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

In the Matter of)	
)	
Rates for Interstate Inmate Calling Services)	WC Docket 12-375
)	

PETITION FOR RECONSIDERATION

Pursuant to 47 C.F.R. § 1.429, United Church of Christ, OC Inc. and Public Knowledge respectfully request reconsideration of *Rates for Interstate Inmate Calling Services*, Third Report and Order, FCC 21-60, (rel. May 24, 2021) (“*Third R&O*”) in this docket.¹ Petitioners fully support the Commission’s goals in the *Third R&O* to reduce the costs incurred by incarcerated people and their loves ones. Petitioners recognize the Commission’s decision is an interim decision and has been adopted with a number of caveats given the state of the record and the exigent circumstances caused by the COVID-19 pandemic. Nevertheless, the Commission’s decision adopted legal conclusions which must be corrected, if only to put the Commission’s future actions on the strongest legal foundation. Therefore, Petitioners seek reconsideration of portions of the Commission’s *Third R&O* to ensure a fully consistent and defensible decision.

The Commission should reconsider its decisions to: include any site commissions in the rate; permit excessive legally codified state and local site commissions as a component of the rate cap permitting an unjust and unreasonable rate for consumers; avoid preempting state and local site commissions that violate federal law.

¹ The Third Report & Order was published in the Federal Register on July 28, 2021, 86 Fed. Reg. 40340 this petition is timely filed within 30 days of that date. 47 C.F.R. §1.429(d).

The decision is inconsistent with prior Commission precedent and court precedent and will enable and incentivize incarcerating institutions and potentially state and local governments to end-run the Commission's rate caps and impose unjust and unreasonable costs on incarcerated people and their families, loved ones and support networks.

The Commission must also further lower the interstate rate cap on inmate calling services. As the Commission has explicitly stated, the interstate rate for inmate calling services has embedded within it cost recovery for ancillary services. The same cost recovery element is also included in the rates for ancillary services.

These requests meet the standard for reconsideration under 47 C.F.R. § 1.429 because the Commission's reasoning was not known to petitioners until the Commission released its order and because consideration of these arguments is required to serve the public interest. *Id.*, §1.429(b)(2), (3).

I. Site commissions should not be included in the rate.

A. Facility costs are not prudent investments under Commission precedent and the record.

The Commission permitted providers to recover, in the rate, costs incurred by correctional institutions which providers pay to facilities as site commissions. The Commission permitted extensive recovery of so-called "legally mandated" payments providers "make to correctional facilities pursuant to law or regulation that operates independently of the contracting process between correctional institutions and providers" as long as the total rate is below 21 cents per minute. *Third R&O*, ¶101. The Commission also allowed payments to facilities under negotiated contracts at \$0.02 per minute, which was the portion of such costs the FCC determined was "reasonably

related to the facility’s cost of enabling inmate calling services at that facility.” *Id.*, ¶103. At no point has any party made the case that the “legally mandated” commissions are costs that meet the Commission standard for “used and useful” and the Commission acknowledged the flawed state of the data on this point. The Commission admits it did not conduct a full analysis under Section 201 to determine whether the resulting rates for consumers with either type of site commission meet the just and reasonable standard in Section 201 of the Communications Act. *Id.*, nn.363, 399. As such, the Commission failed its duty to consumers. Given that omission and the record, the Commission cannot include any site commission in the rate.

As the Commission explained, just and reasonable rates under Section 201 of the Communications Act are “focused on recovering prudently incurred investments and expenses that are ‘used and useful’ in the provision of the regulated service for which rates are being set. In applying this framework, the Commission considers whether the investment or expense ‘promotes customer benefits, or is primarily for the benefit of the carrier.’” *Id.*, ¶126. The Commission recognized that the “used and useful concept is designed, in part, based on the principle that regulated entities ‘must be compensated for the use of their property in providing service to the public.’” *Id.*, ¶129. The FCC also recognized “the equitable principle that the ratepayers may not fairly be forced to pay a return except on investment which can be shown directly to benefit them.” *Id.*, ¶129. As the Commission has explained elsewhere, “[t]he used and useful and prudent investment standards allow into the rate base portions of plant that directly benefit the ratepayer, and exclude any imprudent, fraudulent, or extravagant outlays.”² Including

² *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 4527, ¶39 (1994).

parts of the carceral institution plant in the rates benefits neither the caller nor the called party who is paying the rate.

