

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF CENTURYLINK

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I. INTRODUCTION AND SUMMARY

CenturyLink Public Communications, Inc. on behalf of itself and its affiliates (“CenturyLink”) submits these reply comments in response to the Commission’s *Second Further Notice of Proposed Rulemaking*.¹

CenturyLink shares the Commission’s appreciation of the value that widely available, cost-effective, and secure monitored inmate calling services (“ICS”) provide to inmates and their families. In considering any potential new regulations, however, the Commission should be mindful of the limits of its authority. In particular, the Commission should recognize that it does not have general authority to regulate intrastate rates of ICS providers, and it also lacks authority over commissions that may be required by correctional authorities. It should not read into statutory provisions authority it does not have. It should respect state and local authority and defer to the judgment of prison and jail administrators to determine appropriate policies and rates for intrastate ICS.

If despite the limits of its statutory authority the Commission attempts to further regulate inmate calling services, it should limit any such regulations to ICS rates and ancillary fees. The

¹ *Rates for Interstate Inmate Calling Services*, Second Further Notice of Proposed Rulemaking, FCC 14-158, WC Docket No. 12-375 (rel. Oct. 22, 2014) (“*Further Notice*”). Comments were filed on or before January 12, 2015.

Commission can accomplish its goals of lowering the overall cost of inmate calling by focusing on rates and ancillary fees without necessarily denying correctional authorities the opportunity to utilize some percentage or per-minute commission if they deem it necessary or appropriate for their facilities.

In its *2013 ICS Order*,² the Commission established interim rate caps for interstate ICS of \$0.21 per minute for debit and prepaid calling and \$0.25 per minute for collect calling. Leaving aside the *2013 ICS Order*'s attempt – misguided in CenturyLink's view, and subsequently stayed by the D.C. Circuit³ – to impose a rate-of-return regime on interstate ICS rates, CenturyLink believes these are acceptable rate caps and could be made permanent for all facility types.⁴ However, for these caps to be genuinely effective in reducing the cost of inmate calls, the Commission must also address ancillary fees. Ancillary fees are both a primary driver of end user costs and the area most potentially abusive to and frustrating for inmate families. If the Commission claims authority to regulate ICS and seeks to force per-minute rates down, but does not address ancillary fees, it will only have ensured that ancillary fees will become an ever greater concern for inmate families.

The Commission should not attempt to restrict or prohibit site commission payments to correctional facilities for the simple reason that the Commission lacks authority to do so. If the Commission nevertheless determines to restrict payments to correctional facilities, it should at a

² *In the Matter of Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 12-375, 28 FCC Rcd 14107 (Rel. Sept. 26, 2013) (“*2013 ICS Order*”).

³ Per Curiam Order, *Securus Technologies, Inc. v. FCC*, D.C. Cir. No. 13-1280 (Jan. 13, 2014).

⁴ Some high-cost facilities, such as certain very small jails, juvenile detention centers, and secure mental health facilities, would warrant a waiver from these caps.

minimum authorize a reasonable, adequate per minute administrative fee that would permit correctional facilities to recover their costs of making ICS available. Such a fee would allow correctional facilities to offset monitoring and administrative costs of ICS – costs that will only rise with increased calling due to lower calling rates. It will also ensure that inmate calling services are made widely available to inmates and their family members, while providing an incentive for correctional facilities to reduce or eliminate ancillary fees.

If the Commission nevertheless imposes new ICS regulations, it should adopt the more reasonable reform proposal outlined by CenturyLink, which would deliver meaningful relief to end users while balancing the interests of all parties. Finally, if new rules are adopted, the Commission should grandfather existing contracts or, at a minimum, provide for a transition period of at least one budget cycle to allow ICS providers and correctional facilities sufficient time to adjust. Any transition period should be the same for both rate caps and any restrictions on site commissions.

II. THE COMMISSION LACKS AUTHORITY TO REGULATE INTRASTATE ICS RATES, TO RESTRICT OR PROHIBIT ICS COMMISSIONS, OR TO PREEMPT STATE AUTHORITY.

The *2013 ICS Order* wrongly concluded “that Section 276 affords the Commission broad discretion to regulate intrastate ICS rates and practices that deny fair compensation, and to preempt inconsistent state requirements.”⁵ The *Further Notice* repeats the error.⁶ Advocates for Commission action on intrastate ICS readily take its claim of authority at face value. Other parties, however, argue the agency simply does not have the statutory authority that the *Further*

⁵ *2013 ICS Order* at ¶ 135.

⁶ *Further Notice* at ¶ 29 n.106.

Notice claims. An eagerness for reform, even with the best intentions, cannot justify disregard of the limits of the Commission’s statutory authority.

A. Section 276 Does Not Give Authority To Regulate Intrastate ICS Rates or Fees.

Many commenters respectfully sought to remind the Commission of the purpose and history of Section 276⁷ – and of the limited scope of its grant of authority. As CenturyLink explained in its prior comments in this proceeding, Section 276 does not authorize the Commission to regulate intrastate ICS rates.⁸ Section 276 was enacted to protect competition in payphone services and encourage widespread availability of payphones, through a variety of provisions to be implemented by the Commission. These included prohibiting Bell operating companies (“BOCs”) from subsidizing their own payphone services,⁹ prohibiting discrimination in the provision of payphone lines,¹⁰ and ensuring all payphone service providers could negotiate equally with location owners for the opportunity to provide service.¹¹

The more complex directive of Section 276 was to deal with the then-growing problem of dial-around calling. In making local or toll calls (and even for operator assisted calls), callers were increasingly using 8YY services to avoid use of coins and to bypass the carrier or operator service provider selected by the payphone owner or site owner. Because these calls did not require any payment to the payphone, payphone owners found a large and growing percentage of

⁷ 47 U.S.C. § 276.

⁸ Comments of CenturyLink, WC Docket No. 12-375 (filed Dec. 20, 2013), at 2-8.

⁹ 47 U.S.C. §§ 276(a)(1) and 276(b)(1)(B).

¹⁰ 47 U.S.C. §§ 276(a)(2) and 276(b)(1)(C).

¹¹ 47 U.S.C. §§ 276(b)(1)(D) and 276(b)(1)(E).

usage generated no revenue for the payphone. Section 276(b)(1)(A) directed the Commission to create a “per-call compensation plan” for dial-around calls so that payphone service providers would receive adequate compensation from dial-around carriers for all completed calls for which they would otherwise not receive compensation, except for emergency calls and telecommunications relay service calls.¹²

The limited statutory objectives are clearly stated in the one-sentence preamble to 276(b)(1).¹³ Congress did not intend that Section 276 be broadly interpreted so as to give the Commission authority to regulate intrastate payphone rates, to regulate or prohibit ICS commissions, or preempt state and local authorities from their longstanding authority to determine how to manage any prison calling services. Indeed, for nearly twenty years, the Commission never cited Section 276 to pretend to claim such authority. “Until this proceeding,” NARUC points out, Section 276 “has never been expanded to give the FCC authority to establish intrastate toll rates.”¹⁴

Section 276(b) was intended to promote competition and availability of payphones and to ensure that payphone service providers receive sufficient compensation. Section 276(b)(1)(A) accordingly directs the Commission only to ensure *a minimum* compensation level for payphone

¹² 47 U.S.C. § 276(b)(1)(A). *See also* House Report 104-204 Part I, Communications Act of 1995, p. 88 (July 24, 1995); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 11 FCC Rcd 6716, 6725-26, ¶¶16, 17 & n.54 (1996).

¹³ 47 U.S.C. § 276 (b) (1)(“In order to promote competition among payphone service providers and *promote the widespread deployment of payphone services to the benefit of the general public*, within 9 months after February 8, 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations....”) (emphasis added).

