

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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

To: Commission

**COMMENTS OF PRAESES LLC**

Phillip R. Marchesiello  
Rachel S. Wolkowitz  
Wilkinson Barker Knauer, LLP  
2300 N Street, NW Suite 700  
Washington, DC 20037  
202.783.4141

*Counsel to Praeses LLC*

January 12, 2015

**TABLE OF CONTENTS**

**EXECUTIVE SUMMARY** ..... i

**I. PRAESSES HAS A UNIQUE AND COMPREHENSIVE PERSPECTIVE ON THE ICS INDUSTRY**.....2

**II. BACKGROUND** .....4

**III. THE FCC SHOULD DEFER TO THE EXPERTISE OF FACILITIES WITH RESPECT TO ISSUES OF INMATE WELFARE AND SECURITY, INCLUDING ICS REGULATION** .....7

    A. The Administration of Correctional Facilities is a Complex Undertaking Outside of the Commission’s Expertise .....7

    B. Commission Substitution of its Judgment in Place of the Expert Judgment of Facilities Will Result in Unintended Negative Consequences Caused by the Reallocation of ICS Revenue From Facilities to Providers .....11

    C. The Communications Act Does Not Grant the Commission Authority to Regulate Site Commissions.....18

        1. *Neither Section 201(b) Nor Section 276 Provides the Commission With Authority to Regulate Site Commissions* ..... 19

        2. *The Commission Does Not Have Authority to Regulate the Use by Providers of Their Profits* ..... 23

**IV. ANY ACTION BY THE FCC IN THIS PROCEEDING MUST ENABLE FACILITIES, AT MINIMUM, TO RECOVER THEIR ICS COSTS** .....25

    A. Facilities Incur Real and Significant Costs to Provide ICS to Inmates .....26

    B. ICS Costs Vary Dramatically Among Different Facilities for a Wide Variety of Reasons .....31

    C. If the Commission Prohibits Site Commissions, It Should Adopt a Per-Minute Facility ICS Cost Recovery Mechanism.....37

    D. The Commission Should Provide Facilities and Providers Adequate Time to Recalibrate Their Commercial Arrangements to Take Into Account Any New ICS Regulatory Regime .....40

**V. ICS RATE REGULATION ONLY WILL BE EFFECTIVE IF THE COMMISSION ALSO REGULATES ANCILLARY FEES**.....42

**VI. CONCLUSION** .....46

**ATTACHMENTS**

- ATTACHMENT A:** ICS Cost Survey
- ATTACHMENT B:** Praeses Declaration

## EXECUTIVE SUMMARY

Praeses LLC (“Praeses”) supports the objective of the Federal Communications Commission (“Commission”) of ensuring that inmate calling services (“ICS”) are reasonably priced to enable inmates and their friends and families to maintain contact while the inmates are incarcerated. The Commission, however, should acknowledge the substantial complexities of administering correctional facilities and maintaining inmate welfare and provide great weight and deference to the views expressed in this proceeding by state and local correctional agencies. The expert correctional agencies that have participated in this proceeding are charged by local, state, and federal law with responsibility for inmate welfare, including ICS and programs to reduce recidivism; whereas the Commission’s primary jurisdiction is limited to interstate telecommunications. The Commission should not attempt to dictate to the correctional agencies how they manage their contractual arrangements with ICS providers. The Commission’s prior 2013 order in this proceeding resulted in a significant reallocation of ICS revenue from correctional agencies to ICS providers to the detriment of inmate welfare. The Commission’s current proposals are likely to further compound this ongoing reallocation.

There is no reason to depart in the instant proceeding from the Commission’s longstanding policy of deferring to other expert agencies with respect to matters that are outside of the Commission’s primary jurisdiction and that are fully within the jurisdiction of such other governmental agencies. Moreover, the Communications Act of 1934, as amended, does not provide the Commission with authority to adopt plenary regulation of ICS and the contractual arrangements between correctional agencies and ICS providers. In addition, by determining that site commissions represent an apportionment of ICS providers’ profits rather than ICS costs, the Commission effectively foreclosed its authority to regulate site commissions because the Commission does not have authority to dictate to private companies how they spend their profits.

If, despite this, the Commission ultimately determines to regulate site commissions, then the Commission must implement a mechanism by which correctional agencies, at minimum, are able to recoup the ICS costs that they incur. The record in this proceeding makes absolutely clear that the ICS costs incurred by correctional agencies are real and significant. Accordingly, there can be no justification for the adoption of an ICS regulatory scheme that ensures that ICS providers are fairly compensated but that prevents correctional agencies from even recovering their ICS costs.

The development of a regulatory mechanism for the recovery of ICS costs by correctional agencies is challenging because such costs vary substantially between different agencies and different correctional facilities, in part because correctional agencies independently determine which aspects of their ICS environments to directly administer and which to outsource to ICS providers. Consequently, before making any policy determinations regarding how correctional agencies should recover their ICS costs, the Commission should collect comprehensive data regarding such costs. Furthermore, to accommodate these cost disparities, Praeses proposes to permit correctional agencies to recover their ICS costs through a per-minute cost recovery amount that accurately reflects the individualized ICS costs of specific correctional agencies and that would be added to ICS providers' rates. Also, to facilitate the transition of correctional agencies and ICS providers to any new ICS regulatory landscape dictated by the Commission, the Commission should permit them to continue to operate under their existing contractual arrangements until at least the earlier of the expiration of such agreements and two years from the date that any new ICS regulations become effective.

Finally, the quickest and most effective way for the Commission to reduce ICS costs to inmates in the short term and thereby increase inmates' communications with their friends and

families is for the Commission to strictly regulate the numerous, high ancillary fees imposed on inmates by Providers.

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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

To: Commission

**COMMENTS OF PRAESES LLC**

Praeses LLC (“Praeses”) hereby responds to the Second Further Notice of Proposed Rulemaking (“*Second FNPRM*”)<sup>1</sup> issued by the Federal Communications Commission (“Commission” or “FCC”) in the above-referenced proceeding. The *Second FNPRM* seeks comment on steps the FCC should take to adopt a “comprehensive solution” to ensure inmate calling rates are both just and reasonable and that compensation is fair, but not excessive.<sup>2</sup>

Praeses supports the Commission’s objective of ensuring that inmate calling services (“ICS”) are reasonably priced to enable inmates and their friends and families to maintain contact while the inmates are incarcerated. As set forth herein, however, the Commission should defer to the expert judgment of state and local correctional agencies (“Facilities”) regarding the operation of their ICS environments and the allocation of ICS revenue between the Facilities and their ICS providers (“Providers”). The Communications Act of 1934 (“Communications Act”),

---

<sup>1</sup> *Rates for Interstate Inmate Calling Services*, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 13170 (2014) (“*Second FNPRM*”).

<sup>2</sup> *Id.* at 13174 ¶ 6.

as amended, does not provide the Commission with authority to regulate the contractual arrangements between Facilities and Providers, and, even if it did, this matter is outside of the Commission's core expertise. By contrast, the Facilities are directly charged by state and local law with responsibility for general inmate welfare.

If, despite this, the Commission determines to regulate the site commissions that Providers pay to Facilities, then the Commission must implement a mechanism by which Facilities, at minimum, can recoup the ICS costs that they incur. The record in this proceeding already makes absolutely clear that such costs are significant and real, although they vary substantially among Facilities depending in part on the degree to which individual Facilities self-administer ICS functions. Further, before making any policy determinations regarding the amount of such ICS cost recovery by Facilities, the Commission should collect comprehensive data regarding the Facilities' costs. Also, the Commission should provide Facilities and Providers at least two years to adjust their contractual arrangements to any changes to the ICS regulatory landscape dictated by the Commission. Finally, the quickest and most effective way for the Commission to reduce the cost of ICS in the short term and thereby increase inmates' communications with their friends and families is for the Commission to strictly regulate the numerous, high ancillary fees imposed on inmates by Providers.

**I. PRAESES HAS A UNIQUE AND COMPREHENSIVE PERSPECTIVE ON THE ICS INDUSTRY**

Praeses is a software development and consulting firm. Founded in 1987 and located in Shreveport, Louisiana, Praeses employs approximately 100 professionals across multiple business units. Praeses' business units provide correctional services to Facilities, cyber warfare work to the U.S. Air Force and U.S. Navy, and Internet-enabled services to 29 of the 50 states and to numerous local governments.

Within its correctional services business unit, Praeses has developed extensive experience in the telecommunications industry since the early 1990's. In 2000, Praeses transitioned its core competencies from telecommunications generally to the corrections industry, specifically. At that time, Praeses began to provide Facilities with management of ICS environments and ICS technologies, as well as rate validation and general consulting practices. In addition to the above, Praeses' correctional division now specializes in the preparation of customized requests for proposals ("RFPs"), as well as evaluating and negotiating ICS contracts. As part of its services provided to Facilities, Praeses oversees the day-to-day operations of Providers, validates ICS calling rates and ancillary fees, monitors the compliance of Providers with their Facilities contracts, and assists Facilities to understand and comply with local, state, and federal regulation of ICS.<sup>3</sup>

With its unique market knowledge, Praeses helps Facilities by creating a competitive and level playing field amongst Providers. Importantly, Praeses is independent of any Provider – and has inmate telecommunications data, calling patterns, and Provider processes from hundreds of Facilities – so it is able to promote greater competition amongst Providers. Indeed, any particular Facility is at a material disadvantage when negotiating with sophisticated Providers, and Praeses provides an important counterbalance to promote competition amongst Providers through its deep and broad market knowledge about Provider practices.

Praeses' clients include various types of correctional facilities and the state and local governmental agencies that administer the facilities (collectively "Correctional Clients"),

---

<sup>3</sup> Praeses earns its revenue from the Facility clients to which it provides its services. Based on policy and financial objectives, these Facilities principally choose the structure by which Praeses is compensated – whether through outright payments or some other mechanism. Praeses is indifferent as to the structure that Facilities choose so long as Praeses is fairly compensated for its services.

including regional jails, county jails, statewide departments of corrections, and privately managed correctional facilities. Its Correctional Clients house approximately 400,000 inmates, which represent approximately 13 percent of the total U.S. inmate population.

## II. BACKGROUND

The Commission's 2013 *ICS Report and Order*,<sup>4</sup> which capped interstate ICS rates charged by Providers, was effective in accomplishing the Commission's objective of reducing ICS costs to inmates and causing an increase in interstate call volume.<sup>5</sup> For example, Praeses analyzed interstate ICS data relating to certain of its Correctional Clients covering two seven-month periods: April through October 2013, which is prior to the release of the *ICS Report and Order*; and April through October 2014, which followed the effective date of the *ICS Report and Order*. Praeses found that inmate call volumes increased nearly 70 percent between these two periods.<sup>6</sup> This public interest benefit, however, was accomplished at the detriment of inmate welfare funding and recidivism programming within Praeses' Correctional Clients, while providing a significant windfall for the Providers.

As a result of the increase in call volume unleashed by the lower interstate rates adopted in the *ICS Report and Order*, interstate ICS revenues generated by Providers serving Praeses' Correctional Clients increased by approximately 4 percent when compared to interstate ICS revenues prior to the implementation of the *ICS Report and Order*. But the apportionment between Providers and Facilities of these revenues changed dramatically as a result of the *ICS*

---

<sup>4</sup> *Rates for Interstate Inmate Calling Services, Report and Order and Further Notice of Proposed Rulemaking*, 28 FCC Rcd 14107 (2013) ("*ICS Report and Order*").

<sup>5</sup> *Second FNPRM*, 29 FCC Rcd at 13173 ¶ 5.

<sup>6</sup> Letter from Phil Marchesiello, Counsel to Praeses, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (dated Oct. 3, 2014).

*Report and Order*. Due to the unclear guidance provided by the Commission in the *ICS Report and Order* regarding the permissibility of site commissions, certain Providers unilaterally ceased providing these required payments to the Correctional Clients as required by the ICS agreements. As a result, Praeses has observed that interstate ICS revenues accruing to the Providers serving its Correctional Clients increased by 90 percent since the *ICS Report and Order* became effective, while its Correctional Clients experienced an approximately 70 percent reduction in interstate site commissions – funds that predominantly were used to offset the Facilities’ ICS costs and to support their inmate welfare programs and ensure safety.

Praeses’ Correctional Clients have struggled to avoid significantly scaling back or eliminating inmate welfare programs in light of these funding shortfalls, but they will not be able to do so indefinitely and state and local governments are unlikely to fully replace this lost funding.<sup>7</sup> Consequently, while the Commission’s *ICS Report and Order* increased inmate communications with their friends and families, its adverse effect on inmate welfare will become increasingly apparent over time as additional ICS revenue is reallocated from Facilities to Providers.

In its *Second FNPRM*, the Commission is now considering whether to expand the regulation of the ICS industry that it initiated in the *ICS Report and Order*, by, among other things, regulating intrastate ICS rates and the ICS-related ancillary fees imposed by Providers. The Commission also is considering whether to outright prohibit all site commissions. Putting aside whether these actions are within the Commission’s authority, the Commission only will compound the ongoing reallocation of ICS funds from Providers to Facilities if it adopts its

---

<sup>7</sup> Other Facilities are experiencing the same funding shortfalls as a result of the *ICS Report and Order*. See, e.g., Letter from Adam E. Christianson, President, California State Sheriffs’ Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (dated Dec. 22, 2014) (“CSSA Comments”).

*Second FNPRM* proposals, in part because intrastate ICS accounts for the substantial majority of total inmate call volume – approximately 90 percent at Facilities operated by Praeses’ Correctional Clients. Because Facilities are charged with maintaining inmate welfare, the magnified reallocation of ICS funds that would be caused by the *Second FNPRM* would be to the detriment of the U.S. inmate population and Facilities’ programs to reduce recidivism. It would benefit only the Providers’ shareholders. Thus, if the Commission adopts its *Second FNPRM* proposals and, as a result, call volumes increase as they did following the *ICS Report and Order*, then the reallocation of monies from inmate welfare and recidivism programs will only deepen and the windfall to the Providers will be compounded.