In ignoring the clear precedent that requires included rate elements to serve the needs of the ratepayer, the Commission merely assumes, without evidence, that “it is reasonable for [correctional] facilities to expect providers to compensate them for those costs,” *Id.*, ¶127 (quoting *2016 Reconsideration Order*),³ but offers no explanation and no Commission precedent beyond the flawed *2016 Reconsideration Order*, whose shortcomings the Commission itself recognized,⁴ as to why it is reasonable for a carceral facility to assume that its function as such should be reimbursed by ratepayers. The Commission acknowledged it lacked evidence to determine on a permanent basis whether and what portion of these payments are “legitimately” related to the cost of providing the service.” *Id.*, ¶102

The Commission “*assume[d]* on the record here and for purposes of this interim reform that legally mandated site commission payments simply compensate a correctional institution for the actual costs (if any) an institution incurs to enable interstate and international inmate calling services to be made available to its incarcerated people and are *at least plausibly* a prudent expense that is used and useful in the provision of interstate and international inmate calling services.” *Third R&O*, ¶131 (emphasis added). The Commission made no findings as to whether the costs of legally mandated site commission payments meet the prudent test or in fact “reimburses” for

³ *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Order on Reconsideration, 31 FCC Rcd 9300 (2016) (*2016 Reconsideration Order*)

⁴ UCC OC Inc. and Public Knowledge explained in detail the problems with the process and record in the *2016 Reconsideration Order*. UCC OC Inc. and Public Knowledge ex parte filing, Docket No. 12-375, at 2-3 (March 29, 2021).

anything related to the cost of the service—the revenue, according to the record, can be used for anything from general revenue to incarcerated persons’ drug treatment programs and beyond.⁵

Nothing in the record justifies the FCC’s assumption that the payment is “used and useful” in the provision of the regulated service. In fact, the Commission explicitly found “[w]e have not determined, even on this record, that this expense reflects the actual costs associated with the provision of inmate calling services, separate and apart from the legal compulsion for facilities to collect it.” *Id.*, n.399. The limited scrutiny applied by the Commission bears no resemblance to the scrutiny the FCC gives to other attempts to sidestep the prudent investment test.⁶

Even though the Commission limited the amount of recovery for negotiated site commissions, it used the same kind of unwarranted assumption in that portion of the decision. “[T]he record does not reveal that correctional institutions, in contracting with providers that offer comparatively higher contractually prescribed site commission payments, are somehow benefitting customers of interstate and international inmate calling services as compared to the selection of some other provider.” *Id.*, ¶129.

The Commission’s inclusion of these costs in the rate is even more objectionable given the flawed, inaccurate, old state of data on the record. The evidence before the Commission was poor at best, earning the Commission’s skepticism both in the *Third R&O* and also when some of the same data was used in 2016. It recognized it is “difficult

⁵ See, e.g., Letter from Cheryl A. Leanza to Marlene Dortch, Docket No. 12-375, at 2 (May 14, 2021).

⁶ See, e.g., Iowa Network Access Division Tariff F.C.C. No. 1, 33 FCC Rcd. 11131, 11133 (2018); American Telephone and Telegraph Company the Associated Bell System Companies Charges For Interstate Telephone Service AT&T Transmittal Nos. 10989, 11027, 11657, 64 F.C.C.2d 1, 49, 54-55 (1977) (“*AT&T Phase II Order*”).

to disentangle which part of the site commission payment goes towards reasonable costs and which portion is due to the transfer of market power.” *Id.*, ¶107.

