

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

COMMENTS OF

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THE D.C. PRISONERS' LEGAL SERVICES PROJECT, INC.,

AND

CITIZENS UNITED FOR REHABILITATION OF ERRANTS

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SUMMARY

Millions of the poorest Americans have paid billions of dollars of unjust, unreasonable, and unfair ICS rates and charges since the US District Court directed the FCC to act “with dispatch” on August 22, 2001 in order to “conclude its ongoing proceedings so as to provide both courts and parties with meaningful analysis and guidance.”

Under the leadership of Commissioner Clyburn, the FCC took a vital step in December 2012 to grant the Petitioners’ 2003 Petition for Rulemaking. Under the leadership of Chairwoman Clyburn, the FCC adopted rules establishing ICS rate caps and ICS safe harbor rates in August 2013. Rather than comply with the new rules, ICS providers and correctional authorities rushed to the US Court of Appeals to obtain a stay of the rules and challenge whether the FCC had the authority to adopt the new rules.

Now, the ICS providers have submitted a Joint Proposal that would permanently adopt ICS rates that are lower than those adopted by the FCC in 2013, and they would apply the new rates to intrastate ICS calls as well. Pay Tel has proposed a different rate structure, one that would impose much lower rates on prisons and large jails and a higher rate for smaller jails. Again, this proposal would cover both interstate and intrastate ICS rates.

Most significantly, the ICS providers have requested that the FCC step in and regulate the revenue-sharing structure currently in place between ICS providers and correctional authorities. While they do not come out and specifically state it, the ICS providers would like the FCC to rule that kickbacks cannot be paid, so that the ICS providers cannot be blamed for ending this lucrative practice. While the correctional authorities have argued that the revenue-sharing relationships help defray their administrative costs in providing ICS, no specific evidence of their costs has been introduced into the record, despite their repeated promises to do so.

In light of the ICS providers' ambiguous request for additional FCC oversight, and the uncertain reimbursement needs of the correctional authorities, the Petitioners propose that the FCC establish a uniform ICS rate that will permit the ICS providers to cover their costs of providing service and that will permit the continuation of the revenue-sharing regime where necessary. Should the ICS providers unequivocally state that they would like the FCC to prohibit kickbacks, then the FCC should consider whether to provide that assistance.

In the meantime, the FCC must focus on the impact of the unjust, unreasonable, and unfair ICS rates and charges on millions of ICS customers and use its statutory authority to "determine and prescribe what will be the just and reasonable charge...and what classification, regulation or practice is or will be just, fair, and reasonable."

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Calling Services)

COMMENTS

Martha Wright, Dorothy Wade, Annette Wade, Ethel Peoples, Mattie Lucas, Laurie Nelson, Winston Bliss, Sheila Taylor, Gaffney & Schember, M. Elizabeth Kent, Katharine Goray, Ulandis Forte, Charles Wade, Earl Peoples, Darrell Nelson, Melvin Taylor, Jackie Lucas, Peter Bliss, David Hernandez, Lisa Hernandez, Vendella F. Oura, along with The D.C. Prisoners' Legal Services Project, Inc., and Citizens United for Rehabilitation of Errant (jointly, the "Petitioners") hereby submit these Comments in response to the Second Further Notice of Proposed Rulemaking, released on October 22, 2014, in the above-captioned proceeding.¹

In the *SFNPRM*, the Federal Communications Commission ("FCC") builds upon the groundbreaking work it has already completed and seeks comment on what additional regulatory relief is required to provide comprehensive, lasting relief to the friends, families, and others who desire to remain in contact with those who are incarcerated or otherwise detained by local, county, state, or federal agencies.

Allied against adopting lasting reform of the Inmate Calling Services (ICS) are the ICS service providers, sheriffs, state officials for the various state correctional agencies, the National Association of Regulatory Utility Commissioners, and other "service" entities that feed off of the

¹ *Rates for Interstate Inmate Calling Services*, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 13,170 (2014) (the "*SFNPRM*"). The *SFNPRM* was published in the Federal Register on November 21, 2014, and established January 5, 2015 as the deadline for filing Comments in this proceeding. 79 FED REG 69,682 (rel. Nov. 21, 2014). The deadline was subsequently extended to January 12, 2015, DA 14-1848 (rel. Dec. 17, 2014).

current regime of extracting monopoly profits from ICS customers. Across the country, in state agency proceedings, in FCC proceedings, and in state and federal court proceedings, those against adopting lasting reform have sought to cut-off reform wherever possible. When faced with adverse decisions, they have sought judicial relief, requests for waivers and petitions to hold decisions in abeyance, in order to delay reform – for as long as possible – and continue to force ICS consumers to pay into a system that requires exorbitant fees for services that cost significantly less to provide.

The largest ICS providers have submitted so-called comprehensive reforms that merely freeze their monopoly profits at current levels, while correctional authorities repeat their oft-heard threat of eliminating ICS phone service if they do not continue to receive millions of dollars of kickbacks. Absent from these claims is evidence that it costs more than \$0.05 per minute to provide ICS to inmates in jails or prisons. While the FCC requested and received cost data from ICS providers, the mathematical contortions performed in the providers' studies merely confirmed that consumers of local, intrastate and interstate ICS have been gouged at every turn for more than a decade.

Thus, the tone-deaf celebration that more than 1.3 billion dollars of monopoly profit have been extracted from ICS customers to share with correctional authorities must cease immediately.² In the absence of any substantive cost data by the sheriffs and correction departments that there are significant costs associated with the provisioning of ICS that fall on the government, there simply is no justification for the millions of dollars that they continue to share with ICS providers each year.

In fact, when light has shined upon these practices across the country, the uniform response by decision makers (other than the sheriffs and departments of corrections) has been to take immediate steps to eliminate these monopoly profit-sharing arrangements. In light of

² *Securus Provides Over \$1.3 Billion in Prison, Jail and Government Funding Over the Last 10 Years*, Press Release, rel. Oct. 31, 2014.

the overwhelming evidence that sheriffs and departments of corrections can continue to provide their nominal support of ICS to inmates and their family members, any attempt to justify the continued existence of these kickbacks must be rejected.

Instead, the FCC must adopt a uniform rate for interstate and intrastate ICS, eliminate or establish a list of approved ancillary fees, and take steps to preempt those states that refuse to reform ICS. Congress provided the FCC with clear legal authority to take these steps, and the courts have repeatedly relied upon the FCC to exercise its role as the expert agency to adopt reforms.

Put simply, all eyes are on the FCC to adopt lasting reform of the abusive practices that have extracted billions of dollars from the poorest families in this country and have led to the self-perpetuating high recidivism rates. Given the expansive scope of questions raised in the *SFNPRM*, no party can claim that it was not on notice that the FCC will adopt lasting reform, and the FCC must perform its statutory obligation to ensure just, reasonable, and fair ICS charges, practices, classifications, and regulations.

BACKGROUND

The individually-named parties to this proceeding are the original plaintiffs in a class action brought in the United District Court for the District of Columbia against Corrections Corporation of America in 2000, seeking to set aside exclusive telephone contracts among the private prisons and certain telephone companies. The matter was subsequently referred to the FCC in August 2001, and the agency was directed to act “with dispatch.”³ These parties have actively prosecuted this action through The D.C. Prisoners’ Legal Services Project, Inc., before the FCC since 2001.

³ *Wright v. Corrections Corp. of America*, C.A. No. 00-293 (GK), Memorandum Opinion, slip op. at 15 (D.D.C. Aug. 22, 2001).