¹⁴ NARUC at 8.

owners *from IXCs* receiving dial-around calls for use of the equipment. It does not authorize the Commission to limit or cap the compensation providers receive and has absolutely no bearing on rates charged to end users.¹⁵ Section 276 actually “has nothing to do with end-user rates, or at least the toll rates at issue in this proceeding.”¹⁶

Section 276 also plainly does not authorize the Commission to regulate rates in circumstances in which an ICS provider receives compensation for equipment use under a contract entered into with a correctional facility.¹⁷ On the contrary, where such contracts are in place – as is the case with virtually all ICS contexts – Section 276’s mandate for “fair compensation” to payphone owners is not at issue. The Commission itself has said that “whenever a PSP is able to negotiate for itself the terms of compensation for the calls its payphones originate, then our statutory obligation to provide fair compensation is satisfied.”¹⁸

At the time Congress enacted Section 276, old-fashioned coin-operated pay telephones were still found in jails and prisons. For those older payphones, the issue of “fair” compensation (meaning minimally sufficient to the service provider) was equally applicable. Such phones were little different from conventional public payphones, apart from the fact that their use was highly restricted and closely supervised. To the extent a prison or jail had a contract with a

¹⁵ Georgia DOC at 5-6.

¹⁶ Georgia DOC at 4 (footnote omitted). Indeed, Section 276’s definition of “inmate telephone service” more realistically refers to the provision of payphone *equipment*, as NARUC says, because otherwise “Congress would have used the term ‘inmate telecommunications services,’” corresponding to the definition of “telecommunications services” in Section 153. NARUC at 12, referring to 47 U.S.C. § 153(53) (footnote and emphasis omitted).

¹⁷ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd 21233, 21269 ¶72 (1996) (“*1996 Order on Reconsideration*”).

¹⁸ *Id.* (citation omitted).

payphone service provider to provide and manage their ICS, section 276 simply was not implicated. At today's correctional facilities, Section 276 has been absolutely irrelevant, because services are invariably provided under contract and dial-around calling is not used in modern inmate calling systems; in fact, for security reasons, dial-around calling is explicitly forbidden by correctional authorities at all facilities CenturyLink serves.¹⁹ Ironically, the underlying basis for Section 276 to include inmate telephone service plainly no longer even exists.

B. Precedent Shows Section 276 Provides No Authority Over Intrastate ICS.

The *2013 ICS Order* and the *Further Notice* are mistaken in claiming that *Illinois Public Telecommunications Ass'n*²⁰ supports "this revisionist reading of Section 276."²¹ Several parties agreed that the Commission is "[mis]characterizing the concept of fair compensation" in section 276(b) "as balancing compensation for ICS providers and the cost paid by the 'end-user.'"²²

That case addressed the Commission's need to regulate rates for local coin calls, because payphone owners were compensated for such calls only by the caller's deposit of coins. The Commission adopted a rate for local coin calls in order to ensure that payphone owners would receive the per-call compensation required by Section 276. But the court explained that the Commission had not claimed broader rate-setting authority. It had made clear to the court that

¹⁹ The Tennessee Department of Corrections (at 2) observes that today's inmate calling systems really are no longer "payphones," because they are so very different from the coin-operated payphones of old.

²⁰ *Illinois Pub. Telecommunications Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) (per curiam), cert. denied sub nom. *Virginia State Corp. Comm'n v. FCC*, 523 U.S. 1046 (1998) ("*Illinois Public*").

²¹ NARUC at 12.

²² E.g., Georgia DOC at 6, n.14 (referring to the *2013 ICS Order*, 28 FCC Rcd at 14176-77 ¶ 137).

this local coin rate was just a “default rate, from which the PSPs and the IXC’s could negotiate a departure” by a site contract.²³ The decision had no bearing on intrastate toll rates.²⁴ It certainly did not allow the Commission broader authority over non-coin calling rates, fees, or commissions. And of course, the ICS services at issue in this proceeding are all covered by site contracts.

Indeed, for nearly twenty years, until this proceeding, the Commission had never asserted that Section 276 gave it any broad authority to regulate intrastate rates.²⁵ NCIC explains that, historically, the Commission had acknowledged that payphone rates are outside its jurisdiction.²⁶ For example, in 2002, the agency said it “does not regulate payphone rates, the contractual relationship between a payphone owner and the long distance carrier for the payphone equipment, or the rates for calling cards, including prepaid cards.”²⁷ In 1996, the Commission recognized that Section 276 did not authorize it to regulate operator-assisted call commissions.²⁸

Some parties join the Commission court precedent in an attempt to justify this new-found claim of Commission authority. Most either simply assume or broadly assert that the Commission has such authority, without detailing the reasons.²⁹ Lattice provides more detail, but it wrongly assumes that, because *Illinois Public Telecommunications Ass’n* found the

²³ *Illinois Public Telecommunications Ass’n*, 117 F.3d at 560.

²⁴ NARUC at 11.

²⁵ NARUC at 8.

²⁶ NCIC at 10-11.

²⁷ *Telecommunications Relay Services & The Americans With Disabilities Act of 1990*, Fifth Report and Order, 17 FCC Rcd 21233, 21243 ¶ 24 (2002) (citations omitted).

²⁸ *See Order on Reconsideration* at ¶ 52.

²⁹ *E.g.*, Alliance of Baptists; Former State Attorneys General; U.S. Conference of Catholic Bishops (advocating lower costs for inmate calling).

Commission had authority over one type of intrastate rate – setting a local coin rate solely as the basis for a competitive, default dial-around compensation rate – the Commission can regulate *any* intrastate services.³⁰ The opinion cannot be read so broadly, and the Commission never argued, either at the court or in its proceeding below, that Section 276 gave it intrastate regulatory authority beyond setting a local coin rate necessary to ensure adequate compensation to payphone owners.

As for *New England Public Communications*, also cited by Lattice,³¹ the D.C. Circuit court made it very plain that the agency does not have authority over intrastate rates. The court expressly denied that the Commission had jurisdiction over the intrastate payphone lines at issue. Meanwhile, reviewing the Commission’s authority under Section 276, the court held that “[s]uch general provisions cannot . . . trump section 152(b)’s specific command that no Commission regulations shall preempt state regulations unless Congress expressly so indicates.”³² ICSolutions explains that the case actually shows that the Commission’s authority under Section 276 is very narrow.³³

C. The Commission Lacks Authority To Regulate Intrastate ICS Commissions.

Even if one assumed that Section 276(b)(1)(A) was somehow applicable to interstate or intrastate ICS end-user rates, neither that provision nor Section 201(b) would authorize the

³⁰ Lattice at 3-4.

³¹ Lattice at 4.

³² *New England Pub. Comm’ns v. FCC*, 334 F.3d 69, 78 (D.C. Cir. 2003), *cert. denied sub nom. North Carolina Payphone Ass’n v. FCC*, 541 U.S. 1009 (2004) (citation omitted).

³³ ICSolutions at 5.

Commission to restrict or prohibit site commission payments to correctional facilities.³⁴ Any authority the Commission claimed under section 276 over ICS rates would not extend to site commission payments made by ICS providers to correctional institutions under contract.

Section 276(b)(1) directs the Commission to prescribe regulations that “establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone....”³⁵ It was enacted to ensure payphone service providers – including those serving “correctional institutions” – would not go *uncompensated* for the use of their equipment by IXCs receiving calls from their payphones. Section 276(b)(1)(A) was intended only to ensure a *minimum* compensation level for dial-around for payphone owners from IXCs. It does not empower the Commission to regulate the compensation that payphone owners receive, nor to regulate what ICS providers might do with any revenues they collect.³⁶

Clearly, restricting or prohibiting site commissions simply “cannot legitimately be characterized as a ‘per call compensation plan.’”³⁷ Instead of interpreting the statute based on its text and its 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.”³⁸ That is the epitome of arbitrary and capricious rulemaking.

³⁴ See Georgia DOC at 3-12; Praeses at 21.

³⁵ 47 U.S.C. § 276(b)(1)(A).

³⁶ See Georgia DOC at 5, 6.

³⁷ Praeses at 22.

³⁸ Praeses at 23.