The FCC used data that compared “per-minute costs for facilities that are paid site commissions and those that are not as a way to isolate the gap in costs that could be covered by site commission payments” but it did not incorporate any correctional facility-provided cost data. *Id.*, ¶135. Therefore, it is impossible for the FCC to conclude that these represent actual costs connected to the provision of communications services. Moreover, the FCC adopted a 2 cent per minute rate for contractually negotiated site commissions even though its analysis in Appendix H “reflects even lower potential estimates for legitimate facility costs related to inmate calling services.” *Id.*, ¶136.

The FCC also relied on the National Sherriff Association data, which was not subject to any mandatory collection obligations, which was the voluntary submission of information from a membership whose interest is in obtaining site commissions, that did not make any specific claim with regard to whether any particular site commission met the Commission’s prudent investment standard, and whose limitations were acknowledged in an earlier proceeding, *2016 Reconsideration Order*, ¶27, and is more than 5 years old. The FCC relied on this data, in part, to conclude it could not adopt lower rates for jails under 1,000 ADP. *Third R&O*, ¶142 The FCC relied upon this data even though it expressed skepticism at some facilities included in the NSA data which reported excessively high hours spent on calling-related activities—totaling “more than 17 full-time 40-hour-a-week correctional facility personnel (or four full-time personnel working 24 hours a day every day)” for a single facility of 1,500 ADP. *Id.*, ¶143.

The Commission has claimed it has deferred its decision on whether to include security costs in the rate, but its decision to accept, whole-cloth, facility site

commissions says otherwise—that the Commission has approved facility recovery of security costs. *Id.*, ¶¶148-150. This is arbitrary and capricious and should be reconsidered. The Commission made no finding. Rather, it said, “We cannot determine, based on the current record, whether security and surveillance costs that correctional facilities claim to incur in providing inmate calling services are ‘legitimate’ inmate calling services costs that should be recoverable through interstate and international calling rates.” *Third R&O*, ¶148. What the FCC did find was that the costs identified in the NSA data “suggest a troubling and apparent duplication of some of the same security functions claimed by providers in their costs.” *Id.*, ¶148. The FCC also found the “data do not suggest a methodology that would permit the Commission to verify or otherwise isolate legitimate telephone calling-related security and surveillance costs, such as costs associated with court-ordered wiretapping activity, from general security and surveillance costs in correctional facilities that would exist regardless of inmate calling services.” *Id.*, ¶149. Despite these findings, the Commission included facility costs in the rate, which clearly include security costs that the Commission could not validate.

If ICS providers wish to pay correctional facility site commissions, and correctional facilities wish to receive them, they must comply with the applicable regulatory standards. The data provided in the NSA survey and elsewhere in the record is insufficient to justify the prudent investment standard. The Commission’s decision should be reconsidered to make clear that the Commission is treating all parties before it with the same amount of scrutiny and analysis, rather than treating correctional facilities and those who operate them as above the law. Because the Commission did use

verifiable data from carceral facilities that the legal standard, it must reconsider its rate cap decision until it does so.

B. The FCC’s treatment of legally codified site commissions is unwarranted.

The Commission concluded that legally codified site commission requirements meeting certain could be included in the rate for prisons and jails over 1,000 ADP, but the ultimate total rate, including the legally codified commission payments, could not exceed 21 cents per minute. But the Commission found that site commissions adopted pursuant to contractual bidding procedures or because a provider voluntarily offered to pay them could be included in the rate up to .02 cents per minute. *Third R&O*, ¶122.