Citizens United for Rehabilitation of Errants (CURE) is a grassroots criminal justice reform organization with 18,000 members throughout the country. Approximately 60% of CURE's members are incarcerated; many of their members have loved ones who are incarcerated. CURE has been working since the 1990s to reduce the high cost of calls for incarcerated persons and their loved ones. Since 2000, CURE has conducted the eTc Campaign (Equitable Telephone Charges) whose sole purpose is to promote lower prison phone rates.⁴

On August 9, 2013, the FCC released its groundbreaking Report and Order in this proceeding.⁵ The Order set interim price caps for interstate ICS at 21 cents per minute for prepaid and debit calls and 25 cents per minute for collect calls. The Order also established safe harbor rates of 12 cents per minute for prepaid and debit calls and 14 cents per minute for collect calls. The Order required that the ICS rates and ancillary fees charged be based on the actual cost of providing the service and required ICS providers to submit annual cost data and certifications of compliance with the requirements of the Order.

Subsequent to the issuance of the Order, several ICS providers and state correctional institutions obtained a partial stay of the Order from the D.C. Circuit Court of Appeals, which delayed the effectiveness of the cost-based requirement, the safe harbor rates, and the annual data collection requirements. The Court left in place the 21/25 cent interim rate caps and the one-time collection of cost data from the ICS providers. At the request of involved parties, that proceeding has been held in abeyance pending the outcome of this proceeding.

As a companion to the Order, the FCC also released a Further Notice of Proposed Rulemaking, which raised several of the same questions that have since been incorporated in the *SFNPRM*. The Petitioners argued in their responsive comments that the FCC should adopt a single rate for local, intrastate, and interstate ICS rates.⁶ The Petitioners demonstrated that

⁴ See www.etccampaign.com.

⁵ 28 FCC Rcd 14,107 (2013) (the "Order").

⁶ *Petitioners Comments*, filed December 20, 2013 ("FNPRM Comments").

there were widely divergent intrastate rates of \$5.00 or more for calls carried by the same ICS rates.⁷ The Petitioners later supplemented their submission with a state-by-state breakdown of the intrastate ICS rates obtained from the ICS providers' tariffs.⁸ As demonstrated by that study, CenturyLink charges anywhere from \$2.25 to \$8.25 for a local ICS call lasting 15 minutes, Global Tel*Link charges anywhere from 60 cents to \$13.40 for a fifteen-minute local ICS call, and Securus charges anywhere from 75 cents to \$17.32 for a fifteen-minute local ICS call.

The Petitioners also argued that the FCC should either eliminate all ancillary fees, or borrow the approach taken by states such as Alabama and New Mexico with which the ICS providers had filed cost data.⁹ The Petitioners also urged the FCC to investigate approaches to introduce competition to the local jail since the requested services from correctional facilities are largely the same.¹⁰ Finally, the Petitioners reminded the FCC that any cost/benefit analysis must take into consideration the enormous savings resulting from the reduction of the recidivism rate, and the absence of any substantive cost-related data from the correctional facilities.¹¹

Since the effective date of the interstate rate caps, interstate ICS call volume has greatly increased.¹² In addition, there has been a significant change in posture of the ICS providers. Providers that once stood against the adoption of a uniform ICS rate have changed their tune, and proposals to limit egregious ancillary fees also have been offered by ICS providers. Just as significant, the State of Alabama completed its rulemaking in December 2014, where it found that the single-call ICS rates charged by the ICS providers must be eliminated. These single-call

⁷ *FNPRM Comments*, pg. 5.

⁸ Petitioners Ex Parte Submission, dated September 17, 2014 (the "*Tariff Filing*").

⁹ *FNPRM Comments*, pg. 9.

¹⁰ *FNPRM Comments*, pg. 18.

¹¹ *FNPRM Comments*, pg. 19. It has been estimated that the reduction of the recidivism rate by only 1% will save correctional authorities \$250 million annually. *See Petitioners' Comments*, filed March 25, 2013, Exhibit A.

¹² *SFNPRM*, ¶ 5.

rates, which range from \$9.99 to \$14.99, far exceed the interstate ICS rates adopted by the FCC and bear no correlation to the actual cost of providing the service. Because there is every incentive for ICS providers to prematurely terminate these calls, a problem the Petitioners and others have previously highlighted, the State of Alabama prohibited the existing single-call ICS rates.

In August 2014, ICS providers submitted their confidential cost data with the FCC. The Petitioners have identified significant problems with the cost-data, including (i) inconsistent allocation of costs among the four cost categories; (ii) different methodologies in allocating costs to facilities and payment methods; (iii) inconsistent approaches in determining direct and common costs; and (iv) the absence of revenue information.¹³ In light of these substantial problems, the Petitioners argued that there is strong evidence that the ICS providers had reported higher costs than actually incurred, but, even still, these costs are still substantially lower than could be justified by charging the interstate ICS rate caps adopted in the *Order*.¹⁴

Finally, and perhaps most significant for the FCC in this phase of the rulemaking, certain ICS providers have suggested that the FCC step further into the market to regulate the kickbacks that are paid to correctional facilities. Previously, no ICS provider had gone on record advocating for the reduction or elimination of these kickbacks, but the reduction of interstate ICS revenue, combined with aggressive collection efforts by correctional facilities, apparently has led the ICS providers to ask the FCC to do what the ICS providers refuse to do on their own – simply say no to the kickback requirements imposed by the correctional facilities. Because the ICS providers apparently are unwilling to fight this battle to end kickbacks on their own, they have now decided to suggest that the FCC could address this issue in their stead.

¹³ *Petitioners Ex Parte Submission*, filed September 17, 2014 (including Memorandum from Coleman Bazelon and Kristin Stenerson from the Brattle Group) (the “*Brattle Study*”).

¹⁴ *Id.*, pg. 2.

DISCUSSION

The *SFNPRM* seeks comment on an exhaustive list of issues with the stated goal of adopting lasting relief for inmates, their families, and all those that use ICS. As discussed below, the Petitioners support the FCC's efforts in this regard and urge the FCC to adopt: (1) a uniform rate for prisons and jails that reflects the cost of providing the service, taking into account the various sizes of correctional facilities and the possible reimbursement of expenses by ICS providers to the correctional facilities for the limited expenses of providing the service; (2) a limited "menu" of accepted ancillary fees; and (3) rules that preempt state and local laws that conflict with the uniform ICS rate, with a limited window for states that have attempted to regulate ICS rates and services to come into compliance with the FCC's new rules.

I. THE FCC HAS THE AUTHORITY TO REGULATE KICKBACKS

As noted above, the FCC seeks comment on whether the FCC has the requisite authority under the Communications Act to regulate the existing ICS kickback regime, whereby correctional authorities *require* ICS providers to share a percentage of the revenue derived from ICS as a prerequisite for obtaining authority to serve the correctional facility/system.¹⁵ While ICS providers could simply choose not participate in bidding for ICS contracts that require the sharing of their revenue with the correctional facility, the ICS service providers have expressed their interest in having the FCC step in and regulate this aspect of the ICS industry.

For example, the *Joint Provider Reform Proposal* submitted by Global Tel*Link, Securus, and Telmate on September 15, 2014, stated that the parties would support either eliminating site commissions, or phasing out these kickbacks by introducing a "capped admin-support payment."¹⁶ CenturyLink also apparently supports the reduction in commissions and a

¹⁵ *Inmate Payphone Order*, 17 FCC Rcd 3248, 3252-3, 3262 (2002) (finding that kickbacks constitute profits, and that comparable inmate calling rates should be calculated net of commissions).

¹⁶ *Joint Provider Reform Proposal*, filed Sept. 15, 2014, pg. 3.

payment only of the “administrative and security costs in making inmate calling service available.”¹⁷ A similar approach is advocated by Pay Tel Communications, whose “Ethical Proposal” included a suggestion that the FCC adopt a “reasonable Cost Recovery mechanism” to reimburse correctional facilities for “administrative and security expenses associated with allowing inmate access to ICS.”¹⁸

As such, the five largest ICS providers, making up more than 95% of the ICS industry, have expressed their support for the elimination or substantial reduction of current kickback regime. Apparently, these ICS providers would have the FCC adopt rules limiting the sharing of ICS revenue to only those occasions where there are documented administrative and security costs associated with the provisioning of ICS by the correctional authorities.

