



PC-KY-002-002

**MEMORANDUM**(Third Communication)  
(15 pages in length)**DATE:** August 4, 1995**FROM:** Plaintiffs' class counsel -Douglas L. McSwain  
Sturgill, Turner & Truitt  
155 East Main Street  
Lexington, KY 40507**RE:** Washington v. Reno, Lex. Consol. Civ. Action Nos.  
93-217 & 93-290 (class action)

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**Update.** This Memorandum is to update you on the Washington v. Reno class action lawsuit involving inmate telephone policies. I apologize in advance for its length, but there is a lot to cover with you about the proposed Settlement Agreement, and we want you to be fully informed.

If you have not heard, you have surely figured out that we have reached a proposed settlement with the Bureau of Prisons ("BOP"). The Settlement Agreement we have reached is subject to being approved by the District Court in a "fairness" hearing before it can become a binding agreement upon the BOP and the Plaintiff-inmate class. The "fairness" hearing will be held after you have had ample opportunity to review the Agreement's terms and to file objections, if you should have any, to the Agreement. As your attorneys, we believe we have reached a fair settlement on your behalf and that the Agreement should be approved by you and by the Court.

**Reasons for Settlement Negotiations.** As you know, this case has been a hard-fought lawsuit. It has gone to the Sixth Circuit Court of Appeals and back again to the District Court. It has caused the BOP to introduce a rider onto a bill now pending in Congress (Title VII to H.R. 667) in order to "reverse" the impact of a Sixth Circuit opinion rendered in the case that was adverse to the BOP. It has taken over three (3) weeks of mediation and four (4) additional weeks of further negotiations to get the case actually settled and the settlement terms reduced to writing.

The parties reached their settlement "in principle" through the skilled mediation efforts of the Hon. Bruce E. Meyerson of Phoenix, Arizona. The mediator was mutually selected by your attorneys and the BOP's attorneys after a nationwide search for an acceptable mediator. The mediator is a former state appellate court judge and a public interest lawyer who now specializes in mediation of complex litigation. The mediator was eminently fair throughout the negotiations and did an excellent job of bringing the parties together at the bargaining table.

The representative Plaintiffs who brought this lawsuit on behalf of all federal inmates (the class), whose names appear in the Introduction to the Settlement Agreement, participated throughout the mediation process. The representative Plaintiffs did an excellent job in representing all inmates' interests and in assisting your counsel to make appropriate judgment calls in the give-and-take process of negotiation. Everyone should thank the representative

Plaintiffs for their courage and foresight in having brought this lawsuit and seeing it through to a successful settlement.

I want to briefly explain why we entered into the mediation process to attempt to settle this lawsuit. As you know from my previous communications to you, the BOP, last year, capitulated on a number of issues we raised in this case by publishing a new "rule" regarding inmate telephone privileges. See 59 Fed. Reg. 15812, 15824-25 (April 4, 1994). Inmates did not gain all that they wanted in that "rule," so we amended the Complaint to challenge the new "rule" as well. Shortly thereafter, in September 1994, the Sixth Circuit Court of Appeals rendered its opinion in the case, Washington v. Reno, 35 F.3rd 1093 (6th Cir., 1994). The Sixth Circuit's opinion upheld the validity of inmates' trust fund claims, but failed to provide a clear expression as to what minimum level of telephone privileges inmates may be entitled to as a matter of constitutional law in light of the BOP's new "rule."

We sought a mediation of the lawsuit, after remand from the Sixth Circuit, and before going to final trial, in part because we owe a duty to the courts to try to resolve any dispute, if possible, without a trial, but primarily because we believed that we could negotiate a better resolution of the suit than we could obtain in any final court decision. We thought that by offering to dismiss inmates' trust fund claims relating to the Inmate Telephone System ("ITS") in exchange for BOP concessions on telephone policy issues, we could achieve the best result possible for inmates.

The Sixth Circuit's opinion plainly held that any telephone system purchased by the BOP with the inmates' trust funds (i.e., the "Commissary Fund, Federal Prisons") had to "primarily" benefit inmates rather than the BOP. Under the opinion, considerations of "security" and "inmate control" could not properly be the Bureau's primary purpose for purchasing a new telephone system from the inmates' trust fund. Because of the Sixth Circuit opinion, we believe the BOP had an equally strong incentive to sit down and negotiate a resolution of this lawsuit with inmates.

If we had pushed the case to a trial and gotten a favorable judicial decision, in our opinion, inmates may not have gotten the kind of telephone policy relief that was ultimately obtained in this Settlement Agreement. A court could very well have limited inmates' telephone privileges to what is only constitutionally required. According to our research, case law indicates inmates are only entitled, at a constitutional minimum, to "reasonable" access to the telephone. A debit-only telephone system, such as the BOP was trying to install with the ITS, along with some telephone allowance for indigent inmates who cannot afford to pay for debit calls (as was minimally allowed for in the BOP's recently amended telephone "rules") could very well have been upheld as legal, and all the relief to which inmates are entitled. While inmates may have been able to win in court a substantial money recredititing to their Commissary Fund Trust (due to the BOP's trust fund breach), the courts may not have granted inmates very much relief, if at all, in the manner in which the BOP has to provide inmates "reasonable" telephone access, i.e., whether in the form of direct-dial (debit) or collect calls.