The Commission’s decision to reject the providers’ argument that full pass through of all site commissions should be allowed should be applied equally to the Commission’s decision to permit pass-throughs of legally mandated fees. The Commission rejected pass through of the full amount of contractually negotiated site commissions because: of its duty to ensure charges for interstate and international telecommunications services are not “unjust or unreasonable;” that each carceral communications provider “operates as a monopolist within that facility;” the award of monopoly contract based on “the portion of revenues a provider has offered to share with the facility;” providers bidding for contracts compete to offer the highest site commission payments. *Third R&O*, ¶112. The FCC explained any claim that all site commissions are real required costs forced on providers is “at odds with well-established principles of ratemaking,” violates the FCC’s duty under Section 201 of the Act and offers “no limiting principle” because callers could be “forced to pay rates ... that cover items wholly unrelated to those services.” *Id.*, ¶113. The FCC concluded *GTL* did

not compel a different conclusion because the FCC was entitled to determine which site commissions might or might not be directly related to the provision of service—such a decision must inherently include the possibility that no portion of the site commission is a legitimate charge. *Id.*

All these reasons are equally applicable, and perhaps more so, to charges imposed by the operation of state law permitted under the FCC’s rule. There is nothing with respect to statutory obligation that makes such a charge “used and useful” under the Commission’s obligation to ensure rates are just and reasonable.

While the FCC explicitly did not permit any charges over 21 cents per minute in the new ruling, nothing about the FCC’s decision explains the application of the 21-cent cap to charges directed by law. Under the FCC’s reasoning, if the distinction is whether a rate element is required by law then the amount of the rate would not matter. Nowhere does the FCC explain why a 21-cent limit continues to apply under its interpretation of the GTL decision—which demonstrates the flawed interpretation.

The Commission went to great lengths to constrain the definition of mandated site commissions. *E.g.*, *Third R&O*, n.304. The Commission was also careful to limit its decision to the interim period and the results of any proceeding or report and order emanating from the *Fifth FNPRM*. But the great lengths to which the Commission went to constrain mandated sites commissions, see *e.g.*, *Id.* ¶103, are also indicative of the potential for confusion, compliance difficulties and enforcement issues that lie ahead, to

say nothing of gaming and other chicanery⁷—even if the gaming and chicanery lasts only through what is an indeterminate “interim” period.⁸

C. The Commission incorrectly distinguished its previous findings that site commissions are impermissible monopoly location rent.

The Commission acknowledged that, historically, it considered all site commission payments to be a division of local monopoly profit. But in 2016, the FCC reconsidered its 2015 prison phone rate caps and altered that decades-long conclusion, finding site commissions *may not always* exclusively compensate correctional facilities “for the transfer of their market power over inmate calling services to the inmate calling services provider.” *Id.*, ¶107-108. The FCC explained that the D.C. Circuit’s 2017 vacatur of the 2015 ICS Order rate caps in *GTL v. FCC* was based in part on its finding that “the Commission’s decision to categorically exclude site commission payments from those rate caps was arbitrary and capricious.” *Id.*, ¶109.

The Commission has misconstrued *GTL* and also failed to consider that it is within the FCC’s authority to conclude that no element of the facility belongs in the rate.

⁷ Letter from Cheryl A. Leanza to Marlene Dortch, Docket No. 12-375, (May 12, 2021).

⁸ It is also important to note that the Commission has observed egregious intrastate rates throughout the country, which demonstrates that the state legislative bodies upon which the Commission relies have not been assertive in ensuring that the rates under their jurisdiction are just and reasonable. *See* Letter from Ajit Pai, FCC Chairman, to Brandon Presley, President of NARUC, at 2 (July 20, 2020):

FCC staff analysis has revealed that providers of inmate calling services are charging egregiously high intrastate rates across the country. Intrastate rates for debit or prepaid calls substantially exceed interstate rates in 45 states. Thirty-three states allow rates that are at least double the current federal caps, and 27 states allow excessive “first minute” charges up to 26 times that for the first minute of an interstate call. . . . Indeed, Commission staff have identified instances in which a 15-minute intrastate debit or prepaid call costs as much as \$24.80 – almost seven times more than the maximum \$3.15 an interstate call of the same duration would cost.

