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Via ECFS

April 3, 2015

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: WC Docket No. 12-375 - Written Ex-Parte Presentation
Global Tel*Link Corporation**

Dear Secretary Dortch:

Global Tel*Link Corporation (“GTL”),¹ by its attorneys, hereby submits this written *ex-parte* presentation to address issues raised in the *ICS Order and First FNPRM* and *Second ICS FNPRM* regarding the future regulation of inmate calling service (“ICS”).² This letter supplements the comments, reply comments, and other filings made by GTL in the above-referenced docket.³

¹ This filing is made by GTL on behalf of itself and its wholly owned subsidiaries that also provide inmate calling services: DSI-ITI, LLC, Public Communications Services, Inc., and Value-Added Communications, Inc.

² *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 14107 (2013) (“*ICS Order and First FNPRM*”), *pets. for stay granted in part sub nom. Securus Tech., Inc. v. FCC*, No. 13-1280 (D.C. Cir. Jan.13, 2014), *pets. for review pending sub nom. Securus Tech., Inc. v. FCC*, No. 13-1280 (D.C. Cir. filed Nov. 14, 2013) (and consolidated cases). *Rates for Interstate Inmate Calling Services*, 29 FCC Rcd 13170 (2014) (“*Second ICS FNPRM*”).

³ See GTL January 2014 Reply Comments; GTL April 23, 2014 Ex-Parte Letter; GTL May 16, 2014 Ex-Parte Letter; GTL May 29, 2014 Ex-Parte Letter; GTL Response to One-Time Mandatory Data Collection (filed Aug. 22, 2014); Letter from Global Tel*Link Corporation, Securus Technologies, Inc., and Telmate, LLC (filed Sept. 15, 2014) (hereinafter “Joint Provider Reform Proposal” or the “Proposal”); GTL September 19, 2014 Ex-

GTL continues to support the Federal Communication Commission’s (“Commission” or “FCC”) commitment to take a comprehensive, market-based approach to the regulation of inmate calling services that will address the needs of inmates, their families, ICS providers, the general public, and law enforcement. There has been a wide range of responses by states and correctional facilities in the wake of the *ICS Order and First FNPRM* to address ICS rates and site commissions. These actions are not consistent and much regulatory uncertainty continues to plague the industry.

The Joint Provider Reform Proposal (“Proposal”) is designed to achieve the Commission’s goals of implementing “comprehensive, permanent ICS reforms” that rely on a market-based approach to encourage competition in order to reduce rates and to ensure fair ICS compensation.⁴ The Commission’s goals are achievable only if all three prongs of the Proposal are adopted simultaneously. The Commission should: (1) establish the Proposal backstop rate caps for all ICS calls; (2) modify the existing system of site commissions in favor of a defined, usage-based admin-support payment that covers the legitimate correctional institution costs arising from access to ICS in facilities; and (3) accept a voluntary commitment from the ICS industry to limit ancillary charges to an uniform, industry-defined list of charges that are priced based on backstop rate caps.⁵

Parte Letter; GTL Supplemental Response to One-Time Mandatory Data Collection (filed Sept. 29, 2014); GTL October 2, 2014 Ex-Parte Letter; GTL November 6, 2014 Ex-Parte Letter; GTL Opposition to Pay Tel Communications, Inc.’s Petition for Extension of Waiver (filed Nov. 12, 2014); GTL Opposition to Pay Tel Communications, Inc.’s Supplement to Its Petition for Extension of Waiver (filed Nov. 17, 2014); GTL November 20, 2014 Ex-Parte Letter; GTL November 25, 2014 Ex-Parte Letter; GTL December 4, 2014 Ex-Parte Letter; GTL January 2015 Comments; GTL January 2015 Reply Comments; GTL March 25, 2015 Ex-Parte Letter.

⁴ *Second ICS FNPRM* ¶ 6.

⁵ The Commission’s reliance on industry voluntary commitments when they are good for consumers and good for business is not a novel approach. *See, e.g., Amendment of Parts 1, 2, 22, 24, 27, 90 and 95 of the Commission’s Rules to Improve Wireless Coverage Through the Use of Signal Boosters*, 28 FCC Rcd 1663, ¶¶ 30-31 (2013) (adopting a “blanket licensing framework” for consumer signal boosters rather than a “license-by-rule framework” in light of wireless providers’ “voluntary commitment to permit subscribers to operate Consumer Signal Boosters on their networks”); *Federal-State Joint Board on Universal Service*, 19 FCC Rcd 1563, ¶ 30 (2004) (utilizing a carrier’s agreement to comply with the CTIA Consumer Code for Wireless as evidence of compliance with required consumer protection and service quality standards); *see also* Statement of Commissioner Mignon L. Clyburn Regarding Launch of FCC’s New “Bill” Shock Website (Apr. 20, 2012) (commending the “recent commitments by wireless carriers to voluntarily provide usage alerts” and “applaud[ing] CTIA for its continuing efforts to push the industry on voluntary efforts”); *FCC Advisory Committee Adopts Recommendations to Minimize Three Major Cyber Threats, Including an Anti-Bot Code of Conduct, IP Route Hijacking Industry Framework and Secure DNS Best Practices*, News Release (Mar. 22, 2012) (applauding the “voluntary commitments by the nation’s largest Internet Service Providers” and stating that “[v]oluntary, multi-stakeholder actions exemplified by the CSRIC’s recommendations, and the corporate commitments announced today, are the most effective approach for securing our networks while preserving the Internet as an open platform for innovation and communication”); FCC Chairman Michael Powell Statement on Wireless Industry Voluntary Consumer Code (Sept. 9, 2003) (“Ultimately, voluntary efforts, like the code, are not only good for consumers; they are good for business too. . . .”).

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ATTACHMENT A - Federal Communications Commission Statements Regarding ICS Site Commissions

I. The FCC Should Adopt the Per-minute Rates Proposed by the Joint Provider Reform Proposal for All ICS Calls

The backstop rate caps suggested by the Joint Provider Reform Proposal are supported by ICS provider data submitted in response to the Commission's mandatory data collection, the Commission's own analysis of that data, and the record.⁶ For example, record evidence demonstrates that five ICS providers have overall per minute costs ranging between \$0.1341 and \$0.1967 depending on the provider.⁷ The "below-cost" rate proposals made by some commenters are not supported by the record evidence.⁸

Nor are they supported by Commission precedent. As other parties have pointed out, the "Commission has long recognized that rates must be based primarily on the cost of service, including a *reasonable* return on investment (*i.e.*, profit)."⁹ The Commission's policy consistently has held "that cost of providing service is at the heart of the statutory requirements under Sections 201-205 of the Act for just, reasonable and non-discriminatory rates and that costs are to be directly controlling in the fixing of rates, or are to be considered as reference points or benchmarks, from which to measure the extent of any departures therefrom."¹⁰ The Commission cannot impose rates so low that providers cannot possibly recover their costs.¹¹

The backstop rate caps recommended by the Joint Provider Reform Proposal are just that - backstop caps - not the rate required to be charged. A rate cap does not set the rate that customers will be charged; it simply sets the maximum amount a carrier may charge,¹² and the Commission has used "backstop" rates in the past as part of a "market-based approach" to ensure all "customers receive the benefits of more efficient prices, even in those places and for those

⁶ GTL January 2015 Comments at 8-9; *see also* GTL January 2015 Comments, Siwek/Holt Declaration ¶¶ 5-10 (explaining how the backstop rate caps recommended by the Joint Provider Reform Proposal are "economically reasonable"). Pay Tel is wrong when it says GTL did not attempt to support the rates recommended by the Joint Provider Reform Proposal. *See* Pay Tel January 2015 Reply Comments at 12-13.

⁷ *See, e.g.*, Global Tel*Link Corporation Response to Mandatory Data Collection, Description & Justification, at 3 (filed Aug. 22, 2014); Telmate, LLC Response to Mandatory Data Collection, Report Implementing the FCC Mandatory Data Collection, at 3 (filed Aug. 18, 2014); Pay Tel Communications, Inc. Response to Mandatory Data Collection, Cost Analysis of Inmate Calling Services, at 2 (filed Aug. 18, 2014); Securus Technologies, Inc. Response to Mandatory Data Collection, Report Implementing the FCC Mandatory Data Collection, at 3 (filed July 17, 2014); *Second ICS FNPRM* ¶ 60 (providing rates for CenturyLink) (citing CenturyLink August 2, 2013 Letter at 3); *see also* Securus January 2015 Comments at 14 (listing per minute costs for GTL, Pay Tel, Securus, and Telmate).