For this reason, we believe the trade-off made in inmates' trust fund claims for telephone policy concessions and other concessions under the Settlement Agreement is "fair" to the inmates. We recommend this settlement to you. While inmates have not gained everything in the negotiation process (no party does at the bargaining table), on a whole, we believe the

compromises reached in this Agreement are as fair and just as can possibly be obtained for all inmates.

**Summary of Settlement Agreement's Gains for Inmates.** This Settlement Agreement accomplishes a number of concerns raised by the inmates in the Washington v. Reno lawsuit. A summary of the gains made by inmates in this Agreement is set out below:

1. A guaranteed minimum level of collect calling privileges (120 minutes per month) along with unlimited debit calling, effectively providing inmates a dual collect/debit calling system;
2. A guaranteed minimum level of debit calling privileges (60 minutes per month) for inmates in financial responsibility "refusal" status;
3. A guaranteed minimum level of commissary purchasing privileges for inmates in "refusal" status (\$25.00 per month excluding stamps and telephone credits);
4. An increased exemption level (\$75.00 per month) and cumulative biannual calculation of the exemption (\$450.00 per six months) for amounts deposited to the credit of inmates in the Financial Responsibility Program;
5. A fixed ceiling on debit phone rates under the new telephone system with an expression of no intent to raise current debit rates under the current ITS;
6. A telephone account dispute process and the ability to obtain a written accounting for inmate debit phone calls;
7. A quick and effective process for changing inmates' official telephone lists;
8. A Four Million Dollar (\$4,000,000.00) credit to the Inmate Welfare Fund of the Commissary Fund Trust;
9. An exclusion of one-half of Trust Fund Supervisors' salaries and benefits from being charged to the Commissary Fund Trust;
10. A price comparison survey between commissary prices and retail supermarkets and convenience stores on the outside;
11. Destruction of the "Request for Telephone Privilege" forms collected by the BOP when the ITS debit-only system was first installed.

A more detailed discussion of each of the above points is included below. Furthermore, a discussion of other provisions of the Settlement Agreement is also set out.

**Collect Calling.** Section II of the Settlement Agreement sets out the terms concerning collect calling. This Section is divided into two main parts (Subsections A. and B.) corresponding to the two time frames covered by the Agreement. The first time frame is the period during which inmates are guaranteed 120 minutes of collect calling. This time frame

begins after the BOP has awarded a new telephone system contract and will last for four (4) years after that award date.

During the time between now and the installation of the new telephone system at each institution, collect calling will be provided to inmates if your institution currently allows such calling. As many of you know, several institutions have already been converted to the ITS--which is the BOP's debit-only system. A list of the debit-only institutions is contained in Attachment "B" to the Agreement. At these debit-only institutions, inmates will continue to be able to make only debit calls until the new telephone system is installed. The BOP, as a federal agency, must undergo a lengthy "procurement" process to obtain a new telephone system that will accommodate the 120 minutes of collect calling per inmate guaranteed in this Agreement. The BOP will do its best to get the new contract awarded within two years and will install the new system in the debit-only institutions within 18 months after the award of the contract. The debit-only (ITS) institutions will receive the new telephone system in roughly the same order in which those institutions were converted from the old collect-only system to the ITS.

At the institutions currently allowing inmates unlimited collect calling (a list of which is in Attachment "A" to the Settlement Agreement) and at those institutions allowing inmates both debit and collect calling (a list of which is in Attachment "C" to the Settlement Agreement), inmates will continue to receive unlimited collect calling privileges until the new telephone system is installed. After the new system is installed, inmates in those institutions will be limited to 120 minutes of collect calling per the Agreement. In the current debit and collect institutions, the BOP may require collect calls to be placed only to numbers on the inmate's official telephone list. Further details of how that list will be handled is discussed below.

New institutions opened by the BOP between now and the award of the new telephone system contract will receive debit calling under the ITS, and, after a limited, expedited "procurement" will receive unlimited collect calling privileges until installation of the new telephone system. In effect, inmates in newly-opened institutions will receive the same debit/collect calling privileges inmates currently have in the debit/collect institutions (i.e., those institutions listed in Attachment "C" to the Agreement).

Subsection II.C. of the Agreement provides that the BOP will include international collect calling capability as an item for consideration in the new telephone system "procurement" process. This does not guarantee that the new system will allow for international collect calls, but it should place potential bidders on notice of inmates' interest in obtaining this type of service. Of course, nothing in this Agreement can compel telephone carriers to offer collect service to foreign countries where they do not now provide such service.

Inmates should take special note that the period of the Settlement Agreement's guarantee of at least 120 minutes of collect calling is four (4) years from the date of the award of the new telephone system contract. If, at the end of this four-year period, the BOP decides to reduce the collect calling option, it must go through a procedure similar to the rulemaking process. Inmates must be afforded posted notice of any proposed changes to the collect calling option by publication in the Federal Register and an opportunity to submit written comments to any proposed reduction in collect calling. The BOP must then respond, in the Federal Register, to all comments received from inmates and other interested persons before it may attempt to reduce the availability of collect calls. We trust that you, your families, friends, ministers, doctors,

members of the press, and other interested persons will all let the Bureau know how you feel about any proposed reduction in the collect calling option should the Bureau unwisely decide to reduce the availability of such calling. We do not believe the Bureau will make any drastic changes in the collect calling option if inmates will vigorously oppose any such move and get other interested persons to oppose such a move, as was done in this lawsuit. Furthermore, as will be discussed below, if the Bureau does attempt to reduce the collect calling option, inmates will have the opportunity to relitigate the issue in the courts.