Notably absent from this discussion is any meaningful quantification of the actual costs incurred by correctional institutions for providing ICS in their facilities. Purportedly, there is a survey conducted by the National Sheriffs’ Association, but it has not ever been filed in the record. As a result, the only publically-available information is an incredibly unhelpful statement that “costs to jails are significant.”¹⁹ Further, the American Jail Association promised in February 2014 to submit a report to the FCC “with concrete data outlining all of the concerns and uniqueness of AJA-member facilities.”²⁰ As of the deadline for these Comments, eleven months later, the AJA has failed to file this report. Thus, independent of the question of can (or should) the FCC take steps to regulate the ICS providers’ kickback obligations, the parties with specific information as to the need for reimbursement of their costs have utterly failed to substantiate their claims.

¹⁷ *CenturyLink Ex Parte Submission*, filed Sept. 19, 2014, pg. 1.

¹⁸ *Pay Tel Communications Ex Parte Submission*, filed October 3, 2014, pg. 3.

¹⁹ *National Sheriffs’ Association Ex Parte Submission*, filed Nov. 21, 2014.

²⁰ *American Jail Association Ex Parte Submission*, filed Feb. 11, 2014.

However unsettled the need for a kickback-profit-sharing regime, the FCC certainly has the authority to take steps to reduce the impact on ICS rates. Both ICS providers and correctional authorities agree that their kickback regime has led to higher ICS rates. ICS providers blame correctional authorities for imposing this regime on them and assert that, but for the kickbacks, they would most certainly reduce ICS rates across the board. Correctional authorities argue that the kickbacks are necessary to provide ICS to inmates and threaten that any adjustment to the system would lead to the elimination of ICS in their facilities. Thus, the two are inextricably intertwined.²¹ If ICS rates are artificially kept high due to the kickback regime, then the FCC's statutory obligations under Sections 201, 205 and 276 of the Communications Act, as amended, most certainly provide sufficient authority for the FCC to regulate.

Specifically, Section 276 of the Communications Act directs the FCC to regulate "payphone service" rates, which includes "inmate telephone service in correctional institutions, and any ancillary services."²² The FCC was directed to "ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call."²³ In addition, the FCC was given the authority to preempt "any State requirements" that are inconsistent with the FCC's actions.²⁴ This authority was upheld by the Court of Appeals for the District of Columbia in *Illinois Public Telecommunications v. FCC*, where the Court ruled that Section 276 "unambiguously grants the [FCC] to regulate the rates for local coin calls."²⁵ Thus, the FCC has clear jurisdiction to preempt state laws that have caused intrastate ICS rates to be unfair to the consumer.

²¹ *Id.*, pg. 3.

²² 47 U.S.C. § 276(d) (2015).

²³ 47 U.S.C. § 276(b)(1)(a) (2015).

²⁴ 47 U.S.C. § 276(c) (2015).

²⁵ 117 F.3d 555, 562 (1997).

Moreover, Section 201(b) of the Communications Act declares that any “charge, practice, classification, or regulation that is unjust or unreasonable” is unlawful.²⁶ Previously, the FCC has found that an ICS rate which is far above the cost of providing the service is unjust and unreasonable. ICS providers and correctional authorities have indicated that their high ICS rates and ancillary fees are due to the kickback regime. Because Section 205(a) of the Communications Act gives authority to the FCC to “determine and prescribe what will be the just and reasonable charge...and what classification, regulation or practice is or will be just, fair, and reasonable,” there should be no question that the FCC may find that the kickback regime is an unreasonable practice and prescribe a solution.

As detailed below, the Petitioners have conducted a thorough review of all available cost data and propose an ICS cost structure that is just and reasonable and will fairly compensate ICS providers regardless of whether the FCC takes steps to prohibit kickbacks. It is certainly possible that the Petitioners’ rate structure will lead to reduced profits to share with correctional facilities. However, as previously noted by the Petitioners, the FCC has determined that an otherwise laudable allocation of excess profits is not relevant in determining whether the underlying rates are “just and reasonable in accordance with Section 201(b).”²⁷

Thus, the FCC has the authority to regulate the kickback regimes imposed by correctional authorities on otherwise unwilling ICS providers. Both the correctional authorities and the ICS providers have pointed to the kickback regime as the main justification for unjust, unreasonable, and unfair ICS rates and ancillary fees, and where states or local governments have eliminated kickbacks, ICS fees have been reduced.

As noted above, however, the least-intrusive approach would be for ICS providers to simply refuse to pay kickbacks. On the other hand, ICS providers apparently are unwilling to go

²⁶ 47 U.S.C. § 201(b) (2015).

²⁷ *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17,663, 17,876 (2011), aff’d, 753 F.3d 1015 (10th Cir. 2014).

on record and refuse to pay kickbacks. In fact, the *Joint Provider Reform Proposal* performs grammatical gymnastics to express the providers' interest in eliminating kickbacks without actually stating it.

Put a different way, if the ICS industry is unwilling to refuse to pay kickbacks during the RFP process, and the correctional authorities are unwilling to provide any substantive cost data supporting their demands for reimbursement, the Petitioners question whether the FCC should step in to do so and risk the appeal of a future order. Both parties have already demonstrated their willingness to head to the US Court of Appeals when they disagree with the FCC.

Alternatively, the FCC could simply establish an ICS rate that complies with Sections 201, 205 and 276 of the Act, and let ICS providers and correctional authorities allocate the revenue in any manner they wish. Should the FCC decide to proceed with this approach, it also can avoid the issue of whether there are costs associated with the provisioning of ICS to inmates. Instead, these costs can continue to be negotiated by the parties to the revenue-sharing regime. The Petitioners expectantly await explicit confirmation from the ICS providers that they wish the FCC to do what the ICS providers are unwilling to do for themselves, and/or any substantive data from the correctional authorities that supports a demand for reimbursement of ICS expenses.

II. THE FCC MUST ADOPT A UNIFORM ICS RATE FOR INTERSTATE AND INTRASTATE ICS CALLS.

1. The Need For A Uniform ICS Rate

The central question for debate in this proceeding is whether the FCC has the authority to establish an ICS rate (or rates) for all ICS calls (intrastate and interstate) that is just,

reasonable, and fair. Previously, the Petitioners thoroughly briefed this issue on numerous occasions, and hereby incorporate their arguments *in toto*.²⁸

Simply put, the FCC was granted authority to make a determination that a “charge, practice, classification, or regulations” is unjust and/or unreasonable pursuant to Section 201(b) of the Communications Act. Moreover, when this determination has been made, Section 205 of the Communications Act directs the FCC to “determine and prescribe what will be the just and reasonable charge...and what classification, regulation or practice is or will be just, fair, and reasonable.” Finally, Section 276(b) directs the FCC “to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call,” which necessarily includes the determination of whether the compensation is unfair due to its excessive impact on consumers.

In their *NPRM Comments*, the Petitioners advocated for a uniform rate of 7 cents per minute for all ICS calls. The proposal was supported by the known rates charged by the ICS providers, including a per-minute of 4.8-cent rate in New York, 5 cents in Nebraska, and the reduction in costs to provide the service since the Petitioners’ Alternative Proposal was filed in 2007.

The *Order* did not adopt the Petitioners’ proposal and instead instituted a three-tiered rate structure that contemplated safe-harbor rates at 12 cents per minute for interstate prepaid and debit ICS calls and 14 cents per minute for interstate collect calls, and rate caps at 21 cents for interstate prepaid and debit ICS calls, and 25 cents for interstate collect calls, and a waiver process for those ICS providers requiring further assistance. Despite requests by many parties, the *Order* did not adopt rates for intrastate ICS calls, and tabled the issue for the *FNPRM*.