The Commission’s proposed rules are actually inconsistent with Section 276.³⁹ Far from restricting the ability of payphone service providers to contract with location owners, Section 276(b)(1)(E) actually requires the Commission’s regulations to “provide for all payphone service providers to have the right to negotiate with the location provider on the location provider’s selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones.”⁴⁰ The statute thus instructs the Commission to ensure its rules enable payphone owners – including providers of inmate payphones – to contract with location owners for use of payphone equipment. And Congress understood fully that contracts with location providers involved payment of commissions by payphone owners. If Congress meant to give the Commission authority to regulate – much less, prohibit – those commissions, it would have done so explicitly.

And again, Section 276 does not empower the Commission to regulate arrangements that parties may enter that address compensation for use of payphones.⁴¹ The Commission has recognized that where such contracts are in place, no action under Section 276 is either warranted or authorized, because the payphone owner is able to negotiate “fair compensation” for the use of its equipment.⁴² Commission concern about the level of commissions that

³⁹ ICSolutions at 5.

⁴⁰ 47 U.S.C. § 276(b)(1)(E). *See* ICSolutions at 5.

⁴¹ Georgia DOC at 5-6.

⁴² *1996 Order on Reconsideration*, 11 FCC Rcd at 21269 ¶72 (explaining that “whenever a PSP is able to negotiate for itself the terms of compensation for the calls its payphones originate, then [the Commission’s] statutory obligation to provide fair compensation is satisfied”) (citation omitted).

correctional authorities may compel from carriers in their ICS procurements does not give the Commission authority to regulate or prohibit those commissions.

Nor does the Commission have unrestricted authority to modify provisions in private contracts between carriers and others when the public interest requires. Cases cited in the *2013 ICS Order* all involved contract modifications made necessary because of Commission-ordered changes in rates or arrangements found unlawful following a proceeding in which the Commission already had jurisdiction over the carriers' *interstate* provision of service.⁴³

It is also noteworthy that Section 276 directs the Commission to adopt rules that would apply to “all payphone service providers,” not just ICS providers.⁴⁴ As ICSolutions noted, the Commission's first regulations implementing Section 276 were remanded by the D.C. Circuit in part because they did not apply to *all* payphones – which the court found contrary to Section 276's requirements.⁴⁵ The Commission had initially excluded inmate payphones from the default payphone compensation regime. In the present proceeding, the Commission has not claimed jurisdiction over, or proposed to regulate under Section 276, the intrastate end-user rates charged by, or the interstate or intrastate site commissions paid by, any non-ICS payphone providers. This further confirms that the Commission's rulemaking is inconsistent with Section 276.

Correctional authorities reasonably emphasized their need for discretion in handling ICS services and cautioned against having the Commission “dictating to the professional corrections community how they should manage their facilities, including how they should select and

⁴³ Georgia DOC at 12.

⁴⁴ 47 U.S.C. § 276(b)(1)(A).

⁴⁵ ICSolutions at 5, citing *Illinois Public Telecommunications Ass'n*, 117 F.3d at 566.

contract with third-party ICS providers.”⁴⁶ The Arizona DOC, for example, voiced its “concern that the FCC is abusing its regulatory authority by encroaching on the state’s right to decide whether, and how, ICS users should pay for some of the benefits that are returned to the user.”⁴⁷ The National Sheriffs Association says that “the Commission has it exactly backwards when it asks if site commissions hinder the widespread deployment of payphone services.”⁴⁸ On the contrary, the availability of commission revenue has made inmate calling services available even at specialized facilities and small jails that could never otherwise justify providing the amenity of inmate calling service. By restricting or prohibiting commissions, the Commission not only assures its new regulations will be reversed on appeal, but also will lead to more limited availability of inmate calling services.⁴⁹

The Wright Petitioners note that three major ICS providers proposed limiting commissions to help meet the Commission’s policy goals for inmate calling.⁵⁰ They mistakenly treat this as somehow supporting the Commission’s claim of regulatory jurisdiction. The industry proposal – which naturally reflects those providers’ interests and was not endorsed by CenturyLink – was submitted by those specific parties “in the spirit of compromise and

⁴⁶ Georgia DOC at 1.

⁴⁷ Arizona DOC at 1. The management of prisons, the Arizona Corporation Commission noted, “is one of the most fundamental historical state police powers and as such is subject to a presumption against preemption.” Arizona Corp. Comm’n at 7 (emphasis omitted), citing *Preiser v. Rodriguez*, 411 U.S. 475, 491 (1973).

⁴⁸ National Sheriffs Ass’n at 5.

⁴⁹ This itself is inconsistent with Section 276’s statutory purposes, which include promoting widespread availability of payphones. Section 276 did not direct the Commission to guarantee that intrastate end-user rates or site commissions are, in the Commission’s opinion, reasonable, nor authorize it to preempt state authority on those issues.

⁵⁰ Wright Petitioners at 7-8.

consensus,” as they explained at the time. Similarly, CenturyLink’s and other carriers’ suggestion of a per-minute administrative cost recovery fee for correctional institutions⁵¹ is not a concession that the Commission has authority to restrict or prohibit commissions. CenturyLink, like other parties, has sought to work constructively with the Commission and state and local authorities as they evaluate the state of inmate calling services. Such proposals are not a concession that the Commission has the broad authority that the *2013 ICS Order* and *Further Notice* claim.

D. Section 201(b) Does Not Give the Commission Authority Over Intrastate Rates or Commissions.

Many commenters embrace the *Further Notice*’s assumption that Section 201(b) empowers the Commission to regulate rates, fees, and commissions on interstate and intrastate ICS services.⁵² They all point to Section 201(b)’s mandate that “[a]ll charges, practices, classifications, and regulations” shall be “just and reasonable,” and its grant to the Commission to “prescribe such rules and regulations as may be necessary....”⁵³ However, these supporters of the Commission’s authority to regulate rates, fees, and commissions all overlook the fact that Section 201(b) applies only to *interstate* and *foreign* communications services. While CenturyLink does not endorse unjust or unreasonable practices, Section 201(b) is not a basis for the federal agency to assume authority to regulate intrastate services, including intrastate ICS.⁵⁴

⁵¹ CenturyLink ex parte notice and attachments, WC Docket No. 12-375, on administrative cost recovery fee (filed Sept. 19, 2014).

⁵² *E.g.*, Wright Petitioners at 7-11; Pay Tel at 49-55.

⁵³ 47 U.S.C. § 201(b).

⁵⁴ It follows that the Wright Petitioners (at 10) are similarly mistaken in believing that Section 205(a) gives the Commission freedom to reset intrastate rates, fees, or commissions.

The use of the term “such communications service” in Section 201(b) refers to the “communication service” identified in Section 201(a). That provision is limited to the furnishing of “*interstate or foreign* communication by wire or radio.”⁵⁵ Section 201 accordingly does not grant any authority over intrastate services.⁵⁶ It applies only to interstate services and does not give the Commission “any authority to regulate charges and practices related to intrastate services, including intrastate ICS.”⁵⁷

Meanwhile, Section 2(b)⁵⁸ expressly denies the agency the right to assume authority over intrastate matters: “[N]othing in this [statute] 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.”⁵⁹ This means that “Section 201(b) is sidelined by Section 2(b),” as Georgia DOC explains.⁶⁰ “[I]n the case of intrastate calls, the Commission has no authority to regulate intrastate inmate end user calling rates.” And as NARUC added, the Supreme Court has been “strict” in applying Section 2(b).⁶¹

⁵⁵ 47 U.S.C. §§ 201(a), (b).

⁵⁶ ICSolutions at 4.

⁵⁷ Praeses at 19 (footnote omitted), 20.

⁵⁸ 47 U.S.C. § 152(b).

⁵⁹ *E.g.*, Georgia DOC at 7; NARUC at 9; Praeses at 19-20.

⁶⁰ Georgia DOC at 7 (citation omitted).