The four-year limitation on the length of this Agreement is not an expression of the parties' desire to end collect calling at the expiration of four years, but rather is included because the Bureau simply cannot "bind" itself forever in one Settlement Agreement. For this reason, the provisions for rulemaking and rulemaking-like processes have been included in this Agreement to maintain flexibility for future administrations while at the same time affording inmates the fullest opportunity to affect any future administration's proposed changes in inmate telephone policy.

The 120 minutes of collect calling provided in this Section II reflects a compromise reached between the Plaintiff-inmate class and the BOP. The BOP's current regulations allow inmates virtually no collect calling except for one (1) collect call per month for indigent inmates (i.e., those inmates having less than \$6.00 per month in their prisoner accounts) and an occasional staff-assisted collect call for inmate emergency situations. Inmates, of course, have sought to maintain unlimited collect calling privileges. The 120-minute guarantee of collect calling which has been settled upon in this Agreement is a number that represents approximately half or more of the phone calls made by each inmate per month. Evidence in this lawsuit has suggested that the average inmate in debit institutions makes roughly 180-200 minutes of phone calls per month. This Agreement's 120-minute guarantee for collect calling assures inmates that they can place roughly half, up to perhaps two-thirds, of all their phone calls on a collect-call basis. In this sense, the Settlement Agreement establishes what inmates have sought all along: a dual debit and collect call telephone system.

While the 120-minute collect-call compromise does pose an outside limitation on the amount of collect calling that inmates can make per month, we believe the compromise is a fair trade-off given the advantages of having unlimited debit calling (which is a far cheaper means of communicating) and in light of all the other concessions inmates have gained in this Agreement. The 120 minutes translates into approximately three (3) ten-minute collect calls per week, two (2) fifteen-minute collect calls per week or even four (4) minute collect calls every day of the month. You may choose how you want to spend your 120 minutes of collect calling. Of course, you will always be able to supplement collect calls with whatever amount of direct-dial (debit) calls that you can afford, and you can receive money from your call-recipients (who would otherwise pay for a collect call) to purchase the cheaper debit calls.

**Inmate Financial Responsibility Program.** Section III of the Agreement sets out the provisions concerning inmates in the Inmate Financial Responsibility Program (hereinafter "IFRP"). Inmates should be aware, first of all, that those in "refusal" status are allowed, under the Bureau's currently published regulations, only one call per month. (See 28 C.F.R. § 545.11(10)(d) (as amended April 1994). None of you in "refusal" status have yet felt the pain of the BOP's one-call per month limitation because the BOP unilaterally postponed the effective date of this limitation until January, 1996, pending the outcome of this lawsuit. This Settlement

Agreement guarantees those in "refusal" status at least 60 minutes of debit calling per month, a far greater amount of calling than the Bureau's current one-call per month regulation.

The effective date of this 60-minute guarantee begins when the new telephone system is installed at each institution. Prior to the new system's installation, the BOP will continue to allow inmates in "refusal" status the same calling privileges as are allowed all other inmates at your particular institution.

Subsection III.B. guarantees inmates a floor of \$25.00 per month spending privileges in the commissaries. Currently, the Wardens, according to the terms of Circular No. 2244 which establishes the Commissary Fund, possess the authority and discretion to deny or limit inmates' spending in the commissaries either partially or completely. This Subsection of the Agreement assures "refusal" inmates of at least \$25.00 per month spending capacity in addition to unlimited purchases of stamps and telephone credits.

Subsection III.C. increases the current \$50.00 per month exemption--created by the BOP for purposes of calculating an inmate's required IFRP payment--to \$75.00 per month. Furthermore, this Subsection establishes that the \$75.00 monthly exemption is to be calculated over a six-month period of time, totalling in the amount of \$450.00 every six months. These provisions regarding the IFRP exemption will allow inmates the ability to receive additional money from outside sources to pay for debit telephone calls (or other commissary items) without concern that the BOP will require the inmate to increase his/her payments into the IFRP.

Inmates in IFRP status should be aware that the Washington v. Reno lawsuit has never involved a direct, frontal attack on the validity of the IFRP as a program. Telephone privileges have been the primary focus of this lawsuit. Accordingly, this Settlement Agreement does not attempt to resolve any inmate's concerns about the legality of the IFRP. The IFRP's legality will have to be resolved between inmates and the BOP in another lawsuit on another day. This Settlement Agreement will, however, preclude inmate challenges directed solely to the particular telephone and commissary privileges provided in Subsections III.A. and B. of this Agreement. Inmates may not bring lawsuits geared solely towards setting aside those particular limitations at any time hereafter unless and until the BOP attempts to change or discontinue those privileges after the expiration of this Agreement. More on the preclusive effect of this Agreement is included below.

**Debit Rates.** Section V of the Agreement sets out the provisions for calculating the ceiling applicable to debit rates under the new telephone system and expresses the BOP's present intention not to raise debit rates in those institutions that currently have debit calling capability under the ITS. One of the issues raised in this lawsuit was the Bureau's unfettered and unaccountable ability to set debit telephone rates for inmates. The provisions of Section V recognize that under the new telephone system, either the BOP or the seller of the new system will have to set debit rates. Subsections V.B. and C. set a ceiling above which the BOP may not charge debit rates (if the BOP, under the new telephone system contract, is the responsible party for setting debit rates). The ceiling is based upon rates in state correctional institutions which are typically governed by state public utility regulatory bodies.