In their responsive comments, the Petitioners again urged the FCC to adopt a uniform rate for all ICS calls, noting that the application of rates to just interstate calls would lead to rate

²⁸ See, e.g., *Petitioners Comments*, filed March 23, 2013, pgs. 5-12; *Petitioners Reply Comments*, filed April 22, 2013, pgs. 4-7; *Petitioners Ex Parte Submission*, filed June 19, 2013; *Petitioners FNPRM Comments*, pgs. 4-8; *Petitioners FNPRM Reply Comments*, pgs. 3-12.

arbitrage and would not provide the maximum relief to ICS calls since a majority of the ICS calls are intrastate in nature.²⁹ While ICS providers once opposed the notion of the FCC regulating intrastate ICS calls, the *Joint Providers Reform Proposal*, and the *Ethical Proposal* submitted by Pay Tel both propose uniform rates for intrastate and interstate ICS calls. In fact, the Petitioners are unaware of any ICS provider that currently opposes a uniform rate. Moreover, three recent state-based reforms also confirm that a uniform rate for ICS calls is appropriate, with New Mexico adopting a uniform 15 cents for all calls, Alabama adopting a uniform rate of 25 cents for prisons and 30 cents for jails, and New Jersey adopting a 15 cent rate for all ICS calls from state-run facilities.³⁰

Thus, it would appear that complete consensus exists supporting what the Petitioners have been saying for many, many years – namely that whether an ICS call crosses the street or goes across the country, the cost of providing the service is the same. However, as disclosed by the Petitioners in their *Tariff Filing*, there remains an enormous range of ICS rates being charged for intrastate ICS calls. In fact, there is some evidence that certain intrastate ICS rates have risen since the interstate ICS rate caps went into effect on February 11, 2014.³¹ More importantly, however, there is little evidence that intrastate ICS rates have decreased to match the interstate ICS rates adopted by the FCC, despite the fact that the ICS providers have failed to show that it costs more to provide intrastate ICS.

In the absence of any cost-based justification for the continued difference between intrastate and interstate ICS calls, the FCC must adopt uniform rates moving forward. While there may be a debate that the ICS rate for an ICS call from a jail should be higher than that

²⁹ *Petitioners FNPRM Comments*, 4-8.

³⁰ See Amendment #12, Solicitation # 05-x-32533, Contract 61618, Department of Corrections & Juvenile Justice Program, State of New Jersey (can be found at http://www.state.nj.us/treasury/purchase/noa/contracts/t1934_05-x-32533.shtml).

³¹ *SFNPRM*, ¶ 5.

from a prison, there is no debate that it doesn't cost more to provide intrastate ICS than interstate ICS.

2. Petitioners' Proposal for ICS Rates

However, there does appear to be a need for slightly higher rates associated with small jails (i.e., those with fewer than 350 beds). Attached hereto as Exhibit A is a study prepared by Coleman Bazelon and Kristin Stenerson of the Brattle Group. The Brattle Group generously donates its economic analysis services to the Petitioners and has studied the ICS cost studies filed with the FCC in August and September 2014. On September 17, 2014, the Petitioners submitted a redacted study related to the submitted the cost data, which highlighted significant issues with the cost data. Issues such as misallocation of costs, questionable methods of determining direct and common costs, and the absence of revenue information, call into question whether the FCC can rely upon the provided information.³²

The attached study provides additional analysis of the cost data and makes several recommendations. First, the Petitioners recommend that the FCC adopt a uniform rate of **8 cents** (prepaid and debit) and **10 cents** (collect) for all prisons, and for jails with more than 350 beds. The cost data submitted by the ICS providers demonstrates that the cost of providing service in these large facilities is substantially less than the cost for providing service in small jails and that ICS providers can serve these larger facilities with less administrative costs.

To account for higher churn rates, non-revenue calls, and higher bad debt issues, the Petitioners recommend a rate of **18 cents** (prepaid and debit) and **20 cents** (collect) for smaller jails with fewer than 350 beds. While a large majority of jails fit into this category, its share of the overall minutes of use is approximately 30%. By drawing a line at 350 beds, the FCC would be limiting the impact of the higher rates to those facilities most in need, while

³² *Brattle Study*, pg. 1-2.

ensuring that the vast majority of ICS calls are charged at a rate commiserate with the cost of providing the ICS service.

As early as 2010, the Petitioners acknowledged that a tiered structure may be necessary, although in more recent submissions the Petitioners had advocated for uniform rates among the different classes of correctional facilities.³³ The recommendation also takes advantage of the purported difference in cost in providing service to large jails and prison systems. Over the years, the ICS providers have argued that the costs of serving the smaller facilities are higher due to the rapid churn of inmates and the slow-return of investment costs at these facilities.³⁴ By adopting a rate for large facilities at 10 cents lower than that for small jails, the FCC can adopt rates that surgically limit excess profits at large facilities, while providing a more generous rate costly facilities with higher costs.

Furthermore, this approach will likely eliminate or substantially limit the number of companies that will need to seek waivers of the rules, as well as eliminating arguments on appeal that the FCC ignored these small jails when adopting a rate. The goal for all parties should be the adoption of ICS rules that provide a level playing field, and eliminate – to the greatest extent possible – gamesmanship in the ICS industry.

The proposed rates would apply to all local, intrastate, and interstate ICS calls. These rates would also apply to the so-called single-call services as well.³⁵ If an ICS provider were to continue offering a single-call service, it would need to comply with the proposed rates, along with a \$3.00 funding fee as proposed below. ICS providers have yet to provide any justification

³³ See *Petitioners Ex Parte Submission*, January 7, 2010, pg. 3. See also *Petitioners Ex Parte Submission*, July 16, 2013.

³⁴ See e.g., *Pay Tel Communications Ex Parte Submission*, dated July 3, 2013.

³⁵ *SFNPRM*, ¶ 98.

for charging more than 10 dollars under their single-call services, and furthermore, Alabama took a similar approach when adopting its rules.³⁶

III. THE FCC MUST ELIMINATE OR SUBSTANTIALLY LIMIT ANCILLARY FEES IMPOSED ON ICS CUSTOMERS.

Regulating ancillary fees is a necessary element in ensuring that ICS customer charges are just, reasonable, and fair. It has been shown that ancillary fees are a significant cause of ICS customers being charged excessive rates. Moreover, it has been shown that these fees are largely unregulated, and are outside of the kickback regime discussed above. As such, these fees go straight to the ICS providers' bottom line and exist solely to extract unnecessary funds from ICS customers.

The Petitioners have consistently argued for the elimination of all ancillary fees in the absence of cost-data justifying their existence. Additionally, the Prison Policy Initiative published a groundbreaking study of ancillary fees – *Please Deposit All of Your Money: Kickbacks, Rates, and Hidden Fees* – which documented the extensive (and oppressive) practice of ICS providers charging additional fees to their customers.³⁷ The Petitioners have also demonstrated that the charges made by ICS providers are widely divergent, both among the companies, and even by the same company in different jurisdictions.³⁸ Such disparities have no justification, except for the reason that ICS providers will charge the maximum amount.

The FCC seeks comment on whether it has the requisite authority to address ancillary fees.³⁹ Previously, the Petitioners provided an exhaustive analysis establishing that the FCC has the requisite statutory authority to regulate ancillary fees.⁴⁰ While ICS providers historically

³⁶ *Further Order Adopting Revised Inmate Phone Service Rules*, Docket 15957, released Dec. 9, 2014, § 6.42.

³⁷ *Prison Policy Initiative Ex Parte Submission*, May 9, 2013.

³⁸ *FNPRM Reply Comments*, pgs. 12-14.

³⁹ *SFNPRM*, ¶ 85.

⁴⁰ *Petitioners Comments*, pgs. 25-27; *Petitioners FNPRM Comments*, pgs. 13-16; *Petitioners FNPRM Reply Comments*, pgs. 12-14;

have argued that these transactions are beyond the reach of the FCC, the plain language of Sections 201, 205 and 276 establishes the FCC's clear authority.