The authority to consider which elements belong in the rate does require it to ascertain that at least one or more such elements must be included; thus, it necessarily includes the authority to determine that nothing about a particular element meets the legal standard.

Instead of the detailed and long-standing rulings which were adopted to interpret Section 276 originally, the Commission turned to the *2016 Reconsideration Order's* decision to permit the inclusion of site commissions in the rate without addressing the problems and limitations in the record before it for its 2016 decision.⁹

The Commission incorrectly rejected the application of the *1999 Payphone Order*. The FCC found it could not apply the analysis that locational monopoly payments would be offered only where a particular payphone location generates a sufficient number of calls so that the payphone provider would break-even. *Id.*, ¶115. But the difference between payphones at public locations and carceral institutions is that people in public places had competitive alternatives to place calls—it is virtually inconceivable that a provider would not break even in provision of calls given that incarcerated people and their families have no choice but to communicate using the monopoly provider. *All* providers will break even serving carceral institutions, so whereas there might be locations that were not profitable for payphone operators, there is virtually no chance that would occur in the ICS provider factual scenario. Therefore, the Commission's conclusion that the *1999 Payphone Order* did not apply in the current context was incorrect and should be reconsidered.

⁹ See *ex parte* of UCC and Public Knowledge (March 28, 2021).

D. The FCC Routinely Preempts Inconsistent State Regulation and Did Not Rationally Distinguish its Decision Not to Preempt.

The Commission arbitrarily and capriciously failed to preempt state and local actions adopting both mandated site commissions and contractually negotiated site commissions. It did not explain, the dramatic change from its ordinary practice of eagerly preempting other state and local actions in far less justifiable circumstances. The Commission took action to preempt the jurisdictionally mixed-use ancillary fees regulated by states in similar circumstances, *Id.*, ¶¶217-18, but without any offering any elaboration or reasoning, concluded it would not preempt state and local commissions. *Id.*, ¶119.

The Commission's authority to preempt state and local actions inconsistent with its actions under Title II with respect to interstate telecommunications is unquestionably where the Commission's preemptive authority is at its maximum.¹⁰ Section 152 makes explicit the Commission's authoritative jurisdiction with respect to the interstate communications at issue here.¹¹ Even where the Commission's authority is far more attenuated, its decisions to preempt local governments' authority with regard to local permitting approval, zoning, and cable franchising have been considered and upheld in the federal courts including the Supreme Court.¹²

In Section 201, Congress directed the Commission to set interstate rates. The Commission cannot delegate to the states and/or local governmental entities what

¹⁰ *E.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 379–82 (1999); *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (D.C. Cir. 2010).

¹¹ 47 U.S.C. §152.

¹² *City of Arlington v. FCC*, 569 U.S. 290 (2013); *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020) cert den. 2021 WL 2637868 (June 28, 2021); *City of Eugene, Oregon v. Federal Communications Commission*, 998 F.3d 701 (6th Cir. 2021).

Congress directed the Commission to do. The Commission must preempt the states in order to retain its control over interstate rates.

II. The Commission Should Reconsider the Interim Interstate Rate Cap, Remove the Unlawful Burdens Imposed on Users of Calling Services and Remove the Double Recovery by ICS Providers Allowed by the Current Interim Interstate Rate Cap

The Commission extensively discussed the data it had collected and which it intended to use to calculate the rate cap for large jails and prisons, observing that although it was not ideal, it was suitable for, and sufficient to, calculate rate caps, *Third R&O*, ¶¶49-64. When it came to ancillary service costs, however, the Commission did not break out the costs of ancillary services. The Commission stated that “[b]ased on the record, we find that there is no reliable way to exclude ancillary service costs from our provider-related rate cap calculations. Accordingly, those costs will remain as a part of the industry costs that we use in our calculations of those interim caps.” *Id.*, ¶79. The Commission recognized that this would “result in interim interstate rate caps that allow for the recovery of costs incurred in the provision of ancillary services that calling services customers already pay through separate charges and fees.” *Id.*, ¶80.