In the interim, before the new telephone system is installed, the BOP has agreed to express that it has no present intention of raising debit rates in those institutions which currently

have debit calling under the ITS. Subsection V.D. of the Agreement is very important because it states that the BOP will do its best to set debit rates under the new telephone system at a level less than the agreed-to ceiling set out in Subsections V.B. and C.

Furthermore, inmates should be aware that documents produced from the BOP to your attorneys during discovery in this lawsuit reveal that the Bureau has, in the past, attempted to set debit rates in accordance with a "reasonableness" legal standard. "Reasonable" is the typical telephone rate standard applied by the Federal Communications Commission and the various state public utility regulatory bodies which regulate telephone carrier rates. Assuming the BOP continues to adhere to this "reasonableness" legal standard for debit rates (which we believe is a fair assumption since the BOP does not want to be regulated), debit calls under the new telephone system should continue to be a fairly cheap means of communicating with persons on the outside when compared with the relatively more expensive alternative--i.e., collect calling. The "best efforts" clause of Subsection V.D. should help assure that the BOP does not set inappropriately high debit rates by establishing a ceiling on those rates above which the BOP may not charge.

It should be noted that debit rates, under the new telephone system, could be set by the seller of the system to the BOP. If this occurs, inmates will be able to protect themselves from unreasonably high direct-call rates by petitioning the appropriate federal or state telephone rate regulatory bodies. Collect-call rates charged to the recipients of inmate phone calls will be set by the telephone carriers outside the scope of this Settlement Agreement. Your call-recipients, who may feel they are overcharged for the collect calls received from you, should take up concerns they may have with collect-call rates with the appropriate state or federal telephone rate regulatory review bodies. This Agreement in no way attempts to address collect-call rates for inmate telephone calls or direct-call rates if the seller of the new telephone system sets rates.

**Telephone Dispute Process and Written Accounting.** Section VI of the Agreement addresses the problem that some inmates have experienced under the ITS involving improper charges for unused telephone time or for poor and/or distorted phone connections. Section VI sets out the process whereby an inmate may grieve his/her telephone account charges for a recredititing if the inmate did not actually make or use all the time for which his/her account was charged or if there was a phone service connection problem which had the actual effect of interfering with the inmate's telephone conversation.

Inmates who grieve their telephone account charges may obtain a written accounting of all charges made to their account for the past four (4) months at a cost of \$3.00 per month of accounting unless the \$3.00 monthly charge poses a financial burden to the inmate, in which event it may be waived. In any event, if the inmate wins his/her recredititing grievance, the inmate will get back the \$3.00 charge he/she may have paid for the monthly written account. The BOP will also continue to provide a verbal (mechanized) accounting of telephone charges and credits after each phone call so that no inmate will have to pay for a written accounting if the inmate does not want to do so.

All grievances for recredititing of inmates' telephone account charges must be brought by the inmate within 120 days of the disputed charge, credit or service problem. Inmates may grieve other telephone or service problems not intended to result in a recredit to an inmate's account, but such grievances should be filed within the normal 15 days of the inmate's complaint.

For example, an improper distribution of phone lines as between local, domestic and international calling traffic would be an appropriate matter to grieve if the BOP does not have installed an appropriate distribution of lines, although such a grievance should be brought in a timely fashion after an inmate discovers the problem.

Official Telephone Lists. Section VII of the Agreement alters considerably the turn-around period during which the BOP must enter changes in an inmate's telephone list. Under the Bureau's current regulations, inmates can only place debit calls to numbers preapproved on an official telephone list that cannot be changed but once every 90 days. Moreover, changes under current practice are ordinarily effected by the BOP within ten (10) days after an inmate has requested a change in his/her list. Subsection VII.A. provides that inmates may make at least three (3) changes per month to an inmate's telephone list (and more if there is a demonstrated need for additional changes). Furthermore, changes to an inmate's list will ordinarily have to be entered by the BOP within five (5) calendar days, excluding weekends and holidays.

The official telephone list policies set out in Section VII may be applied to current debit/collect calling institutions, a list of which is set out in Attachment "C" to the Agreement. Eventually, when the new telephone system is fully installed nationwide, all inmates will be able to place calls (debit or collect) to only those persons on their official telephone lists. Inmates should always remember, however, that they may include elected officials, courts and members of the press on their phone lists, as well as anyone else. The BOP may not exclude anyone from an inmate's list without affording notice and opportunity to be heard (through the Administrative Remedy process) to both the inmate and the person who has been excluded from the inmate's list. This issue as to whom inmates may properly include on their telephone lists was resolved in inmates' favor earlier in this lawsuit, and is now official BOP policy. See 28 C.F.R. § 540.101(a)(2) (as amended April 4, 1994).

Subsection VII.B. reiterates the current BOP policy to provide staff-assisted calls to any inmate who has a compelling need to contact someone not on his/her official telephone list and before his/her list can be changed (i.e., within the five calendar days).