In particular, Section 201(b) grants the FCC authority to determine that a "charge, practice, classification, or regulation" is unjust or unreasonable. Moreover, Section 276 grants the FCC the authority to regulate intrastate ICS rates, which includes "inmate telephone service in correctional institutions, and any ancillary services."⁴¹ Finally, Section 205 directs the FCC to "determine and prescribe what will be the just and reasonable charge...and what classification, regulation or practice is or will be just, fair, and reasonable."

An individual ICS customer has no reason to interact with an ICS provider unless it is to create an account, add additional funds to an account by wire transfer or credit card payment, or close an account when a loved one is released. As such, the ancillary fees charged by ICS providers to their customers are inextricably intertwined with the ICS calls and are most certainly a charge and/or practice covered by the Communications Act. ICS providers have failed to provide any persuasive argument that the FCC lacks statutory jurisdiction to regulate the ancillary fees charged to an ICS customer in order to make the ICS call possible in the first place.

In addition, some states have taken steps to regulate ancillary fees, further bolstering both the need and the authority for the FCC to regulate as well. Specifically, New Mexico and Alabama have adopted comprehensive reform for both ICS rates and ancillary fees by establishing price caps on authorized fees, and by prohibiting all other fees not specifically authorized. Surprisingly, the *Joint Providers Reform Proposal* and the *Ethical Proposal* have also proposed FCC regulation of ancillary fees.

Thus, there is no doubt that the FCC has the jurisdiction to regulate ancillary fees, and the parties imposing such fees have suggested possible reforms. The FCC also seeks comment

⁴¹ 47 U.S.C. § 276(d) (2015).

on the appropriate definition for ancillary fees.⁴² In the event that the FCC does not adopt the Petitioners' recommendation to eliminate the ability of ICS providers to charge ancillary fees, it must adopt rules that specifically identify the fees which may be charged by ICS providers and prohibit all other fees imposed on ICS customers.

Following the lead of New Mexico and Alabama, it appears that the best approach is to articulate which fees qualify as "ancillary" by incorporating such fees into the FCC's rules, and prohibiting all other fees imposed upon ICS customers. Both New Mexico and Alabama have taken the approach that ICS providers can not charge ICS customers any fee unless it has been previously approved by the state commission. The Petitioners propose the following permissible ancillary fees:

- Processing Fees (Live, IVR, Website): \$3.00
- Money Transfer Fees: \$5.95
- Billing (paper only): \$2.00

The proposed ancillary fees conform with the approaches taken by New Mexico and Alabama, and are in line with the recommendations by the Joint Providers and Pay Tel.

This approach is consistent with the Petitioners' recommended approach on kickbacks and the ICS rate caps. The Petitioners support the FCC's exercise of its clear authority to establish rates, charges, and practices for the ICS industry. Should the ICS providers or correctional facilities desire to provide additional services, they can approach the FCC and seek the modification or waiver of the FCC's rules.

The Petitioners also support the FCC's emphasis on the disclosure of ancillary fees for ICS customers.⁴³ Both the Joint Providers and Pay Tel have suggested specific guidelines for the disclosure of rate and ancillary fee information.⁴⁴ The Petitioners' urge the FCC to require that rate and ancillary fee information be available to the public without having to set up an account

⁴² *SFNPRM*, ¶ 85.

⁴³ *SFNPRM*, ¶ 109.

⁴⁴ *Id.*, ¶ 110.

or register with the ICS provider. In particular, the FCC must mandate that all ICS providers list their rates and ancillary fee information in a publically-available location on the ICS provider's website, and also train its staff to disclose all rate and fee information to anyone who contacts the ICS provider.

IV. THE FCC'S PROMOTION OF COMPETITION

The *SFNPRM* seeks comment on how to promote competition in the ICS industry.⁴⁵ Previously, the Petitioners suggested that the FCC follow the approach it took in the Inside Wiring proceeding and establish a demarcation point at the facility at which any authorized ICS provider could connect.⁴⁶ Because correctional authorities differentiate ICS providers almost exclusively on who will provide the highest kickback, the underlying service offerings by the ICS providers must be almost uniform. The correctional authorities would be permitted to create a list of required security measures, and those that seek to provide service would be required to meet those standards.

Absent that type of arrangement, it is not clear how the ICS industry can be made "competitive."⁴⁷ Correctional institutions are, by their nature, monopoly facilities. Inmates do not select the institution in which they will be incarcerated, and the FCC need not intercede on the correctional institutions' authority in this regard. The Petitioners recommend that the FCC establish ICS rate caps and limited ancillary fees first and then determine whether additional steps will be necessary in the future.

The FCC's goal of introducing competition in this context should be to establish ICS rates at the lowest point so that ICS consumers do not pay unjust, unreasonable, or unfair ICS rates and fees. However, even the most enthusiastic advocate for market-based solutions would have to acknowledge that there are certain cases where the introduction of competition is not possible

⁴⁵ *SFNPRM*, ¶ 113.

⁴⁶ *Petitioners FNPRM Comments*, pg. 17.

⁴⁷ *SFNPRM*, ¶ 114.

or desirable. In the instant case, a monopolistic correctional facility asks for bids from companies seeking to become the monopolistic ICS service provider. In this context, and in light of the correctional authorities' unwillingness to introduce competition, the best the FCC can do is to adopt a ICS rate that protects consumers from excessive ICS rates and fees.

V. THE FCC MUST PREEMPT CONFLICTING STATE OR LOCAL LAWS WHEN NECESSARY.

As noted above, almost all states continue to permit ICS rates that are far beyond the interstate ICS rates adopted by the FCC in 2013. As a result, in almost every state in the United States, it now costs more to place intrastate ICS calls than interstate ICS calls. This disparity undermines the FCC's goals in adopting the ICS rate caps and leaves more than 80% of the ICS calls unaffected by the FCC's actions.

The Communications Act grants sole authority over interstate communications to the FCC. Moreover, Section 276 of the Communications Act unequivocally preempts "any State requirements [that] are inconsistent with the Commission's regulations" for ICS.⁴⁸ Also, *Illinois Public Telecommunications* confirmed that Section 276 granted authority to the FCC to regulate local calls.⁴⁹ Thus, there is no debate that the FCC has the authority to preempt those state regulations that conflict with regulations adopted in this proceeding.

While a small number of states may have taken a laudable interest in the issues under review by the FCC, the fact remains that the FCC has the sole authority to fashion a solution that applies nationwide. No party has provided any evidence that any one state is inherently more costly to serve. In fact, most states have willfully and completely ignored this issue.

Therefore, the Petitioners support the preemption of any state law or regulation that authorizes ICS rates and fees beyond what is adopted in this proceeding. In order to permit the orderly transition to FCC-mandated ICS rates and fees, the Petitioners suggest that the new ICS

⁴⁸ 47 C.F.R. § 276(c) (2015).

⁴⁹ 117 F.3d 555, 562 (1997).

rates and fees would apply to states that had not enacted reform earlier than January 1, 2015, within 90 days of the effective date of a final order in this proceeding.

Moreover, those states, such as Alabama and New Mexico, which had adopted ICS reform prior to January 1, 2015, would be permitted an additional 90 days to conform their rules when necessary to those adopted by the FCC. To the extent that the FCC rules do not conflict with a state law or regulation (i.e., the state law prescribes rates lower than those adopted by the FCC), that state would be permitted to retain its previously-adopted rules and regulations.

VI. THE FCC SHOULD ADOPT A LIMITED TRANSITION PERIOD FOR ICS RATES

The FCC proposed to permit a 90-day period after the effective date of new ICS rules to modify contracts between ICS providers and correctional authorities.⁵⁰ The Petitioners support this proposal, especially since this would be the second round of changes to the agreement since 2013. Correctional authorities have been on notice since at least December 2012 that the FCC may take action in this proceeding, and ICS providers were successful in implementing the changes in the interstate ICS rates. No party has shown thus far that they have been unable to meet a 90-day deadline, and the Petitioners support its adoption moving forward.