⁸ *See, e.g.*, Alliance of Baptists January 2015 Comments at 1; Leadership Conference on Civil and Human Rights January 2015 Comments at 1; HRDC January 2015 Comments at 6 (proposing between \$0.05 and \$0.07 per minute); Illinois Campaign for Prison Phone Justice January 2015 Comments at 3 (proposing \$0.05 per minute); Martha Wright January 2015 Comments at 14 (proposing \$0.08/\$0.10 per minute for certain facilities); Legal Services for Prisoners with Children December 2014 Comments at 3 (supporting a \$0.07 per minute cap); National Lawyers Guild January 2015 Comments at 2-3 (supporting a \$0.07 per minute cap).

⁹ Letter filed by Andrew D. Lipman at 2 (dated Feb. 20, 2015).

¹⁰ *AT&T Co., (Long Lines Department) Transmittal No. 11935*, 59 FCC 2d 671, ¶ 13 (1976).

¹¹ Letter filed by Andrew D. Lipman at 2-3 (dated Feb. 20, 2015).

¹² *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, ¶ 22 (1990) ("1990 Order").

services where competition does not develop quickly.”¹³ Much of the criticism of the Proposal’s recommended rate caps is based on the unfounded belief that ICS providers will always charge at the cap.¹⁴ There is no such evidence in the record, and that belief is contrary to the historical success of rate caps and incentive regulation to achieve benefits for consumers and carriers alike.¹⁵ “[P]ermitting flexibility in price-setting generates economic efficiencies that benefit ratepayers through lower rates.”¹⁶ Adoption of the rate caps set forth in the Joint Provider Reform Proposal will benefit consumers, and is consistent with long-standing Commission precedent.

GTL has reviewed the draft rule 64.6070 regarding the backstop rate caps proposed by Securus,¹⁷ and proposes the following revision (shown in redline):

No Provider may charge a rate for any inmate-initiated call from a correctional facility that exceeds \$0.20 per minute for Debit Calling or \$0.24 for Collect Calling. No per-call fee, per-call charge, or connect fee may be charged, except for those correctional facilities where per-call pricing is in existence on the effective date of these rules and the per-call rate for a 15-minute call is less than or equal to \$3.00 for Debit Calling or \$3.60 for Collect Calling ~~regardless of the amount of the per minute charge~~. For correctional facilities to which payments described in Rule 64.6090(a) continue to be paid, this Rate Cap will be effective when those payments cease.

As stated in the Proposal, per-call surcharges should not be permitted except to the extent per-call pricing already exists for a particular correctional facility, and the per-call rate is less than or

¹³ *Access Charge Reform, et al.*, 12 FCC Rcd 15982, ¶ 267 (1997).

¹⁴ *See, e.g.*, HRDC January 2015 Comments at 15; WC Docket No. 12-375, Expert Reply Report of Don J. Wood, at 8, 12 (filed Jan. 27, 2015) (“Wood Reply Report”).

¹⁵ *1990 Order* ¶ 22 (finding a rate cap regime creates “a regulatory environment that requires carriers to become more productive. Carriers that can substantially increase their productivity can earn and retain profits at reasonable levels,” but “[i]f carriers fail to become more productive, they risk seeing their earnings erode”). For example, GTL existing rates for the Massachusetts Department of Correction are significantly below the currently effective rate caps in Massachusetts (\$3.00 per-call surcharge and \$0.10 per minute). *See* Massachusetts Department of Correction Global Tel Link (GTL) Calling Rates Effective October, 2010 Billing Cycle, *available at*: <http://www.mass.gov/eopss/docs/doc/global-tel-link-calling-rates.doc> (charging \$0.86 or \$0.65 per-call surcharge and \$0.10 or \$0.075 per minute); *see also* Industry Notice, *Collect Inmate Calls - Rate Cap* (Sept. 3, 2004) (establishing current rate cap). Similarly, GTL’s current rates for the New Jersey Department of Corrections (\$0.13 per minute for all calls) are below the currently effective rate caps in New Jersey (\$5.25 per-call surcharge and \$1.15 per minute). *See* Amendment #14 to Contract #61616 between Global Tel*Link Corporation and the Purchase Bureau, Division of Purchase and Property, Department of the Treasury, on behalf of the State of New Jersey, Department of Corrections (DOC) and Juvenile Justice Commission (JJC), *available at*: http://www.state.nj.us/treasury/purchase/noa/contracts/t1934_05-x-32533.shtml.

¹⁶ *1990 Order* ¶ 35.

¹⁷ Securus February 9, 2015 Ex Parte at Attachment.

equal to the backstop rate caps recommended by the Proposal for a 15-minute call.¹⁸ In those facilities currently utilizing per-call pricing, such pricing should be permitted to stay in place through expiration of the existing contract to avoid the difficult task of converting existing per-call pricing into per-minute pricing when other factors may have been taken into consideration in the development of the per-call rate.

II. Adoption of a Tiered Rate Regime for ICS Rates Is Not Justified

Numerous parties oppose utilizing a tiered rate structure for ICS rates, including Securus, CenturyLink, Inmate Calling Solutions, Telmate, the Idaho Department of Correction, the Human Rights Defense Center (HRDC), Legal Services for Prisoners with Children, and the National Lawyers Guild.¹⁹ Tiered rates will not achieve the Commission's goal of promoting competition and lower ICS rates.²⁰ The difficulties inherent in administering a tiered rate scheme are substantial and would require monitoring and enforcement by the Commission, ICS providers, consumers, and correctional facilities. As the Idaho Department of Correction points out, a "simple per minute rate structure" allows for flexibility, while a tiered rate system would be "confusing and problematic."²¹ Tiered rate caps do not provide the "administrative ease and avoidance of potential loopholes" favored by the Commission.²²

The record does not support adoption of tiered rates for ICS. Don Wood, consultant for Pay Tel, claims GTL's lower costs in prisons relative to jails justify utilizing tiered rates.²³ Mr. Wood's argument, however, presumes that the Commission is pursuing rate-of-return regulation, rather than a market-based solution based on backstop price caps.²⁴ There is an important distinction between the two. Under backstop price caps, the cap is intended as a "safety" only to guard against exorbitant rates. Rate-of-return regulation, by contrast, requires carriers "to set their rates based on the costs - investment and expense - of providing a service."²⁵ Under traditional rate-of-return regulation, a carrier's "allowed profits are computed from its total invested capital, whether or not the carrier is using capital, labor, operational methods, and pricing in the most efficient manner."²⁶ To maximize its profits, the carrier "has an incentive to manipulate its inputs of capital and labor, without regard to efficiency, and to adopt strategies for

¹⁸ For example, all calls from South Carolina Department of Corrections facilities are charged at a flat rate of \$1.53 for a collect call of up to 15 minutes and \$1.29 for a prepaid call of up to 15 minutes. *See* South Carolina Department of Corrections, *Telephone Calls*, <http://www.doc.sc.gov/pubweb/family/TelephoneCalls.jsp>.

¹⁹ *See, e.g.*, Joint Provider Reform Proposal at 2; Securus January 2015 Comments at 17; CenturyLink January 2015 Reply Comments at 29; ICSolutions January 2015 Comments at 20-21; Idaho Department of Correction November 2014 Comments at 1; HRDC January 2015 Comments at 7; Legal Services for Prisoners with Children December 2014 Comments at 3; National Lawyers Guild January 2015 Comments at 2-3.

²⁰ GTL January 2015 Comments at 11-14; *see also Second ICS FNPRM* ¶ 70.

²¹ Idaho Department of Correction November 2014 Letter at 1.

²² *Second ICS FNPRM* ¶ 67.

²³ Wood Reply Report at 2.

²⁴ WC Docket No. 12-375, Expert Report of Don J. Wood, at 32 (filed Jan. 12, 2015).

²⁵ *1990 Order* ¶ 22.

²⁶ *Price Cap Performance Review for AT&T*, 7 FCC Rcd 5322, ¶ 4 (1992) ("*1992 Order*").

investment and pricing based upon what it expects the regulatory agency might wish, not necessarily what best serves its customers and society.”²⁷ In comparison, use of backstop price caps “improves on traditional regulation by creating positive incentives for reasonable rates, innovation, productivity growth, and accurate cost allocation, while reducing regulatory burdens;” the goal of this “method is to control prices directly, rather than indirectly by examining whether levels of expenses, investment, and profits are reasonable.”²⁸

Mr. Wood also criticizes the single cap approach taken by the Joint Provider Reform Proposal, arguing that the solution does not sufficiently address the issue of cross-subsidization.²⁹ He points out that, rather than applying a single rate cap, applying many rate caps (one for each facility) would remove the need for providers to cross subsidize. This argument is a straw man. Tiered rate caps arbitrarily encourage a narrower form (intra-facility type) of cross-subsidization over another.³⁰ ICS costs generally are based on metrics such as minutes of use rather than how a correctional facility is labeled or how many inmates are housed at the facility.³¹ As such, call volume, not inmate population or facility type, is a more accurate measure for establishing price differences.³² Nevertheless, there is no economic justification for utilizing a tiered rate system for ICS calling.³³ A single backstop rate cap has one objective - to protect end users against exorbitant rates. Putting a single cap in place allows ICS providers to allocate their revenue most efficiently by removing restrictions on the type of cross subsidies a carrier can implement, which will best promote the goals of the Commission.³⁴

III. Modification of the Existing Site Commission System Is Necessary to Achieve the FCC’s Goals

The Commission repeatedly has articulated its views on the effect existing site commission practices have on the ICS market.³⁵ The Commission’s goal of implementing a market-based approach to encourage competition, promote lower ICS rates, and ensure fair ICS provider compensation can only be achieved with a comprehensive regime that to correctional facilities that are limited to their legitimate costs related to ICS.³⁶ Contrary to the views of the

²⁷ 1992 Order ¶ 4.