However, the Commission can avoid this result in the instant proceeding while still accomplishing its objectives. To do so, the Commission should limit its further regulation of the ICS industry to those issues that clearly are within the Commission’s statutory authority and core competency. On the one hand, the Commission should focus solely on regulating the interstate ICS rates charged by Providers and should oversee Provider practices with respect to ancillary fees. On the other hand, the Commission should refrain from attempting to dictate to Facilities how they administer their ICS environments, allocate ICS funds, maintain the safety of inmates and the general public, and pursue their shared goal of maximizing inmate welfare while reducing recidivism. Further, if the Commission is unwilling to defer to the substantial institutional expertise of the Facilities with respect to these matters, then, at minimum, the FCC should adopt a practical mechanism that enables the Facilities to recover their real and significant ICS costs.

### **III. THE FCC SHOULD DEFER TO THE EXPERTISE OF FACILITIES WITH RESPECT TO ISSUES OF INMATE WELFARE AND SECURITY, INCLUDING ICS REGULATION**

#### **A. The Administration of Correctional Facilities is a Complex Undertaking Outside of the Commission's Expertise**

As an initial matter, Praeses encourages the Commission to recognize and acknowledge the substantial complexities of administering correctional facilities and managing inmate populations and to provide great weight and deference to the views expressed in this proceeding by the expert state and local Facilities that actually bear these challenging responsibilities. Doing so would be consistent with the Commission's longstanding policy of deferring to other expert agencies with respect to matters that are outside of the Commission's primary jurisdiction and that are fully within the jurisdiction of such other expert agencies.<sup>8</sup> According to the Commission, "[i]t is an axiom of administrative law that each administrative agency should respect the boundary between it and another administrative agency where both have jurisdiction over a particular activity."<sup>9</sup>

---

<sup>8</sup> See, e.g., *Norvado, Inc.*, Order on Reconsideration, 29 FCC Rcd 1204, 1210 ¶ 15 (WTB 2014) (holding that "the Commission defers to local authorities to consider visual effects in their exercise of land use jurisdiction"); *Milford Broadcasting Co.*, Hearing Designation Order, 8 FCC Rcd 680, 680 ¶ 2 (MB 1993) (private disputes are beyond the Commission's jurisdiction and must be resolved in a local court of competent jurisdiction); *Interactive Control Two, Inc.*, Order on Reconsideration, 16 FCC Rcd 18948, 18960 ¶ 28 n.96 (WTB 2001) (deferring to the bankruptcy court "with respect to matters within its jurisdiction"); *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, Report and Order, 15 FCC Rcd 2329, 2359-60 ¶ 67 (2000) (deferring to EEOC with respect to discrimination complaints against broadcasters "because Congress intended the EEOC to be principally responsible for the resolution of employment discrimination disputes"); *Bangor Broadcasting Corp.*, Memorandum Opinion and Order, 33 F.C.C.2d 687, 689 ¶ 5 (1972) (deferring to the Internal Revenue Service as to whether a licensee violated an executive order because such determination is a "matter within the expertise of another governmental agency").

<sup>9</sup> *Application of National Broadcasting Co., Inc. For Renewal of License of Station WRC-TV, Washington, D.C.*, Memorandum Opinion and Order, 52 F.C.C.2d 273, 292 ¶ 70 (1975)

For example, as part of the Commission’s review of the application of its license transfer rules to tender offers and proxy contests, the Commission declined to adopt special rules to govern such hostile takeovers.<sup>10</sup> The Commission explained that it is both “unnecessary and inappropriate for us to become involved in reviewing such corporate financing decisions,” “particularly in light of the regulatory oversight of other governmental entities with greater expertise in financing matters.”<sup>11</sup> Further, when applying its tender offer and proxy contest policy to a subsequent transaction, the Commission noted that it should “refrain[] from injecting its own interpretation and interference ... in legal areas where other agencies have superior expertise and jurisdiction.”<sup>12</sup>

Similarly, the Commission declined to intervene in a state election dispute because the matter was outside of the Commission’s core competency.<sup>13</sup> According to the Commission, its intervention with respect to the dispute “would be ... substitut[ing] our judgment for that of those better equipped to make this determination and would require the Commission to engage in

---

(deferring to the Equal Employment Opportunity Commission when applying the FCC’s employment discrimination rules) (citing 2 Am. Jur. 2d Administrative Law, Section 209).

<sup>10</sup> *Tender Offers and Proxy Contests*, Policy Statement, 59 Rad. Reg. 2d 1536, ¶ 41 n.139 (1986).

<sup>11</sup> *Id.* at ¶ 41 n.138 & n.139; *see also id.* ¶ 61 (holding that “only those regulatory restraints which are necessary to promote the objectives underlying ... the Communications Act should be” adopted and “the imposition of regulatory restrictions which do not further statutory objectives ... would constitute unwarranted governmental interference in the marketplace”).

<sup>12</sup> *Application of Frank K. Mayers*, Memorandum Opinion and Order, 60 Rad. Reg. 2d 1095, ¶ 25.

<sup>13</sup> *Petition for Reconsideration by LaRouche Exploratory Committee*, Memorandum Opinion and Order, 11 FCC Rcd 10423, 10426 ¶ 7 (MMB 1996); *see id.* (“The Commission defers to state election authorities because it lacks the expertise to make an independent determination of the legal qualifications of a candidate for public office.”).

a subjective analysis of factors beyond our expertise.”<sup>14</sup> Furthermore, when declining to exert authority over false and misleading commercials, the Commission deferred to the Federal Trade Commission, which the Commission acknowledged “is the agency with expertise in determining whether an advertisement is false or misleading.”<sup>15</sup>

The Facilities are the expert agencies charged with the operation of correctional institutions and the management of inmate welfare. They are responsible for the safety and welfare of inmates, staff, and the general public within the constraints imposed by their limited budgets and resources, while remaining in compliance with a myriad of local, state, and federal statutes and regulations, as well as judicially imposed mandates which govern the Facilities. The development and implementation of appropriate ICS policies is a piece of the vast correctional ecosystem, and ICS is inexorably intertwined with numerous other priorities that also must be addressed by expert correctional agencies but that are beyond the purview of the Commission. By contrast to the Commission, the Facilities have extensive experience and expertise with respect to these matters – a level of experience and expertise that the Commission cannot replicate in the context of this proceeding. The courts have long recognized the complexities of the administration of Facilities and, as a result, have purposefully provided great deference to the governmental agencies that administer the Facilities when addressing the constitutional rights of inmates. According to the U.S. Supreme Court:

---

<sup>14</sup> *Id.* (citation omitted).

<sup>15</sup> *Elimination of Unnecessary Broadcast Regulation*, Policy Statement and Order, 57 Rad. Reg. 2d 913, ¶ 7 (1985); *see id.* (“With respect to those policies which address practices prohibited by other legal norms, such as false and misleading commercials, we believe that this agency has no special expertise or speed which would justify imposing strictures beyond those of the primary law enforcement mechanisms.”).

Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration. ... Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. ... For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.<sup>16</sup>

Thus, consistent with the Commission's policy to defer to expert agencies with respect to matters outside of the Commission's core expertise, the Commission should provide deference to the expert opinions of the Facilities regarding how to provision and procure ICS, including the payment and allocation of site commissions. The Commission should not merely substitute its judgment whole cloth for the judgment and discretion of the Facilities.

---

<sup>16</sup> *Procunier v. Martinez*, 416 U.S. 396, 404-405 (1974) ("*Martinez*"). The Supreme Court goes on in *Martinez* to assert that "prison administration" is "peculiarly within the province of the legislative and executive branches of government." *Id.* Although the Commission is a legislative agency, like the federal courts, the Commission is not an expert in the administration of correctional facilities and, even with respect to ICS, has been provided only with very limited regulatory authority by the Communications Act. By contrast, the state and local Facilities that have participated in this proceeding are expert agencies that have been provided with the authority and responsibility under law to oversee the overall welfare of inmates, including ICS but also including numerous other matters far more central to the wellbeing of inmates and the protection of the general public. *See also Turner v. Safley*, 482 U.S. 78, 84-85 (1987) (citing *Martinez* at 405, for the proposition that "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources"); *Arsberry v. Illinois*, 244 F.3d 558, 564 (7<sup>th</sup> Cir. 2001) (noting that "prisons are costly to build, maintain, and operate, and that the residents are not charged for their room and board" and holding that the appropriate "combination of taxes and user charges" imposed on inmates to "cover[] the expense of prisons is hardly an issue for the federal courts to resolve"), *cert. denied* 534 U.S. 1062 (2000); *Benzel v. Grammer*, 869 F.2d 1105, 1108 (8<sup>th</sup> Cir. 1989) ("[W]e are keenly aware that federal courts owe great deference to the expertise of the officials who perform the always difficult and often thankless task of running a prison.") (internal quotations and citations omitted), *cert. denied* 493 U.S. 895 (1989).

**B. Commission Substitution of its Judgment in Place of the Expert Judgment of Facilities Will Result in Unintended Negative Consequences Caused by the Reallocation of ICS Revenue From Facilities to Providers**

The Commission's reallocation of ICS revenue from Facilities to Providers through the elimination of site commissions will have unintended negative consequences that are inconsistent with the Commission's policy objectives in this proceeding. Such reallocation will be to the detriment of inmate welfare programs that are funded by Facilities using site commissions, including programs aimed at reducing recidivism and ensuring the security of inmates and the general public. It may also cause Facilities to decrease their spending on ICS, which will result in a decrease in the availability of ICS to inmates.

In the *Second FNPRM*, the Commission itself effectively acknowledges the danger of substituting its judgments regarding correctional facility policies for the judgment of the state and local expert agencies directly charged with administering correctional facilities. The Commission justifies its proposal to prohibit site commissions in large part on the Commission's determination that increased communications between inmates and their friends and families will reduce recidivism and result in concomitant benefits to the children of inmates.<sup>17</sup> However, the *Second FNPRM* acknowledges:

---

<sup>17</sup> See *Second FNPRM*, 29 FCC Rcd at 13171 ¶ 2 (explaining that reforming ICS will "make[] it easier for inmates to stay connected to their friends and families," which will reduce recidivism and help children of incarcerated parents); see also *id.* at 13231 ¶ 159 ("[C]ommenters have argued that inmate recidivism decreases with regular family contact. This not only benefits the public broadly by reducing crimes, lessening the need for additional correctional facilities and cutting overall costs to society, but also likely has a positive effect on the welfare of inmates' children.") (internal citations omitted); *id.* at 13241 (Statement of Commissioner Mignon Clyburn) ("But what the statistics do not show, is the personal impact: 2.7 million children, who have committed no crime, are being punished by an unjust and unreasonable inmate calling structure.... While an affordable calling structure will not solve every problem, by reforming the inmate calling regime, we can make a difference for struggling families wishing to maintain contact.").

[C]ommenters have argued that eliminating site commissions would directly affect jail revenues and lead to a reduction in recreational and rehabilitation services provided to inmates by facilities. Such a reduction could produce its own wave of negative aftereffects that offset some of the purported benefits.<sup>18</sup>

The Commission then seeks from commenters “any information or analysis that would help ... to quantify these costs or benefits.”<sup>19</sup>

This analysis, however, ultimately should not be conducted by the Commission. The Commission’s applicable expertise is limited to telecommunications matters. It is not realistic for the Commission to expect to become an expert on recidivism in the context of a single fast-tracked ICS proceeding.<sup>20</sup> Instead, as set forth above, the Commission should defer with respect to correctional policy matters to the state and local expert agencies and state and local legislatures that have direct experience with, and responsibility over, these matters. Their views in this proceeding are clear and uniform – the funds generated through site commissions are crucial for the maintenance of inmate welfare, and there will be real and significant harms to inmate welfare if the Commission’s actions in this proceeding further reallocate ICS revenues from Facilities to Providers through the elimination of site commissions.<sup>21</sup> For example:

---

<sup>18</sup> *Id.* at 13231-32 ¶ 159 (citations omitted).

<sup>19</sup> *Id.* at 13232 ¶ 159.

<sup>20</sup> *See id.* at 13173-74 ¶¶ 5-6 (“We therefore initiate this Second Further Notice ... to develop a record to adopt comprehensive, permanent ICS reforms *as expeditiously as possible.*”) (emphasis added); *see also id.* at 13242 (Statement of Commissioner Mignon Clyburn) (“Thus, it is imperative for us to move quickly to adopt an Order for total reform.”).

<sup>21</sup> *See* Letter from A. Travis Quesenberry, County Administrator, King George County, Virginia, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (dated Dec. 17, 2014) (“King George Comments”) (“If rate restrictions are imposed, further cuts to vital services, including valued services to our jail and prison inmate populations, undoubtedly will be necessary.”).

