communications.<sup>69</sup> The D.C. Circuit’s recent order remanding the Commission’s imposition of rate caps for ancillary services<sup>70</sup> leaves the Commission’s authority to restrict fees for access to TRS intact.

However, reinvigorating the prohibition on unjust charges to incarcerated people with communications disabilities is not enough. The Commission must also update Rule § 64.1330(b) to ensure that ICS providers cannot impose fees on family members on the receiving end of these calls through backdoor contractual arrangements with other

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reconsideration. With TTYs no longer practical over IP networks and lack of wireline RTT support or interconnection, the issue of direct calling rates is largely symbolic at this time. However, when the Commission implements the necessary infrastructure for RTT-to-RTT calling, it should use ancillary jurisdiction and its plenary authority under Section 225 and other provisions of the 1934 Act to extend the bar on relay charges in Section 276(b)(1)(A) to prohibit ICS providers from collecting compensation for direct RTT-to-RTT calling. While the significantly reduced rates adopted in the 2015 Order were better than the pre-2015 status quo, there is no justifiable rationale for imposing additional fees on an incarcerated person *just because the person they are calling relies on a particular accessible communications technology*—i.e., uses RTT.

<sup>68</sup> 47 U.S.C. § 225(d)(1)(D).

<sup>69</sup> 47 U.S.C. § 225(b)(2).

<sup>70</sup> *Cf. GlobalTel\*Link v. FCC*, 866 F.3d 397, 415 (D.C. Cir. 2017) (“Therefore, we likewise hold that the FCC had no authority to impose ancillary fee caps with respect to intrastate calls.”).

common carriers.<sup>71</sup> The convoluted scheme used by ICS providers, other telephone companies, and carceral officials to facilitate communications for incarcerated people with communications disabilities frequently results in a wide array of inscrutable and exorbitant fees and charges to incarcerated people *and* the people they call for services that by statute are required to be provided without cost.<sup>72</sup> The Commission must map out and eliminate *all* sources of these unjust fees and charges and ensure that ICS providers and others do not perpetuate them.

To help this reinforcement, the Commission must reinvigorate its 2015 effort to require that ICSs report critical information pertaining to accessible calls.<sup>73</sup> The Commission should mandate reporting for all ICS providers on fees and rates charged to users of accessible communications services, eliminating safe harbor provisions that allow ICS providers to avoid reporting if certain conditions are met.<sup>74</sup> The Commission likewise should require ICS transparency to eliminate charges to incarcerated people with communications disabilities and their families.<sup>75</sup>

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<sup>71</sup> 47 C.F.R. § 64.1330(b) (requiring states ensure that TRS calls from all payphones are provided at no charge to the *caller*). The current regulation, by identifying the caller as the entity that must be allowed TRS without charge, allows ICS and other telecommunications providers to tack on charges to the recipient of the call, which goes against Section 276(b)(1)(A) in that “[TRS] calls for hearing disabled individuals shall not be subject to . . . compensation.” 47 U.S.C. § 276. The practice of charging the *recipient* of TRS enabled phone calls subverts the intent of the Communications Act and obviates provisions that allow for ICS and TRS compensation from the TRS Fund.

<sup>72</sup> See HEARD Comments at 4 (Jan. 19, 2016); HEARD Comments at 15 (Dec. 20, 2013), <https://www.fcc.gov/ecfs/filing/6017581637> (enclosing an AT&T bill with added charges of \$63.49 for a 33-minute phone call using TRS).]

<sup>73</sup> 2015 Order at 12,822, ¶ 244.

<sup>74</sup> *Id.* at 12,883, ¶ 246

<sup>75</sup> The Commission has already recognized that transparency is a strong motivating factor for ICSs to ensure equitable and fair access to telecommunications. See *id.* at 12,882, ¶ 244 (“[R]eporting requirements will encourage providers to actively address problems affecting users’ ability to access TRS . . .”).

#### **IV. The Commission should form a task force with the Department of Justice to address accessibility problems in correctional facilities.**

While the Commission can do a great deal to ensure that accessible communications services and equipment are provided by ICS, we acknowledge the provision of those services and equipment relies on cooperation and coordination with officials who administer carceral facilities. These facilities and those they contract with are obliged under Title II and III of the ADA, Section 504 of the Rehabilitation Act, and/or other disability laws to ensure that incarcerated people with communications disabilities are able to access communications on equal terms.<sup>76</sup>

However, the Commission's obligations under Section 225(a) do not leave it with the privilege of passively sitting back and hoping that carceral facility officials and their ICS contractors will meet their legal obligations. To ensure the functional access mandate, the Commission must take an active role and establish a joint task force with the Department of Justice to ensure that carceral officials, including those directly under the DOJ's jurisdiction at the Bureau of Prisons, as well as the Department of Homeland Security, which oversees carceral facilities administered by Immigration and Customs Enforcement (ICE), and any comparable state agencies, do their part to ensure that the civil rights of incarcerated people to communicate on functionally equivalent terms functionally equivalent access to telecommunications is a critical component of their oversight priorities.