²⁸ 1992 Order ¶ 6.

²⁹ Wood Reply Report at 10; *see also* Pay Tel January 2015 Reply Comments at 22-23.

³⁰ GTL January 2015 Comments, Siwek/Holt Declaration ¶ 12.

³¹ GTL January 2015 Reply Comments, Siwek/Holt Reply Declaration ¶ 10.

³² Securus January 2015 Comments at 19.

³³ GTL January 2015 Comments, Siwek/Holt Declaration ¶ 12. For example, CenturyLink states out, “there is no clean proxy for cost that could be relied upon to create tiers.” CenturyLink October 10, 2014 Ex Parte at 3. Even Pay Tel now concedes, it “remains open to discussion concerning the appropriate cap in the largest jails (*e.g.*, 2500+), where [it] is possible that economies of scale and demand overwhelm the additional costs associated with jails.” Pay Tel January 2015 Reply Comments at 10, n.37.

³⁴ The single rate cap also presumes that market effects will bring prices down.

³⁵ *See* Attachment A, which provides the Commission’s prior statements regarding ICS site commissions.

³⁶ *Second ICS FNPRM* ¶ 6.

Alabama Public Service Commission (“PSC”), it is not enough to simply establish backstop rate caps and accept a defined set of ancillary fee caps.³⁷ It will be “impossible for rates to satisfy the ‘just and reasonable’ standard as long as [site] commission payments are allowed.”³⁸

GTL supports the ability of correctional institutions to recover “admin-support” payments for their administrative, investigative, security, and maintenance costs associated with ICS.³⁹ This approach is supported by several other commenters, including the Oregon Department of Corrections, which endorses the “idea” of “some form of capped administrative support payment in lieu of a site commission payment.”⁴⁰ The Oklahoma Department of Corrections likewise supports the move from “unmonitored, undefined and inconsistent ‘site commissions’” in favor of “providing an avenue for recovery of [the actual costs associated with providing an inmate calling system] via an administrative fee” as “a reasonable and realistic approach to a very real situation for agency administrators across the nation.”⁴¹ GTL submitted an analysis that shows such facility costs to be in the range of \$0.005 to \$0.016 per intrastate minute of use.⁴²

Some commenters question the admin-support cost analysis conducted by Economists Inc. (“EI”).⁴³ For example, CenturyLink argues that the proposed admin-support analysis does not provide a real incentive to correctional facilities to lower ICS rates or limit ancillary fees.⁴⁴ But this was not the intent of the EI analysis - it was focused on the issue of cost recovery, not how to create incentives for correctional facilities to lower ICS rates. CenturyLink also argues that the EI cost study ignores the costs of shared functions related to both ICS and other prison staffing activities, such as investigative personnel’s active monitoring of inmate conversations.⁴⁵ This is inaccurate. EI specifically addressed such overlap in its analysis by taking into account the estimated number of full-time-equivalent hours that certain personnel factored into the cost-per-minute estimates.⁴⁶ The real question is how much of a correctional facility’s personnel costs should be recoverable from ICS revenues. For example, investigative personnel may spend a significant amount of time monitoring telephone calls, but such investigative capabilities would not be available without the ICS system in the first instance. In this regard, ICS is adding a benefit to the facility rather than imposing a cost.

³⁷ Alabama PSC January 16, 2015 Ex Parte Presentation at 2.

³⁸ Letter filed by Andrew D. Lipman at 3 (dated Feb. 20, 2015).

³⁹ GTL January 2015 Comments at 16-17. As outlined in the Proposal, it would be within the discretion of each correctional institution to determine whether to seek an admin-support payment from its ICS provider.

⁴⁰ Oregon DOC December 2014 Comments at 2.

⁴¹ Oklahoma DOC January 2015 Comments at 2.

⁴² GTL January 2015 Reply Comments, Attachment 2; *see also* Letter filed by Andrew D. Lipman at 4 (dated Feb. 20, 2015) (“No correctional facility has submitted the kind of detailed cost analysis supported by expert economist reports that have been filed by the ICS providers in this docket.”).

⁴³ *See, e.g.*, CenturyLink January 2015 Reply Comments at 20-21; National Sheriffs’ Association January 2015 Comments at 9. GTL responded to many of these commenters in its initial comments and reply comments. *See* GTL January 2015 Comments at 16-17; GTL January 2015 Reply Comments at 12-18.

⁴⁴ CenturyLink January 2015 Reply Comments at 20-21.

⁴⁵ CenturyLink January 2015 Reply Comments at 20-21.

⁴⁶ GTL January 2015 Reply Comments, Attachment 2, ¶¶ 5-11.

It is also important that the transition to admin-support payments accomplishes the goal of reducing site commission payments to “enable the market to perform properly and encourage selection of ICS providers based on price, technology and services rather than on the highest site commission payment.”⁴⁷ An admin-support payment of \$0.05 per minute as suggested by some parties⁴⁸ would result in correctional facilities receiving the same or in some cases more than they currently receive under the existing site commission system. Such a result would not serve to eliminate the “competition-distorting role site commissions play in the market place.”⁴⁹

There are several recent examples supporting the Commission’s finding that reform of the existing site commission system “should enable correctional institutions to prioritize lower rates and higher service quality as the decisional criteria in their RFPs, thereby giving ICS providers an incentive to offer the lowest end-user rates.”⁵⁰ In New Jersey⁵¹ and Ohio,⁵² the elimination of site commission payments has resulted in lower ICS rates. In West Virginia, the Division of Corrections recently reviewed bids for ICS without regard to the site commission payment offered, which resulted in competition between ICS providers solely on the basis of technology and end user rates.⁵³ Arkansas also selected its ICS vendor using only technical criteria, with negotiations on pricing occurring after the selection of the vendor with the highest technical score.⁵⁴ Notably, and contrary to Pay Tel, each of these recent changes occurred in the

⁴⁷ *Second ICS FNPRM* ¶ 21.

⁴⁸ CenturyLink October 10, 2014 Ex Parte Letter at 2.

⁴⁹ *Second ICS FNPRM* ¶ 27.

⁵⁰ *Second ICS FNPRM* ¶ 27. There is no reason for the Commission to engage in “reform of the RFP process in order to shift the selection criteria to the true end users of ICS so that providers are required to compete on the basis of lowest price while maintaining reasonable cost recovery for confinement facilities” as suggested by the Alabama PSC. *See* Alabama PSC January 16, 2015 Ex Parte Presentation at 9. This will be the natural result of the “market-based” solution contemplated by the Commission and reflected in the Joint Provider Reform Proposal.

⁵¹ After the issuance of the *ICS Order and First FNPRM*, the New Jersey Department of Corrections eliminated all site commission payments and has reduced the per-minute rate for all ICS calls, which currently stands at \$0.13 per minute. The New Jersey Department of Corrections recently awarded a new contract under which inmates will be charged less than \$0.05 per minute for all ICS calls. *See* Amendments to Contract #61616 between Global Tel*Link Corporation and the Purchase Bureau, Division of Purchase and Property, Department of the Treasury, on behalf of the State of New Jersey, Department of Corrections (DOC) and Juvenile Justice Commission (JJC), *available at* http://www.state.nj.us/treasury/purchase/noa/contracts/t1934_05-x-32533.shtml. The New Jersey Board of Public Utilities recently denied a petition for rulemaking regarding ICS rates in New Jersey based, in part, on the pending Request for Proposal (“RFP”) issued by the New Jersey Department of the Treasury for ICS and the ongoing proceedings before this Commission. *See* 47 N.J. Reg. 668(b) (Mar. 16, 2015) (noting the denial of the petition for rulemaking regarding intrastate ICS rates in New Jersey).