- The San Francisco Sheriff expends inmate welfare funds in three ways: (i) on salaries for prisoner legal services and program staff, who work with inmates to reduce legal barriers to their re-entry to society; (ii) recidivism reduction programming, such as survivor restoration programs, parent-child contact visitations, and post-release services for veterans; and (iii) inmate services and supplies, such as materials for the inmates' legal library and "comfort items" for indigent inmates. Due in large part to these programs, San Francisco's recidivism is well below the state average and has continued to drop over the last several years.<sup>22</sup> However, "because eliminating commissions would significantly reduce funding for programs targeted at reducing recidivism, the FCCs [*sic*] proposed changes to inmate calling rates could have the unforeseen consequence of increasing, rather than reducing recidivism."<sup>23</sup>
- "The [Idaho Department of Corrections] deposits phone commissions received into an inmate management fund (IMF) where such funds are used for the benefit of inmates through a variety of expenditures such as purchases of books, recreational supplies and equipment, copyright costs and supplies for inmate legal services, and educational offerings. This account also funds 27.5 staff in positions directly supporting inmate services such as librarians, inmate-accessible paralegals, religious services, teachers, and contract officers."<sup>24</sup>
- In accordance with Arizona statute, the Arizona Department of Corrections funds inmate education, work programs, and substance abuse treatment with monies derived from site commissions.<sup>25</sup>
- Utilizing site commissions, the Barnstable County Sheriff's Office in Massachusetts runs one of the six facilities nationwide recognized by the Department of Justice as a model for programs that support successful inmate reintegration. The facility was

---

<sup>22</sup> See Letter from Ross Mirkarimi, Sheriff, Office of the Sheriff City and County of San Francisco, to Pamela Arluck, Acting Division Chief, FCC, WC Docket No. 12-375, at 1-2 (dated Dec. 15, 2014); see also *id.* at 1 (noting that commissions are a significant portion of the budget for services targeted at reducing recidivism).

<sup>23</sup> See *id.* at 1.

<sup>24</sup> Letter from Brent D. Reinke, Director, Idaho Department of Correction, to Marlene H. Dortch, Secretary, FCC, WC Docket 12-375, at 3 (dated Nov. 20, 2014).

<sup>25</sup> Letter from Charles L. Ryan, Director, Arizona Department of Corrections, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (dated Dec. 31, 2014) ("Arizona DOC Comments") (citing A.R.S. § 41-1604.03). See also Letter from Dr. Glenn Mayle, Chair, Arizona Community College Coordinating Council, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (dated Oct. 28, 2014) (noting that critical inmate educational and career-training services are "made possible" through the site commissions received by the Arizona Department of Corrections).

also highlighted in President Obama’s annual drug treatment report for its “ground breaking introduction of Vivitol, an effective treatment for opiate addition.”<sup>26</sup>

- According to the sheriff in Marion County, Indiana: “I am proud of our funding of Jail Programs such as GED, anger management, parenting classes, and AA/NA activities. All of these are funded and supported by the Jail’s Commissary Fund. Marion County just recently created a new women’s program to help address the rising number of female inmates. All of the new programs, clothing, and improvements to the infrastructure were funded through the Commissary’s telephone monies.”<sup>27</sup>
- “The [Kansas Department of Corrections] utilizes site commissions to finance an array of programs ranging from sex offender treatment, GED and vocational education, substance abuse treatment, transitional housing, and cognitive skills development. As a result of these programs, Kansas has achieved a three-year recidivism rate of 34.8%—nearly half the rate cited by the Department of Justice.”<sup>28</sup> Moreover, “[l]osing programs funded by site commissions would result in 302 more admissions to Kansas prisons per year ... Increased call volume and any corresponding reduction in recidivism that can be attributed to such increases will not offset the increase in recidivism resulting from the lack of effective offender programing.”<sup>29</sup>
- The Sheriff of Riverside County, California employs site commissions to deliver: (i) residential substance abuse treatment; (ii) a comprehensive, cognitive-behavioral program that provides individualized education and guidance on substance dependency, rational thinking, recognizing and managing high risk situations, healthy relationships and job readiness; (iii) education and vocational service with courses that range from computer information systems to parenting and anger management; (iv) reentry services including job placement workshops and job referrals; and (v) other inmate support services such as indigent barber services, law libraries, and inmate welfare packs.<sup>30</sup> “Eliminating phone revenues will have an adverse effect on

---

<sup>26</sup> Letter from James M. Cummings, Sheriff, Office of the Sheriff Barnstable County (Massachusetts), to Tom Wheeler, Chairman, FCC, WC Docket No. 12-375, at 4 (dated Dec. 24, 2014) (“Barnstable Sheriff Letter”).

<sup>27</sup> Letter from John R. Layton, Sheriff, Marion County, to Tom Wheeler, Chairman, FCC, WC Docket No. 12-375, at 3 (dated Dec. 8, 2014) (“Marion County Letter”).

<sup>28</sup> Letter from Ray Roberts, Secretary of Corrections, Kansas Department of Corrections, to the Office of the Secretary, FCC, WC Docket No. 12-375, at 1-2 (dated Dec. 16, 2014) (“Kansas DOC Comments”).

<sup>29</sup> *Id.* at 2.

<sup>30</sup> Letter from Stan Sniff, Sheriff, Riverside County, to Tom Wheeler, Chairman, FCC, WC Docket No. 12-375, at 1-2 (dated Dec. 30, 2014).

the Riverside County Sheriff's Inmate Training and Education Bureau and the inmates we serve. The absence of these funds will drastically decrease our ability to maintain the level of education and treatment currently provided to our inmates; potentially increasing the recidivism rate within our county."<sup>31</sup>

Each of the uses of site commission funds referenced above constitutes a policy determination by a state or local governmental entity regarding the best means of funding and fostering inmate welfare, including the reduction of recidivism. It is difficult to justify a decision by the Commission, whose primary jurisdiction is limited to interstate and foreign telecommunications matters, that it knows better than these Facilities how to manage inmate welfare, including the provision of recidivism-reducing programs, by regulating how ICS revenues are allocated and more specifically by shifting the revenues from Facilities to Providers.

The potential for unintended negative consequences caused by the Commission's proposed reallocation of ICS revenues from Facilities to Providers in this proceeding, however, is not limited to increased recidivism. More fundamentally, the Commission's proposal in this proceeding has the potential to undermine the Commission's stated policy objective: to increase the access of inmates to ICS.<sup>32</sup> By hampering or even eliminating outright the ability of Facilities to recoup their real and significant ICS costs, the Commission may cause Facilities to reduce ICS their expenses. Making ICS economically infeasible to Facilities will directly reduce

---

<sup>31</sup> *Id.* at 3.

<sup>32</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand and Notice of Proposed Rulemaking, 17 FCC Rcd 3248, 3275 ¶ 70 (2002) (“*Order on Remand and NPRM*”) (“Section 276 was promulgated with the dual goals of promoting competition among payphone providers and promoting the widespread deployment of payphone service.”) (citation omitted).

the level and the availability of ICS to inmates.<sup>33</sup> Several Facilities and Providers already have made this point in the record:

- “If jails have absolutely no monetary incentive to put forth the time and resources needed to ensure that their inmates have access to a well-functioning and secure telephone platform, *some facilities, particularly small ones, may simply decline to allow or at least reduce the amount of telephone contact with family and friends.*”<sup>34</sup>
- “If ICS revenue to facilities is eliminated and ICS becomes a net cost to those facilities, local sheriffs will be faced with the choice of foregoing ICS or asking for taxpayer dollars to provide these services. Many sheriffs will make the choice to discontinue those services entirely, either because there are simply no public funds available to backfill the lost revenue from ICS, or because of political pressure.”<sup>35</sup>

---

<sup>33</sup> The courts have held that correctional facilities may reasonably restrict inmate access to ICS. *See, e.g., Chico-Polo v. Embarq Payphone Services, Inc.*, 2012 U.S. App. LEXIS 27237, at \*5 (6<sup>th</sup> Cir. Mar. 15, 2012) (“[T]elephone access within a prison may be reasonably restricted.”); *Almahdi v. Ashcroft*, 310 Fed. Appx. 519, 522 (3<sup>rd</sup> Cir. 2009) (“[R]egulations limiting telephone use by inmates have been routinely sustained as reasonable.”); *United States v. Footman*, 215 F.3d 145, 155 (1<sup>st</sup> Cir. 2000) (“Prisoners have no per se constitutional right to use a telephone....”); *Pope v. Hightower*, 101 F.3d 1382, 1384-85 (11<sup>th</sup> Cir. 1996) (upholding restrictions on inmate use of telephones imposed by a correctional facility); *Benzel*, 869 F.2d at 1108 (“Although in some instances prison inmates may have a right to use the telephone for communication with relatives and friends, prison officials may restrict that right in a reasonable manner.”); *Strandberg v. Helena*, 791 F.2d 744 (9<sup>th</sup> Cir. 1986) (holding that correctional facilities may impose reasonable restrictions on inmate access to telephones); *Fillmore v. Ordonez*, 829 F. Supp. 1544, 1563-64 (D. Kan. 1993), *aff’d*, 17 F.3d 1436 (10<sup>th</sup> Cir. 1994) (“The exact nature of telephone service to be provided to inmates is generally to be determined by prison administrators, subject to court scrutiny for unreasonable restrictions.”).

<sup>34</sup> Letter from Melody Weil, President, Combined Public Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (dated Dec. 22, 2014) (emphasis added) (“CPC Letter”).

<sup>35</sup> Letter from Sherriff John Bishop (Ret), Executive Director, Oregon State Sheriffs’ Association, to Tom Wheeler, *et al.*, Chairman, FCC, WC Docket No. 12-375, at 5 (dated Jan. 5, 2015) (“OSSA Letter”); *see also id.* at 6 (“In light of the Commission’s expressed interest in eliminating any site commission to facilities in the future – there is little incentive to facilities to continue to incur the avoidable costs of contracting for an ICS provider, the costs of monitoring and maintaining security related to ICS, and the costs of constant subpoenas and public records requests for inmate phone calls given that there will be no offsetting revenue stream from site commissions.”).

- “The proposed rates and rules including the elimination of commissions for the hosting facility will have the inevitable result of making inmate phone services economically unfeasible.”<sup>36</sup>
- “Correctional facilities incur significant administrative and security costs in supporting inmate calling services ... Without methods to offset their costs of managing ICS services, many correctional facilities understandably would likely reduce inmate calling, which is an outcome that undermines the Commission’s core objectives for ICS reform.”<sup>37</sup>
- “If site commissions are eliminated or reduced, and providing effective ICS comes at a net operating loss, correctional facilities may be forced to discontinue providing calling services.”<sup>38</sup>
- “Inmate calling services are a discretionary service allowed for the benefit of inmates and their families. If jails are not permitted to recover their costs, then some Sheriffs may significantly limit or eliminate altogether access to inmate phones in their jails.”<sup>39</sup>

Praeses is not suggesting that the Commission has no authority, or should not exercise its authority, over ICS. Because ICS has an interstate telecommunications component, certain aspects of ICS may fall within the Commission’s jurisdiction, although such jurisdiction is limited to that authority expressly granted to the Commission by the Communications Act. However, the Commission’s decision making process in connection with ICS matters should be limited to those considerations over which the Commission has primary jurisdiction – interstate

---

<sup>36</sup> Barnstable Sheriff Letter at 2; *id.* (asserting that, pursuant to Massachusetts General Law chapter 7 § 3B, “[t]he Sherriff’s Office *would not be able to allow a phone provider to provide a service to inmates* where the provider makes a profit and the Sheriff’s Office makes none”) (emphasis added).

<sup>37</sup> Letter from Thomas M. Dethlefs, Associate General Counsel, Regulatory, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (dated Aug. 14, 2014) (“CenturyLink Ex Parte”).

<sup>38</sup> Letter from Jerry Jacobs, President, Consolidated Telecom, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 7 (dated Dec. 19, 2014) (“CTEL Comments”).

<sup>39</sup> Letter from Mary J. Sisak, Counsel to the National Sheriff’s Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (dated Nov. 21, 2014) (“Sisak Ex Parte”).

telecommunications. Further, the Commission should not attempt to regulate the allocation of ICS revenues between Facilities and Providers by shifting revenues to Providers and thereby depriving Facilities of funding they use to administer inmate welfare. Further, the Commission should not purport to holistically evaluate, and should not base its decision making on, important policy considerations that are far afield from the Commission's expertise, such as how and whether to maximize inmate access to ICS, general inmate welfare, the safety of the general public, the best means of reducing recidivism, and the contractual arrangements between Providers and Facilities.<sup>40</sup>

**C. The Communications Act Does Not Grant the Commission Authority to Regulate Site Commissions**

Public policy considerations weigh strongly in favor of Commission deference in this instance because the Commission's jurisdiction and authority to regulate the payment of site

---

<sup>40</sup> For this reason, the Commission should not attempt to dictate to Facilities the manner in which they administer their ICS environments by requiring Facilities to contract with multiple Providers. *See Second FNRPM*, 29 FCC Rcd at 13186 ¶ 35, 13216-17 ¶¶ 114-15. The Commission cannot point to any authority provided to it in the Communications Act that enables the Commission to require Facilities to outsource their ICS functions to third-party Providers in the first place. Therefore, the Commission certainly does not have authority to require Facilities to contract with multiple Providers. Even if the Commission had such authority, however, the Commission should refrain as a policy matter from taking this action. It would be an inefficient use of Facilities' scarce resources to require Facilities to negotiate contracts with, and devote personnel to supervising, multiple Providers. Further, this would require the inefficient deployment of redundant ICS infrastructure at each Facility, which ultimately would result in higher inmate ICS costs. *See OSSA Letter* at 6 (noting the significant additional time and expense and increased security risk of a potential multiple provider system); Letter from April Grady, Contracts Management Bureau Chief, Business Management, Montana Department of Corrections, to FCC, WC Docket No. 12-375, at 2 (dated Dec. 29, 2014) ("While it is possible to enter into contracts with multiple providers, security and intelligence functions are more successful when all on the same system."); Arizona DOC Comments at 3 ("[I]t makes no sense to operate multiple ICS providers in a prison system."); Letter from A. Dale Pinkerton, *et al.*, Chairman, County of Butler Prison Board, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (dated Dec. 8, 2014) ("Forcing us to sign contracts with multiple phone providers will create a huge burden for us and make it astronomically more difficult for us to maintain security.").

commissions by Providers to Facilities is questionable at best.<sup>41</sup> The statutory provisions to which the Commission cites in the *Second FNPM* do not provide the Commission with the broad authority that it seeks in this proceeding to overtly regulate the contractual relationships between Facilities and Providers. Moreover, even if such authority could be found in the Communications Act, the Commission foreclosed its authority to regulate site commissions by unambiguously determining that site commissions do not represent legitimate ICS costs that can be considered when setting ICS rates and instead are paid by Providers out of their ICS profits.

