



ALAN WILSON
ATTORNEY GENERAL

October 24, 2024

Bryan P. Stirling
Director
South Carolina Department of Corrections
PO Box 21787
Columbia, SC 29210

Dear Director Stirling:

We received your letter requesting an Attorney General's opinion regarding rates for inmate calling services and collection of a surcharge pursuant to Budget Proviso 65.25 under the 2024-2025 Appropriations Act.¹ Your letter states:

The Federal Communications Commission (FCC) recently passed a rule that limits how much state prisons and local detention centers can charge inmates for making telephone and video calls. Specifically at issue is the ability of the South Carolina Department of Corrections (SCDC) to be able to combat contraband. This rule stems from the passage of the Martha Wright-Reed Just and Reasonable Communications Act of 2022² (the Act). SCDC is already charging prison inmates less than the FCC's new per-minute charge and actually has one of the lowest rates in the country. SCDC uses a portion of our rate (.03 cents) to fight contraband pursuant to Budget Proviso 65.25. I am concerned this new rule could prevent SCDC from collecting and using these funds to fight contraband, despite the fact state law allows us to collect this fee. The language in the Act regarding the meaning of "ancillary service fees" and "mandatory taxes and fees" is subject to more than one interpretation.

As you know, contraband in prisons, including contraband cell phones, poses a serious safety threat both inside and outside of the prison walls. Contraband cell phones have been used by inmates to commit crimes like bribery, drug deals, scams, fraud, victim harassment, orchestration of riots, and intimidation of correctional staff. Additionally, the threat posed by contraband and contraband cell phones is growing, particularly with the increase in the use of drones to deliver contraband to

¹ 2024 H.B. 5100 (June 26, 2024).

² Pub. L. 117-338, 136 Stat. 6156 (2023).

prison facilities. SCDC believes it should be able to continue to collect this fee under the mandatory taxes and fees definition of the new rule.

You ask us to opine whether your interpretation of the definition of mandatory taxes and fees is correct.

Law/Analysis

Budget Proviso 65.25 provides:

(CORR: Cell Phone Interdiction) An inmate under the jurisdiction of [SCDC] is not permitted to possess a telecommunications device unless authorized by the Director. Therefore, the Director of [SCDC] is granted the right to add a surcharge to all inmate pay phone calls to offset the cost of equipment and operations of cell phone interdiction measures. The surcharge will be added to the cost per call, collected by chosen telephone vendor and paid to [SCDC] on a monthly basis. [SCDC] is authorized to retain the funds to pay, either directly or through the State lease program, for equipment required to enact cell phone interdiction or retrieval or for critical security needs. When the equipment has been paid in full, the surcharge amount will be reviewed and adjusted to cover the cost of ongoing operational expenses of the interdiction equipment. Any unexpended balance may be carried forward from the prior fiscal year into the current fiscal year and be used for the same purpose or for critical security needs.

Legislative enactments are presumed valid unless and until a court declares it invalid. *See Op. S.C. Att’y Gen.*, 2021 WL 6104708 (S.C.A.G. November 16, 2021) (determining “a municipal ordinance is a legislative enactment and therefore, presumptively valid unless and until a court declares it invalid”). Accordingly, it would be up to a court to determine the validity of Budget Proviso 65.25. Further, “It is the policy of this Office not to address issues involving federal law.” *Op. S.C. Att’y Gen.*, 2023 WL 4918024 (S.C.A.G. July 26, 2023); *see also Op. S.C. Att’y Gen.*, 2021 WL 3703910 (S.C.A.G. August 2, 2021) (“Interpreting federal law is beyond the scope of our opinions.”); *Op. S.C. Att’y Gen.*, 2009 WL 2406409 (S.C.A.G. July 24, 2009) (“As we stated in a prior opinion, ‘the question of the applicability of federal law to a particular situation is a factual matter which is beyond the scope of an opinion of this Office.’” (quoting *Op. S.C. Att’y Gen.*, 1989 WL 406145 (May 8, 1989))). “The examination of federal law and the policies of a federal agency are beyond the scope of an opinion of this Office.” *Op. S.C. Att’y Gen.*, 2011 WL 2648714 (S.C.A.G. June 16, 2011). “In such matters, this Office defers to the federal agency charged with the interpretation of the federal statute or regulation in question.” *Op. S.C. Att’y Gen.*, 2023 WL 4332351 (June 27, 2023). However, we provide the following in the hope it may be helpful to you.