If the FCC adopts rules to eliminate kickbacks, then the period to make that change also should be limited. As noted previously, no correctional authority can claim not to be aware on the ongoing proceeding, and the advocacy groups for correctional facilities have been active throughout the proceeding. As such, the Petitioners can support a six-month period for correctional authorities and ICS providers to come into compliance with the elimination of kickbacks. In fact, it is likely that the ICS providers will expedite this aspect of the new rules.

⁵⁰ *SFNPRM*, ¶ 130.

VII. A COST/BENEFIT ANALYSIS CAN NOT BE USED TO AVOID THE STATUTORY OBLIGATION TO ACT ON UNJUST, UNREASONABLE, AND UNFAIR ICS RATES.

Finally, the FCC seeks an analysis of the costs and benefits of reforming ICS.⁵¹ The Petitioners have responded to this same question on several different occasions.⁵² In doing so, the Petitioners provided an analysis of the reduction of recidivism and the lack of data from the correctional authorities on their costs. In fact, the Petitioners demonstrated that just “a 1% reduction in recidivism would save more than \$250 million per year, year after year.”⁵³

The Petitioners have also provided a discussion as to whether a cost/benefit analysis is appropriate at all, especially when it has been shown that a systematic violation of the Communications Act has occurred for more than 14 years. The FCC does not have the authority to pick and choose which statutory obligations it enforces.⁵⁴ When confronted with unjust, unreasonable, and unfair rates, charges and practices, the FCC has an obligation to act, just as the US District Court directed it do on August 22, 2001.

⁵¹ *SFNPRM*, ¶ 159.

⁵² *NPRM Comments*, pgs. 30-32. *See also FNPRM Comments*, pgs. 18-20.

⁵³ *NPRM Comments*, Exhibit C, pg. 24.

⁵⁴ *NPRM Comments*, pg. 31 (citing *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1230 (D.C. Cir. 1999); *National Cable & Telecommunications Association v. FCC*, 567 F.3d 659 (D.C. Cir. 2009) (“We decline to put issues relating to their cable service outside the Commission’s authority simply because those issues also matter to their landlords.”)).

CONCLUSION

The FCC's prime directive is:

to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.⁵⁵

The Petitioners are grateful for the FCC's continued efforts in providing to relief to millions of Americans who have been forced to pay unjust, unreasonable, and unfair ICS rates and charges for more than a decade. The FCC took an important, initial step in August 2013, and the Petitioners urge the FCC to finalize rules in this proceeding as soon as possible.

Respectfully submitted,

By: /s/ Deborah M. Golden, Esquire

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January 12, 2015

⁵⁵ 47 U.S.C. § 151 (2015) (emphasis added).

EXHIBIT A

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

In the Matter of)
)
Rates for Interstate Inmate)
Calling Services)

WC Docket No. 12-375

**SECOND FURTHER NOTICE DECLARATION OF COLEMAN
BAZELON**

Coleman Bazelon declares as follows:

I. Purpose

1. My name is Coleman Bazelon. Previously, I filed a Declaration¹ and Reply Declaration² in WC Docket No. 12-375 and comments on the FCC Mandatory Data Collection Further Notice in this Proceeding.³ In this declaration, I briefly review the Mandatory Data Collection submissions completed by the ICS providers and based on those data propose new rates for ICS services.
2. As part of an effort to ensure that ICS rates are just, reasonable and fair, the FCC released an order on September 26, 2013 which included the following reforms⁴:

¹ “Declaration of Coleman Bazelon,” Martha Wright, et al, D.C. Prisoners’ Legal Services Project, Inc., Cure, Prison Policy Initiative, and the Campaign for Prison Phone Justice, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 et al., WC Docket No. 12-375, March 25, 2013, Exhibit C.

² “Reply Declaration of Coleman Bazelon,” Martha Wright, et al, D.C. Prisoners’ Legal Services Project, Inc., Cure, Prison Policy Initiative, and the Campaign for Prison Phone Justice, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 et al., WC Docket No. 12-375, April 22, 2013, Exhibit A.

³ “RE: Rates for Interstate Inmate Calling Services,” Lee Petro, WC Docket No. 12-375, September 17, 2014, Attached FCC Mandatory Data Collection Further Notice.

⁴ “Rates for Interstate Inmate Calling Services, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking,” Released: September 26, 2013. (Hereinafter, “ICS Order”).

- It required ICS providers' interstate rates and charges to be cost based,
 - It adopted interim caps for interstate calling rates,
 - It adopted interim "safe harbor" rate levels,
 - It took action to help deaf and hard of hearing inmates and their families,
 - It ensured that security measures remain robust by ensuring that costs are recovered through ICS rates, and
 - It adopted robust enforcement measures.
3. To determine if additional reforms are necessary, the FCC requested comments on the proposed reforms and required ICS providers to file data on costs, rates, and usage with the FCC. The Mandatory Data Collection requires ICS providers to include direct and common costs incurred in providing inmate calling services for debit, prepaid, collect and any other ICS separated into telecommunications costs, equipment costs, security costs, ancillary costs, and other relevant costs. ICS providers were also required to report commissions paid, revenue and non-revenue producing minutes of use and calls, and average call durations.⁵

II. Summary of Previous Findings

A. SUMMARY OF DATA

4. The FCC received submissions from ICS providers⁶ with varied levels of detail and analyses. GTL and Securus are the largest providers and together provided more than three-quarters of the minutes of use (MOU) in 2013.
5. Figure 1 and Table 1 below show the average cost per MOU for each payment type and were extremely varied across the ICS providers, ranging from a low of

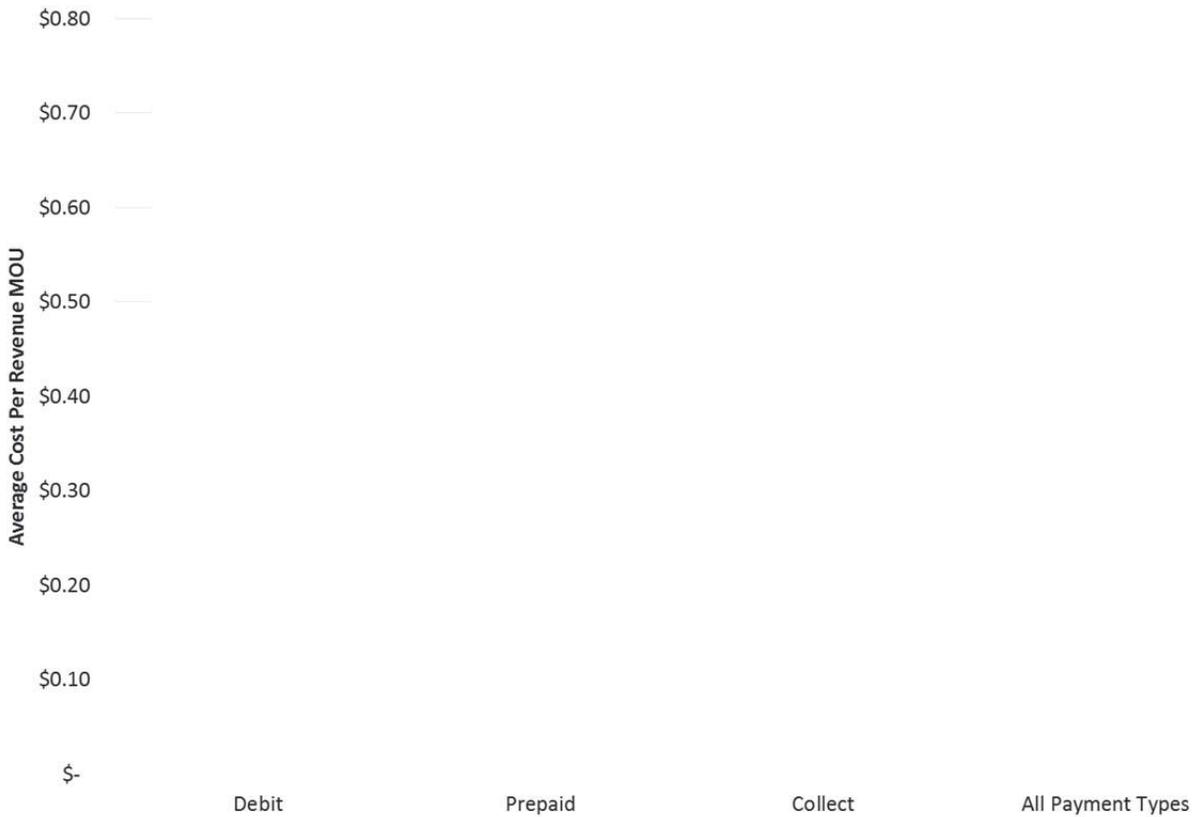
As expected, ICS providers reported the highest costs for collect calls at a weighted average (which have additional billing and bad debt

⁵ "Instructions for Inmate Calling Services Mandatory Data Collection," WC Docket No. 12-375, ICS Mandatory Data Collection (2013).