1. *Neither Section 201(b) Nor Section 276 Provides the Commission With Authority to Regulate Site Commissions*

Neither Section 201(b) nor Section 276 of the Communications Act<sup>42</sup> was intended by Congress to provide the Commission with authority over the payment of site commissions. The Commission's effort to find such authority in these statutes is unavailing and unlikely to be sustained on judicial appeal.<sup>43</sup> As an initial matter, Section 201(b) applies only to interstate communications services and therefore cannot provide the Commission with any authority to regulate charges and practices related to intrastate services, including intrastate ICS.<sup>44</sup>

---

<sup>41</sup> Certain Providers that now support the Commission's proposal to prohibit the payment of site commissions previously argued before the D.C. Circuit that the Commission had no authority to do so. For example, Securus Technologies, Inc. told the court: "The decision to impose site commissions lies in the authority of state and local governments. In preventing the payment of site commissions, the FCC is changing the manner in which facilities operate and the services that they can provide. This action is beyond the FCC's purview." Securus Technologies, Inc. Emergency Motion for Stay of FCC Order Pending Review at 14, *Securus Techs. v. FCC*, Case No. 13-1280 (D.C. Cir. filed Nov. 25, 2013).

<sup>42</sup> 47 U.S.C. §§ 201(b), 276.

<sup>43</sup> The D.C. Circuit stayed three rules adopted in the *ICS Report and Order*. Order, *Securus* (D.C. Cir. Jan. 13, 2014) (*pets. for stay granted in part*). The case is currently in abeyance. Order, *Securus* (D.C. Cir. Dec. 16, 2014) (holding consolidated cases in abeyance).

<sup>44</sup> Section 201(b) applies to "[a]ll charges, practices, classifications, and regulations for and in connection with *such communications service*." 47 U.S.C. § 201(b) (emphasis added). The

Even with respect to interstate ICS, Section 201(b) only provides the Commission with authority to prohibit unreasonable “charges, practices, classifications, and regulations *for and in connection* with [interstate] communications service[s].”<sup>45</sup> The payment of site commissions by Providers to Facilities does not qualify as a charge, classification, or regulation. Although site commission payments may qualify as a “practice” of Providers in the most generic sense of the word, the Commission effectively has found that it is not a practice “for and in connection” with interstate communications. Specifically, the Commission determined that site commissions “are simply payments made for a wide range of purposes, most or all of which *have no reasonable and direct relation to the provision of ICS.*”<sup>46</sup> Clearly, the payment of site commissions cannot be “for and in connection” with ICS for purposes of Section 201(b) and at the same time, in the Commission’s words, “have no reasonable and direct relation to the provision of ICS.” Thus, Section 201(b) also does not provide the Commission with authority to regulate, much less prohibit, the payment of site commissions.

Similarly, Section 276 does not provide the Commission with authority to regulate or ban site commissions. As an initial matter, Section 2(b) of the Communications Act limits the scope of the Commission’s authority under Section 276 to interstate telecommunications, and therefore

---

words “such communications service[s]” refer in context to Section 201(a), which applies to “interstate or foreign communication by wire or radio.” 47 U.S.C. § 201(a). Therefore, neither provision provides the Commission with any authority over intrastate communications services. *See also* 47 U.S.C. § 152(b) (“[N]othing in this [Act] shall be construed to apply or to give the Commission jurisdiction with respect to ... charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate* communication service by wire or radio of any carrier.”) (emphasis added).

<sup>45</sup> 47 U.S.C. § 201(b).

<sup>46</sup> *ICS Report and Order*, 28 FCC Rcd at 14136 ¶ 55 (emphasis added) (citation omitted).

Section 276 cannot provide the Commission with authority to regulate intrastate ICS.<sup>47</sup> More fundamentally, however, Congress made clear when it adopted Section 276 that the statute was intended to “prohibit cross-subsidization between a [Bell Operating Company’s (“BOC”)] telephone exchange or exchange access service and its payphone and telemessaging services,”<sup>48</sup> which has nothing to do with ICS. The text of the statute and its legislative history are directed at preventing BOCs from taking anticompetitive actions against competitive payphone service providers (“PSPs”), and only mention inmate payphones in passing.<sup>49</sup> Tellingly, the *Second*

---

<sup>47</sup> Section 2(b) of the Communications Act makes explicitly clear that “nothing in this [Act] shall be construed to apply or to give the Commission jurisdiction with respect to ... charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.” 47 U.S.C. § 152(b). The U.S. Supreme Court has confirmed that Section 2(b) means what it says: “[The Communications] Act grants to the FCC the authority to regulate ‘interstate and foreign commerce in wire and radio communication’ while expressly denying that agency ‘jurisdiction with respect to ... intrastate communications service.’” *Louisiana PSC v. FCC*, 476 U.S. 355, 360 (1986) (citations omitted) (emphasis added).

<sup>48</sup> H.R. Rep. No. 104-458 at 157-158 (1996) (Conf. Rep.) (“Conference Report”). The legislative history focuses almost exclusively on BOCs. Among other things, it states: (i) that the statute “prohibits a BOC from discriminating between affiliated and nonaffiliated payphone and telemessaging services, under rules set forth by the Commission;” (ii) that “[t]he Commission also is directed to determine whether ... it is appropriate to require the BOCs to provide payphone service or telemessaging services through a separate subsidiary that meets the requirements of new Section 252;” and (iii) that the statute “prohibits BOCs from cross-subsidizing and from preferring or discriminating in favor of their own payphone operations.” *Id.* at 158. In addition, the House amendment to Section 276 “directs the Commission to adopt rules that eliminate all discrimination between BOC and independent payphones and all subsidies or cost recovery for BOC payphones from regulated interstate or intrastate exchange or exchange access revenue. The BOC payphone operations will be transferred, at an appropriate valuation, from the regulated accounts associated with local exchange services to the BOC’s unregulated books.” *Id.* By contrast, inmate payphones are not discussed in the legislative history.

<sup>49</sup> Section 276(d) defines the term “payphone service” to include “the provision of inmate telephone service in correctional institutions.” 47 U.S.C. § 276(d); *see also* Conference Report at 158 (reciting the definition of “payphone service” set forth in the statute). The mere fact that the term “payphone service” encompasses inmate payphones does not alter the intended scope of the statute, which is limited to protecting competitive payphone providers against certain anti-

*FNRPM* never even mentions BOCs because they have no relevance to the instant proceeding. If Congress had intended Section 276 to provide the Commission with plenary authority to regulate all aspects of the provision of ICS, Congress would have included at least some language in the statute stating as much. It did not. The Commission’s aggressive interpretation of the statute does not change this fact.

Moreover, even if Section 276 could properly be interpreted to authorize the Commission to impose comprehensive ICS rate regulation on Providers, which it cannot, the statute still would not provide the Commission with authority to prohibit Providers from sharing their profits with Facilities.<sup>50</sup> Section 276(b)(1)(A) grants the Commission authority to “*establish a per call compensation plan* to ensure that all payphone service providers are fairly compensated.”<sup>51</sup> The Commission now suggests in the ICS context that Section 276(b)(1)(A) authorizes the Commission to ban payments by Providers to third parties for certain necessary inputs, such as access to Facilities for the placement of inmate payphones. This interpretation stretches the statute beyond the breaking point. The prohibition of site commissions cannot legitimately be characterized as a “per call compensation plan.” In addition, nothing in the statute suggests that Congress intended to allow the Commission to ensure that PSPs (including Providers) receive

---

competitive actions by BOCs. The inclusion of inmate payphones in the scope of the definition does not somehow transform the basic purpose of the statute.

<sup>50</sup> Although the statute references “location providers,” which presumably would include Facilities, the only operative language in the statute related to location providers merely provides that payphone service providers, which includes ICS Providers, have “the right to negotiate with the location provider[s]” regarding the identity of the carrier that carries the payphone service provider’s IntraLATA calls. 47 U.S.C. § 276(b)(1)(E). This statement confirms that Congress intended for payphone service providers to negotiate contracts with location providers, such as the contracts between ICS Providers and Facilities. However, Section 276(b)(1)(E) in no way provides the Commission with any authority over site commissions.

<sup>51</sup> 47 U.S.C. § 276(b)(1)(A) (emphasis added).

“fair compensation” by outright prohibiting third parties (including Facilities) from charging for necessary inputs, such as site commissions for access to locations for the placement of payphones.

Ultimately, the Commission’s interpretation in this proceeding of Sections 201(b) and 276(b)(1)(A) of the Communications Act has been turned on its head. Instead of interpreting the statutes based on their text and legislative history, the Commission determined in advance what result it desired to achieve and then aggressively interpreted the statutes to provide the Commission with its desired authority. This is not an appropriate approach to statutory interpretation. Based on their text and legislative history, Sections 201(b) and 276(b)(1)(A) of the Communications Act were never intended by Congress to provide the Commission with plenary authority over ICS.

2. *The Commission Does Not Have Authority to Regulate the Use by Providers of Their Profits*

The Commission repeatedly and unambiguously has held that “site commissions payments are an apportionment of [Provider] profits” and do not represent legitimate Provider costs.<sup>52</sup> Even assuming, *arguendo*, that the Commission has authority to regulate *ICS rates*

---

<sup>52</sup> *Second FNPRM*, 29 FCC Rcd at 13173 ¶ 4 (citation omitted); *see also id.* at 13176 ¶ 10 (“The Commission reaffirmed previous findings that site commission payments were not costs but ‘profit.’ As a result, the Commission determined that site commission payments ‘were not part of the cost of providing ICS and therefore not compensable in interstate ICS rates.’”) (citations omitted); *ICS Report and Order*, 28 FCC Rcd at 14135 ¶ 53 n.197 (“In this Order we find that site commissions are not recoverable through interstate ICS rates because the record makes clear that they are not a direct cost of providing interstate ICS.”); *id.* at 14135 ¶ 54 (“[W]e reaffirm the Commission’s previous holding and conclude that site commission payments are not part of the cost of providing ICS and therefore not compensable in interstate ICS rates.”) (citations omitted); *Order on Remand and NPRM*, 17 FCC Rcd at 3262 ¶ 38 (“[C]ommissions ... represent an apportionment of profits between the facility owners and the providers of the inmate payphone service.”); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545, 2562 ¶ 37 n.72 (1999) (“We conclude that these locational rents should be treated as a form of profit rather than a cost.”).

under the legal theories set forth in the *Second FNPRM*, no party to this proceeding has asserted any meaningful legal authority under which the Commission may regulate how Providers spend their *profits*. Authority to regulate ICS rates, and thereby limit the level of Providers' profits, is not the same as authority for the Commission to dictate the use by a Provider of its profits. Once the Commission determined that site commissions paid by Providers to Facilities constitute Provider profits rather than legitimate ICS costs recoverable through ICS rates, the Commission relinquished any authority that it may otherwise have had over such site commissions. The Commission can no more direct a Provider not to share its profits with Facilities than it can direct the Provider not to share its profits with its shareholders.

In the *Second FNPRM*, the Commission attempts to explain away this fundamental bar to Commission regulation of the use by Providers of their profits to pay site commission's to Facilities. According to the Commission:

[I]f a correctional institution were to self-provision ICS and to seek to charge rates that include an amount that would be deemed a site commission as part of its profits, above and beyond a normal rate of return, such conduct could be directly addressed by Commission regulation of ICS rates to limit rates to a level that ensures fair compensation, but no more.<sup>53</sup>

This reasoning is unavailing. If a Facility self-provisions ICS and, in doing so, earns an outsized profit "above and beyond a normal rate of return," then the Commission may have authority to regulate the ICS rates charged by the Facility to prevent the Facility from earning such an outsized profit in the future. It does not, however, follow that the Commission has authority to regulate the Facility's *use* of its profit, irrespective of whether the profit is outsized or a normal rate of return.

---

<sup>53</sup> *Second FNPRM*, 29 FCC Rcd at 13185 ¶ 31.

The same holds true of profits earned by Providers. The Commission may have authority to regulate interstate ICS rates to prevent Providers from earning outside ICS profits, but the Commission does not have authority to dictate to Providers how they *use* any profits that they generate. Consequently, by unambiguously determining that site commissions constitute Provider profits, the Commission eliminated its authority to regulate the payment of site commissions by Providers.

#### **IV. ANY ACTION BY THE FCC IN THIS PROCEEDING MUST ENABLE FACILITIES, AT MINIMUM, TO RECOVER THEIR ICS COSTS**

As set forth above, the Commission should refrain from further regulating site commissions and consequently diminishing Facilities access to vital funds which are used to support inmate welfare and reduce recidivism. It should not attempt to substitute its own judgment for the expert judgment of the Facilities with respect to how to allocate ICS revenues to best balance the competing priorities intrinsic to maintaining inmate welfare in a budget constrained environment. Such deference is especially appropriate here because it is unlikely that the Commission even has authority to regulate site commissions.