⁶¹ NARUC at 9, discussing *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

E. The Commission Lacks Authority To Preempt State Authority Over Intrastate ICS.

Given the limited scope of Section 276 – and the lack of general Commission authority over intrastate “charges, classifications, practices, services, facilities, or regulations”⁶² – it follows that Section 276(c) does not preempt state authority affecting ICS rates or commissions. “Neither Sections 276 nor 201 ... give the FCC the power to broadly preempt state authority over ICS.”⁶³

Section 276(c) preemption is confined to the limited purposes outlined in Sections 276(a) and (b). Those are ensuring a level playing field for independent payphone owners competing against Bell Operating Company payphones, and developing a per-call compensation system that enables payphone owners to receive adequate compensation for dial-around calls.⁶⁴

The language of Section 276(c) is deliberately narrow: “*To the extent* that any State requirements are inconsistent with the Commission’s regulation, the Commission’s regulations *on such matters* shall preempt such state requirements.” In context, “such matters” plainly refers to the “contents of regulations” called for by Section 276(b)(1). To be precise, those include: (1) establishing a per call compensation system for dial-around calls, (2) discontinuing carrier access charge payphone service elements and payments and eliminating payphone subsidies from basic exchange and exchange access revenues; (3) adopting nonstructural safeguards for BOC payphone service to ensure nondiscrimination in payphone access lines; (4) ensuring BOC payphone service providers have the same right to negotiate with location provider for payphone

⁶² 47 U.S.C. § 152(b).

⁶³ Arizona Corp. Comm’n at 4 (emphasis omitted).

⁶⁴ Arizona Corp. Comm’n at 4-5; Praeses at 21-22; NARUC at 6-7.

placement; and (5) ensuring all payphone service providers can negotiate with location providers on the location on the latter's selection of payphone provider and carrier.⁶⁵ Implementing these statutory provisions was admittedly difficult for the Commission. But those Congressionally-appointed tasks were completed years ago, and certainly do not provide a basis for preempting state authority over unrelated aspects of intrastate ICS.

Section 276(c) was understandably necessary to make a per-call payphone compensation regime work. Individual states would likely be unable to ensure out-of-state IXCs paid payphone owners for use of their equipment.⁶⁶ Congress also evidently determined that ensuring intrastate calls were included was necessary to ensure payphone owners received "fair compensation" from IXCs, since they could not reasonably contract with every carrier that might receive some calls from a particular payphone. Section 276 thus was a "new framework [that] separated payphone equipment from the telecommunications services provided," including local, toll, or operator services.⁶⁷

In adopting Section 276, however, Congress gave the Commission "authority to protect independent payphone providers – nothing more."⁶⁸ "Whatever the merits of any proposed FCC policy, the *Second Further Notice* proposes actions that should be rejected as outside the FCC's authority."⁶⁹ State and local authorities have voiced a virtually consistent view.⁷⁰ The Commission lacks authority to address intrastate services. A wide range of commenters opposed

⁶⁵ 47 U.S.C. §§ 276(b)(1)(A)-(E).

⁶⁶ NCIC at 15.

⁶⁷ NARUC at 10.

⁶⁸ NARUC at 6 (footnote omitted).

⁶⁹ NARUC at 6.

⁷⁰ NARUC at 7.

the Commission’s assertion that it can preempt state authority to further its goal of inmate calling reform.⁷¹

The Wright Petitioners assert that *Illinois Public Telecommunications Ass’n* shows that the Commission has “clear jurisdiction to preempt state laws that have caused intrastate ICS rates to be unfair to the consumer.”⁷² The D.C. Circuit made no such ruling. The court was considering a challenge to the Commission’s rules eliminating payphone line subsidies and developing a default per-call compensation rate for dial-around calls, as described earlier in these comments. The court recognized that Section 276 authorized the Commission to oversee wholesale payphone line rates and to devise a compensation system to ensure payphone owners would be paid by dial-around carriers for interstate and intrastate coinless calls made using their payphone equipment.⁷³ The case had no bearing on interstate or intrastate end-user toll rates.⁷⁴ The Commission did not assert authority over them, and the court certainly did not suggest that Section 276 empowers the Commission to preempt any state laws, regulations, or contracts simply because it disapproves of them. In that case, just as throughout the heavily litigated

⁷¹ See e.g. NARUC at 7-14; Georgia DOC at 3-12; Tennessee DOC at 2; Arizona Corporation Commission at 4-8.

⁷² Wright Petitioners at 9.

⁷³ *Illinois Public Telecommunications Ass’n*, 117 F.3d at 561-562.

⁷⁴ Andrew Lipman (at 5) says that CenturyLink was wrong to suggest, in earlier comments, that the Commission has not “previously claimed ... authority over intrastate end-user rates,” given that the agency’s payphone compensation rules set a rate for local coin calls. However, CenturyLink had thought it clear it was referring to intrastate end-user rates for toll services – whether for prison or public payphones – as IXC toll services are the services at issue in this proceeding. *Illinois Public Telecommunications* recognized Commission authority to set a default local coin rate – a rate that, where necessary, would raise the end user’s charge to ensure minimum, adequate compensation to the payphone owner for use of the equipment. 117 F.3d at 561. Meanwhile, of course, ICS calls are not local coin calls.

history of the Commission’s payphone regime, “the FCC ha[d] consistently interpreted [Section 276(c)] in a much less preemptive fashion.”⁷⁵

But if some parties think the agency does have such authority, Congress imposes an explicit rule of statutory construction. Section 601(c)(1) provides, “where a provision can be read in several ways, it must be construed to avoid preemption.”⁷⁶ In the *Further Notice*, sadly, the Commission appears inclined to allow its policy ends to justify its means, an approach “unlikely to survive judicial review” and “likely to undermine existing State actions to address this [ICS reform] issue.”⁷⁷

III. ANY ICS REGULATION MUST ENSURE THAT CORRECTIONAL FACILITIES RECOVER THE COST OF MAKING ICS AVAILABLE.

The goals of lowering ICS rates and increasing inmate telephone contact cannot be achieved without a cost recovery mechanism for correctional facilities such as a site commission or a per minute administrative fee. As ICSolutions pointed out in its comments, “[r]egulating commissions, especially by eliminating them, will certainly result in a disincentive for correctional facilities ... to host the inmate phones.”⁷⁸ Correctional facilities incur legitimate costs in making ICS available and protecting the public. Without a mechanism to recover these costs, correctional facilities will have a strong incentive to keep ICS rates high or restrict inmate calling, or both.⁷⁹

⁷⁵ NARUC at 8.

⁷⁶ NARUC at 8 (footnote omitted). *See also* Arizona Corp. Comm’n at 5.

⁷⁷ NARUC at 4 (footnote omitted).

⁷⁸ ICSolutions at 6.

⁷⁹ In their comments, the Wright Petitioners state incorrectly that “CenturyLink also apparently supports the reduction in commissions and payment only of the ‘administrative and security

The *Further Notice* seeks comment on whether site commissions should be eliminated or restricted.⁸⁰ Lattice and certain other parties advocated in their initial comments that the Commission should eliminate or severely restrict site commissions, while in some cases acknowledging that some form of cost recovery mechanism should be authorized.⁸¹ If the Commission decides to go beyond its authority and restrict or prohibit site commissions, it should at a minimum authorize a significant per minute administrative fee that allows correctional facilities to recover their ICS-related costs and that encourages correctional facilities to make inmate calling more readily available at a lower overall cost. A reasonable per minute administrative fee would give correctional facilities an incentive to limit the number and amount of ancillary fees. Ancillary fees raise the effective cost of a call, are the largest source of consumer frustration, and have a depressing effect on inmate call volumes. With a reasonable per minute administrative fee, correctional facilities will have further incentive to increase inmate calling and to remove or eliminate ancillary fees that lead to less inmate calling.

In its comments, Global Tel*Link (“GTL”) – a supporter of ancillary fees – estimated that correctional facilities incur costs from allowing inmates access to ICS provider services of between \$0.005 to \$0.016 per minute.⁸² Practically speaking, the permissible per minute

costs in making inmate calling service available.” Wright Petitioners at 7-8. In fact, CenturyLink does not support and has never supported the elimination of site commissions.

⁸⁰ *Further Notice* at ¶21.

⁸¹ Lattice at 5-6; GTL at 14-16; Wright Petitioners at 7-10; New Jersey Institute for Social Justice at 2-3; Human Rights Defense Center at 4-5.