Although many accessible communications devices are technologically simple and require no more than access to the appropriate network connections, many carceral facilities place unreasonable restrictions on their use, making it difficult or impossible for

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<sup>76</sup> See 2015 Order, at 12,887, ¶ 230 (“In addition, we strongly encourage correctional facilities to comply with obligations that may exist under other federal laws, including Title II of the ADA, which require the provision of services to inmates with disabilities that are as effective as those provided to other inmates.”).

incarcerated people who are deaf or hard of hearing to actually use them.<sup>77</sup> In some carceral facilities, the daily times provided to users who are deaf or hard of hearing are more stringent than those provided to others.<sup>78</sup> In other facilities, the time offered to incarcerated people who are deaf or hard of hearing is equal, but the time required to connect a call using a TTY, videophone, or other devices—in addition to the complicated nature of conversations on such devices—cuts substantially into that time. In some places, access may even depend on whether a given carceral staff member familiar with the needed device is working that day or an office is open.<sup>79</sup>

Some states have already begun to adopt accessible telecommunications equipment in carceral facilities, often as a result of litigation.<sup>80</sup> But the writing is on the wall for carceral facilities that have not yet faced losing court battles: disability law requires functionally equivalent communications services and equipment.

The Commission, through a multi-agency partnership, must educate carceral administrators on the importance of VRS, videophones, and other accessible technology

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<sup>77</sup> HEARD Reply Comments at 4 (Jan. 12, 2014) (from a letter sent by a deaf incarcerated person: “The counselors here have T.T.Y. machines but they don’t allow me to use them often. They make excuses and I often have to wait several days before I am allowed to use the machine to call my family.”).

<sup>78</sup> *Id.* at 5 (from another letter from a deaf incarcerated person describing the times available to access TTY as limited to only two hours per day for five days a week compared to six and a half hours every day of the week access time for hearing incarcerated people).

<sup>79</sup> *Rights of Deaf and Hard of Hearing Inmates*, Nat’l Ass’n of the Deaf, <https://www.nad.org/resources/justice/jails-and-prisons/rights-of-deaf-and-hard-of-hearing-inmates/> (last visited Nov. 22, 2020) (“Some facilities limit TTY use to daytime hours because the office where a TTY is stored is only open during those hours.”).

<sup>80</sup> See Matt Clarke, *Federal Court Orders Videophone Access for Deaf Prisoners in Colorado*, Prison Legal News (Mar. 4, 2020), <https://www.prisonlegalnews.org/news/2020/mar/4/federal-court-orders-videophone-access-deaf-prisoners-colorado/> (discussing a federal court’s determination that depriving inmates accessible telecommunications equipment is a violation of the ADA and Rehabilitation Act).

and services to ensuring the civil rights of incarcerated people with communications disabilities. Apparently, many carceral officials needlessly perceive videophones with suspicion.<sup>81</sup> With the mass installation of video visitation in carceral facilities nationwide,<sup>82</sup> continued excuses to avoid comparable, and accessible, telecommunications equipment rings hollow. It is critical for the Commission to help remind carceral entities that functionally equivalent access to telecommunications is a right of incarcerated people that carceral administrators cannot arbitrarily deny.

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<sup>81</sup> Bambocci, *supra* note 27 (“For years, prison administrators were afraid of internet and video use in prison.”).

<sup>82</sup> See Leon Digard et al., *A New Role for Technology?: Implementing Video Visitation in Prison*, VERA Institute of Justice (Feb. 2016), [https://www.vera.org/downloads/publications/video-visitacion-in-prison\\_02.pdf](https://www.vera.org/downloads/publications/video-visitacion-in-prison_02.pdf).

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The Commission has a unique role to play in carceral communications: as arbiter of reasonable rates, as enforcer of fair access, and policymaker for equitable justice. In these roles, the Commission has only minimally risen to the challenge. Incarcerated people with communications disabilities have been marginalized and relegated to second-class status when it comes to communications access. The Commission must act now to ensure that the civil rights of incarcerated people with communications disabilities are fully recognized and fulfilled.