This is unsustainable. The Commission cannot properly force users of ancillary services who also use regular calling services¹³ to pay twice for the same services: once in the rates they pay for regular calling services and again in the rates they pay for ancillary services. Users who use only regular calling services and no ancillary services are paying for a service they don’t use since the costs of ancillary services are also included in the

¹³ Petitioners use “regular calling services” to refer to calls made without any ancillary services. The easiest example of a regular calling service is a prepaid call direct dialed where the caller simply inputs the prepaid account number and the whole process is automated.

rates they pay. Of course, ICS providers are collecting twice for the costs of that same service, ancillary services, since they are not providing the service to users when they are using regular calling services. But when those same callers and any other caller uses ancillary services, they will be billed for the use of the ancillary service.

The Commission said it would address the issue in the next data collection and went on to discuss why the resulting rates were within the “zone of reasonableness” permitted under existing law.

The Commission went on to calculate the upper and lower bounds of the zone of reasonableness for larger jails and prisons with such precision as was achievable with the existing data. *See Id.* ¶¶ 81-83. But even before doing so, the Commission recognized that it is “likely that our estimates overstate providers’ inmate calling service costs.” The Commission stated that all providers have an incentive to overstate their costs in order to obtain higher rates and profits. Moreover, imprecisions in, or omissions from, the instructions in the Mandatory Data submitted by the ICS providers also likely resulted in higher cost data. *Id.*, ¶ 83. In other words, ICS providers are now recovering inflated costs of ancillary services twice.

In calculating the high end of the zone of reasonableness, the Commission consciously observed, but made no adjustment for, significant errors it singled out that pushed the high end cost figure for prisons higher: for example, GTL’s use of the purchase price GTL paid for going concerns it had purchased and GTL’s lack of support for the cost figures it did provide, which were significantly higher than the costs of comparably situated entities in so far as the Commission could make comparisons. *Id.*, ¶¶ 85-88.

In calculating the low end of the zone of reasonableness, the Commission was working with the same data that the Commission had used to calculate the upper end of the zone of reasonableness and which the Commission had stated likely overstated costs. The Commission nonetheless took at least one step to ameliorate the possibility that the data understated the cost of providing services. The Commission omitted the data from three outliers.¹⁴

The Commission determined that for prisons it would choose a rate “above the midpoint between the upper [\$0.133] and lower [0.0643] bounds of the zone of reasonableness (approximately \$0.10).” In fact, despite all the biases the Commission recited that tended to overstate the costs upon which the Commission was relying in setting the rate, the Commission set a rate that is almost double the lower bound and only about 10% below the upper bound. The arbitrary and highly capricious result is that ICS providers are being given almost the entirety of the bloated cost bases that double count the costs of ancillary services.

As for larger jails, the Commission set the upper bound of the zone of reasonableness at \$0.218 per minute and the lower bound at \$0.08. *Id.*, ¶ 88. It chose a rate cap of \$0.14, a rate “just below the midpoint between the upper and lower bounds of the zone of reasonableness (approximately 0.15) but still well above the lower bound of approximately \$0.08.” *Id.*, ¶ 96.

¹⁴ The Commission also substituted certain other cost of service data for GTL’s contract level data. Petitioners have not signed the non-disclosure agreement and do not have access to the data to determine its effect on the Commission’s calculation of the low end of the zone of reasonableness.

In sum, the Commission at one point emphasized the discretion given to it when working within the upper and lower bounds of the zone of reasonableness to ensure recompense, and the Commission took more than ample steps to protect the interests of ICS providers to ensure their compensation. Not until many paragraphs later, in a separate section of the *R&O*, did the Commission mention its responsibilities under Section 201 to ensure provider expenditures are “prudently incurred,” *Id.*, ¶ 126 (citations omitted), and acknowledge the incurred expenses must “promote customer benefits,” and not [be] primarily for the benefit of the carrier.” *Id.* (citations omitted).