However, if the Commission nevertheless insists on prohibiting site commissions,<sup>54</sup> it must provide the Facilities with an alternative mechanism that enables them to, at minimum,

---

<sup>54</sup> In the context of its proposal to prohibit site commissions, the Commission defines the term “site commission” broadly to encompass not just monetary payments by Providers to Facilities, but also any type of in-kind payment or other product or service of value. *Second FNPRM*, 29 FCC Rcd at 13187 ¶ 37. This proposal is unworkable because it requires the Commission to undertake an impossible line-drawing exercise. Facilities’ contracts with Providers are complex, multi-faceted arrangements. The agreements regularly require Providers to provide a wide variety of ICS-related services. It will not be possible for the Commission (or for Facilities and Providers) to determine which such services are permissible and which constitute impermissible in-kind site commissions. For example, many Facilities require Providers to provide certain advanced ICS features and capabilities or to allow free calls by indigent inmates or by inmates to public defenders. It would be contrary to the public interest for the Commission to treat these contract obligations, which directly benefit inmates, as impermissible in-kind site commissions and therefore prohibit them.

recoup their costs of providing inmates with access to ICS.<sup>55</sup> The record in this proceeding demonstrates beyond doubt that the Facilities bear real and significant costs to provide ICS, although these costs necessarily vary substantially among Facilities. There can be no justification for the adoption of an ICS regulatory scheme that is intended to ensure that Providers receive fair compensation for the provision of ICS but that actively deprives Facilities of any compensation, including the ability merely to recoup their costs.

**A. Facilities Incur Real and Significant Costs to Provide ICS to Inmates**

Contrary to the Commission’s uncertainty as to whether Facilities incur ICS costs,<sup>56</sup> there can be no doubt that Facilities bear real and significant costs to provide inmates with access to ICS, although these costs vary dramatically among Facilities based on a variety of factors. Facilities, and not Providers, have the ultimate responsibility for providing ICS to inmates while maintaining the safety of the general public and preventing criminal activity.<sup>57</sup> Most choose to outsource some of this responsibility to third-party Providers, but each Facility independently determines which aspects of ICS to outsource and which to administer internally. It has been Praeses’ experience that most Facilities contract with a Provider to administer some portion of

---

<sup>55</sup> The Commission appears to agree that the Facilities should be provided with a mechanism to at least recoup their costs to provide ICS to inmates. *See ICS Report and Order*, 28 FCC Rcd at 14135-36 ¶ 54 n.203 (“[W]e cannot foreclose the possibility that some portion of payments from ICS providers to some correctional facilities may, in certain circumstances, reimburse correctional facilities for their costs of providing ICS. As a result, we provide several avenues for exploring this issue further.”).

<sup>56</sup> *See Second FNPRM*, 29 FCC Rcd at 13179 ¶ 19 (“We also seek comment on *whether* facilities incur costs in the provision of ICS and, *if so*, how facilities should recover these costs ....”) (emphasis added); *id.* at 13180 ¶ 21 (“[W]e seek comment on *whether* correctional institutions incur any costs in the provision of ICS ....”) (emphasis added); *id.* at 13189 ¶ 42 (“The record is mixed on *whether*, and, *if so*, how much facilities spend on ICS.”) (emphasis added); *id.* at 13189 ¶ 43 (“*To the extent the record indicates that* facilities incur costs related to the provision of ICS ....”) (emphasis added).

<sup>57</sup> *See supra* III.A.

the Facilities' ICS environments, such as the installation of inmate telephones or the processing of inmate calls, but that all Facilities maintain direct responsibility for other portions, often including, among other things, call monitoring and a variety of other vital security functions.<sup>58</sup> The aspects of a Facility's ICS environment that it directly administers always impose costs on the Facility,<sup>59</sup> and the Commission has no control over the degree to which a Facility chooses to operate its ICS environment.<sup>60</sup> More fundamentally, a Facility's administrative costs to procure and supervise a Provider, standing alone, represent real and significant expenditures by the Facility. This includes preparing and issuing an RFP for ICS, evaluating RFP responses submitted by Providers, negotiating an ICS contract with the winning bidder, and developing a

---

<sup>58</sup> This fact is consistent with GTL's assertion that one Facility that it serves allocates 42 full-time employees to the provision of ICS security, while another similarly sized Facility allocates less than one full-time employee. *See* Letter from Cherie R. Kiser, Counsel to GTL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, Att. 2 at 5 (dated Sept. 19, 2014) ("GTL Ex Parte").

<sup>59</sup> In its *ICS Report and Order*, the Commission provides a list of ICS costs often incurred by Providers that the Commission deems to be compensable costs for purposes of a demonstration by a Provider that its ICS rates are cost-based. *See ICS Report and Order*, 28 FCC Rcd at 14134 ¶ 53 & n.196. Each of these costs could be incurred by a Facility depending on which aspects of its ICS environment a Facility determines to self-provision. If the Commission has determined that such ICS costs should be recoverable by a Provider, then these ICS costs also must be recoverable by a Facility to the extent that the Facility incurs the costs rather than the Provider with which the Facility contracts.

<sup>60</sup> Although the Commission has no control over the Facilities' determination regarding which aspects of ICS to outsource to Providers and which to administer, this proceeding may have a significant impact on that determination by Facilities going forward. If the Commission adopts regulations in this proceeding purporting to govern the contractual arrangements between Facilities and Providers, such regulations may cause Facilities to reevaluate the degree to which they choose to rely on Providers. Rather than foregoing all ICS revenue – funding that supports important inmate welfare programs, Facilities may choose to manage their ICS environments in-house in an effort to preserve this funding source. Accordingly, even if it was possible to develop an understanding of the typical ICS costs incurred by Facilities (which, as discussed below, is probably not the case), the magnitude of these costs is likely to change over time as a direct result of any action that the Commission takes in this proceeding to regulate the contractual arrangements between Facilities and Providers.

supervisory structure to monitor the Provider's compliance with the contract on an ongoing basis.<sup>61</sup>

Moreover, the Facilities already uniformly have asserted in this proceeding that they incur ICS costs. For example:

- “Certainly [Oregon Department of Corrections (“ODOC”)] Inmate Phone Service (IPS) providers incur costs associated with providing the equipment and services necessary to allow for effective communication. In addition, the correctional facilities in which these services are provided also incur costs. Similar, to all of ODOC’s programs, there is a level of security that must be in place at all times to monitor activities and behaviors while these services are being used. When issues of concern are identified or observed, there may be investigations, review, and/or disciplinary actions that become necessary. These responsibilities, along with the general office administration associated with IPS, have a cost.”<sup>62</sup>
- According to the sheriff’s office for Johnson County, Iowa: “We currently have in place a collect phone system which allows inmates to connect to friends and families to continue a connection to their communities. This is a benefit to the inmates but it comes at a monetary cost to our office. We have to have the staff to monitor these calls so that inmates are not using the system in an incorrect or illegal way. We have staffing costs for the monitoring and maintenance of the equipment and a whole variety of indirect costs for this system.”<sup>63</sup>
- The National Sheriffs’ Association is currently conducting a cost survey of its members. “Preliminary results show costs to jails are significant.”<sup>64</sup>
- For one small county in California, operational expenses for ICS are approximately \$215,000 annually. “The costs included the following: staff-time for inmate

---

<sup>61</sup> Indeed, the fees that Praeses charges its Correctional Clients for its services are legitimate ICS costs incurred by the Correctional Clients.

<sup>62</sup> Letter from Colette S. Peters, Director, ODOC, to Tom Wheeler, *et al.*, Chairman, FCC, WC Docket No. 12-375, at 1-2 (dated Dec. 9, 2014).

<sup>63</sup> Letter from Lt. William Deatsch, Johnson County Sheriff’s Office, to FCC, WC Docket No. 12-375, at 1 (dated Dec. 18, 2014).

<sup>64</sup> Sisak Ex Parte at 2. *See also* Letter from James R. Wilson, Sherriff, Williamson County, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (dated Dec. 22, 2014) (“[L]ike all programs and services, there is a cost to providing inmate phone services.”).

movement; staff-time to provide technicians access for repairs; staff-time for monitoring calls; and staff-time to process billings/phones cards, etc.”<sup>65</sup>

- According to the sheriff’s office for Marion County, Indiana: “Jail telephone communications are closely monitored at the Marion County Jail. Costs associated with Jail telephones are high due to the wanton destruction, and unusual wear and tear. ... At the Marion County Jail, we have staff dedicated to making sure the telephones are in good repair. We have additional staff dedicated to ensure inmates do not rig the telephone system and gain access to outside lines that are not restricted. This is a constant and expensive endeavor. ... Perhaps one of the biggest expenses Sheriffs face from the use of inmate phones is monitoring and investigation.”<sup>66</sup>
- Letters also were filed with the Commission by a host of Facilities, each of which listed more than a dozen, and in some cases more than two dozen, discrete costs incurred by the Facility to offer ICS to its inmates. These Facilities included: the Mohave County (Arizona) Sheriff’s Office; Pinal County (Arizona) Sheriff’s Office; the Denton County (Texas) Sheriff’s Office; the Cayuga County (New York) Sheriff’s Office; Tuolumne County (California) Sheriff’s Office; a Hutchinson County (Texas) judge; the Graham County (Arizona) Sheriff’s Office; the Columbia County (Georgia) Detention Center; the Charlevoix County (Michigan) Sheriff’s Office; the Greene County (Missouri) Sheriff’s Office; the Office of the Sheriff, County of Niagara (New York); a Hemphill County (Texas) judge; a Panola County (Texas) judge; a San Augustine County (Texas) judge; a Terry County (Texas) judge; a Washington County (Texas) judge; the Wheeler County (Texas) Sheriff’s Office; a Garza County (Texas) judge; and the Yell County (Arizona) Sheriff’s Department.<sup>67</sup>

---

<sup>65</sup> Letter from Raymond Loera, Sheriff/Coroner/Marshal, Imperial County Sheriff’s Office, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (dated Dec. 30, 2014).

<sup>66</sup> Marion County Letter at 2.

<sup>67</sup> Letter from Jim McCabe, Sheriff, Mohave County Sheriff’s Office, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (dated Dec. 12, 2014); Letter from Lt. Anthony Shepardson, Jail Director, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (dated Dec. 12, 2014); Letter from William Travis, Sheriff, Denton County Sheriff’s Office, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (dated Dec. 8, 2014); Letter from David S. Gould, Sheriff, Cayuga County Sheriff’s Office, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (dated Dec. 3, 2014); Letter from Lt. Tamara McCaig, Jail Commander, Tuolumne County Sheriff’s Office, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (dated Dec. 2, 2014); Letter from Faye Blanks, County Judge, Hutchinson County, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (dated Dec. 2, 2014); Letter from Tim Graver, Commander, Graham County Sheriff’s Office, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (dated Dec. 1, 2014); Letter from Columbia County Detention Center, Appling, Georgia, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Dec. 1, 2014); Letter from W.D. Scheider, Sheriff, Charlevoix County Sheriff’s Office, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (dated Dec. 1, 2014); Letter from Jim C. Arnott, Sheriff, County of Greene, to Marlene H. Dortch, Secretary, FCC, WC Docket No.

- According to the Oregon State Sheriffs' Association, it bears, *inter alia*, "the cost of creating a Request for Proposals and negotiating with the selected vendor to arrive at a contract.... [This] process often takes several months from the initial publication of the RFP to the final signature and many hours of staff and attorney time. After an ICS vendor is selected, the facility then has to conduct detailed background checks to make sure that the employees of the provider can work within the secured facility. This takes a good deal of staff time, and the costs are borne by the facility. ... Any time a facility changes ICS providers, or the provider upgrades ICS software or equipment, there are direct costs to the facility in the form of training staff on new technology. These costs often involve staff overtime, as there is no extra time within a shift that is available for this type of training. ... To the extent that facilities are able to monitor calls, there are personnel and administration costs associated with monitoring, investigating and prosecuting these crimes that are directly related to ICS. ... [Due to request for copies of inmate calls, m]any Oregon jails have one or more employees who spend a large portion of their time responding to these requests."<sup>68</sup>

By contrast, it appears that only a single entity has asserted that Facilities incur no significant ICS costs.<sup>69</sup> In addition to being contradicted by the filings of the many Facilities set forth above, this position also has been contested by the majority of other Providers.<sup>70</sup>

---

12-375 (dated Dec. 1, 2014); Letter from James R. Voutour, Sheriff, County of Niagara, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (dated Dec. 1, 2014); Letter from George Briant, County Judge, County of Hemphill, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (dated Dec. 1, 2014); Letter from David L. Anderson, County Judge, Panola County, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (dated Dec. 1, 2014); Letter from Samye Johnson, County Judge, San Augustine County, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (dated Dec. 1, 2014); Letter from J. D. Wagner, County Judge, Terry County, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (dated Dec. 1, 2014); Letter from John Brieden, County Judge, Washington County, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (dated Dec. 1, 2014); Letter from Carrie Gaines, Jail Administrator, Wheeler County Sheriff's Office, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (dated Dec. 1, 2014); Letter from Lee Norman, County Judge, Garza County, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (dated Dec. 1, 2015 [*sic*]); Letter from John M. Foster Jr, Chief Deputy, Yell County Sheriff's Department, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (dated Nov. 25, 2014).

<sup>68</sup> OSSA Letter at 2-3.

<sup>69</sup> See *Second FNPRM*, 29 FCC Rcd at 13188 ¶ 40 (citing Comments of Martha Wright, *et al.*, WC Docket No. 12-375, at 17-18 (dated Mar. 25, 2013) ("Wright Petitioners Comments") for the proposition that certain "parties question whether the facilities incur any additional costs for the provision of ICS"). The Commission states in the *Second FNPRM*, that "the record is mixed on

Thus, there can be no doubt that Facilities incur real and significant costs to provide ICS to inmates. There is uniform consensus regarding this issue among the Facilities, which are the parties best suited to address the issue. Further, there is no meaningful evidence on the record that Facilities do not incur ICS costs. Accordingly, the Commission, at minimum, must provide a mechanism for Facilities to recover these costs. It is not possible to justify an ICS regulatory regime that is premised on the need to ensure that Providers receive fair compensation for their provision of ICS but that actively prevents Facilities from being compensated even for their ICS costs.