⁸² GTL at 17; *see also* Letter from Stephanie Joyce, Counsel to Securus, to Marlene H. Dortch, Dec. 8, 2014, attachment entitled “Securus Handles Most Items for Facilities Related to ITS Use.” Notwithstanding CenturyLink’s general disagreement with Securus’ list of activities in that attachment, its disregard of the relative costs of each activity is improper. For example,

administrative fee must be significantly higher than the \$0.005 to \$0.016 per minute amounts suggested by GTL. Such a de minimis per minute administrative fee would provide no real incentive to correctional facilities to lower ICS rates or limit ancillary fees.

GTL's estimate is also flawed because it attempts to conduct an "incremental-only" cost study that critically ignores the costs of shared functions related both to ICS and other prison staffing activities. It does not account for the cost of corrections officers overseeing and monitoring ICS use, back office staff dealing with inquiries on the phone system, booking/intake officers' supervision of voice biometric enrollments for incoming inmates, investigative personnel's active monitoring of inmate conversations, response to system alerts of suspicious activity, search/download/transmission of recordings internally and for outside law enforcement agencies, administrative staff's verification of blocked and allowed numbers including attorney ("do not record") numbers, ongoing training on new features, and many other ICS-related activities.⁸³ It also does not account for facility capital costs such as inside phone wiring and inmate phone space, which is typically the responsibility of the facility.

In its prior ex parte, CenturyLink provided information about the range of ICS administrative activities performed by correctional facilities, noting that it could only credibly quantify monitoring costs under certain assumptions.⁸⁴ The Commission now has access to a rich record of data from the correctional facilities that actually incur these costs, and

investigative-related costs borne by facilities are significant and implicitly treating them as equivalent to dozens of smaller administrative tasks performed by Securus ignores reality.

⁸³ See generally National Sheriffs Ass'n at 2-4.

⁸⁴ Letter of Thomas M. Dethlefs (CenturyLink) to Marlene H. Dortch (FCC), Sept. 19, 2014, Ex. A & B. These costs alone exceeded \$0.05 under the assumption that 10% of calls were monitored.

CenturyLink urges the Commission to set the GTL submission aside and look to these facilities' filings for more informed data.

In its comments, the National Sheriffs' Association submitted an extensive summary of reported costs from its members that suggests that the estimate by GTL of correctional facility ICS costs is far too low.⁸⁵ Approximately half of the jails with inmate populations above 1,000 inmates estimated their cost of making ICS available to be above \$0.06 per minute.⁸⁶ The Tennessee Department of Corrections estimated its cost of making ICS available to be \$0.03 per minute and the Georgia Department of Corrections estimated "it incurs ICS costs that equate to approximately \$0.07 per minute of inmate calling."⁸⁷ Cook County Jail estimated in its comments that it "incurred approximately \$2.4 [million] in ICS-related costs," equivalent to a site commission of 47.6% on intrastate calls.⁸⁸

A cost recovery mechanism for correctional facilities is also important because site commissions often fund other inmate welfare programs that are genuinely worth preserving. The *Further Notice* treats site commissions as if they are an insignificant part of correctional facilities' budgets because the \$460 million in site commissions paid represented only 0.3 or 0.4 percent of the annual operating budgets of correctional facilities.⁸⁹ The inference is that correctional facilities can easily continue to operate as usual without site commissions. However, site commissions are often the sole source of funding for particular budget line items

⁸⁵ National Sheriffs Ass'n, Exhibit A.

⁸⁶ *Id.*

⁸⁷ Tennessee DOC at 1; Georgia DOC at 18 (footnote omitted).

⁸⁸ Cook County at 3.

⁸⁹ *Further Notice*, ¶23.

such as inmate welfare programs, and the elimination of site commissions will in many cases mean the elimination of these programs, possibly for a long time. Cuts to inmate programs undermine inmate welfare and also can lead to unrest that puts correctional facility officers at risk. The Commission should not discount this concern; in CenturyLink’s discussions with correctional facilities, this is a genuine risk.

Finally, proposals to ban site commissions altogether are likely to merely shift commission payments from monetary payments to various difficult to monitor in-kind payments. For example, the Joint Provider Proposal advocates that the Commission permit any payment, service or product that is directly related to, or integrated with, the provision of communications services.⁹⁰ It is simply too vague on its definition of the site commissions that would be eliminated.⁹¹ Any service that produces data related to inmates or outside parties can be “integrated” with an ICS by simply sharing some of its data with the ICS. By allowing vendors to “throw in” ancillary services like video visitation units, cell phone detection, jail/offender management system, or other such services, the Joint Provider Proposal simply replaces a uni-dimensional and transparent revenue sharing mechanism (site commissions) for a multi-dimensional and opaque mechanism (various “value-added” or in-kind ancillary services). These ancillary services have the added effect of increasing the costs to transition to a new provider and thereby decreasing a facility’s incentive to re-bid services. The reason is that replacing the ICS

⁹⁰ Joint Provider Proposal, p. 4. CenturyLink addresses various deficiencies of the Joint Provider Proposal throughout these reply comments.

⁹¹ The *Further Notice* (at ¶ 21) seeks comment on “prohibiting site commissions as a category, including all payments, whether in-kind payments, exchanges, allowances, or other fees.” This definition is also too vague. It is not at all clear when “value added services” related to the ICS (no matter how tangentially) constitute an in-kind “exchange” versus an allowable product offering whose costs may be recovered through ICS end-user charges.

provider would then entail replacing other costly systems for which the facility may not have budget or transition staff. It is therefore not surprising that providers who control 85% of the market are making such a proposal.

Moreover, a prohibition of site commissions, including in-kind payments, exchanges, or other fees – however conceivably defined – would put the Commission in the untenable position of constantly having to adjudicate permissible versus impermissible ICS services. It would also create troublesome distortions in the competitive ICS marketplace – the same competitive marketplace the Commission is relying on to drive down costs to end users.

IV. IF THE COMMISSION IS TO REGULATE ICS, IT MUST ALSO ADDRESS ANCILLARY FEES.

If the Commission is determined to try to regulate intrastate ICS, it must address the total effective cost of ICS calling. The total cost of ICS to end users comprises both calling rates and ancillary fees and charges. Thus, comprehensive ICS reform of both interstate and intrastate rates would need also to sharply limit the number and rates for ancillary fees.⁹² Ancillary fees can inflate costs for consumers and will allow circumvention of any rate caps.

A number of commenters (including even some ICS providers) argued forcefully that the Commission must address ancillary fees. The Martha Wright Petitioners pointed out that “ancillary fees are a significant cause of ICS customers being charged excessive rates” and recommended “elimination of all ancillary fees in the absence of cost-data justifying their existence.”⁹³ ICSolutions observed that “[t]he Commission’s objective to reduce total costs/charges to consumers will not be achieved by addressing phone rates and facility

⁹² For new contracts, CenturyLink believes ICS providers could manage with no fees, but operating solely on per-minute or per-call ICS rates.

⁹³ Wright Petitioners at 16.

commissions, while still allowing these unregulated discretionary fees to continue.”⁹⁴ Pay Tel stated that “if regulation is left to rates alone, unscrupulous providers will simply seek to raise and add on new fees to offset losses.”⁹⁵ The Prison Policy Initiative stated that “fees are an essential part of the total cost to the consumer for telecommunications services” and for that reason, “the FCC must take action to immediately rein in ancillary fees.”⁹⁶

CenturyLink shares the concern that the proliferation of excessive ancillary fees is the single largest source of abuse in the industry, and that any meaningful ICS regulation must significantly restrict or eliminate these fees. NCIC noted in its comments that “[a]ncillary fees came about as a way to bypass state rate caps, as a new means to increase revenue without actually increasing the per-minute rates.”⁹⁷ And the use of fees has actually accelerated since the release of the original *2013 ICS Order*.⁹⁸ Following release of that order, some providers unilaterally increased their standard fees for purchasing prepaid services with a credit or debit card, along with “validation” or “cost recovery” surcharges per call.⁹⁹ Some ICS providers have increased their reliance on “single pay” services with charges of \$10 or \$15 *per call*. Providers’ incentives to charge these fees are simple. These incentives remain regardless of the calling rates

⁹⁴ ICSolutions at 7.