⁵² The Ohio Department of Rehabilitation and Correction recently revised its ICS rate structure to eliminate all commissions and adopt a uniform rate of \$0.05 per minute for all ICS calls effective April 1, 2015. *See State Telecom*, COMMUNICATIONS DAILY, April 1, 2015, at 14; *see also* Amanda Seitz, *Phone calls from prison getting cheaper*, DAYTON DAILY NEWS (March 31, 2015), <http://www.daytondailynews.com/news/news/phone-calls-from-prison-getting-cheaper/nkjh3/>.

⁵³ Request for Proposal COR61453 - Inmate Telephone System, *available at* <http://www.state.wv.us/admin/purchase/rfq/fy2014/COR61453.pdf>.

⁵⁴ State of Arkansas, Office of State Procurement, Request for Technical Proposal Number SP-15-0016 (issued Sept. 11, 2014).

“free market” without the imposition of statutory changes or other administrative regulation of ICS rates.⁵⁵

Commission action, however, is still necessary to achieve the Commission’s goals. While some states and correctional institutions have eliminated commissions and lowered rates in light of the Commission’s ongoing proceedings, others have had varied responses ranging from increases in the required site commission payment to requests for additional in-kind contributions or upfront payments.⁵⁶ For example, the Alabama PSC adopted an order in December 2014 establishing ICS rate caps and ancillary fee caps, but refused to address the payment of site commissions.⁵⁷ GTL has appealed the PSC’s decision to the Alabama Supreme Court arguing that the newly adopted rate caps are confiscatory in light of the PSC’s failure to address the payment of site commissions.

Any admin-support payment adopted by the Commission must reflect the legitimate costs actually incurred by correctional institutions to allow inmates access to ICS. Many of the discrepancies in the record on the “costs” correctional facilities incur are due to the differences in what tasks are handled by the ICS provider and what tasks are handled by the correctional facility. For this reason, admin-support payments should cover only those facility costs related to allowing inmates access to communications-related services. Costs associated with probation services, offender management services, managed access services,⁵⁸ and associated maintenance and support have nothing to do with the provision of ICS, and should not be considered “legitimate” costs eligible for recovery through an admin-support payment. Any payment, service, or product that is not directly related to, or integrated with, the provision of communications services in a correctional facility should be prohibited from being linked to ICS rates or contracts. Restrictions on admin-support payments also should not be limited to “monetary payments” to correctional facilities as suggested by some.⁵⁹ The definition of a

⁵⁵ Cf. Pay Tel January 2015 Reply Comments at 19-20 (claiming that ICS rates drop only “because of state regulation requiring lower costs” and “not because of the free market”).

⁵⁶ See, e.g., *Second ICS FNPRM* ¶ 26 (noting that site commissions on intrastate revenue increased after the *ICS Order and First FNPRM*); *id.* at n.92 (discussing the continued use of site commission payments as decisional criteria in RFPs); see also Martha Wright March 6, 2015 Ex Parte Letter (explaining that the “amount of revenue earned by the [Arizona Department of Corrections] from its ICS contract steadily increased”).

⁵⁷ WC Docket No. 12-375, Alabama Public Service Commission Ex Parte, Further Order, Appendix D (filed Jan. 16, 2015).

⁵⁸ Managed access service or jamming technologies are standalone wireless products that are not integrated with ICS, require special temporary authority to act as a wireless carrier, and are used by correctional facilities solely for security purposes that are unrelated in any way to enabling ICS provider communications services between and for inmates and other consumers. See GTL January 2015 Reply Comments at 17-18. Managed access service is simply another security solution that correctional institutions can use to combat contraband, in the same manner they employ scanners, canine patrols, other screening devices to stop unlawful activities in their facilities. None of those security solutions are related to the provision of ICS, and like managed access service, would not be costs eligible for recovery through an admin-support payment. Further, issues relating to the deployment and funding associated with managed access service are being addressed by the Commission in a separate proceeding. See *Promoting Technological Solutions to Combat Contraband Wireless Device Use in Correctional Facilities, et al.*, 28 FCC Rcd 6603 (2013); see also GN Docket No. 13-111, Reply Comments of Global Tel*Link Corporation (filed Aug. 23, 2013).

⁵⁹ Securus January 2015 Comments at 13.

prohibited site commission payment instead should include any “in-kind” requirements, equipment funds, exchanges, fees and the like.⁶⁰ This will ensure the transition to the admin-support payment system creates a market environment favorable to the Commission’s objective of encouraging lower ICS rates.

GTL has reviewed the draft rule, 64.6000(11) defining “site commission,” proposed by Securus⁶¹ and proposes the following revision (shown in redline):

(11) Site Commission means any form of monetary payment, in-kind payment requirement, gifts, exchange of services or goods, fee, technology allowance, product, or the like that is not directly related to, or integrated with, the provision of communications services to inmates in a correctional facility that is remitted by an ICS Provider on a recurring or non-recurring basis (a) to the entity that operates a correctional facility, or (b) to the entity with which a Provider enters into an agreement to provide ICS to a facility, (c) to a governmental agency that oversees a facility, (d) to the State, County, or City where the facility is located, or (e) to an agent of such entities.

The Commission already has defined site commissions broadly to include “payments in money or services from ICS providers to correctional facilities or associated government agencies, regardless of the terminology the parties to the agreement use to describe them.”⁶² These revisions will ensure that admin-support payments specifically relate to the costs associated with allowing inmates access to communications-related services, and expressly exclude “in-kind” requirements, exchanges, and the like.

GTL also supports the inclusion of a bright-line rule regarding the transition away from the existing site commission regime as Securus has recommended.⁶³ Despite the Commission’s clear statements prohibiting the payment of site commissions on interstate ICS revenue,⁶⁴ some parties continue to question whether the Commission “has indeed prohibited interstate site commissions.”⁶⁵ The Commission therefore must be clear in the forthcoming rules as to how

⁶⁰ Joint Provider Reform Proposal at 4; *ICS Order and First FNPRM* ¶ 56 (“We note that we would similarly treat ‘in-kind’ payment requirements that replace site commission payments in ICS contracts.”); *see also* HRDC January 2015 Comments at 4 (noting that Michigan has eliminated site commissions but the “Special Equipment Fund” created by the Michigan Department of Corrections to combat contraband wireless devices continues to be funded by a per-minute increase in ICS phone rates); Prisoner Legal Services of Massachusetts January 2015 Comments at 5 (urging the Commission to prohibit inducements such as gifts of equipment).

⁶¹ Securus February 9, 2015 Ex Parte at Attachment.

⁶² *ICS Order and First FNPRM* at n.199.

⁶³ Securus February 9, 2015 Ex Parte at Attachment.

⁶⁴ *Rates for Interstate Inmate Calling Services*, 29 FCC Rcd 10043 (2014) (“August 20 Public Notice”); *see also* 47 U.S.C. § 208. The Commission reiterated that the payment of site commissions on interstate ICS revenues suggests those rates exceed the reasonable costs of providing interstate ICS and could be found to be unjust and unreasonable, and be subject to refunds to end users even if the ICS provider was charging the ICS rate caps adopted by the *ICS Order and First FNPRM*. *See August 20 Public Notice* at 2.

⁶⁵ *See* Alabama PSC January 30, 2015 Ex Parte Response to Securus at 2.

admin-support payments may be paid and recovered to avoid regulatory uncertainty in the marketplace.

The Commission should be clear that any per-minute admin-support payments collected along with ICS rates are considered separate from and not part of the end user revenue reported for purposes of the universal service fund and other federal funding mechanisms. ICS providers will receive the FCC-prescribed admin-support payments and remit them to correctional institutions. End user consumers should not be subject to universal service or other fund obligation pass-throughs on amounts to be paid to correctional facilities. For universal service purposes, admin-support payments should be treated similar to a collect-and-remit fee (*e.g.*, 911 fees).⁶⁶

GTL has reviewed the draft rule, 64.6090(b) regarding admin-support payments, proposed by Securus⁶⁷ and proposes the following rule in lieu of the Securus proposed rule:

Rule 64.6090 Admin-Support Payments

(b) Beginning on the effective date of these rules, a Provider may remit to a correctional facility, in place of and not in addition to the payments described in subsection (a) of this rule, an admin-support payment not to exceed an amount equal to \$0.____ per minute for completed, billed, inmate-initiated calls from a correctional facility. The admin-support payment permitted under this subsection will not be considered part of the Provider's end user revenues for purposes of federal universal service fund or other federal fund contribution obligations.