**B. ICS Costs Vary Dramatically Among Different Facilities for a Wide Variety of Reasons**

Estimates of ICS costs incurred by Facilities that have been filed on the record to date vary dramatically because Facilities' ICS costs are far from uniform. As discussed above, each Facility determines the degree to which it will directly administer ICS (often in connection with security functions) versus the degree to which it will rely on a third-party Provider. Because of this fact standing alone, it is not clear that it will be possible for the Commission to develop a useful average or proxy for Facilities' ICS costs generally. The ICS costs incurred by a Facility

---

*whether, and if so, how much facilities spend on ICS.*" *Second FNPRM*, 29, FCC Rcd at 13189 ¶ 42 (emphasis added). Even if this statement was accurate at the time that the Commission adopted it, it is not now. The record overwhelmingly demonstrates that Facilities incur ICS costs. Whereas the record contains only a single bare and conclusory statement that Facilities do not incur costs, it contains filings by dozens of Facilities, Providers, and other interested parties attesting to the fact that Facilities bear real and significant ICS costs.

<sup>70</sup> See, e.g., Letter from William L. Pope, President, Network Communications International Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (dated Dec. 17, 2014) ("NCIC Ex Parte") ("[T]he average county/parish/city jail does not have onsite [Provider] technicians and may be in a remote location, where the [Facilities'] staff will often handle as much as 90% of the onsite work."); see generally Letter from Thomas M. Dethlefs, Associate General Counsel-Regulatory, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (dated Sept. 19, 2014); GTL Ex Parte at Att. 2 at 5.

that manages most of its ICS environment necessarily will be much higher than the ICS costs incurred by a Facility that may be required to oversee less of its ICS environment.

Even if all Facilities struck the same balance between directly administering and outsourcing their ICS environments, which they do not and cannot do, ICS costs still would vary among Facilities because of differences in the characteristics of the Facilities and because of differences in the Facilities' ICS environments. Praeses identified some of these differences in the course of its evaluation of the ICS costs of a group of its Correctional Clients. These include:

- *Type of Facility.* The costs of ICS vary among different type of Facilities, including local and county jails, private incarceration facilities, and state-level departments of correction, as well as the minimum, medium, and maximum security levels within each. Not surprisingly, large Facilities, such as state-level departments of correction benefit from their scale when deploying and administering ICS environments in a way that generally is not possible for much smaller local jails. In addition, privately run Facilities often have more ICS requirements and compliance procedures than Facilities directly administered by government agencies. Further, certain governmental jurisdictions impose substantial ICS regulatory requirements on their Facilities, which can be costly to track and comply with, while other governmental jurisdictions tend to provide individual Facilities with greater discretion regarding how they operate their ICS environments.
- *Location.* As with telecommunications generally, it is less expensive to provision ICS at urban Facilities and Facilities close to urban centers than it is to provision ICS at rural and remote Facilities. In addition to the higher cost of deploying telecommunications infrastructure to rural and remote Facilities, it also is more expensive and time consuming to maintain this infrastructure. It takes longer for Provider technicians to travel to rural and remote Facilities to make repairs and troubleshoot problems. Therefore, some Facilities are unable to wait for the arrival of a Provider technician to address service interruptions and network outages and instead are forced to troubleshoot the matter using their own on-site staff. This may require the Facility to hire specialized telecommunications personnel or to dedicate its resources to provide ongoing maintenance separate and apart from any maintenance services provided by the ICS Provider.
- *Calling options.* ICS costs vary depending on the nature of the calling options that a Facility offers to its inmates, which options may include, among others, collect calls, prepaid collect calls, prepaid card calls, debit accounts, call recipient debit accounts, free calls, speed dial, and voicemail. Facilities that provide only basic calling options to inmates incur significantly lower administrative costs than Facilities that offer more advanced and innovative calling options to their inmates.

- *Security features.* Different Facilities require different types of security features to be implemented into their ICS environments, such as, among others, varying (i) call recording, live monitoring, and retention technologies, (ii) levels of automated and manual call monitoring, and (iii) adoption of advanced security features such as voice biometrics. In addition, Facilities (in particular at the county level) spend a significant amount of time responding to law enforcement requests about inmate call recipients by compiling data, preparing reports, and providing court testimony in connection with ICS activity. Further, many Facilities (in particular statewide departments of correction) require inmates to register their call recipients as a security measure, which involves a variety of back-office administrative functions including review, management, and often data entry of each inmate's list of approved call recipients. Also, some Facilities have deployed new technologies that enable them to track the location of inmate call recipients. Moreover, inmates often attempt to bypass ICS security systems using cell phones at some Facilities, which requires the Facilities to monitor ICS usage trends to identify problematic cell phone usage.
- *Types of Inmates.* Certain types of inmates have unique telecommunications requirements. For example, a Facility housing mostly U.S. Immigrations and Custom Enforcement ("ICE") detainees tend to require additional involvement from staff to administer their pro bono ICS offerings. Similarly, local lockups that tend to have a very high level of inmate churn may incur much higher relative costs to register inmates for ICS than regional prisons that have a more stable inmate population.

Several Facilities and Providers already have acknowledged on the record the wide disparities in ICS costs that these and other factors can cause.<sup>71</sup> Further, the broad range of ICS costs incurred by Facilities that already have been filed in the record by certain Providers also demonstrates this proposition.<sup>72</sup>

Praeses surveyed its Correctional Clients regarding their ICS costs, and its survey also demonstrated the wide range of such costs among Facilities.<sup>73</sup> For purposes of the cost survey,

---

<sup>71</sup> See, e.g., CSSA Comments at 5 (identifying ICS cost factors such as facility size, inmate classification, and facility age); NCIC *Ex Parte* at 1 (noting facility staff responsibilities, and thus cost, often differ based on the size of the facility).

<sup>72</sup> *Second FNPRM*, 29 FCC Rcd at 13189 ¶ 42 (noting that two different Providers filed estimates of ICS security costs to Facilities that differed by more than an order of magnitude).

<sup>73</sup> As noted above, Praeses' Correctional Clients include a variety of different types of Facilities across the country including statewide department of corrections, small county jails, and private correctional facilities.

Praeses identified six high-level categories of recurring ICS costs incurred by its Correctional Clients (accounting, administrative, investigative/security, operational, regulatory compliance, and RFP/contracting) and one category of fixed ICS costs (loaded/capital costs).<sup>74</sup> Within these seven categories, Praeses identified more than 50 sub-categories associated with tasks that many Facilities regularly perform to manage ICS, including but not limited to:

- management of network and infrastructure,
- administration of debit, invoice reconciliation,
- inmate fraud research,
- review of monthly reporting,
- blocking and unblocking numbers,
- contract compliance,
- administering calling lists,
- coordinating issue resolution,
- pulling reports,
- call monitoring,
- call recording analysis,
- Prison Rape Elimination Act compliance,
- law enforcement requests and other cross-agency investigations,
- burning of calls,
- retrieval of call detail records,
- managing alerts on suspected activity,
- updating system users,
- voice biometric enrollments,
- data analytics,
- assisting in phone repair process (escorts, tests, etc.),
- PIN administration,
- responding to general public inquiries,
- responding to inmate requests and grievances,
- separation of privileged and therefore non-recorded calls,
- administering free calls and training,
- Americans with Disabilities Act compliance,
- ICE compliance,
- RFP evaluation,
- Provider interviews,
- ICS contract negotiation, and
- vendor transitions.

---

<sup>74</sup> A copy of the survey form used by Praeses is attached hereto as Attachment A.

Data sourced from Praeses' Correctional Clients that responded to the survey reveal significant and variable ICS costs incurred by these Correctional Clients.<sup>75</sup>

- The Correctional Clients' ICS costs averaged \$0.18 per minute with a standard deviation of \$0.12.<sup>76</sup>
- The Correctional Clients' ICS costs averaged \$1.88 per call with a standard deviation of \$1.05.
- The Correctional Clients' ICS costs averaged \$34.46 per inmate with a standard deviation of \$20.09.

The dramatic disparity on the record in ICS costs incurred by Facilities – disparities that vary by orders of magnitude – most likely represent a combination of two factors: (i) the actual ICS cost differentials among different types of Facilities attributable to the factors discussed above; and (ii) the fact that different parties are including different types of costs when conducting their evaluations and/or measuring and prorating such costs in different ways.

Accordingly, the Commission should collect standardized cost information from Facilities as an initial step in this process just as it did with Providers.<sup>77</sup> It would be arbitrary and capricious for

---

<sup>75</sup> Based on its analysis of the cost data provided to Praeses by its Correctional Clients, Praeses believes the majority of the Correctional Clients did not have sufficient time or resources to account for all of their ICS costs when completing the survey. Accordingly, Praeses believes that the averages most likely significantly underestimate the ICS costs of certain Correctional Clients.

<sup>76</sup> The standard deviation demonstrates the degree of variation in a data set. A standard deviation that is high relative to its associated average demonstrates a high level of variability amongst the data points underlying the average. In this instance, the ICS data in the text related to the Correctional Clients demonstrates that their ICS costs vary significantly.

<sup>77</sup> See *ICS Report and Order*, 28 FCC Rcd at 14172-73 ¶¶ 124-126; *Second FNPRM*, 29 FCC Rcd at 13174 ¶ 6 (“The Commission was unable to adopt comprehensive reform in the *Inmate Calling Report and Order and FNPRM* due to the limited data in the record and administrative notice limited only to interstate ICS.”). See also Letter from Robert Patton, Director, Oklahoma Department of Corrections, to Tom Wheeler, *et al.*, Chairman, FCC, WC Docket No. 12-375, at 2 (dated Jan. 6, 2015) (noting that the FCC dedicated significant consideration and resources to determining the actual cost of providing ICS by the vendors and urging FCC, if it decides to regulate site commissions, to allow for agencies to recover their ICS “associated costs via a well-

the Commission to adopt standardized cost recovery amounts or to cap Facilities' permissible cost recovery at some specified level without first having a better understanding of the Facilities' actual ICS costs.

Therefore, the Commission should develop a standardized, comprehensive cost survey to be completed by Facilities, including standardized cost measurement and proration procedures, and the Commission should collect and analyze cost data provided by the Facilities in response to the survey. Further, when developing this survey, the Commission should attempt to improve upon some of the deficiencies that it has identified with the cost submissions that it required of Providers.<sup>78</sup> The Commission also should collect information in the survey regarding, and take into account in any rules that it adopts, the different practices of Facilities with respect to which aspects of their ICS environments they directly manage and which they retain Providers to manage. As already has been demonstrated on the record both with respect to Facilities and Providers, without such Commission-imposed review of ICS cost data, it is not possible for any meaningful conclusions to be drawn about the ICS costs incurred by Facilities – other than that their costs are real and significant. Moreover, without such data, the Commission has no foundation on which to take any action to regulate ICS cost recovery by Facilities, whether through site commissions or some other cost-recovery mechanism.<sup>79</sup>

---

defined and frequently reevaluated administrative fee” and consult corrections professionals “when determining the method for calculating such a cost”).

<sup>78</sup> *Second NPRM*, 29 FCC Rcd at 13192 ¶ 50 (citing Letter from Lee G. Petro, Counsel to Martha Wright, *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (dated Sept. 17, 2014) (identifying inconsistent cost allocation among cost categories and different cost allocation methodologies among the cost submissions)).

<sup>79</sup> *See ICS Report and Order*, 28 FCC Rcd at 14172 ¶¶ 124-125 (“To enable the Commission to take further action to reform rates, including developing a permanent cap or safe harbor for interstate rates, as well as to inform our evaluation of other rate reform options in the Further

**C. If the Commission Prohibits Site Commissions, It Should Adopt a Per-Minute Facility ICS Cost Recovery Mechanism**

If the Commission ultimately determines to prohibit site commissions, the Commission must adopt an alternative mechanism by which Facilities can recoup their ICS costs.<sup>80</sup> Praeses proposes the Facility cost recovery mechanism outlined below.<sup>81</sup>

First, the Commission should provide broad guidance regarding the nature of overall ICS costs that are appropriately compensable via ICS rates. For example, the Commission could determine that all costs that Providers and Facilities would not incur but for their provision of ICS to inmates qualify as compensable ICS costs. In the alternative, the Commission could

---

Notice, we require all ICS providers to file data regarding their costs to provide ICS.”) (citation omitted).

<sup>80</sup> As an alternative to eliminating site commissions and adopting a mechanism in this proceeding for ICS cost recovery by Facilities, the Commission could address its concern that site commissions sometimes are not used by Facilities for inmate welfare programs in a manner that requires less regulatory intervention. Specifically, the Commission could require Facilities to segregate and deposit into an inmate welfare fund all site commissions payments received by the Facility to ensure that the site commissions are not used for any purpose other than inmate welfare programs, such as programs to reduce recidivism. At least one state apparently has made the policy determination that this is an appropriate approach. *See* Letter from John McMahan, Sheriff-Coroner, San Bernardino County Sheriff’s Department, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (dated Nov. 6, 2014) (“San Bernardino Comments”) (“California Penal Code Section 4025 statutorily mandates revenues generated from inmate telephone and commissary commissions be deposited into [California’s Inmate Welfare Fund]. Revenues are to be used for the direct benefit of inmates such as recreation, enhanced medical services, and programs.”).

<sup>81</sup> The most straightforward and least intrusive means from a regulatory perspective of enabling Facilities to recover their costs is to cap interstate and intrastate ICS rates, strictly regulate ancillary fees, and then permit Providers and Facilities to negotiate site commissions. This approach would prevent site commissions from driving overall ICS costs to inmates above the Commission-imposed ICS rates and ancillary fee caps, and would provide stability in overall ICS costs to inmates. However, Praeses acknowledges that this approach may be inconsistent with the Commission’s prior determination that site commissions are an apportionment of Provider profits and that ICS rates must be cost-based.

develop a cost matrix listing approved ICS cost categories that can be used by Facilities to determine their aggregate compensable ICS costs.