⁹⁵ Pay Tel at 55.

⁹⁶ Prison Policy Initiative Comments re Second Further Notice of Proposed Rulemaking ¶¶15-16, 30, 38, 40, 92, 96, 103, 106, 110 on Certain Aspects of the “Joint Provider Reform Proposal” at 3.

⁹⁷ NCIC at 21.

⁹⁸ *Further Notice*, ¶82.

⁹⁹ This increase in fees was later accompanied by certain providers’ unilateral decisions to cease paying commissions on interstate calling following implementation of the partially stayed *2013 ICS Order* in February 2014. See *Further Notice*, ¶125 (seeking comment about decisions by ICS providers on site commission payments).

charged or, as noted in the *Further Notice*, the commission paid.¹⁰⁰ The bottom line is that, if the Commission acts on intrastate ICS, ancillary fees are an issue by themselves and must also be addressed. Other potential actions – even theoretically eliminating commissions – will not impact the use and ongoing abuse of ancillary fees.

CenturyLink strives to limit the number and size of ancillary fees and is troubled by the impact of fees sometimes applied by other ICS providers. If the Commission chooses to regulate rates, “premium” or “convenience” payment options should either be prohibited or allowed only when parties billed under the option would incur rates and fees (to the extent any fees are allowed) that match all other billing options. Among some providers, such payment can typically involve a \$14.99 per call fee for billing directly to a credit/debit card. Surcharges for billing to a mobile phone account typically involve a \$9.99 fee for text collect billing. The effective end-user rates for calls made using these payment options increase three- or four-fold above the current interstate rate caps and, as CenturyLink readily advises correctional facilities, are universally unfair to ICS consumers. Moreover, called parties generally are not advised about available lower cost options at the time of an inmate call, effectively coercing them into a very high cost option.¹⁰¹ As stated by ICSolutions, “[w]e believe consumers select these

¹⁰⁰ *Further Notice*, ¶82 (“We seek comment on the extent to which the proliferation of ancillary charges may be a result of the market distorting effects of site commissions.”)

¹⁰¹ Especially for short-term inmates in county jails and detention centers, the decision of whether to accept an ICS call and how to pay for it is typically made in “real time” as the call is received from the inmate. In these types of situations, there is no reasonable way for called parties to make informed decisions unless the ICS provider proactively informs them of options in clear, concise language prior to payment; i.e. simple posting on websites or reactive responses upon request are not sufficient. This is in stark contrast to traditional telecommunications services, which allow for a subscriber to shop pricing and features of recurring payment options in non real-time.

premium options not because they want the convenience, but rather, they are unaware of the other lower cost payment options.”¹⁰²

Securus attempts to justify Single Call Services such as their Text2Connect and PayNow, calling them a “game-changer,” because “wireless carriers for decades refused to allow collect calls under any circumstances.”¹⁰³ In addition, it claims that these fees are necessary to compensate third-party providers through which Securus directs these calls,¹⁰⁴ insisting that it has invested significant sums of capital dollars into these programs that are “optional and in addition to the placement of regular, direct-dialed calls to which the forthcoming rate cap with [sic] apply.”¹⁰⁵ Securus goes on to say that these services have become “a more vital component of Securus’s service as more and more people abandon landline telephones.”¹⁰⁶

To justify these extremely high-cost services, Securus asserts that calls to cell phones are not billable using traditional collect billing arrangements, which are not offered by cell phone carriers.¹⁰⁷ While this assertion is true, the conclusion that these programs, and by association their high charges, are necessary to address this issue is not. CenturyLink and many other providers operate different billing programs that directly and more effectively address this issue.

¹⁰² ICSolutions at 11 (emphasis omitted); *see* Prison Policy Initiative, “Comments re: Second Further Notice of Proposed Rulemaking ¶¶ 98-102, single call Programs” at 5 (“These programs, far from being a convenience, border on extortion. And rather than being an equal option presented among lower-cost methods of completing the same call, they are typically offered in a vacuum, as the only means of talking to a loved one calling you in distress [citation omitted].”)

¹⁰³ Securus at 27.

¹⁰⁴ Securus at 26: “Securus has explained that most of its fees are necessary to pay for the services of third-party companies and financial institutions without which these optional payment and calling methods would not be possible [reference omitted].”

¹⁰⁵ *Id.* at 28.

¹⁰⁶ *Id.* at 27.

¹⁰⁷ *Id.*

These programs automatically route cell phone customers, in “real-time” as they accept inmate phone calls, to live operators or automated systems to set up alternative payment arrangements. During the transaction, customers are fully informed of all fees as well as lower-cost alternatives for establishing and funding accounts. In addition, customers are able to purchase “blocks” of prepaid services and spread any transaction fees across multiple calls. Although Single Call programs similar to those above would be straightforward for CenturyLink to implement, it has not adopted them for the simple reason that they unnecessarily drive up costs to end users while typically providing no value compared to other options available.

GTL argues in its comments that ICS providers should be permitted to mark up fees for third party funding.¹⁰⁸ CenturyLink does not believe that mark-up of third party funding should be permitted. The key costs of third party funding are borne by the third party provider, not by the ICS provider. Allowing providers to assess add-on fees for third party funding could encourage transaction fee “churning.”

If the Commission caps intrastate rates, it should also cap transaction fees for purchase of prepaid collect service. CenturyLink believes a reasonable cap would be \$5.95 per transaction for telephone transactions and \$3.00 per transaction for those completed through automated channels. Also, if the Commission addresses rates and fees, it must address *billing policies* related to ancillary fees. For example, a provider could set arbitrarily low purchase maximums on customers in order to increase the number of times customers must top-off their accounts, collecting a transaction fee each time. A provider could also set purchase minimums and then impose policies that make it difficult for consumers to obtain refunds, resulting in “captured

¹⁰⁸ GTL at 31.

funds.” This could be avoided by prohibiting unreasonable minimum purchases of prepaid services and setting purchase maximums at \$50 or slightly higher.¹⁰⁹ In its July 2014 Order, the Alabama Public Service Commission recognized and addressed these issues and for the most part, in CenturyLink’s opinion, took a sensible approach in its proposed rules regarding both fees and policies.¹¹⁰

V. THE COMMISSION SHOULD NOT ADOPT THE WRIGHT PETITIONER OR PAY TEL PROPOSALS.

CenturyLink believes a tiered rate cap regime is unwise, and the Commission should decline to adopt the tiered rate structures proposed by the Wright Petitioners or Pay Tel. The Wright Petitioners argue that the Commission impose per-minute rates of \$0.08 (prepaid and debit) and \$0.10 (collect) for all prisons, and for jails with more than 350 beds.¹¹¹ They also propose per-minute rates of \$0.18 (prepaid and debit) and \$0.20 (collect) for smaller jails with fewer than 350 beds.¹¹² Pay Tel recommends a tiered rate structure with per-minute rates of

¹⁰⁹ Due to chargebacks associated with credit/debit card transactions, it is reasonable to set limits on purchase maximums.

¹¹⁰ Further Order Adopting Revised Inmate Phone Service Rules, *Re: Generic Proceeding Considering the Promulgation of Telephone Rules Governing Inmate Phone Service*, Docket 15957, 2014 WL 3605361 (Ala. P.S.C. July 7, 2014). While CenturyLink agrees with Alabama Public Service Commission’s general approach to fees and policies, it has filed for reconsideration of certain components of the order, including its continued allowance of single pay services, even at significantly reduced fees. As a secondary item, CenturyLink also opposed the specific rate cap structure contained in the Order. *See* CenturyLink’s Motion for Rehearing or Reconsideration, *Re: Generic Proceeding Considering the Promulgation of Telephone Rules Governing Inmate Phone Service*, Docket 15957, filed January 2, 2015, incorporating by reference CenturyLink’s prior comments in the docket filed December 6, 2014 and August 6, 2014.

¹¹¹ Wright Petitioners at 14.