IV. The Joint Provider Reform Proposal Voluntarily Commits to Limit Ancillary Fees If the FCC Adopts a Comprehensive ICS Rate Regime

The Commission has defined the term “ancillary charges” to refer to “charges imposed on ICS end users that do not relate to the telecommunications costs of making an ICS call.”⁶⁸ ICS providers’ ancillary charges are outside the scope of the Commission’s jurisdiction because they go beyond the “telecommunications costs” of making an ICS call, and that is the limit of the Commission’s jurisdiction under Sections 201(b) and 276.⁶⁹ The Commission “literally has no power to act . . . unless and until Congress confers power upon it,”⁷⁰ and such power must be

⁶⁶ See, *e.g.*, 2015 Telecommunications Reporting Worksheet Instructions (FCC Form 499-A) at 13-14 (approved October 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0302/DOC-332306A1.pdf (“gross revenues should exclude taxes and surcharges that are not recorded on the company books as revenues, but are instead remitted to government bodies”).

⁶⁷ Securus February 9, 2015 Ex Parte at Attachment.

⁶⁸ *ICS Order and First FNPRM* at n.332.

⁶⁹ GTL January 2015 Comments at 26-30 (explaining the Commission’s lack of jurisdiction over ICS provider ancillary charges).

⁷⁰ *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

found in the language of the enabling statute.⁷¹ Sections 201(b) and 276 do not provide the Commission with the “power to act” on ICS providers’ ancillary charges.

Section 201(b) applies only to “communications services,”⁷² and billing and collection “is not a communications service for purposes of Title II of the Communications Act.”⁷³ Billing and collection “does not employ wire or radio facilities” and does not allow customers to “communicate or transmit intelligence of their own design and choosing.”⁷⁴ Billing and collection “is a financial and administrative service” outside of the Commission’s jurisdiction.⁷⁵ While the Commission previously has found that “billing and collection services provided by a common carrier for its own customers are subject to Title II,”⁷⁶ that finding applies only to the extent an ICS provider is billing for completed calls, and not when an ICS provider is billing a customer for some other product or service, such as credit card processing or a money transfer that is unrelated to the completion of individual calls by the ICS provider.⁷⁷

Section 276 also does not support the regulation of ICS provider ancillary charges.⁷⁸ The statute’s reference to “ancillary services” does not equate to ICS provider ancillary charges. The Commission consistently has referred to “ancillary services” as services such as caller ID, voice mail, or call forwarding that are ancillary to the underlying provision of telecommunications service.⁷⁹ Services such as call waiting, speed dialing, caller ID, and call forwarding are “ancillary services directly related to” the provision of “basic service,” and carriers may provide

⁷¹ *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) (finding courts “will not alter the text [of the statute] in order to satisfy the policy preferences” of an administrative agency).

⁷² 47 U.S.C. § 201(b).

⁷³ *Detariffing of Billing and Collection Services*, 102 FCC 2d 1150, ¶ 31 (1986) (“*Billing and Collection Order*”); *see also Capital Network Sys., Inc. v. FCC*, 3 F.3d 1526, 1528 (D.C. Cir. 1993).

⁷⁴ *Billing and Collection Order* ¶ 32 (quoting *NARUC v. FCC*, 525 F.2d 630, 641, n.58 (D.C. Cir. 1976)).

⁷⁵ *Billing and Collection Order* ¶ 32.

⁷⁶ *ICS Order and First FNPRM* ¶ 114; *see also* Pay Tel January 2015 Reply Comments at 42.

⁷⁷ *Cf. Truth-in-Billing and Billing Format*, 14 FCC Rcd 7492, ¶ 25 (referencing “billing and collection for [a carrier’s] own service”); *see also* Andrew D. Lipman January 2015 Comments at 9 (“These are not charges for communications services, nor are they related to the completion of individual calls. . . . [The Commission’s] analogy only holds up, however, to the extent that the ICS provider is billing for completed calls, since that is the extent of the Commission’s regulatory ambit under Section 276. When the ICS provider is billing a customer for some other service, such as a money transfer, the Commission’s jurisdiction is not applicable.”).

⁷⁸ 47 U.S.C. § 276(d). Section 276 gives the Commission jurisdiction over “payphone service,” which is defined to mean “the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.”

⁷⁹ *See, e.g., Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 19 FCC Rcd 5608, ¶ 42 (2004) (stating that wireless carriers “offer ancillary services” such as “caller ID, voice mail, call forwarding, long distance, push-to-talk”); *Local Exchange Carriers’ Payphone Functions and Features, et al.*, 13 FCC Rcd 1961, ¶ 4, n.16 (1997) (noting Bell Atlantic’s provision of “six unbundled payphone features” such as call blocking and call screening that assist independent payphone service providers “in making payphone services available to the public, for example, by helping them prevent fraudulent calls from their payphones” and noting the definition of “payphone service” includes “any ancillary services”).

these “optional services to facilitate [consumers’] use of traditional telephone service.”⁸⁰ These services also are known as “adjunct-to-basic services,” and are intended to “facilitate the completion of calls through utilization of basic telephone service facilities.”⁸¹ In the ICS context, the Commission has determined that services such as call blocking, call tracking, and call screening are considered adjunct-to-basic services because they merely facilitate the inmate’s use of the inmate calling service.⁸²

When reviewed in context, there is no link between the reference to “ancillary services” in Section 276 and the ancillary charges imposed by ICS providers. The purpose of the Communications Act is to make available “communication service”⁸³ and Section 276 specifically addresses “completed intrastate and interstate call[s].” Therefore, the term “ancillary services” in the statute “must be construed as meaning communications services that are ancillary to the completion of interstate and intrastate ICS calls,”⁸⁴ just as the Commission consistently has used the term “ancillary services” in the past.

Despite the Commission’s lack of authority over ICS provider ancillary fees, the Joint Provider Reform Proposal nevertheless offers to voluntarily limit the types of ICS provider ancillary charges to a uniform list of charges and at backstop rate caps.⁸⁵ It is important to note that the fee amounts suggested by the Joint Provider Reform Proposal are backstop *caps* and, are imposed only when a correctional institution requests that the optional capability be available or otherwise approves the rate to be charged, which is often less than the proposed caps in the Joint Provider Reform Proposal.

There is near uniform agreement in the record that ICS providers should be permitted to assess “a very narrow class of ancillary fees,”⁸⁶ especially when “the consumer makes a choice”

⁸⁰ *North American Telecommunications Association Petition for Declaratory Ruling under Section 64.702 of the Commission’s Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, 3 FCC Rcd 4385, ¶ 30 (1998) (citing *Second Computer Inquiry*, 72 FCC 2d 358, n.60 (1979)).

⁸¹ *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, 16 FCC Rcd 6417, ¶ 77 (1999).

⁸² *Petition for Declaratory Ruling by the Inmate Calling Services Providers Task Force*, 11 FCC Rcd 7362, ¶¶ 30-31, 33 (1996).

⁸³ 47 U.S.C. § 151; *see also* 47 U.S.C. § 152(a) (stating provisions of the Act apply to “communication by wire or radio”).

⁸⁴ Andrew D. Lipman January 2015 Comments at 8 (noting “ancillary services” could include, for example, “charges for operator services or directory assistance that are in addition to the basic per-minute charges for a call”); *see also* Andrew D. Lipman Ex-Parte Presentation at 5 (dated Mar. 16, 2015) (noting that while Section 276 includes “ancillary” services in the scope of ICS, the context of the statute “requires that this term be limited to ancillary *communications* services, not to financial or other services that may be offered to ICS customers”) (emphasis in original).

⁸⁵ Joint Provider Reform Proposal at 4-5.

⁸⁶ CenturyLink August 14, 2014 Ex Parte at 2.

to utilize a certain billing or payment option.⁸⁷ Other comments similarly recognize the need for ICS providers to impose ancillary charges on a limited basis.⁸⁸

Several commenters support adoption of the ancillary fees adopted by the Alabama PSC.⁸⁹ Although they differ on the amount that can be charged, the so-called “Alabama approach” and the Joint Provider Reform Proposal both recommend allowing ICS providers to impose fees for debit/credit card processing, single payment/single call payment options, third-party payment transfers, and canteen transfers.⁹⁰ The Alabama approach, however, imposes additional fees on consumers beyond those recommended by the Proposal. For example, the Alabama PSC permits ICS providers to charge a \$2.00 paper billing fee for prepaid ICS customers or direct-billed ICS customers that request a paper copy of their monthly statement.⁹¹ The Joint Provider Reform Proposal has no such fee. In addition, the Alabama PSC permits ICS providers to impose a \$3.00 bill processing fee when a collect call is billed by a call recipient’s serving carrier.⁹² While the bill processing fee is not included in the Joint Provider Reform Proposal, the Alabama bill processing fee can be viewed as akin to the Proposal’s validation fee. Both fees relate to how an ICS call is transmitted to the calling party. The Alabama bill processing fee, however, is significantly higher than the validation fee in the Proposal. For example, applying the 8% validation fee to a 15-minute ICS call at \$0.20 per minute would result in a validation charge of \$0.24 for that call, which is substantially less than the \$3.00 bill processing fee that would be charged under the Alabama plan. Further, unlike the Alabama fee that would be charged once a billing cycle, the validation fee would apply only when a correctional facility approves the application of the charge.