But there is no benefit for the calling services customers in helping to pay for ancillary services they do not use. Nor is there any benefit for ancillary services customers in paying the costs of service for which the carrier is already being compensated, although such double recovery does provide substantial “benefit [for] the carrier.”

While Petitioners fully appreciate that the Commission is seeking data in the *Fifth FNPRM* to eliminate the bias in favor of higher costs upon which the bounds of the zone of reasonableness are determined, there are two problems in the present context. First, any action will do nothing to restore the extra charges incurred by calling service customers during this interim period, as further discussed below. Second, while the Commission can take steps to reduce the effects of provider biases toward over-stating charges, the Commission cannot eliminate those biases. While clearer instructions may eliminate the more egregious difficulties in the instructions, the Commission cannot eliminate the collective and individual disposition of providers to interpret any instructions to allow them to overstate or state costs in the manner most favorable to

them. Nor can the Commission eliminate the incentive for providers to do everything they can to overstate costs. Hence the problems the Commission recognized are inherent in the ratemaking process and do nothing to promote the ratepayers' interests that are also at stake. The latter is the job of the Commission. Erring on the side of providers against ratepayers if the Commission follows the reasoning it used here will result in systematic bias against the ratepayers the Commission is required to protect.

Accordingly, the Commission should not allow these anti-ratepayer biases to control rates for even the interim period, and particularly in a context where there is double recovery of costs. In this regard, it is important to emphasize that this "interim period" between the effective date of the rates in the *Third R&O* and any revision is not necessarily—indeed not likely—a matter of a few months. Procedural requirements will cause significant delay: design and development of the Mandatory Data collection, the process of OMB approval, including opportunity for public comment and possible changes to the data the Commission is allowed to seek, some of which could address the Commission's attempts to address the issues—a process of indeterminate length outside the control of the Commission, the time ICS providers will need to complete the data collection, and assuming the data that comes back is complete, the time necessary to analyze the data, prepare an additional FNPRM and conduct that proceeding—including all the potential for delay in that process with which the Commission is fully familiar—to finally get to revised rates that reflect true costs.

During this entire period, it is ratepayers, some of whom are not even using the services whose costs they are helping to pay, that bear the burden. There is no way to reimburse them, or any of the ratepayers who use all or any of the ICS provider services,

to recoup that loss, and certainly no way to target for redress the consumers who paid those costs even while they made no use of the services.¹⁵

The Commission should reconsider its decision to set the maximum rate for prisons at \$0.12 and the decision to set the large jail rate at \$0.14. Instead, the Commission should design a rate for both services that reflects that there is double recovery for ancillary service costs. To the extent the Commission cannot make such an allocation of cost, the Commission should reasonably lower the rate within the parameters of each rate's zone of reasonableness to reflect a rate that errs on the side of the users of the services instead of the current rate, which gives the benefit both of overstated costs and double recovery to the ICS providers. In setting the rate the Commission should also recognize that it will be less difficult to design a recovery scheme for ICS providers in the event the final rates are determined to be too high, as is likely even by the Commission's own estimates, once complete cost information is available than it will be to provide relief or recompense to the users of the service that made the overpayment.

¹⁵ Indeed, many of the ratepayers who paid the excessive rates will no longer be using ICS services since the users of these services is, by definition, a changing group. Although it also possible that the group of companies who were possibly under-compensated during the "interim" may have changed, designing relief for the companies is a less complicated task than providing relief to the users of the services during the interim most or many of whom will have moved on and no longer be users of the service.

III. Conclusion

For the foregoing reasons, petitioners respectfully request the Commission reconsider its *Third Report & Order* in this docket as described herein.

Sincerely,

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