Credit of Four Million Dollars (\$4,000,000.00) to the Commissary Fund. Section VIII of the Agreement provides that the BOP will credit Four Million Dollars (\$4,000,000.00) to the "Commissary Fund, Federal Prisons" to be spent solely for the benefit of inmates, as a whole, in inmate welfare, amusements, education, library, etc. This is, in effect, a recredit to the Inmate Welfare Fund of the Commissary Fund Trust. As many of you know, one of the issues raised in this lawsuit was the BOP's inappropriate use of the Inmate Welfare Fund for a debit-only telephone system that was not designed "primarily" for the benefits of inmates, but rather was designed for security enhancement and inmate control. With the collect calling guarantees provided in this Settlement Agreement, along with the other concessions of this Agreement, the new telephone system is now designed primarily for the benefit of inmates and thus expenditure from the Commissary Fund Trust for the system is appropriate.

The \$4 Million credit required in Section VIII represents, in effect, a "damages" payment for the BOP's improper use of the Commissary Fund Trust during its installation and operation of the ITS over the past four (4) years. Profits that were generated in the Commissary Fund and returned to inmates in the form of inmate welfare were approximately \$1 Million per year prior to the beginning of the installation of the ITS in late 1991. Those inmate welfare profits dropped

each year after 1991 as more and more institutions were converted to the ITS. In 1994, inmate welfare distributions from the Commissary Fund Trust were less than \$100,000.00. The \$4 Million credit provided in this Section VIII restores to the Commissary Fund the approximate amount of welfare monies that should have been distributed to inmates during the years the ITS has been in operation (1991-1995).

The \$4 Million credit required in Section VIII will not be affected by any Congressional abolition of the Commissary Fund Trust, as has been proposed in Title VII of H.R. 667, a bill which was recently passed by the United States House of Representatives in February 1995. The \$4 Million is to be credited to the Commissary Fund "or its successor."

Under Subsection VIII.D., inmates are to be afforded an opportunity to make suggestions or recommendations to their respective Wardens as to how this \$4 Million should be spent at their respective institutions. Inmate welfare committees or other inmate organizations may want to give their input to their Wardens as to the use of these funds, or inmates may simply be surveyed. Irrespective of the means of input, inmates should insist that their Wardens give them a reasonable opportunity to express their opinions as to the appropriate way to spend their institution's respective share of the \$4 Million being made available for inmate welfare purposes in accordance with the Agreement.

Payment of Trust Fund Supervisors. Section IX of the Agreement provides that one-half of the salaries and benefits of the Trust Fund Supervisor shall, beginning in Fiscal Year 1996 (October 1995), no longer be charged to the Commissary Fund Trust. One of the issues raised by inmates in this lawsuit was that the BOP inappropriately charged salaries and benefits of certain employees to the Commissary Fund when those employees' duties were not exclusively Trust Fund related. The job descriptions of the Supervisors includes roughly one-half commissary and trust fund operations and one-half other BOP-related functions. Circular No. 2244, the document that establishes the Commissary Fund, recognizes the propriety of charging certain BOP employees' compensation to the Commissary Fund but only if such employees perform commissary-related work. Section IX of the Agreement effects an appropriate resolution of the BOP's charging Trust Fund Supervisors' compensation to the Commissary Fund. By virtue of documents produced in discovery, it appears that this Section IX will save the Commissary Fund at least \$12 Million over the life of the Agreement (four (4) years plus approximately two (2) years for the time needed to award a new telephone system contract) and perhaps substantially more money will be saved. Of course, if the Trust Supervisors' job descriptions change such that their work becomes exclusively commissary related, then the credit provided in this Section as to this one-half of their salaries and benefits will cease.

Commissary Price Surveys. Section X of the Agreement is in response to inmates' concerns that they may be overcharged in the prices of goods offered for sale in the commissaries. Circular No. 2244, the document that establishes the Commissary Fund, as well as the legislative history surrounding the creation of that Fund, envisions the BOP selling articles (goods) to inmates at prices that are just high enough to cover the cost of the goods sold plus the BOP's expenses of operating the commissaries and prisoner trust account system. The Fund is generally not supposed to be a perpetual profit-making endeavor, but prices must be charged such that no losses are experienced in the Fund. In other words, the BOP must err on the side of making a "little" profit (rather than a loss) and must return what profits are generated to the inmates, as a whole, as welfare distributions.

The price surveys required by Section X will give inmates an accountability check on the BOP to insure the BOP is operating the commissaries as efficiently and inexpensively as possible, thereby keeping prices to inmates competitive with the prices of reasonably comparable retail stores on the outside of prison.

The price surveys required by Section X are to be posted for inmate review in the first and fourth years after the Agreement goes into effect. As with any government document, copies of the survey may also be obtained by inmates, at a reasonable charge, pursuant to a request under the Freedom of Information Act. The price surveys are to be conducted at one institution within each of the BOP's six regions and two of the six institutions surveyed are to be female institutions. Pursuant to Subsection V.E. of the Agreement, the commissary price surveys posted under Section X of the Agreement should also contain the current year's debit phone rate survey showing the debit rates charged at the various state correctional institutions.

Additionally, as a future accountability check on the BOP, I would suggest that some inmates think about obtaining copies of the annual audits conducted with respect to the Commissary Fund Trust. These audits will reveal how much the BOP is spending in expenses in the commissaries yearly and how much is being generated in revenues from sales to inmates. The "equity" distributions line in these audit reports also reveals how much money is deemed available for the Inmate Welfare Fund purposes for ultimate expenditure for and on behalf of inmates. You should be able to obtain copies of these audits by Freedom of Information Act request. Furthermore, the General Accounting Office may be interested in any irregularities you may discover in these audit reports on the Commissary Fund Trust.