Transaction/deposit fee. ICS providers impose transaction or deposit fees when an ICS customer seeks to fund either a prepaid ICS account (held by an inmate’s friends and family) or a debit ICS account (held by an inmate) using a credit or debit card.⁹³ The transaction/deposit fee under the Joint Provider Reform Proposal applies only when a customer chooses to use a credit

⁸⁷ 2014 ICS Workshop Transcript at 140.

⁸⁸ See, e.g., Alabama PSC January 2015 Comments at 13; Michael Hamden January 2015 Comments at 14; Combined Public Communications December 2014 Comments at 3; Legal Services for Prisoners with Children December 2014 Comments at 4.

⁸⁹ See, e.g., Combined Public Communications January 2015 Comments at 3; NCIC January 2015 Comments at 22-23; Butler County Prison Board December 2014 Comments at 1.

⁹⁰ Compare WC Docket No. 12-375, Alabama Public Service Commission Ex Parte, Further Order, Appendix D (filed Jan. 16, 2015) (“Alabama PSC Further Order”) with Joint Provider Reform Proposal at 4-7.

⁹¹ Alabama PSC Further Order at 56.

⁹² Alabama PSC Further Order at 56. In fact, the Alabama PSC specifically asks the Commission to include such a bill processing fee in the Commission’s definition of “ancillary charges.” See Alabama PSC January 30, 2015 Ex Parte Presentation at 1.

⁹³ Joint Provider Reform Proposal at 5. This is a “financial transaction” over which the Commission does not have authority. See GTL January 2015 Comments at 27-30; see also Andrew D. Lipman January 2015 Reply Comments at 6 (“In short, none of the commenting parties have offered any persuasive argument for an interpretation of Section 276 that would permit the Commission to regulate financial transactions. The statute simply does not confer that authority, and the Commission therefore cannot prohibit or limit fees for non-communications services.”).

or debit card to fund an account or pay an amount due to GTL, and does not apply to every transaction/deposit. The customer is informed of the fee amount prior to completion of the transaction, and always has the ability to proceed with the transaction without incurring any fee (such as payment by check or money order). While some commenters have taken issue with the amount of the fee recommended by the Proposal, this is only a *cap* and in GTL's experience, more than seventy-five percent (75%) of GTL's deposit transactions currently incur no fee or a fee already at or below the proposed \$7.95 cap.

GTL has reviewed the draft rules associated with ancillary charges proposed by Securus.⁹⁴ GTL does not support the adoption of rules addressing ancillary charges because GTL does not consider such charges to be within the scope of the Commission's jurisdiction.⁹⁵ However, if the Commission adopts a comprehensive ICS rate regime as contemplated by the Proposal, GTL supports the voluntary industry commitment to limit ancillary charges for three (3) years to a uniform list of charges at backstop rate caps set forth in the Proposal. The voluntary commitment could define the parameters for the ancillary charges as appropriate. For example, GTL would support the inclusion of the following language in a posted ICS provider voluntary commitment with the indicated revisions (shown in redline):

Transaction or Deposit Fee. A Provider may charge up to \$7.95 for a transaction by which a eConsumer uses a debit or credit card (i) to establish or to replenish a Prepaid Calling, Prepaid Collect Calling, or Debit Calling account, ~~and no maximum funding amount may be imposed by the Provider when any such fee is charged,~~ or (ii) to pay amounts due in arrears.

The proposed further refined voluntary commitment would ensure the commitment covers all types of ICS accounts that may be funded using a debit/credit card to which the transaction or deposit fee would apply. This revised commitment also ensures that ICS providers can continue to apply their existing policies regarding funding maximums. ICS providers typically seek to control the amount that can be placed in an ICS account at one time via a debit/credit card payment in order to limit fraud. Under its current policy, GTL does not allow consumers to deposit more than \$50 at a time. ICS providers are subject to more fraud risk and expense when customers can deposit larger amounts using a debit/credit card, and funding maximums also protect the consumer in the event of credit card theft.

Money transfer fee. Third-party money transmitters such as Western Union establish the amount at which their services will be made available.⁹⁶ The Proposal recognizes this, and would leave such fees in place as dictated by the third-party. The Proposal also would allow ICS providers to impose a money transfer fee, up to a maximum of \$2.50, to cover the administrative costs of handling the money transfer and the funding of the ICS account. It is not accurate that

⁹⁴ Securus February 9, 2015 Ex Parte at Attachment (proposing rule 64.6080 regarding ICS ancillary charges).

⁹⁵ See *supra*; see also GTL January 2015 Comments at 26-30; GTL January 2015 Reply Comments at 18-19.

⁹⁶ As the Alabama PSC recognizes, "[t]hird-party payment transfer services do not fall under the Commission's or the APSC's jurisdiction." See Alabama PSC January 30, 2015 Ex Parte Presentation at 3.

the costs of third-party funding are borne only by the third-party provider.⁹⁷ As explained above in connection with the transaction/deposit fee, ICS providers incur costs to fund and replenish ICS accounts, whether the funds are being transferred to the ICS provider via credit card or via a third-party money transfer service.⁹⁸ Under the Proposal, ICS providers are allowed to impose a fee of *up to* \$2.50 to cover the ICS provider's administrative costs of handling such transactions.⁹⁹ For the reasons discussed above, GTL does not support the adoption of any rules related to ICS provider ancillary charges, but GTL would support the inclusion of Securus' proposed language regarding money transfer fees¹⁰⁰ in a posted voluntary commitment.

Validation fee. The validation fee applies when an ICS provider incurs costs to validate a called party, such as when the ICS provider has not previously established an account for that telephone number, confirmed the telephone number can receive collect calls billed to a local exchange carrier bill, or been able to identify the geographic location of the called party using traditional industry standards. The up to eight percent (8%) validation fee represents a *cap* on the amount that can be charged by an ICS provider. The fee would apply only when allowed by a correctional institution and at the rate approved by the correctional institution.

The validation fee covers the substantial network and administrative costs incurred by ICS providers to perform out-of-the-ordinary validation associated with processing calls in a manner that complies with correctional facility security requirements. When the called party's billing name and address ("BNA") cannot be validated using standard industry tools such as the Line Information Database ("LIDB"), GTL must use proxies for the information normally supplied by the LIDB. In the case of wireless calls, geo-location information can be used to collect data regarding the location of the cell towers used during the call, which can then be added to the call detail record for future investigatory purposes to ensure the correctional facility understands where the called party was located during the duration of the call. When a correctional facility permits inmates to call wireless numbers that cannot otherwise be validated using standard industry tools, GTL incurs costs to augment its network with additional validation capability, as well as for the increased recording and data storage capacity required. Thus, while some validation costs may have been included in the ICS provider cost data submitted to the Commission as part of the mandatory data collection, those figures do not encompass all of the costs an ICS provider incurs when it is required to validate a called party.

⁹⁷ See, e.g., Alabama PSC January 16, 2015 Ex Parte Presentation at 23; CenturyLink January 2015 Reply Comments at 28.

⁹⁸ Cf. Andrew D. Lipman January 2015 Comments at 9 ("the Commission does not have statutory authority to regulate fees for financial transactions such as electronic fund transfers and other methods of funding an account" because "[t]hese are not charges for communications services, nor are they related to the completion of individual calls").

⁹⁹ Cf. Alabama PSC January 30, 2015 Ex Parte Presentation at 4. To the extent any revenue sharing occurs between ICS providers and third-party financial service providers, however, the Commission already has determined that revenue sharing arrangements are permissible, and previously has rejected an outright ban on revenue sharing arrangements as "overly broad." See *Connect America Fund, et al.*, 26 FCC Rcd 17663, ¶ 672 (2011); see also *Second ICS FNPRM* ¶ 104 (asking about revenue sharing arrangements).

¹⁰⁰ Securus February 9, 2015 Ex Parte at Attachment (proposing rule 64.6080(c) regarding money transfer fees).