Second, each Facility will quantify its ICS costs in accordance with the Commission's guidance.<sup>82</sup> Each Facility will then divide this aggregate cost figure by the total number of minutes of ICS calls that the Facility anticipates that its inmates will make in the upcoming year based on the total minutes of ICS calls placed by its inmates during the prior year. This calculation will result in a separate per-minute ICS cost recovery amount for each Facility. Each Facility will file with the Commission on an annual basis its per-minute ICS cost recovery amount and will certify that it determined its aggregate ICS costs consistent with Commission guidance. To the extent that the Commission has specific concerns about a particular Facility's per-minute cost amount, the Commission can require the Facility to provide to the Commission the Facility's underlying cost and inmate usage data for further Commission review.

Third, each Facility will contractually require its Provider to add the Facility's per-minute cost recovery amount to whatever interstate and intrastate ICS rates the Provider is permitted to charge inmates pursuant to the Provider-focused ICS rate regulation adopted by the Commission in this proceeding.<sup>83</sup> The Provider will be required to remit to the Facility an amount equal to

---

<sup>82</sup> The Commission should provide Facilities with discretion to determine at what operational level to conduct this cost analysis. For example, a large department of corrections may choose to calculate its ICS costs at the department level if it centrally manages the ICS environments of its multiple correctional facilities or may choose to calculate ICS costs for its correctional facilities individually if the facilities tend to incur very disparate ICS costs.

<sup>83</sup> Assuming that the Commission requires Providers' ICS rates to be cost-based, then a Provider's ICS rate should be lower at a Facility that incurs higher ICS costs due to the Facility's self-provisioning of a greater portion of its ICS program. Consequently, the aggregate ICS rate at such Facility (*i.e.*, the combined per-minute Provider ICS rate and per-minute Facility cost recovery amount) should be roughly equivalent to what the aggregate ICS rate would be at the Facility if the Facility relied almost entirely on the Provider for the provision of ICS. In the latter scenario, the Provider would bear higher ICS costs and therefore would be able to impose

the Facility's per-minute cost recovery amount times the number of minutes of ICS calls placed by the Facility's inmates on a monthly or other agreed-upon basis.<sup>84</sup>

This approach to ICS cost recovery by Facilities has two primary advantages. First, it takes into account that ICS costs incurred by Facilities vary greatly among Facilities based on the factors discussed above, including certain characteristics of the Facilities and their inmate populations, as well as the degree to which Facilities directly manage ICS. By contrast, any per-minute Facility cost recovery amount that is adopted by the Commission to uniformly apply to all Facilities<sup>85</sup> is certain to shortchange many Facilities whose actual ICS costs exceed the Commission-mandated cost recovery amount (for example, because the Facility operates significant portions of its ICS environment), while overcompensating other Facilities. Second, by relying on a per-minute cost recovery mechanism, this approach will provide Facilities with

---

higher ICS rates, but the Facility's ICS costs, and therefore its per-minute cost recovery amount, would be lower.

<sup>84</sup> As an alternative, less administratively intensive means of permitting Facilities to recover their ICS costs through Providers, the Commission could require each Facility to stipulate in its ICS RFP the monthly dollar amount of the Facility's ICS costs and require the winning Provider to pay this amount to the Facility on a monthly basis. If all Providers responding to a Facility's RFP are required by the RFP to pay the Facility a specified dollar amount and are not permitted to offer the Facility an amount in excess of this figure, then the RFP process will not exert upward pressure on ICS rates or ancillary fees. Instead, each Facility would receive the identical ICS cost reimbursement irrespective of which Provider the Facility selects and some Providers might even offer lower, more competitive ICS rates and fees.

<sup>85</sup> See *Second FNPRM*, 29 FCC Rcd at 13189-90 ¶¶ 43-44. Adopting a waiver standard in an attempt to prevent these proposals from shortchanging Facilities that incur higher ICS costs would be sufficiently administratively burdensome, especially for smaller Facilities, as to be ineffective. Most Facilities, including all smaller Facilities, do not have the staff or expertise required to prepare and file such waiver requests. See generally, OSSA Letter at 5-6 (noting that small facilities "should not be forced to undergo the time and expense of seeking a waiver"). Even if they did, it is unlikely that the Commission has resources available to address hundreds of such waiver requests on an annual basis. Thus, any per-minute Facility cost recovery mechanism adopted by the Commission must take into account the dramatically variable nature of the ICS costs incurred by individual Facilities.

an incentive to place downward pressure on the ICS rates and ancillary fees proposed by Providers during the RFP process because it will be in the Facility's interest to maximize inmate call volumes. As a result, Praeses' proposal will incent Facilities to greatly consider Providers that propose the lowest possible ICS rates and the lowest and fewest ancillary fees.

**D. The Commission Should Provide Facilities and Providers Adequate Time to Recalibrate Their Contractual Arrangements to Take Into Account Any New ICS Regulatory Regime**

To the extent that the Commission determines to intervene in the contractual arrangements between Facilities and Providers, including by regulating how ICS revenues will be allocated or adopting a new mechanism by which Facilities can recover their ICS costs, the Commission should provide Facilities and Providers with adequate time to adjust to the new regulatory landscape. Several participants in this proceeding have emphasized the importance of Commission adoption of such a grace period.<sup>86</sup> Specifically, the Commission should permit Providers and Facilities to continue to operate under their existing agreements until at least the earlier of the expiration of such agreements and two years from the date that any new regulations become effective. However, Praeses does not object to a Commission requirement that any new agreements that are entered into during such two-year period be fully compliant with any regulations regarding payments by Providers to Facilities that are in effect at that time.

As a result of any Commission action involving site commissions, hundreds of ICS contracts nationwide will need to be renegotiated and/or rebid, which is certain to be a time-consuming exercise. In most cases, affected Facilities will be required to develop new RFPs,

---

<sup>86</sup> See, e.g., King George Comments at 2; Arizona DOC Comments at 2; San Bernardino Comments at 3; Letter from Mark Warner, United States Senator, to Tom Wheeler, Chairman, FCC, (dated Sept. 4, 2014) ("I would strongly urge that any rate changes be phased in gradually and thoughtfully in order to reduce additional transition burdens. Sheriffs often have long-terms contracts with vendors, and the costs of breaking these contracts, in addition to other transition costs, should not act to compromise inmate services.").

select winning bidders, resolve ICS Provider protests, negotiate new agreements with the winning bidders, and obtain appropriate governmental approvals of the new contracts, which process often takes a year or more to complete. In addition, the significant majority of these contracts likely will involve a limited number of Provider counterparties. These Providers may not have sufficient resources available to concurrently participate in such a large number of simultaneous RFP processes and contract negotiations. Also, these new contracts may be difficult for the parties to negotiate until the industry has a better understanding of the new trends in call volumes and the new ICS financial environment that will be caused by the Commission's actions. Furthermore, to the extent that any new Commission rules regarding site commissions have the effect of reallocating ICS revenue from Facilities to Providers, the Facilities should be given sufficient time to modify their inmate welfare programs and the programs' funding sources to minimize the adverse impact on inmates to the extent possible.

The importance of providing an adequate transition period for the ICS industry was demonstrated by the challenges that Facilities faced following the Commission's prior regulation of interstate ICS rates. Rather than triggering an orderly amendment of existing ICS contracts pursuant to the "change of law" provisions present in most such contracts, the Commission's *ICS Report and Order* resulted in confusion among Facilities and Providers.<sup>87</sup> Certain Providers unilaterally ceased paying site commissions without any renegotiation of their ICS contracts, while other Providers worked cooperatively with the Correctional Clients to holistically reform their ICS contracts to take into account the new regulatory landscape. In other cases, Providers merely have ceased complying with their ICS contracts without attempting to negotiate new

---

<sup>87</sup> See *Opposition of Securus Technologies, Inc. to Prison Policy Initiative's Motion for Extension*, WC Docket 12-375, at 3 (dated Dec. 12, 2014) (stating that certain ICS contracts and amendments remain unsigned due to the uncertainty of the ICS industry regarding the appropriate interpretation of the *ICS Report and Order*).

agreements or agreement amendments, and these Providers generally have not maximized the reduction in their ICS rates to account for the fact that they no longer are paying site commissions but instead are retaining these ICS revenues as additional profits. Further, many of Praeses' Correctional Clients continue to struggle with sudden funding shortfalls attributable to the 70 percent reduction in interstate site commissions that they have experienced as a result of the *ICS Report and Order*. Certain of these Correctional Clients were required to reduce or delay new ICS technology initiatives that the Correctional Clients were planning or had begun implementing. Participants in this proceeding have reported similar disruptions as a result of the *ICS Report and Order*.<sup>88</sup>

It simply is not possible for the ICS industry to implement fundamental changes in its operational structure in a matter of several months. Even if all of the affected parties cooperatively work in good faith to accomplish such structural reforms, which was not the case in every instance following the *ICS Report and Order*, it takes time to modify hundreds of contracts and for Facilities to adjust to new funding shortfalls that the Commission estimates to exceed \$450 million.<sup>89</sup>

#### **V. ICS RATE REGULATION ONLY WILL BE EFFECTIVE IF THE COMMISSION ALSO REGULATES ANCILLARY FEES**

With the exception of a limited number of the largest Providers, there is broad consensus on the record that the Commission must further regulate ancillary fees as a crucial part of any new ICS regulation adopted by the Commission.<sup>90</sup> Praeses strongly believes that the ever-

---

<sup>88</sup> See, e.g., Barnstable Letter at 4 (noting that the Sheriff's Office will have to reevaluate its budget and determine which staff members to lay off as a result of the new rules).

<sup>89</sup> See *Second FNRPM*, 29 FCC Rcd at 13181 ¶ 23.

<sup>90</sup> See, e.g., Letter from Dorsey Nunn, Executive Director, Legal Services for Prisoners with Children, to Marlene H. Dortch, Secretary, FCC, WC Docket 12-375, at 4 (dated Dec. 4, 2014)

increasing ancillary fees charged by certain Providers are the primary cause of high inmate ICS costs, and that Commission action to reduce and rationalize ancillary fees is the fastest and most effective way to reduce ICS costs. Failure by the Commission to impose meaningful restrictions on ancillary fees will enable Providers to continue to shift their revenue generation mechanism from ICS rates to ancillary fees, thereby undermining any benefit to inmates of further ICS rate regulation by the Commission. Accordingly, the Commission should act immediately to impede this trend.

Ancillary fees are a significant burden on inmates and their families. Over the last few years, ICS providers have been deriving a greater percentage of their overall ICS revenue from multiple and sometimes exorbitant ancillary fees rather than ICS rates.<sup>91</sup> As identified by the Commission, both inmates and their friends and families have limited funds to spend on inmate calls, and any funds that they spend on ancillary fees reduce the number of minutes of calls that they can make. Therefore, as certain Providers increase the variety and amount of their ancillary fees, including many fees that are imposed irrespective of whether an inmate ever makes a call, ICS becomes increasingly unaffordable. Mere ICS rate regulation will not impact this problem. As explained by one ICS provider who primarily serves county jails and juvenile detention centers:

---

(“Comprehensive ancillary charge reform is an essential component to ICS reform.”); CTEL Comments at 3-8; Letter from Darrell A. Baker, Director, Utilities Services Division, Alabama Public Service Commission, to Tom Wheeler, *et al.*, Chairman, FCC, WC Docket No. 12-375, at 4, 11-12 (dated Sept. 30, 2014) (“[T]o effectively constrain excessive site commissions, it is essential to first address the excessive revenue sources that fill the non-commissionable revenue reservoir,” *i.e.*, ancillary fees.); CPC Letter at 3; CenturyLink Ex Parte at 2; *see also* Wright Petitioners Comments at 24-27 (arguing that ICS providers “regularly charge excessive ancillary fees”).

<sup>91</sup> *See* CenturyLink Ex Parte at 2 (“Ancillary fees are the chief source of consumer abuse and allow circumvention of rate caps.”); CTEL Comments at 3-8.

It is of no consequence to an inmate, or his/her family, if a per minute calling rate is low, yet the process necessary to establish an account, deposit money, or remit a payment is high. ... Every dollar expended by an inmate or his family in the ICS process must be accounted for ....<sup>92</sup>

In addition, the increasing prevalence of multiple, high ancillary fees masks the true level of site commissions because Providers do not pay site commissions on revenue generated from ancillary fees. If effective site commission percentages are calculated based on overall Provider ICS revenue, rather than merely based on ICS rates, then site commissions would constitute a significantly lower percentage. In addition, strict controls on ancillary fees will stabilize the financial offering to Facilities during the RFP process. If ICS rates reimburse ICS Providers and Facilities solely for their costs, Providers will not be incented to increase the amount or number of ancillary fees and any prior upward pressure on site commissions will be eliminated.

Praeses counsels its Correctional Clients to contractually limit, whenever possible, the authority of ICS providers to charge numerous ancillary fees and to cap the amount of such fees.<sup>93</sup> However, absent Commission requirements regarding ancillary fees, Facilities do not always have the leverage, expertise, or knowledge during commercial negotiations to accomplish this objective. Based on Praeses' experience dealing with Providers regarding ancillary fees, Praeses offers the following insights in connection with the Commission's adoption of regulatory limitations on such fees:

- All costs that Providers necessarily and unavoidably incur as part of completing an inmate call should be recovered through ICS rates. As a result, Providers should not be permitted to charge any ancillary fees to recover such intrinsic ICS costs, such as validation fees or fees related to Facility-required security. Only certain services that are offered by Providers to inmates or their friends and families as a convenience, and

---

<sup>92</sup> CTEL Comments at 7.