⁶ Lattice Incorporated (Lattice), Pay Tel, Network Communications International Corp. (NCIC), Securus, Telmate, Inmate Calling Solutions (ICSolutions), Global Tel*Link (GTL), Century Link, Custom Teleconnect, ATN, Combined Public Communications, Correct Solutions, Encartele, and Protocall.

⁷ Weighted by Revenue Producing MOU for each provider. The straight (unweighted) average of each provider's cost per minute is

costs) and similar costs (within the same provider) for debit and prepaid calls at an industry weighted average of \$.⁸



e: Weighted average is weighted by Revenue Producing MOU for each provider.

⁸ FCC Mandatory Data Collection Submissions.

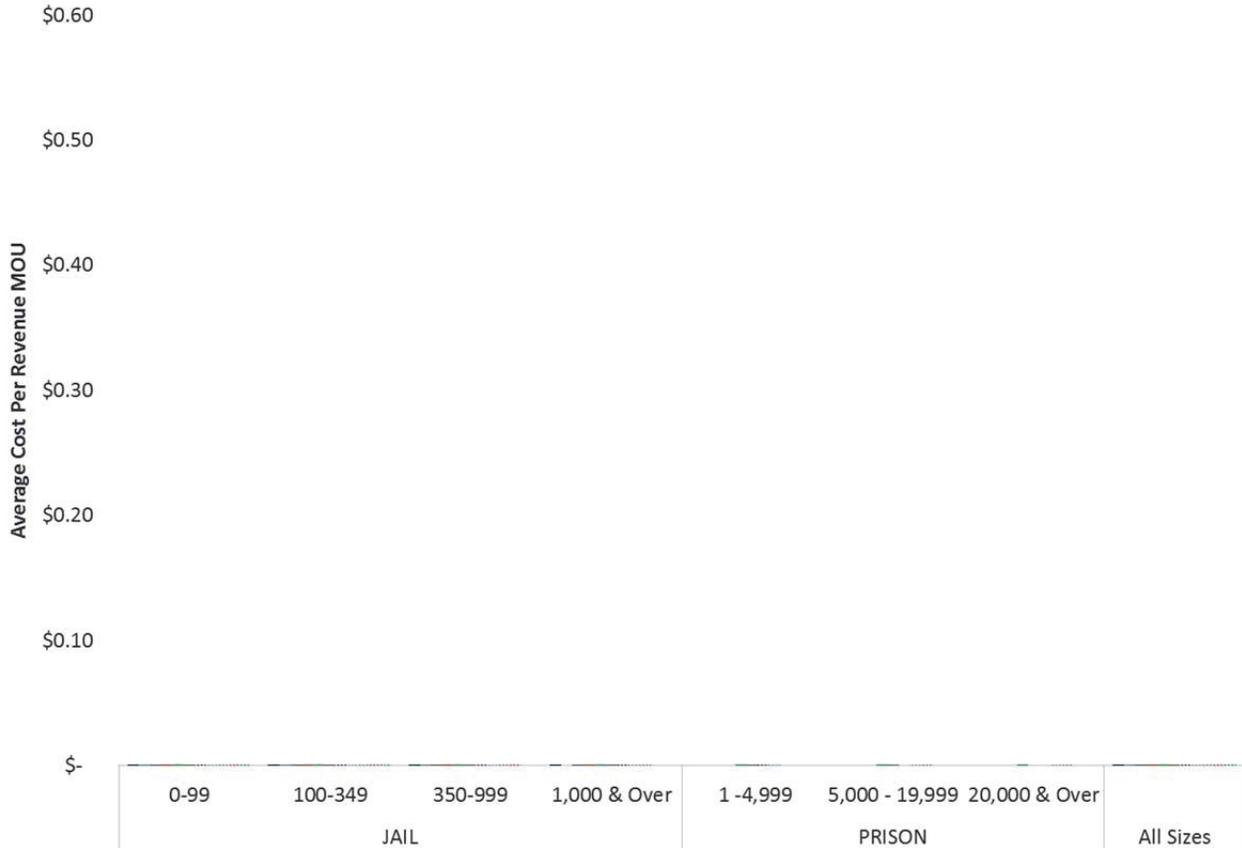
Table 1: Average Cost per Revenue Producing MOU by Payment Type (2013)

Payment Type	Combined Public Comm	Lattice Incorporated	Pay Tel	NCIC	Securus	Telmate	Inmate Calling Solutions	Global TelLink	Century Link	Correct Solutions	Custom Teleconnect	Weighted Average
Debit	\$											
Prepaid	\$											
Collect	\$											
All Payment Types	\$											

Note: Weighted average is weighted by Revenue Producing MOU for each provider.

- ICS providers were also asked to separate costs by facility size for both jails and prisons. Figure 2 and Table 2 below show average cost per MOU by facility size and type. Data from the providers generally showed that jails (run by local governments with lower average daily population (ADP) and higher churn) had significantly larger average cost per MOU than prisons (run by state governments). In addition, data generally showed a decrease in average cost per MOU as facility size increased. However, the extent of the decrease in cost from increased facility size varied greatly. For example, [redacted] reported its lowest average cost per minute as \$ [redacted] (Prisons with ADP of 1-4,999) and highest average cost per minute as \$ [redacted] (Jails with ADP of 0-99), a \$ [redacted] per minute difference. At the other extreme, [redacted] reported its lowest average cost per minute as \$ [redacted] (Jails with ADP of 350-999) and highest average cost per minute as \$ [redacted] (Jails with ADP of 0-99), a \$ [redacted] per minute difference. These differences may reflect underlying issues with the reported cost data (discussed in the following section) as much or more than actual cost differences in serving facilities of different types and sizes.

Figur Average Cost per Revenue Producing MOU by Facility Size (2013)



Note: Weighted average is weighted by Revenue Producing MOU for each provider.

Table 2: Average Cost per Revenue Producing MOU by Facility Size (2013)

Facility	ADP Group	Combined Public Comm	Lattice Incorporate	Pay Tel	NCIC	Securus	Telmate	Inmate Calling Solutions	Global TelLink Century Link	Correct Solutions	Custom Teleconnect	Weighted Average
JAIL												\$
PRISON												\$
All Sizes		\$										

Note: Weighted average is weighted by total Revenue Producing MOU for each provider.