The Act “amend[s] the Communications Act of 1934³ to require the [FCC] to ensure just and reasonable charges for telephone and advanced communications services in correctional and detention facilities.” Pub. L. 117-338, 136 Stat. 6156 (2023). It extends the FCC’s jurisdiction to regulate intrastate incarcerated people’s communications services (IPCS) rates. Martha Wright-Reed Act § 2(a)(1) & (c); 47 U.S.C. § 152(b); 47 U.S.C. § 276(b)(1)(A). As amended, 47 U.S.C. § 276(b)(1)(A) provides:

In order to promote competition among payphone service⁴ providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that . . . establish a compensation plan to ensure that all payphone service providers are fairly compensated, *and all rates and charges are just and reasonable*, for completed intrastate and interstate communications using their payphone or other calling device, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation; . .

(emphasis added). Section 276 further provides, “To the extent that any State requirements are inconsistent with the [FCC]’s regulations, the [FCC]’s regulations on such matters shall preempt such State requirements.” 47 U.S.C. § 276(c). The Act mandates the FCC promulgate regulations necessary to implement the Act, including determining “just and reasonable rates” by considering, among other things, “costs associated with any safety and security measures necessary to provide [IPCS].” Martha Wright-Reed Act § 3(a), (b)(2). The Act notes, “Nothing in this Act shall be construed to modify or affect any Federal, State, or local law to . . . prohibit the implementation of any safety and security measures related to [IPCS] at such facilities.” Martha Wright-Reed Act § 4.

On July 18, 2024, the FCC adopted rules implementing the Act. Incarcerated People’s Communication Services; Implementation of the Martha Wright-Reed Act; Rates for Interstate Inmate Calling Services, 89 Fed. Reg. 77244 (Sept. 20, 2024). The FCC Final Rule⁵ defines “ancillary service charge” as:

³ 47 U.S.C. § 151 *et seq.*

⁴ 47 U.S.C.A. § 276(d) (“As used in this section, the term ‘payphone service’ means the provision of public or semi-public pay telephones, the provision of inmate telephone service and advanced communications services described in subparagraphs (A), (B), (D), and (E) of section 153(1) of this title in correctional institutions, and any ancillary services.”).

⁵ 89 Fed. Reg. 77244, 77244 (Sept. 20, 2024) (“*Effective date:* This rule is effective November 19, 2024, except for amendatory instruction 7 (§§ 64.611(l)(2), (3), (5), (6)); amendatory instruction 15 (§ 64.6040(f)); amendatory instruction 17 (§ 64.6060); amendatory instruction 20 (§ 64.6090); amendatory instruction 22 (§ 64.6110); amendatory instruction 23 (§ 64.6120); amendatory instruction 25 (§ 64.6130(d) through (f), and (h) through (k)); amendatory instruction 27

[A]ny charge to Consumers^[6] associated with the provision or use of [IPCS] that is not:

(1) Included in the per-minute charges assessed, in accordance with §§ 64.6010 and 64.6030, for individual [IPCS];

(2) Included in the charges assessed, in accordance with § 64.6140, in connection with an Alternate Pricing Plan; or

(3) An Authorized Fee, a Mandatory Fee, or a Mandatory Tax.

89 Fed. Reg. 77244, 77362 (Sept. 20, 2024); 47 C.F.R. § 64.6000 (effective Nov. 19, 2024). The Rules define “Mandatory Tax or Mandatory Fee” as:

[A] fee that a Provider^[7] is required to collect directly from Consumers, and remit to federal, state, or local governments. A Mandatory Tax or Mandatory Fee that is passed through to a Consumer for, or in connection with [IPCS] may not include a markup, unless the markup is specifically authorized by a federal, state, or local statute, rule, or regulation.

89 Fed. Reg. 77244, 77363 (Sept. 20, 2024); 47 C.F.R. § 64.6000 (effective Nov. 19, 2024). The Final Rule provides, “A Provider of [IPCS] must not charge any Ancillary Service Charge, as defined in § 64.6000 of this chapter.” 89 Fed. Reg. 77244, 77364 (Sept. 20, 2024); 47 C.F.R. § 64.6020 (effective Nov. 19, 2024). Further, “A provider must not charge a Consumer any tax or fee associated with [IPCS] other than a Mandatory Tax, a Mandatory Fee, or an Authorized Fee, as defined in § 64.6000 of this chapter.” 89 Fed. Reg. 77244, 77365 (Sept. 20, 2024); 47 C.F.R. § 64.6070.