Allowing a rate-regulated carrier to recover its additional costs is not a novel proposition.¹⁰¹ In the local number portability (“LNP”) context, for example, the Commission determined that incumbent local exchange carriers (“ILECs”) could recover their carrier-specific LNP costs through a tariffed and levelized monthly end user charge over a period of five years.¹⁰² Despite this, the carriers sought and received approval to treat their additional, unrecovered LNP implementation costs as “exogenous” and to recover those costs through a different cost recovery mechanism.¹⁰³ As GTL explained in its comments, GTL is required to authenticate the called party by verifying the called party’s telephone number and billing address to comply with correctional facility security policies.¹⁰⁴ The costs associated with such validation are beyond GTL’s control, and are not recovered elsewhere, which necessitates approval of the proposed validation fee.¹⁰⁵

For the reasons discussed above, GTL does not support the adoption of any rules related to ICS provider ancillary charges. GTL, however, would be amenable to including the language proposed by Securus¹⁰⁶ with the below revisions (shown in redline) to address the validation fee in a posted voluntary commitment:

Validation Fee. A Provider may charge, on a per-call basis, a fee to recover the cost of call validation that is up to 8% of the total amount charged for the call, excluding any per-minute admin-support payment that may be added to the per-minute ICS rate caps for ICS calls.

This commitment, as clarified, will ensure the validation fee is calculated based only on the newly-adopted rate caps for ICS calls.

Convenience fees for premium payment options. These optional payment alternatives give consumers the convenience of paying for the receipt of a single inmate-initiated call including, but not limited to: (1) billing directly to a credit/debit card; (2) billing to an existing

¹⁰¹ See generally, e.g., Letter filed by Andrew D. Lipman (dated Feb. 20, 2015) (discussing how the Commission and the courts have viewed the rate making process and the role of costs).

¹⁰² *Telephone Number Portability*, 13 FCC Rcd 11701, ¶¶ 143-46 (1998).

¹⁰³ See, e.g., *Verizon’s Petition for Waiver of the Commission’s Rules to Treat Unrecovered Local Number Portability Costs as Exogenous Costs under Section 61.45(d)*, 21 FCC Rcd 10140 (2006); see also *Petition of AT&T Inc. for Waiver of the Commission’s Rules to Treat Certain Local Number Portability Costs as Exogenous Costs under Section 61.45(d)*, 21 FCC Rcd 8076 (2006).

¹⁰⁴ GTL January 2015 Comments at 23-25.

¹⁰⁵ In the LNP context, the Commission determined that ILECs subject to rate-of-return or price cap regulation could recover their carrier-specific costs through an end user charge, but gave carriers not subject to rate regulation the ability to recover their carrier-specific LNP costs “in any lawful manner.” *Telephone Number Portability*, 13 FCC Rcd 11701, ¶¶ 135-36 (1998). In this vein, the Commission later found that “precluding carriers subject to rate regulation from recovering their intermodal LNP costs, while allowing other carriers to recover such costs, would not be competitively neutral and thus would violate the statutory mandate.” *Telephone Number Portability; BellSouth Corporation Petition for Declaratory Ruling and/or Waiver*, 19 FCC Rcd 6800, ¶ 15 (2004).

¹⁰⁶ Securus February 9, 2015 Ex Parte at Attachment.

wireless telephone account;¹⁰⁷ and (3) transferring funds from canteen or commissary accounts to ICS accounts. ICS providers offer these services as a “convenience” to a customer who may not want to establish a prepaid ICS account, or may have no other way to accept a collect call from an inmate.¹⁰⁸

Some commenters claim a consumer would never use a “convenience” option if the consumer knew it could establish an ICS account for a lower fee or at no cost.¹⁰⁹ But this argument ignores the reality of the correctional environment. When a consumer receives a call in the middle of the night from someone that has been arrested and needs to be bailed out, the consumer may not want to set up an account that will never be used again in the foreseeable future, but simply wants to pay for the single call using a credit card. As Securus notes, “these are *optional* conveniences offered to customers” and “are not intended as permanent methods for inmates to make collect calls.”¹¹⁰ The availability of these options in no way “diverts” ICS traffic away from conventional billing methods or is designed to “bypass” ICS rate caps.¹¹¹ Consumers should have the ability to utilize convenience payment options if they so choose, especially when they are advised of the amount of the charge and the availability of free payment options in advance as outlined in the Joint Provider Reform Proposal.¹¹²

GTL is opposed to the adoption of Securus’ proposed rule¹¹³ but it would voluntarily commit to the following regarding optional, premium payment fees:

Optional, Premium Payment Fee. A Provider may charge for optional, premium payment arrangements services if (i) the amount does not exceed the charge that the Provider applied for that service on the Effective Date of the Commission’s [forthcoming order in the *Second ICS FNPRM*] December 31, 2014, (ii) the Provider continues to accept payment methods that are free of charge, and (iii) the Provider advises

¹⁰⁷ The Alabama PSC incorrectly states that “all the call recipients” billing a call to their existing wireless account “are using mobile phones” so “dropped calls could be a significant issue.” See Alabama PSC January 16, 2015 Ex Parte Presentation at 18. Consumers, however, have the option to bill a call destined to any telephone number to their existing wireless account; a consumer is not required to receive a call on its “mobile phone” in order to utilize the convenience payment option.

¹⁰⁸ There is no basis for Pay Tel’s proposal that premium payment options be prohibited “in prisons where pre-approved call lists are used.” See Pay Tel January 2015 Reply Comments at n.146. Regardless of whether a pre-approved call list exists for a particular inmate (in either a prison or a jail), consumers should have the option to utilize premium payment options if they so choose.

¹⁰⁹ See, e.g., ICSolutions January 2015 Comments at 11; Prison Policy Initiative January 2015 Ancillary Charges Comments at 2-3; Alabama PSC January 16, 2015 Ex Parte Presentation at 19.

¹¹⁰ Securus October 6, 2014 Letter at 5 (emphasis in original).

¹¹¹ Cf. Alabama PSC January 16, 2015 Ex Parte Presentation at 3, 17; see also Pay Tel January 2015 Reply Comments at 36-37.

¹¹² Joint Provider Reform Proposal at 5-6; see also Andrew D. Lipman January 2015 Comments at 9 (arguing the Commission’s jurisdiction applies only “to the extent that the ICS provider is billing for completed calls, since that is the extent of the Commission’s regulatory ambit under Section 276”).

¹¹³ Securus February 9, 2015 Ex Parte at Attachment.

the consumer in clear and conspicuous language, during every transaction, of the amount of the charge and the availability of free payment options. Three (3) years after the Effective Date, a Provider may increase its charges for any optional, premium payment arrangement that existed on the Effective Date. During the three years, to the extent a Provider seeks to offer an optional, premium payment arrangement that it did not offer on the Effective Date, a Provider shall notify the Commission of type of payment arrangement, the charge for the payment arrangement, and the date the payment arrangement will be available to consumers at least thirty (30) days prior to offering such payment arrangement to end user customers.

Under this commitment, ICS providers can offer additional optional, premium payment options in the future consistent with the Proposal's recommendation that ICS providers' existing fee amounts for such options be capped for a period of three (3) years.¹¹⁴

V. All Aspects of the ICS Rate Regime Must Be Implemented Simultaneously

The Commission's goal of achieving market-based ICS rates will not occur without simultaneous Commission action to establish backstop rate caps for all ICS rates, to transition site commissions to admin-support payments, and to accept the industry-wide voluntary commitment to limit ancillary charges to a uniform list of charges subject to backstop rate caps. The record supports the notion that "[c]ommission reform and rate caps must happen together" and that "rate caps cannot be successful without commission reform."¹¹⁵

The Joint Provider Reform Proposal recommended that any admin-support payment requirement adopted by the Commission be applied upon the effective date of the new capped rates, which the Proposal recommended occur 90 days from the effective date of the Order resulting from the *Second ICS FNPRM*.¹¹⁶ GTL continues to support a 90-day transition period, which was endorsed by numerous other commenters.¹¹⁷

Some commenters support a 90-day timeframe for rate and fee reform with a longer period for site commission reforms.¹¹⁸ To the extent the Commission moves forward with a longer phased-in approach for implementing changes to the existing site commission system, reductions in ICS rates and ICS provider proposed changes to ancillary fees must be phased-in over the same timeframe. The rate caps proposed in the Joint Provider Reform Proposal are built

¹¹⁴ Joint Provider Reform Proposal at 6.

¹¹⁵ National Lawyers Guild at 3; *see also* Michael Hamden January 2015 Comments at 7; HRDC January 2015 Comments at 1-2; *see also generally* Legal Services for Prisoners with Children December 2014 Comments.

¹¹⁶ Joint Provider Reform Proposal at 2, 3.

¹¹⁷ *See, e.g.*, HRDC January 2015 Comments at 12; Prisoner Legal Services of Massachusetts January 2015 Comments at 6; Illinois Campaign for Prison Phone Justice January 2015 Comments at 3-4; NCIC January 2015 Comments at 29.