¹¹² *Id.*

\$0.08 for prisons, \$0.22 for jails with average daily populations of 350 or more, and \$0.26 for jails with average daily populations of 1-349.¹¹³

Both proposals suffer from the same fundamental problems. First, both the Wright Petitioner and Pay Tel proposals should not be adopted because they seek to set rate caps equal to their individually-devised estimates of the average cost of serving various correctional facilities. Notwithstanding the issues with their estimates of these averages, for rate caps to function properly, they cannot properly be set at average cost. Setting rate caps at average cost would mean that roughly half the facilities in a particular tier would have a cost to serve above the rate cap and, as a result, would have to be served uneconomically. There is no obligation to serve particular facilities in the ICS industry and, barring unusual circumstances, facilities where costs cannot be recovered would not be served.

Any successful ICS reform must be based on the recognition that inmate calling services are not traditional common carrier services, but instead are customized managed IT services. As a result, the range in the cost of serving particular correctional facilities with different contract requirements is very wide. CenturyLink's own experience bears this out. For example, for 2013 there was a 12.7 cent per minute range of cost for collect calls between the lowest cost prison and the highest cost prison served by CenturyLink. This difference even increased slightly through 2014. For county jails and other facilities, the range of collect call costs (excluding extreme cases¹¹⁴) was 18.8 cents per minute, noting that the cost to serve CenturyLink's lowest

¹¹³ Pay Tel Comments at 24.

¹¹⁴ These extreme examples include only a small holding facility and certain juvenile detention and secure mental health facilities.

cost jail was several cents lower than its lowest cost prison.¹¹⁵ These ranges were similar for prepaid and debit calls. In addition, these findings would be similar if the Commission's method of allocating common costs by minutes of use were applied to CenturyLink's cost data.

Neither the Wright Petitioner proposal nor the Pay Tel proposal would accommodate these broad ranges of cost. Consequentially, if adopted, both proposals would likely lead to a large number of unserved correctional facilities as providers reasonably decline to serve the higher cost facilities. To function correctly, rate caps should be set above the range of costs incurred to serve various correctional facilities.¹¹⁶ Market forces can then help drive rates down in facilities with a cost of service below the rate caps. If one takes into account the range of costs of serving particular facilities and the average cost information submitted in response to the Mandatory Data Collection, it is clear that the current interim rate caps certainly should not be reduced.

Second, the Wright Petitioner and Pay Tel proposals should not be adopted because their proposed rates for prisons are far too low. The average cost for prisons reported in the Mandatory Data Collection for all ICS providers was \$0.14 per MOU for debit/prepaid calls and \$0.172 per MOU for collect calls, where common costs were allocated on the basis of minutes of

¹¹⁵ It is telling that CenturyLink's lowest-cost facilities are county facilities – for example, the two lowest being a medium-sized facility housing approximately 700 and a smaller facility housing 200 inmates.

¹¹⁶ Of course, the Commission can use a waiver process so that it does not have to set the rate caps equal to the highest cost facility. However, a waiver process will only work if waivers are (a) the rare exception rather than the rule, (b) are fairly reviewed, and (c) are promptly granted. Providers cannot bid on particular RFPs unless they can be confident that a waiver will be granted. It is not in the interests of either the industry or the Commission for waiver requests to be the norm. Rate caps should be treated only as backstops, so that market forces can help drive ICS rates down when the cost of service is below the caps, as providers bid against one another on the same competitive RFP.

use.¹¹⁷ The Wright Petitioners and Pay Tel each propose prison rates that are far below these average costs. Their proposals are completely unreasonable when, as discussed above, the range of costs of serving correctional facilities is factored in. If any ICS reform effort is to succeed, it must enable a rate sufficient to recover costs at all facilities. An arbitrary rate or rate cap cannot be sustained.

Third, the Wright Petitioner and Pay Tel proposals should not be adopted because they ignore the wide variability in the cost of serving prisons compared to serving jails. Some prisons are considerably more costly to serve than many county jails. For example, the prison served by CenturyLink that is most costly to serve has a cost of service that is significantly higher than the average cost CenturyLink incurs to serve its county jail customers. In fact, CenturyLink's lowest cost facilities are jails, not prisons. This holds true regardless of whether one uses CenturyLink's original cost allocation methodology or the Commission's MOU-based methodology. The tiered rate cap structures proposed by the Wright Petitioners and Pay Tel mistakenly presuppose that there is a clear demarcation between the cost of serving jails and the cost of serving prisons. There is not.

VI. THE COMMISSION SHOULD NOT REQUIRE MULTIPLE ICS CONTRACTS.

The *Further Notice* seeks comment on whether “to require correctional institutions to enter into service contracts with multiple ICS providers[.]”¹¹⁸ GTL, Securus, the Georgia DOC and Ohio DRC all explained in their initial comments that requiring multiple ICS providers is a

¹¹⁷ *Further Notice*, ¶53, Table One.

¹¹⁸ *Further Notice*, ¶35.

very bad idea, for a host of reasons.¹¹⁹ Leaving aside the gating item of the Commission’s lack of statutory authority to impose such a requirement, the concept is simply unrealistic in the correctional environment.

GTL rightly points out that requiring multiple ICS providers at a correctional institution would raise the cost of providing ICS, and therefore actually result in higher ICS rates.¹²⁰ When a single provider serves a correctional institution, that provider is able to make bulk purchases with the most competitive carriers and to efficiently order the right number fixed access circuits to serve each facility. Dividing ICS traffic up amongst multiple providers is economically inefficient, because it leads to the need for multiple fixed access circuits in circumstances in which a single or small number of fixed access services would be sufficient. Furthermore, the “threshold” price per minute at which service is economical will be far higher when there are multiple providers than when there is a single, competitively chosen, carrier.

With multiple providers, billing and collection also becomes much more complicated and costly. A single provider normally has to have systems for account establishment, user authentication, fraud and bad debt control and other issues. If all of these functions are provided by multiple carriers, it would seriously complicate the processing of inmates. The problem would be especially acute at county jails, where inmate turnover is high and accounts must be set up in “real time” as a newly-booked inmate is attempting to post bond or seek legal counsel. Different carriers are likely to have different systems with different credit and account policies that would create major problems for inmates, families or friends attempting to arrange for ICS.

¹¹⁹ GTL at 35-38; Securus at 29-34; Georgia DOC at 15-16; Ohio Department of Rehabilitation and Correction at 1-6.

¹²⁰ GTL at 37-38.

The Georgia DOC explains that correctional facilities already face “complex and challenging decisions on a daily basis.” They must balance the “competing priorities that are involved in managing the welfare of inmates[,]” while striving to provide security within a dangerous facility and ensure safety to employees, the public, and inmates – all with “limited financial resources.”¹²¹ Their circumstances and their special needs mean that “ICS operations are very different than the business of telecommunications companies that cater to the general public.”¹²² Additionally, correctional procurement is a complex, “specialized government function,” governed by detailed state and local laws. “The administrative and technical complexity” of requiring multiple ICS providers “would be prohibitive and the operational and capital costs would be enormous.”¹²³

Furthermore, as the Ohio DRC explains, requiring multiple ICS providers at a correctional institution would also seriously undermine the ability of correctional institutions to maintain security.¹²⁴ Correctional authorities have warned throughout this proceeding that many inmates pose real dangers to the community, to correctional personnel, and to other inmates. Security involves critically important measures in restricting, tracking, archiving and monitoring calls. It also involves closely managing debit and billing systems in a dangerous environment where one inmate may coerce another to exploit his account. If there were multiple providers serving a correctional institution, complex and expensive systems work would be required to

¹²¹ Georgia DOC at 14.

¹²² Georgia DOC at 15.

¹²³ Georgia DOC at 15.

¹²⁴ Ohio Department of Rehabilitation and Correction at 3-7.

allow usage and billing information and call records among providers to be shared and to allow the correctional institution to monitor and track calls handled by multiple carriers.