Destruction of Telephone Privilege Forms. Section XI of the Agreement requires the BOP to destroy the "Request for Telephone Privilege" Forms that were inappropriately collected and retained by the BOP when the ITS was first installed at each of the various institutions around the country. One of the issues raised by the Plaintiff-inmate class in this lawsuit was an attack, under the Privacy Act, on the BOP's use of that Form and the BOP's failure to comply with the other requirements of the Privacy Act. The BOP previously abandoned use of the Telephone Privilege Form last year when it finally published its "rule" regarding inmate telephone use. See 59 Fed. Reg. 15812, 15822 (April 4, 1994). This Section XI completes the reversal in the BOP's policy regarding these Forms by requiring the previously collected Forms to be destroyed.

Other Privacy Act issues were also raised by the Plaintiff-inmate class including the BOP's failure to give notice, by publication in the Federal Register, that a new system of records was being maintained by the BOP with regard to inmate telephone use and the BOP's failure to give notice to certain Congressional committees of the existence of such records under the Privacy Act. The BOP recently published a system of records notice, and this notice should already have been posted in your institution. The notice provides various exemptions pertaining to law enforcement purposes for maintaining the new telephone system of records on inmates. Your counsel herein does not anticipate filing any comment with respect to the BOP's system of records filing. Each inmate is, however, encouraged to exercise his/her right to comment on the BOP's proposed "rule" regarding the new system of records and exemptions under the Privacy Act.

If you desire to send any written comments with respect to the BOP's new Privacy Act "rule," you should do so on or before September 15, 1995 (an extended deadline granted by the BOP) by sending your comments to the following address:

Patricia E. Neely, Staff Assistant  
Systems Policy Staff  
Justice Management Division  
Room 850 WCTR Building  
Department of Justice  
Washington, D.C. 20530

Finally, inmates should be aware that your counsel has received copies of the BOP's notice letter to the various Congressional committees pertaining to the new telephone system of records. These letters were sent by the BOP pursuant to the requirements of the Privacy Act and the express demands of the Plaintiff-inmate class that the BOP fully comply with the law.

With the destruction of the Telephone Privilege Forms required by this Section XI and the BOP's recent Privacy Act filing in the Federal Register and notices given to Congress, the Plaintiff-inmates have completely prevailed in all their Privacy Act demands against the BOP.

Other Provisions of the Settlement Agreement. Section I of the Agreement is purely introductory and self-explanatory.

Section IV of the Agreement recites, in effect, the current provisions of 28 C.F.R. § 540.100(a) (as amended April 4, 1994). The BOP always retains the authority to restrict an individual inmate's telephone privileges for security, protective or disciplinary reasons, and this provision merely recites that authority.

Section XII of the Agreement specifies the effective date of the Agreement. The policies, practices and procedures specified in the Agreement take effect at the time specified in the various sections of the Agreement creating those policies, etc. The changes in BOP policies, practices, etc. remain in effect for four (4) years from the date of award of the new telephone contract. That award should occur within approximately two (2) years. Section XII also requires the BOP to give notice to the United States District Court for the Eastern District of Kentucky, with service upon your counsel herein, of the following three (3) events: (1) when the new solicitation for bids (called "Request for Proposal") is published; (2) when the BOP selects a pool of qualified and competent bidders for the new telephone system contract; and (3) when the new telephone system contract is awarded. This notice provision will help maintain accountability with the BOP to the Court and assure the BOP's timely compliance with the terms of the Agreement. At the same time, it will provide your counsel in this suit the opportunity, if appropriate, to remind the BOP at critical junctures during the bidding selection process of the requirements of the Sixth Circuit Court of Appeals' opinion rendered in this lawsuit, to wit: that the new debit/collect telephone system must "primarily" benefit the inmates. See Washington v. Reno, 35 F.3rd 1093 (6th Cir. 1994). Of ongoing concern to inmates, which your counsel may want to remind the BOP during the bidding process, is that the new telephone system should have reasonable debit rates (comparable to debit (direct-call) rates offered to persons on the outside), and collect calling should be offered to international-call destinations.

Section XIII of the Agreement contains standard settlement language reciting that this is a compromise and settlement of the Washington v. Reno class-action lawsuit and will result in a dismissal of all claims raised in that suit (except attorney's fees and costs, which are issues that have not been settled and must be litigated between your counsel and the BOP), and that the BOP does not admit any liability by virtue of this settlement. This Settlement Agreement will operate as a full and final adjudication of all the Plaintiff-inmate class' telephone privilege claims and commissary privileges issues raised in the Third Amended Complaint and Amendment to the Third Amended Complaint as discussed in the Settlement Agreement.

Subsection XIII.D. makes it clear that this settlement and dismissal does not resolve or preclude any inmate's potential or pending lawsuit involving a frontal attack on the IFRP or the current limitations imposed on "refusal" inmates. Inmates are precluded from challenging the particular limitations on telephone and commissary privileges which this Agreement establishes for "refusal" inmates; however, if any inmate's facial legal challenge to the IFRP should succeed, nothing in this Settlement Agreement will preclude a court of competent jurisdiction from voiding all restrictions imposed upon inmates in "refusal" status including the commissary and telephone limitations contained in this Agreement.