In its discussion, the FCC recognizes that “[t]he rules [it] adopt[s] today do not alter the circumstances in which providers may pass authorized fees, mandatory taxes, and mandatory fees through to consumers.” 89 Fed. Reg. 77244, 77256-7257. In a 2015 Order, the FCC determined:

We agree that the ability to collect applicable pass-through taxes and regulatory fees without adding a markup is important and consistent with precedent. However,

(§ 64.6140(c), (d), (e)(2) through (4), (f)(2), and (f)(4)), which are delayed indefinitely. The [FCC] will publish a document in the **Federal Register** announcing the effective date of these provisions.” (emphasis in original)).

⁶ 47 C.F.R. § 64.6000 (effective Nov. 19, 2024) (“Consumer means the party paying a Provider of Incarcerated People's Communications Services.”).

⁷ 47 C.F.R. § 64.6000 (effective Nov. 19, 2024) (“Provider of Incarcerated People's Communications Services or Provider means any communications service provider that provides Incarcerated People's Communications Services, regardless of the technology used.”).

we reiterate that it is misleading “for carriers to state or imply that a charge is required by the government when it is the carriers’ business decision as to whether and how much of such costs they choose to recover directly from consumers through a separate line item charge.” As such, we do not permit fees or charges beyond mandatory taxes and fees, and authorized fees that the carrier has the discretion to pass through to consumers without any mark up. This will help ensure, consistent with the goals of the reforms adopted in this Order, that ICS end user’s rates are just, reasonable and fair because they are paying the cost of the service they have chosen and any applicable taxes or fees, and nothing more.

Rates for Interstate Inmate Calling Services, 80 Fed. Reg. 79136, 79162 (Dec. 18, 2015). We believe this language signals the FCC’s intention to continue to permit IPCS providers to pass through mandatory taxes and mandatory fees to consumers. Moreover, the FCC Final Rule implements IPCS rate caps and limitations on fees as to *providers*, not state actors. Accordingly, if Budget Proviso 65.25 is determined to be a mandatory tax or mandatory fee by the FCC or a court, we believe the FCC has signaled it would allow IPCS providers to pass the fee through to consumers.

However, we believe there are several points raised in the FCC’s discussion concerning its interpretation of the Act’s language that may also have bearing on your question.⁸ In its discussion, the FCC addresses its use of the “used and useful framework” to determine “just and reasonable” IPCS rates and charges under 47 U.S.C. 276(b)(1)(A), and its interpretation of the statutory language “rates and charges.” 89 Fed. Reg. 77244, 77250-253 & 77255-77257 (Sept. 20, 2024). As explained by the FCC, the used and useful framework is the standard by which it determines just and reasonable rates under Section 276(b)(1)(a) and “applies to all IPCS over which [the FCC] now ha[s] authority.” *Id.* at 77250-7251. It views this standard as an “‘equitable principle’ that prevents ratepayers from having to pay for costs that are ‘primarily for the benefit of the carrier,’ while allowing regulated entities to be compensated for providing service.” *Id.* at 77251. The FCC recognizes:

As one commenter suggests, the used and useful framework allows us to recognize all IPCS costs that benefit IPCS users, including any such costs incurred by correctional facilities, as costs that should be recovered through IPCS rates and charges. Conversely, that framework allows us to exclude from that recovery any costs that do not benefit IPCS users, either because they were imprudent or because they were for non-IPCS products or services, regardless of whether the provider or the facility incurred them.

Id. at 77251.

⁸ We note that we provide these excerpts from the FCC’s discussion merely to highlight the issues that may be of consequence with regard to your question. We strongly encourage you to review the FCC’s discussion and its other filings pertaining to the Act in their entirety.

With respect to safety and security measures, the FCC “ensure[s] that IPCS consumers do not bear the costs of those safety and security measures that are not necessary to provide IPCS regardless of how desirable th[ose] measures may be to correctional institutions.” Id. at 77253. It notes, “section 3(b)(2) of the Act requires that [the FCC] ‘consider costs associated with any safety and security measures necessary to provide’ IPCS in promulgating and implementing rules and in ‘determining just and reasonable rates’ for IPCS.” Id. at 77253. The FCC explains:

Our actions in this Order do not prohibit any correctional institution from implementing any safety and security measure that it deems appropriate or desirable. We do, however, ensure that IPCS consumers do not bear the costs of those safety and security measures that are not used and useful or necessary to provide IPCS regardless of how desirable these measures may be to correctional institutions. Section 4[of the Act] does not preclude such an outcome.

Id.