Many carriers do not have the capability to provide the complex security arrangements that many correctional institutions require. For all those that do, making those systems investments and incurring those administrative costs in a shared facility would make service less economic. If the Commission sought to compel correctional institutions to allow multiple service providers, the added procurement complexity and security and administrative costs would also likely lead to higher end-user costs and reduced availability of calling. Attempting to “artificially induce ICS competition in this manner would backfire....”¹²⁵

In short, it is likely that ICS security needs for facility security and employee, public, and inmate safety could be unavoidably and needlessly compromised in a multiple provider regime. The Commission should recognize the limits of its statutory authority and respect the needed, appropriate discretion of correctional authorities in managing this aspect of their facilities.

VII. ANY RULES SHOULD GRANDFATHER EXISTING CONTRACTS OR PROVIDE FOR SIMULTANEOUS TRANSITION OF RATE REDUCTIONS AND SITE COMMISSIONS.

The *Further Notice* also seeks comment on a brief 90-day transition period for ICS providers to reduce rates below any newly imposed rate caps and, alternatively, on a two-year or one budget cycle transition period for correctional facilities to transition away from site commission payments.¹²⁶ The Wright Petitioners support a 90-day period “to modify contracts between ICS providers and correctional authorities” and a six month transition for elimination of

¹²⁵ Georgia DOC at 15.

¹²⁶ *Further Notice*, ¶¶129-132.

site commissions.¹²⁷ The Joint Provider Proposal proposed a 90-day transition period to any rate caps and FCC-mandated restrictions on site commissions.¹²⁸ Pay Tel, meanwhile, recommended an 18-month transition for any new regulatory requirements,¹²⁹ and Securus advocated a two-year transition period for any site commission restrictions.¹³⁰ GTL added that the transition to permanent rate caps and site commission restrictions be simultaneous, whatever the period.¹³¹

If the Commission, despite limits of its authority, determines to impose new ICS regulations, CenturyLink believes it should grandfather existing contracts or, failing that, provide for a simultaneous transition period for both rates and restrictions on site commissions that gives correctional facilities and ICS providers at least one budget cycle to adjust to new rules.

The appropriateness of grandfathering existing contracts should be obvious. Correctional authorities and ICS providers need time to adjust arrangements to Commission policy, and contracts cannot simply be disregarded. Section 276 – the Commission’s ostensible authority for regulating ICS – itself specifically exempted “any existing contracts between location providers and payphone service providers ... or carriers” at the time of its enactment.¹³² Current ICS contracts likewise should be grandfathered if the Commission imposes a new regulatory regime. These contracts are governed by state competitive procurement laws and are not simply unilaterally revised. Contractual obligations cannot be unilaterally ignored by correctional

¹²⁷ Wright Petitioners at 21 (citation omitted).

¹²⁸ *Further Notice*, ¶129.

¹²⁹ Pay Tel at 61.

¹³⁰ Securus at 34.

¹³¹ GTL at 18.

¹³² 47 U.S.C. § 276(b)(3).

authorities or ICS providers, nor are they necessarily free under state procurement law to amend their contracts' provisions even if both parties agree.¹³³

If the Commission unreasonably fails to grandfather existing contracts, the two-year transition period proposed in the *Further Notice* would at least help minimize the disruption, if applied to implementation of any rate caps and any restrictions on payments to correctional facilities. If the Commission claims authority over intrastate rates, the disruption to the ICS industry and to correctional facilities across the nation will be far more serious than what occurred when the Commission imposed rate caps on interstate rates. And that is not merely because the Commission's other proposed interstate regulations were stayed by order of the D.C. Circuit. Roughly 90 percent of all inmate calls are jurisdictionally intrastate.

ICS contracts are the result of competitive procurements with financial offers that are determined by simultaneously evaluating multiple inter-dependent components – calling rates, fees, special development, commissions, and others – and these components cannot be arbitrarily separated after-the-fact. Additionally, ICS contracts are multiyear and typically involve significant up-front capital investment, so abrupt changes in regulations would unreasonably and unlawfully burden providers with economic losses in what is already a low-margin business.

Similarly, correctional facilities must be allowed time to revise their budgets and to find replacement sources of funding for the programs and safety measures that are presently enabled by their site commission revenues. If any new regulations do not give correctional facilities at least a full budget cycle to adjust and find replacement funding, it is a certainty that the inmate welfare programs funded by site commissions will be curtailed and availability of calling

¹³³ If the Commission fails to grandfather existing contracts, its regulatory order should specifically provide that its adoption of the new rules constitutes a change in law.

services will be restricted, to the detriment of the very policy goals the Commission seeks to advance. And any inmate calling reform effort would be short-lived if the Commission fails to design it, and implement it, with due consideration of the impacts on correctional authorities and providers, as well as end users.

VIII. THE COMMISSION SHOULD CONSIDER CENTURYLINK'S BALANCED REFORM PROPOSAL.

CenturyLink understands the Commission's interest in inmate calling services, despite its lack of statutory authority to regulate intrastate ICS rates or to prohibit site commissions. If the Commission is determined to attempt such intrastate ICS reform, CenturyLink believes it should adopt the balanced, comprehensive reform proposal presented by CenturyLink to the Commission in its October 10, 2014 *ex parte*.¹³⁴ That approach would deliver meaningfully lower end-user costs, while recognizing the legitimate interests of all parties.

The proposal involves three elements. First, the Commission would adopt a simple, uniform rate cap for both interstate and intrastate calls, with an appropriate allowance for collect calling. The current interstate rate cap levels are \$0.21 per MOU for debit/prepaid calls and \$0.25 per MOU for collect calls. Rate caps at these levels would be reasonable to all parties and acceptable to providers, with adjustment or waiver only where necessary, as explained above.¹³⁵

Second, the Commission would limit and cap ancillary fees as follows: Premium payment options would be allowed only when there is no markup for the service. Parties billed under a premium payment option should also incur the same rates and fees as other approved billing options. Third party fees such as Western Union charges would be allowed, but without

¹³⁴ Letter of Thomas Dethlefs (CenturyLink) to Marlene Dortch (FCC), WC Docket No. 12-375 (filed Oct. 10, 2014).

¹³⁵ *See p. 2, supra.*

any mark-ups, any revenue sharing arrangements or any volume rebates. The deposit transaction fee for prepaid calling would be no greater than \$5.95 for transactions by telephone with a live operator and \$3.00 for automated transactions. There would be no validation fee. To prevent churning of deposit fees, policies such as prepaid purchase minimums and maximums, prepaid account refund requirements, and account expiration policies would also be addressed. The Commission would not allow purchase minimums and would require purchase maximums to be no less than \$50. Remaining balances would not expire, and refunds would be available at any time for no fee.

Third, as explained above,¹³⁶ if the Commission insists on addressing commissions, it should ensure that correctional facilities have the opportunity to recover the significant administrative and security costs incurred in making inmate calling services available. That may be through a commission as a percentage of revenue or, alternatively, a reasonable per minute cost recovery mechanism. If the Commission limits site commissions to correctional facilities, any such cap must be sufficient to permit correctional facilities to cover their legitimate administrative and security costs, such as call monitoring, while leaving a large enough administrative overhead to provide incentive for facilities to make calling privileges readily available.¹³⁷

IX. CONCLUSION

CenturyLink understands the very genuine benefits of inmate calling. It shares the Commission's interest in widely available and cost-effective inmate services. Even so, the

¹³⁶ See Section III, pp. 22-24, *supra*.

¹³⁷ Several correctional authorities have provided specific examples of their administrative costs in this proceeding. See, e.g., Cook County at 3; Georgia DOC at 18, National Sheriffs Ass'n, Exhibit A; Tennessee DOC at 1.

Commission must be mindful of the limits of its authority and the risks that new ICS regulations, despite the best of intentions, may undermine goals of inmate and family welfare, public safety, and ICS competition.

The Commission should not overreach its statutory authority by regulating intrastate ICS calling. If it nevertheless seeks to regulate interstate or intrastate services, the Commission should limit any new ICS regulations to reasonable ICS rate caps and include appropriate restrictions on ancillary fees. It should not ignore correctional authorities' legitimate need for commission revenue. And it should grandfather existing contracts or allow a meaningful transition.

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