<sup>93</sup> Praeses has encountered Providers that have sought to impose as many as 15 different ancillary fees on ICS calls, including fees from \$3.00 to \$9.25 per instance that an end-user adds funds to its prepaid or inmate debit account.

that therefore are not reasonably required to be incurred for an inmate to place a call, should be permitted to be subject to ancillary fees, and all such ancillary fees should be required to be cost-based. Consequently, Praeses agrees with the Commission's proposal to prohibit ancillary fees related to "account establishment by check or bank account debit; account maintenance; payment by cash, check or money order; monthly electronic account statements; account closure; and refund of remaining balances."<sup>94</sup>

- All funds deposited with a Provider by an inmate or his or her family member should be available to the inmate for ICS, and any excess funds should be refunded to the inmate when the account is closed. Providers already derive interest on prepaid funds, and therefore they should not be entitled to also charge account maintenance, account inactivity, or refund fees.
- Debit calling is primarily an electronic process and is largely facilitated by Facilities in most instances. As a result, Providers do not incur significant recurring costs for debit calls that might justify debit call-related fees such as funding/transfer fees and fund validation fees.
- Newer technologies, particularly debit and prepaid calling, have dramatically reduced the use of collect calls by inmates to the point that collect calls are almost non-existent at the facilities operated by Praeses' Correctional Clients. Consequently, Providers no longer incur significant recurring costs associated with collect calling. Therefore, if the Commission permits Providers to charge a higher ICS rate for collect calls, then Providers should be prohibited from charging inmates and their friends and families ancillary fees for such calls, such as a collect call bill statement fee.
- Fees related to single-call services and convenience payment programs that impose charges on inmate call recipients but do not require the inmates or recipients to establish an account should not involve an ancillary fee that exceeds 50 percent of the fee that Providers charge to initially fund an inmate's ICS account.

To the extent that the Commission permits Providers to impose certain ancillary fees, the Commission should require all such fees to be cost-based and subject to a fixed cap to prevent Providers from agreeing to, and passing through to inmates, unreasonable costs charged to Providers by third parties in connection with certain third-party services, such as third-party

---

<sup>94</sup> See *Second FNPRM*, 29 FCC Rcd at 13206 ¶ 89. Praeses also supports Commission prohibition of the categories of ancillary fees prohibited by the Alabama Public Service Commission, including "account set-up, account maintenance, account funding, payment by check or money order, monthly electronic billing statements, and refunds," as well as regulatory cost recovery fees. *Id.* at 13206 ¶ 90, 13213 ¶ 105.

money wiring services. Providers also should be required to annually provide supporting data to the Commission to demonstrate their compliance with these requirements. Further, Providers should not be permitted to charge any new ancillary fees without prior Commission approval. For example, if new calling options or call funding methods are developed, Providers should be required to obtain Commission approval prior to implementation of any new ancillary fees in connection with such options. In addition, any such new ancillary fees should be required to be cost-based and ICS providers should be required to submit supporting cost data to the Commission as part of their request for permission to charge such new ancillary fees. Finally, in addition to disclosing their ancillary fees in a prominent location on their websites, Providers should be required to disclose all applicable fees at the time that an inmate (or an inmate's friend or family) seeks a service from a Provider that is subject to an ancillary fee but prior to the inmate or call recipient incurring the fee. Providers also should be required to post all of their ancillary fees at each Facility that the Provider services in a prominent location that is accessible to all inmates.<sup>95</sup>

## **VI. CONCLUSION**

For the reasons set forth above, the Commission should not attempt to determine the appropriate allocation of ICS revenue between Facilities and Providers by further regulating their contractual arrangements, such as by restricting or prohibiting site commissions. The Communications Act does not provide the Commission with the jurisdiction to do so. Even if it did, the Commission nonetheless should defer to the Facilities with respect to their arrangements with Providers. This matter is outside of the Commission's core expertise, but falls squarely within the experience and expertise of the Facilities, which are charged by state and local law

---

<sup>95</sup> *See id.* at 13214-16 ¶¶ 109-110.

with maintaining inmate welfare. Furthermore, if the Commission ultimately determines to intervene in these contractual arrangements, it should implement a regulatory mechanism by which Facilities, at minimum, are able to fully recoup their real and significant costs of providing ICS.

Respectfully submitted,

PRAESES LLC

By: /s/ Phillip R. Marchesiello  
Phillip R. Marchesiello  
Rachel S. Wolkowitz  
Wilkinson Barker Knauer, LLP  
2300 N Street, NW Suite 700  
Washington, DC 20037  
202.783.4141

*Its Attorneys*

January 12, 2015

**ATTACHMENT A TO PRAESES COMMENTS**

**ICS COST SURVEY**

## Inmate Calling Services (ICS) Cost Recovery - Per Employee

<b>Facility:</b>	
<b>Name:</b>	
<b>Email:</b>	
<b>Phone Number:</b>	

CONFIDENTIAL

	Tasks	Hour(s) Per Day	Hour(s) Per Week
Accounting	Administration of debit purchase		-
	Posting of checks, payments, etc.		
	Reconciliation of debit, historical, and monthly financial records		
	Refund processing		
	Training on the reimbursement processes		
	Invoicing		
	Inmate fraud research		
	Monthly reporting		
	<b>Weekly Total:</b>		
Administrative	Blocking/unblocking numbers		
	Contract monitoring and compliance		
	Coordinate service issue resolution		
	Respond to ICS system alerts		
	Reporting		
	Administering PANs/calling lists		
	Infrastructure management		
	IT interfaces		
	<b>Weekly Total:</b>		
Investigative	Call monitoring (post call) and court testimony		
	Call monitoring (real time)		
	Call recording analysis		
	Follow-up of security incidents and PREA monitoring		
	Respond to law enforcement requests and burning of calls under investigation		
	Review/validate test calls		
	Validate any do-not-record (DNR) numbers		
	Alert management		
	User management		
	External law enforcement management		
	Voice biometrics investigations		
	Data analytics		
	Word transcription		
	Language translation for call recordings		
<b>Weekly Total:</b>			-
	<b>Tasks</b>	<b>Hour(s) Per Day</b>	<b>Hour(s) Per Week</b>

**Inmate Calling Services (ICS)  
Cost Recovery - Per Employee**

<b>Facility:</b>	
<b>Name:</b>	
<b>Email:</b>	
<b>Phone Number:</b>	

**CONFIDENTIAL**

<b>Operational</b>	Enrolling inmate in voice biometrics		
	Escorts for phone repair technicians		
	ICS account deactivation		
	ICS Training- training of inmates and facility staff on the use of the ICS		
	Implementation of upgrades		
	Inmate escorts to phones and visual monitoring		
	Reporting		
	PIN generation upon admission to the facility		
	Receive and respond to inquiries and formal grievances from		
	Receive and respond to inquiries from the public including bail bondsmen		
	Administering free calls		
	Training		
	Administering TDD calls		
	Administering pro bono calls		
	Announcements to inmates		
<b>Weekly Total:</b>			-
<b>FCC Compliance</b>	<b>Tasks</b>	<b>Hour(s) Per Day</b>	<b>Hour(s) Per Week</b>
	Compliance verification of FCC order		
	Analysis and research		
	Meeting(s)		
	<b>Weekly Total:</b>		
<b>RFP / Contracting</b>	<b>Tasks</b>	<b>Hour(s) Per Day</b>	<b>Hour(s) Per Week</b>
	RFP evaluation committee		
	Vendor interviews and presentations		
	Vendor transition		
<b>Weekly Total:</b>			-

<b>Employee Totals</b>	
<b>Total Weekly Total:</b>	-
<b>Estimated Monthly Total:</b>	-
<b>Estimated Annual Total:</b>	-

**Inmate Calling Services (ICS)  
Cost Recovery - Facility**

<b>Facility:</b>		<b>Max Capacity:</b>	
<b>Name:</b>		<b>Facility ADP:</b>	
<b>Email:</b>		<b>City, State:</b>	
<b>Phone Number:</b>		<b>Vendor:</b>	

**CONFIDENTIAL**

**Accounting**

<b>Tasks</b>	<b>Blended Hourly Rate</b>	<b>Total Weekly Hours (All Employees Combined)</b>	<b>Total Weekly Cost</b>	<b>Percentage of Total Facility Cost</b>
Administration of debit purchase			\$ -	
Posting of checks, payments, etc.			\$ -	
Reconciliation of debit, historical, and monthly financial records			\$ -	
Refund processing			\$ -	
Training on the reimbursement processes			\$ -	
Invoicing			\$ -	
Inmate fraud research			\$ -	
Monthly reporting			\$ -	
<b>Weekly Totals:</b>		<b>0</b>	<b>\$ -</b>	

**Administrative**

<b>Tasks</b>	<b>Blended Hourly Rate</b>	<b>Total Weekly Hours (All Employees Combined)</b>	<b>Total Weekly Cost</b>	<b>Percentage of Total Facility Cost</b>
Blocking/unblocking numbers			\$ -	
Contract monitoring and compliance			\$ -	
Coordinate service issue resolution			\$ -	
Respond to ICS system alerts			\$ -	
Reporting			\$ -	
Administering PANs/calling lists			\$ -	
Infrastructure management			\$ -	
IT interfaces			\$ -	
<b>Weekly Totals:</b>		<b>0</b>	<b>\$ -</b>	

**Investigative**

<b>Tasks</b>	<b>Blended Hourly Rate</b>	<b>Total Weekly Hours (All Employees Combined)</b>	<b>Total Weekly Cost</b>	<b>Percentage of Total Facility Cost</b>
Call monitoring (post call)			\$ -	
Call monitoring (real time) and court testimony			\$ -	
Call recording analysis			\$ -	
Follow-up of security incidents and PREA monitoring			\$ -	
Respond to law enforcement requests and burning of calls under investigation			\$ -	
Review/validate test calls			\$ -	
Validate any do-not-record (DNR) numbers			\$ -	
Alert management			\$ -	
User management			\$ -	
External law enforcement management			\$ -	
Voice biometrics investigations			\$ -	
Data analytics			\$ -	
Word transcription			\$ -	
Language translation for call recordings			\$ -	
<b>Weekly Totals:</b>		<b>0</b>	<b>\$ -</b>	

**Operational**

<b>Tasks</b>	<b>Blended Hourly Rate</b>	<b>Total Weekly Hours (All Employees Combined)</b>	<b>Total Weekly Cost</b>	<b>Percentage of Total Facility Cost</b>
Enrolling inmate in voice biometrics			\$ -	
Escorts for phone repair technicians			\$ -	
ICS account deactivation			\$ -	
ICS Training- training of inmates and facility staff on the use of the ICS			\$ -	

**Inmate Calling Services (ICS)  
Cost Recovery - Facility**

<b>Facility:</b>		<b>Max Capacity:</b>	
<b>Name:</b>		<b>Facility ADP:</b>	
<b>Email:</b>		<b>City, State:</b>	
<b>Phone Number:</b>		<b>Vendor:</b>	

**CONFIDENTIAL**

Implementation of upgrades			\$ -	
Inmate escorts to phones and visual monitoring			\$ -	
Reporting			\$ -	
PIN generation upon admission to the facility			\$ -	
Receive and respond to inquiries and formal grievances from inmates			\$ -	
Receive and respond to inquiries from the public including bail bondsmen			\$ -	
Administering free calls			\$ -	
Training			\$ -	
Administering TDD calls			\$ -	
Administering pro bono calls			\$ -	
Announcements to inmates			\$ -	
<b>Weekly Totals:</b>			<b>0 \$ -</b>	

**FCC Compliance**

Tasks	Blended Hourly Rate	Total Weekly Hours (All Employees Combined)	Total Weekly Cost	Percentage of Total Facility Cost
Compliance verification of FCC order			\$ -	
Analysis and research			\$ -	
Meeting(s)			\$ -	
<b>Weekly Totals:</b>			<b>0 \$ -</b>	

**RFP / Contracting**

Tasks	Blended Hourly Rate	Total Weekly Hours (All Employees Combined)	Total Weekly Cost	Percentage of Total Facility Cost
RFP evaluation committee			\$ -	
Vendor interviews and presentations			\$ -	
Vendor transition			\$ -	
<b>Weekly Totals:</b>			<b>0 \$ -</b>	

**Loaded Costs**

	Weekly Cost (Calculated)	Estimated Monthly Cost	Annualized Cost	Percentage of Total Facility Cost
Insurance	\$ -		\$ -	
Employee benefits	\$ -		\$ -	
Office space	\$ -		\$ -	
Furniture	\$ -		\$ -	
Office supplies	\$ -		\$ -	
Taxes	\$ -		\$ -	
Computer costs	\$ -		\$ -	
Depreciation	\$ -		\$ -	
<b>\$ -</b>		<b>\$ -</b>	<b>\$ -</b>	

**Facility Totals**

<b>Monthly Hours</b>	<b>0</b>
<b>Monthly Cost</b>	<b>\$ -</b>
<b>Annualized Hours</b>	<b>0</b>
<b>Annualized Cost</b>	<b>\$ -</b>

**ATTACHMENT B TO PRAESES COMMENTS**

**PRAESES DECLARATION**

I am Ann O'Boyle, Director, Correctional Services Division, Praeses, LLC ("Praeses") located in Shreveport, Louisiana. I have reviewed the attached comments of Praeses to be filed in the Federal Communications Commission's Wireline Competition Bureau Docket No. 12-375. I declare under penalty of perjury that the information contained in Praeses' comments is true and correct to the best of my knowledge, information and belief.

*/s/ Ann O'Boyle* \_\_\_\_\_  
Ann O'Boyle  
Director, Correctional Services Division  
Praeses LLC

Executed: January 12, 2015