Further, the FCC interprets the statutory language “rates and charges” to include “ancillary service charges, authorized fees, mandatory taxes and fees, and any other charges a provider may seek to impose on consumers.” Id. at 77255. It provides:

Notably, section 276(b)(1)(A) also specifies that “*all* rates and charges” be just and reasonable. By specifying that “all,” as opposed to some smaller subset of “rates and charges” are to be just and reasonable, Congress obviously intended to grant us broad regulatory oversight of “rates and charges.” We find that the requirement that “all” rates and charges be just and reasonable applies both to the rates providers impose and the rates consumers ultimately pay. Thus, the totality of the rates and charges a provider assesses on or collects from consumers must be just and reasonable.

Id. at 77256. The FCC recognizes:

To exclude any tax or fee that a provider might impose on IPCS consumers from the terms “all rates and charges” would risk opening the door to assessments that could undercut the requirement of section 26(b)(1)(A) that amounts IPCS providers impose—and that IPCS customers pay—be just and reasonable. Indeed, the [FCC] recognized as much in the *2015 ICS order* (80 FR 79135, December 18, 2015) when it repeatedly referred to mandatory taxes, mandatory fees, and authorized fees as charges and banned all inmate calling services “fees or charges beyond mandatory taxes and fees, and authorized fees that the carrier has the discretion to pass through to consumers without any markup.” The [FCC] concluded that this ban would help ensure just and reasonable rates for inmate calling services. The record at that time demonstrated that providers had been marking up taxes and regulatory fees before passing them on to consumers and that those inflated fees had contributed to

unreasonable inmate calling services rates and charges. Given the history of inflated [inmate calling service] charges, there can be no assurance of a just and reasonable end result for IPCS if the definition of rates and charges were limited in [a manner that] would allow providers to impose additional charges on consumers or to mark up their authorized fees, mandatory taxes, or mandatory fees before recovering them from consumers.

Id.

While these points raised in the FCC's discussion may be relevant to your question, we believe the FCC has signaled it would allow IPCS providers to pass through mandatory taxes and mandatory fees through to consumers. Therefore, if the FCC or a court determines Budget Proviso 65.25 is a mandatory tax or mandatory fee, it is likely the FCC will permit a provider to pass it through to consumers. Although we must defer to the FCC's interpretation of the Act and its regulations promulgating it, we nevertheless reiterate that a legislative enactment "must continue to be enforced unless set aside by a court or repealed by the General Assembly." Op. S.C. Att'y Gen., 2020 WL 3619620 (S.C.A.G. June 25, 2020) (quoting Op. S.C. Att'y Gen., 2017 WL 4464415 (September 26, 2017)).

Conclusion

Legislative enactments are presumed valid unless and until a court declares it invalid. *See* Op. S.C. Att'y Gen., 2021 WL 6104708 (S.C.A.G. November 16, 2021) (determining "a municipal ordinance is a legislative enactment and therefore, presumptively valid unless and until a court declares it invalid"). Accordingly, it would be up to a court to determine the validity of Budget Proviso 65.25. Further, "It is the policy of this Office not to address issues involving federal law." Op. S.C. Att'y Gen., 2023 WL 4918024 (S.C.A.G. July 26, 2023); *see also* Op. S.C. Att'y Gen., 2021 WL 3703910 (S.C.A.G. August 2, 2021) ("Interpreting federal law is beyond the scope of our opinions."); Op. S.C. Att'y Gen., 2009 WL 2406409 (S.C.A.G. July 24, 2009) ("As we stated in a prior opinion, 'the question of the applicability of federal law to a particular situation is a factual matter which is beyond the scope of an opinion of this Office.'" (quoting Op. S.C. Att'y Gen., May 8, 1989))). "The examination of federal law and the policies of a federal agency are beyond the scope of an opinion of this Office." Op. S.C. Att'y Gen., 2011 WL 2648714 (S.C.A.G. June 16, 2011). "In such matters, this Office defers to the federal agency charged with the interpretation of the federal statute or regulation in question." Op. S.C. Att'y Gen., 2023 WL 4332351 (June 27, 2023). Although we must defer to the FCC's interpretation of the Act and its regulations promulgating it, we nevertheless reiterate that a legislative enactment "must continue to be enforced unless set aside by a court or repealed by the General Assembly." Op. S.C. Att'y Gen., 2020 WL 3619620 (S.C.A.G. June 25, 2020) (quoting Op. S.C. Att'y Gen., 2017 WL 4464415 (September 26, 2017)).

Bryan P. Stirling
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Sincerely,

A handwritten signature in blue ink that reads "Elizabeth McCann". The signature is fluid and cursive, with the first name and last name clearly distinguishable.

Elizabeth McCann
Assistant Attorney General

REVIEWED AND APPROVED BY:

A handwritten signature in blue ink that reads "Robert D. Cook". The signature is written in a cursive style, with the first name being the most prominent part.

Robert D. Cook
Solicitor General