At the risk of being repetitive, inmates should be aware that the combined effect of Subsections XII.B. and XIII.D. and E. will be to preclude any future inmate challenge to the specific limitations on telephone and commissary privileges contained in the Agreement unless and until the BOP sees fit to make changes in those limitations, for example, by making them more burdensome upon inmates. These combined provisions have the salutary effect of making this Agreement likely to last longer than the contracted-for term of years (i.e., four (4) years from the award of the new telephone system contract). While the BOP is technically free to change the policies, privileges and procedures set out in this Agreement (subject to rulemaking-like processes with notice and opportunity to be heard for inmates), the BOP will be disinclined to change the policies and privileges afforded inmates in the Agreement after four (4) years because if it does make changes, inmates will no longer be precluded from bringing legal challenges to the BOP's limitations on inmate telephone and commissary privileges.

Subsection XIII.E. makes it clear that any inmate may sue for the same or similar privileges as those claimed in this lawsuit if the BOP should ever change or discontinue the policies, privileges or procedures required by this Settlement Agreement. The BOP, of course, reserves the right to defend against any such future lawsuits to the fullest extent. The "policies, privileges or procedures" referred to in this particular Subsection include not just the 120 minutes of collect calling set out in Section II, but all the other telephone and commissary policies, privileges and procedures contained in the Agreement.

Subsection XIII.F. makes it clear that this Settlement Agreement does not, in any way, affect any individual inmate's claim for damages or claim for the recredititing of money, if any inmate should possess such a claim against the United States, the BOP or any other person. No preclusive effect arises at all from this Agreement as to any inmate's claim for money damages under any viable theory of law because individual damage issues have not been raised in this lawsuit. Consequently, if any inmate believes that he/she possesses a viable claim for damages or recredititing of money, any inmate may pursue such a claim irrespective of this Agreement. Of course, any applicable statute of limitation must be followed with respect to any claim for damages.

Subsections XIII.G. and H. recite the obvious, that no other persons than the Plaintiff-inmate class members are given rights under the Agreement and that nothing in the Settlement Agreement requires the BOP to take any action contrary to law or statute as may be properly enacted by Congress.

Section XIV of the Agreement deals with future enforcement actions that may have to be brought by inmates. Subsection XIV.A. requires inmates to go through at least the first step of the Administrative Remedy process by filing a BP-9 with their respective Wardens before filing any action to enforce any term of the Settlement Agreement. You should file your BP-9 timely, i.e., within fifteen (15) days after you discover the BOP may be violating the Settlement Agreement. If you fail to file it timely, you may and should go ahead and file it "late" although filing it late may affect the remedy you ultimately obtain.

Subsections XIV.B., C. and D. set out that an inmate may, but is not required, to appeal the Warden's decision through the BP-10 and BP-11 stages or may file an action to enforce the Settlement Agreement before or after any appeal level. Subsection XIV.E. provides that inmates should attach to any filing of an action to enforce the Agreement, copies of whatever BP grievance papers were filed by the inmate prior to the institution of the action (for example, the BP-9 and the BP-10 or BP-11, or both, if these appeals were pursued) along with the Warden's and/or the BOP's responses to the inmate's grievance and appeals (if taken). If you fail to attach any of the BP paperwork to your Complaint for enforcement of the Settlement Agreement, the Court's consideration of your Complaint will probably be delayed.

Subsection XIV.F. provides that any action to enforce the Settlement Agreement must be filed with an appropriate filing fee or an application to proceed *in forma pauperis* (i.e., without a fee, upon a showing of inability to pay the fee). The action may be submitted on a form similar to the form attached as Attachment "D" to the Settlement Agreement. This form is not absolutely necessary, but would be helpful to the Court if you are filing without the assistance of an attorney. Any action to enforce the Settlement Agreement may only be brought in the United States District Court for the Eastern District of Kentucky. The address of the Clerk's Office of that Court is included in the Agreement and repeated herein:

United States District Court for the Eastern  
District of Kentucky, Lexington Division  
c/o The Clerk of the Court  
U. S. Courthouse, Post Office Box 3074  
Lexington, Kentucky 40596-3074

Attachment "D" to the Settlement Agreement is self-explanatory. It includes a form for a Complaint for the Enforcement of the Settlement Agreement which you should fill out thoroughly and specifically, giving references, wherever possible, to the particular portions of the Settlement Agreement which you believe have been violated. Copies of the Settlement Agreement should be maintained for your reference by the BOP in all prison law libraries. At the back of Attachment "D" is a form for applying to proceed *in forma pauperis* (i.e., without paying a filing fee). If you are incapable of paying the filing fee (which is presently \$120.00), you should fill out the application to proceed *in forma pauperis* (sign it under penalty of perjury), and send the application to the Clerk of the Court along with your Complaint. If you are requesting to proceed *in forma pauperis*, you need not worry about service of the Summons and

the Complaint upon the Federal Bureau of Prisons because the Court must first approve your application to proceed *in forma pauperis*. The Court will have to determine whether or not you are in fact incapable of paying the filing fee, and will only allow your Complaint to proceed without the fee after it determines that your Complaint has not been filed for a frivolous or malicious purpose. If the Court approves of your action proceeding *in forma pauperis*, it will, under current practice, direct the Clerk to issue and serve the Summons and Complaint, on your behalf, upon the appropriate Defendant representatives without your having to do anything else in the way of service of process.