B. PROBLEMS WITH SUBMISSIONS

7. Data submitted by ICS providers had many issues which were discussed in my previous comments and by the FCC in the Second Further Notice of Proposed Rulemaking, including:⁹
 - Inconsistent and inaccurate allocation of costs between ICS and other services;
 - Inconsistent categorization of costs into equipment, telecom, security, other and ancillary fees with limited or no justification or description;
 - Incorrect calculation of financing charges;
 - Inconsistent categorization of costs as direct or common;
 - Inconsistent and inappropriate allocation of common costs with limited or no justification or description;
 - Incorrect calculations for return on capital; and
 - Incomplete description and justifications.
8. Given the lack of easily attributable direct costs, variations in categorizations of costs, and limited insight into allocation methodologies and data, a rate based on average costs provided in the ICS providers Mandatory Data Collection submissions would not be fair, just, reasonable, and cost based. The data do provide some information, however imperfect, that can be used to set maximum reasonable rates. Further data collection would be required to establish more accurate, and likely lower, rates.

III. Proposed Rate

9. I propose a base rate of \$0.08 per minute with add-ons of \$0.02 per minute for collect calling and \$0.10 per minute for calls from facilities with fewer than 350 beds. These rates are based on select adjustments to data submitted in this proceeding. Because of the issues raised with data collected, these proposed rates likely still overstate actual ICS industry costs. Further data collection may allow refinement, and possibly reducing, any maximum rates. Nevertheless, the rates proposed are justified based on the data submitted.

A. BASE RATE

10. Securus and GTL, which together account for more than three-quarters of the industry, report approximately _____ across all

⁹ “RE: Rates for Interstate Inmate Calling Services,” Lee Petro, WC Docket No. 12-375, September 17, 2014, Attached FCC Mandatory Data Collection Further Notice.

facility types for 2013. This provides a starting place for a base rate because these two ICS providers are clearly at scale and can efficiently provide ICS service. However, as I discussed above and in my previous comments, these costs include many incorrectly calculated additions such as inappropriately recoverable financing costs. To provide a more realistic base rate,

I make no other adjustments to their cost data in calculating a base rate.¹⁰

11.

As an initial matter, this is not an economically appropriate way to calculate their actual return on equity because

12.

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Prepared at the Request of Counsel

Table 4: Securus Select Net Asset Balances (\$ Million)¹⁶

14.

B. COLLET CALLING

16. Collect calls accounted for a small portion of revenue producing MOU, approximately ¹⁷ It is my understanding that these calls can be more costly than debit and prepaid calls due to challenges with bad debt collection.¹⁸ Here I estimate the additional costs of collect over debit/prepaid calling services.

¹⁶ Securus Technologies, Inc. Form 10-Ks for the fiscal years ended December 31, 2005 to December 31, 2009. Direct Call Provisioning is approximately 86% of Securus revenues in 2009 which also include Wholesale Services and Offender management Software.

¹⁷ FCC Mandatory Data Collection Submissions.

¹⁸ "FCC Mandatory Data Collection Description & Justification for Global Tel*Link Corporation," Economists Incorporated, August 22, 2014.

17. allocated costs by revenue and thus any differences in costs they report between collect and debit/prepaid are unlikely to accurately reflect underlying cost differences, such as the cost of bad debt. Consequently, I exclude their data from the following analysis of cost differences. Excluding them from the calculations, that provide debit/prepaid and collect calls. For providers with debit or prepaid and collect calling services, the table below shows the average difference in per minute cost to provide these services.

Table 5: Difference in Collect and Debit/Prepaid Calls (2013)

Payment Type							
Average Debit/Prepaid	\$						
Collect	\$						
Difference	\$						

Note: Weighted average is weighted by Revenue Producing MOU for each provider.

18. There are several reasons to believe that the estimated per minute overstates the per-minute cost differential of providing collect services going forward. First, and foremost, these estimates of per minute costs are based on higher, and sometimes significantly higher, ICS rates. With lower rates, bad debt related to collect calling should decrease, especially on a per-minute basis, for at least two reasons. First, any given unpaid debt will be smaller as a result of lower future prices. Second, with lower bills, fewer customers will be unable to pay their bills. Consequently, I would expect the percentage premium for collect services to decrease as the base cost of calls is reduced. Therefore, I estimate the percentage increase in costs for collect services and apply that to the base rate to calculate a per-minute collect surcharge and round down to the nearest penny.

19. According to the MOU weighted averages, collect calls are more expensive than debit/prepaid calls (). When I apply this percent difference to the adjusted base cost of \$0.08/MOU for debit and prepaid costs calculated above, the additional cost per MOU for collect calls is estimated to be about \$0.025, which I round down to \$0.02 per minute.

20. Thus, I propose a \$0.02 per MOU adder for collect calls. This is consistent with the safe harbor rates established in The Report and Order, which included a \$0.02 per MOU premium for collect calls.¹⁹

¹⁹ The safe harbor rates established in the Report and Order were \$0.12 per minute for prepaid/debit and \$0.14 per minute for collect calls. “ICS Order,” paragraph 5.

C. LARGE VS SMALL FACILITIES

21. In the cost data submitted by ICS providers, the majority of providers reported higher costs per MOU for small jails than for larger jails and prisons. Some reasons for the higher costs per MOU are:

- **Higher Churn:** According to statistics from the US Department of Justice in Table 6 below, jails with lower ADP have significantly higher turnover rates than jails with 1,000 or more ADP. In addition, according to American Correctional Association data, the Prison population has very low weekly turnover rates.²⁰ The higher turnover for smaller facilities can lead to additional one-time prisoner costs combined with more prisoners who do not ever make revenue generating calls.

Table 6: Weekly Turnover by ADP

ADP	2012 Weekly Turnover Rate	2013 Weekly Turnover Rate
< 50	130.6%	121.1%
50 - 99	83.2%	83.6%
100 - 249	74.3%	67.9%
250 - 499	63.2%	66.3%
500 - 999	56.7%	75.5%
1,000 +	49.4%	44.3%

Source: "Jail Inmates at Midyear 2013- Statistical Tables," U.S. Department of Justice Bureau of Justice Statistics, August 12, 2014.

- **More unbillable calls:** Due to the higher churn, low ADP jails can have more unbillable calls. After booking, an inmate is permitted a call to the ICS provider to set up their account. The ICS provider incurs the costs of the call and account setup, but receives no revenue. The detainee is also given a free call while in booking. Inmates can receive additional free calls if they are not bonded out within a certain time and to commissary services which are often not on-site (unlike prisons which often have on-site commissary services).²¹

²⁰ "Inmate Calling Services (ICS) Market Distinctions Prisons vs. Jails," Pay Tel Communications – Ex Parte Presentation, WC Docket No. 12-375. (Hereinafter, "ICS Market Distinctions".)

²¹ "ICS Market Distinctions".

- **Higher customer service costs.** Higher churn facilities have higher customer service costs from newly booked inmates who need to make immediate contact with family or representation. This leads to requirements for 24 hour call center support. In addition, newly booked inmates are less familiar with the services and require extra help than long term inmates whose family and friends become familiar with the ICS.²²
- **Higher bad debt and refund processing.** Additionally, due to the higher churn, small jails have less of an opportunity to establish a relationship with their inmates which increases the likelihood of bad debt. For those that do set up accounts, if the inmate is released after a short time, the account becomes inactive. This leads to increased labor and costs to refund unused balances after release.²³

22. I calculate the difference in cost between jails with ADP less than 350 versus jails with ADP greater than 350 and prisons by finding the MOU weighted difference in costs across providers between these types of facilities. Table 7 shows the difference by provider. Based on these data, I propose a \$0.10 per minute premium for facilities with an ADP below 350.

Table 7: Difference in Cost per MOU for Jails with ADP < 350 vs Jails with ADP > 350 and Prisons (2013)

Facility	
Jails with ADP <350	\$
Jails with ADP >350 and Prisons	\$
Difference	\$

Note: Weighted average is weighted by Revenue Producing MOU for each provider.

IV. MOU for Weighted Average

23. Table 8 and Table 9 below show the Revenue Producing MOU by provider for 2013 that I use in my calculations to find weighted average values.

Table 8: Revenue Producing MOU by Payment Type (2013)

Payment Type	
Debit	
Prepaid	
Collect	
Total	

²² “ICS Market Distinctions”.

²³ “ICS Market Distinctions”.