If you are capable of paying the filing fee, you must serve your Complaint and Summons in accordance with Rule 4, Fed. R. Civ. P. The following are the steps you should follow under Rule 4, Fed. R. Civ. P. and the local rules of court in the Eastern District of Kentucky to effect service of process. First, you should send an original and three (3) copies of your Complaint, along with the appropriate filing fee (presently \$120.00) to the Clerk of Court. You should prepare three (3) Summons forms, one each to be served upon the following: (1) U. S. Attorney General, 5111 Main Justice Building, 10th and Constitution Avenue, N.W., Washington, D.C. 20530; (2) U. S. Attorney for the Eastern District of Kentucky, Suite 400, 110 West Vine Street, Lexington, Kentucky 40507; and (3) Federal Bureau of Prisons, Correctional Programs Branch, 320 First Street, N.W., Washington, D.C. 20534. If you do not have blank copies of the Summons forms, you should ask the Clerk of Court in the Eastern District of Kentucky to send you blank forms for service of process in your case. Once you have filled out the three (3) Summons forms, you should send the forms to the Clerk of Court for the Eastern District of Kentucky for "issuance" (signature and seal). You should ask the Clerk to return the issued Summons to you along with the three (3) extra copies of your Complaint, which you sent to the Clerk along with your original Complaint, each of which should be stamped "Filed" by the Clerk. Once you receive back the issued Summons and the stamped-"filed" copies of your Complaint you must then send, by certified or registered mail, one Summons along with one copy of the Complaint to each of the following persons: (1) U. S. Attorney General (at the address above); (2) U. S. Attorney for the Eastern District of Kentucky (address above); and (3) Federal Bureau of Prisons (address above). These steps will complete the service of process requirements for your Complaint. Do not hesitate to seek the assistance of the Clerk's Office of the Eastern District of Kentucky with respect to any of these steps. The Clerk's Office phone number is (606) 233-2503.

Subsection XIV.G. makes it clear that only actions for enforcement of the Settlement Agreement are required to be brought in the Eastern District of Kentucky. If you have a complaint against the BOP for matters other than enforcement of the Settlement Agreement, you should file such a complaint where the Defendant whom you are suing resides or where the claim arose. This Subsection makes clear that actions for the recrediting of money to an inmate's telephone account are not covered by Section XIV of the Agreement. If an action solely for the recrediting of money is brought in the Eastern District of Kentucky, the Court may very well transfer it to the appropriate federal court (or the Court could perhaps dismiss it).

Subsection XIV.H. recites that the Court may, on its own, require exhaustion of administrative appeal remedies if the Court so chooses, that the Court has authority to review any inmate's action to enforce the Settlement Agreement, *de novo* (i.e., on evidence presented anew to the Court), and that the Court may enter any appropriate orders to enforce the Agreement.

Any final order entered by the Court will, of course, be appealable to the Sixth Circuit Court of Appeals in Cincinnati, Ohio.

Section XV of the Agreement addresses the schedule and procedure for Court approval for this Settlement Agreement. Copies of the parties' Notice of the Settlement and the Settlement Agreement itself should be made available for you to inspect in all the institutions' law libraries nationwide, along with a copy of this Memorandum from your counsel. If any of you wishes to object to the Settlement Agreement, you have the opportunity to do so. You should write the Clerk of the United States District Court for the Eastern District of Kentucky at the address set out above. The Clerk must have your written objections, if any, on or before [insert date].

Personal Note. On a personal note, I would like to say this has been a very stressful lawsuit. The BOP is a formidable opponent. Notwithstanding the strength of the United States Government in this lawsuit, I believe you have gained a fair resolution of the issues raised in this lawsuit. Sure, there may always be a desire to gain the "moon" in any lawsuit, and perhaps some would not be content short of gaining the "moon." But, on the whole, I believe if you study the terms of the Settlement Agreement, you will find it to be a good and just compromise. It provides for a telephone system that is fundamentally fair to all inmates alike.

I encourage each of you to be vigilant in protecting your gains made in this lawsuit and as established in this Settlement Agreement. I encourage you to be responsible in any effort you may make to enforce this Agreement and your rights under it (assuming the Court approves it). Ultimately, the courts will not respond to frivolous complaints or untrustworthy claims that the BOP has violated the law or this Agreement. On the other hand, if the BOP does violate any term of the Agreement, rest assured your filing an honest and forthright pleading to enforce the Agreement will be given appropriate consideration by the Judges of the United States District Court for the Eastern District of Kentucky.

This may be the last time I communicate to you as a class. I thank you for the opportunity to work on this case as your counsel. I hope you agree with me that we have achieved a "rough and appropriate justice" in this Agreement.

I thank those of you who responded to one of my earlier communications in which I mentioned my Christian faith. I appreciate your prayers for me and my staff. I know many of you are believers in God, and I encourage and support you in your faith. Ultimately in hard times, as I know all of you are now experiencing, your faith in God, who is faithful, just and forgiving, is your best hope for the future. May God bless all of you.

Sincerely,

STURGILL, TURNER & TRUITT  
/s/ Douglas L. McSwain  
Plaintiffs' Class Counsel

Trust in the Lord with all your heart and lean not on your own understanding;  
In all your ways acknowledge Him, and He will make straight your paths.

Proverbs 3:5-6