¹¹⁸ *See, e.g.*, Martha Wright January 2015 Comments at 21; Virginia Association of Regional Jails January 2015 Comments at 9; Securus January 2015 Comments at 34-35.

on ICS provider cost data that excluded site commissions, and are tied to the Proposal's corresponding recommendation to transition from the existing site commission system. To achieve both just and reasonable rates for consumers and fair compensation to ICS providers, the Commission must ensure that reductions in ICS rates and ICS provider proposed changes to ancillary fees are implemented over the same timeframe as site commission reform.¹¹⁹

GTL also supports the last sentence in Securus' proposed rule 64.6070, which states the following: "For correctional facilities to which payments described in Rule 64.6090(a) continue to be paid, this Rate Cap will be effective when those payments cease."¹²⁰ This rule makes clear that the newly adopted rate caps will apply only when traditional site commission payments have transitioned to an admin-support payment.

VI. Any Rate Regime Adopted Must Promote the Introduction of New Technologies

Some commenters express concern over the integration and introduction of new technologies into the correctional environment, especially how such new technologies may be used to circumvent the Commission's rate regulations for plain old ICS.¹²¹ The Commission, however, already has recognized that new technologies available in correctional settings "should offer improvements and innovations that benefit users and thus serve [the Commission's] goals for ICS reform."¹²² Inmates should not be denied the benefits of innovation such as those being offered by GTL,¹²³ and these new service offerings should not be subject to the same regulatory regime as plain old ICS.¹²⁴ New technological advancements like GTL Genesis do not "serve only to provide inmates with connection to ICS payphone service" or act as "an alternative means of providing ICS payphone service."¹²⁵ They offer significantly more than the typical ICS payphone service. The Prison Policy Initiative recognizes the "value" advanced inmate communications services can provide to inmates and their families, such as offering additional and timelier methods of communication.¹²⁶ The nascent technologies being offered by GTL and other providers address "a real need" and provide "a more flexible approach to communication."¹²⁷ The best way to encourage the continued development of innovative

¹¹⁹ See, e.g., Letter filed by Andrew D. Lipman (dated Feb. 20, 2015) ("Given the Commission's undoubtedly correct holding that site commission payments are an allocation of profit, not a cost of providing service, it is impossible for rates to satisfy the 'just and reasonable' standard as long as these commission payments are allowed.").

¹²⁰ Securus February 9, 2015 Ex Parte at Attachment.

¹²¹ See, e.g., Pay Tel January 2015 Reply Comments at 34; Leadership Conference on Civil and Human Rights January 2015 Comments at 1; Prison Policy Initiative January 2015 Advanced Services Comments at 1-2; CenturyLink January 2015 Reply Comments at 22-23.

¹²² *Second ICS FNPRM* ¶ 145.

¹²³ GTL January 2015 Comments at 39-42 (discussing the GTL Genesis offering).

¹²⁴ GTL January 2015 Comments at 42-45 (discussing the regulatory regime applicable to new technologies being offered in the correctional marketplace).

¹²⁵ Cf. Alabama PSC January 30, 2015 Ex Parte Presentation at 10.

¹²⁶ Prison Policy Initiative January 2015 Advanced Services Comments at 1.

¹²⁷ Prison Policy Initiative January 2015 Advanced Services Comments at 1-2.

services in the correctional setting is to let them grow and develop in a minimally regulated environment, which has been the Commission’s long-standing practice.¹²⁸ The Commission should encourage the deployment of new technologies, not stifle their innovation and deployment by unnecessarily regulating or restricting them.

The adoption of the rate regime recommended by the Joint Provider Reform Proposal will drive innovation, and promote development and deployment of nascent technologies that will change and improve the inmate experience.¹²⁹ The Commission repeatedly has touted the advantages of incentive regulation (such as the use of rate caps)¹³⁰ as a way to encourage innovation and development. Incentive regulation “is more likely to help strengthen the competitiveness of American industry in domestic and international telecommunications markets, and, most importantly, help ensure that consumers share in the benefits of the information age through lower rates and a wide array of high quality services.”¹³¹ In addition to lower rates, consumers “receive other benefits as a result of incentive regulation implemented through price caps” such as new “innovations that result in consumers enjoying a wider range of high quality services at cost-effective prices. . . . The incentives for greater efficiency and innovation established by price caps should provide direct and indirect benefits for society as a whole.”¹³² When rate caps are set at the correct amount, carriers are encouraged to move prices “to economically efficient levels, to reduce costs, to invest efficiently in new plant and facilities, and to develop and deploy innovative service offerings.”¹³³

Economic theory supports the Commission’s long-standing position on innovation and deployment of new technologies, and the need for ICS rate caps and ancillary fee caps to be set at appropriate levels. There is no question that increased profit leads to increased capital investment and innovation, especially in the face of rapidly changing telecommunications technology.¹³⁴ Economists believe “technological progress lowers both capital equipment and operating costs,” and that as a consequence of this, optimal regulated pricing reflects the value of future technological improvements.¹³⁵ In other words, one goal of rate regulation is to encourage innovation in order to drive future costs down. Innovation is generally borne out of investment

¹²⁸ GTL January 2015 Comments at 45-47.

¹²⁹ The Commission consistently has recognized “Congress’ clear preference for a national policy” to accomplish its objective “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” *Vonage Holdings Corporation*, 19 FCC Rcd 22404, ¶ 34 (2004) (citing 47 U.S.C. § 230(b)(2)) (subsequent history omitted); *see also id.* (noting “Congress’s policy to ‘promote the continued development’ and ‘preserve the vibrant and competitive *free* market’ for these types of services”) (citing 47 U.S.C. § 230(b)(1), (2)) (emphasis in original).

¹³⁰ *See* GTL January 2015 Comments at 5-7 (discussing rate caps and incentive regulation).

¹³¹ *Policy and Rules Concerning Rates for Dominant Carriers*, 4 FCC Rcd 2873, ¶ 2 (1989) (“1989 Order”).

¹³² *1989 Order* ¶ 43.

¹³³ *Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation*, 12 FCC Rcd 2259, n.20 (1997).

¹³⁴ Gary Biglaiser & Michael Riordan, *Dynamics of Price Regulation*, 31:4 RAND Journ. of Econ. 744-767 (Winter 2000) (hereinafter “Biglaiser & Riordan”).

¹³⁵ Biglaiser & Riordan at 745.

in research and development, which requires sufficient revenue generation above operating and other expenses because companies rely on cash flow for investment spending.¹³⁶

Site commission reform, in conjunction with ICS rate caps and ancillary fee caps, will lead to lower end-user prices because lower marginal costs generally lead to lower prices.¹³⁷ Incentives to innovate operate in a similar manner. A provider will generally have an incentive to innovate as long as the benefit of the innovation (which comes in the form of lower production costs) exceeds the cost of research and development.¹³⁸

In contrast, if ICS rate caps are set too low and site commissions remain unconstrained, the introduction of new technologies will not be possible. In economic parlance, the term “intertemporal” refers to how current decisions affect what options become available in the future - investment by a telecommunication carrier might be viewed as an “intertemporal” cross-subsidy in which installation of a new technology may require current revenue streams in order to attain its value in the future.¹³⁹ If the ICS rate cap is set too low, however, current revenue streams will not be available for investment in future innovation. In this regard, pricing flexibility is critical for maintaining efficient intertemporal cross-subsidization. The backstop rate caps for ICS should be set at a level that protects users from paying exorbitant rates for service, but are sufficiently high to support investment in future innovation. Concurrently, the existing site commission system must be modified. Unconstrained site commissions hinder investment by diverting cash flow away from research and development, and thus from innovation.

VII. Correctional Institutions Must Have the Ability to Control the Flow of Communications within Their Facilities for Security Purposes

The Commission already has determined that “legitimate security concerns may justify ICS providers blocking calls in certain circumstances.”¹⁴⁰ This is consistent with the Commission’s prior findings that prison authorities have the right to “screen phone calls,”

¹³⁶ See, e.g., Bronwyn H. Hall & Josh Lerner, *The Financing of R&D and Innovation*, 1 Handbook of the Economics of Innovation (2010) 609-639.

¹³⁷ See, e.g., *Second ICS FNPRM* ¶ 24 (stating that the “demand for site commission payments generates pressure on ICS providers to raise rates and assess additional ancillary charges”).

¹³⁸ See, e.g., Michael L. Katz & Harvey S. Rosen, *Microeconomics*, McGraw-Hill 3rd Ed., 1998 at 424.

¹³⁹ Laffont, Jean-Jacques, and Jean Tirole, *Competition in Telecommunications*. Cambridge, Mass: MIT Press, 2000 at 145-146 (“Cross-subsidies may also have an intertemporal dimension through the depreciation of investment expenditures. For example, a few years ago it was argued that U.S. local exchange carriers could install a fiber-optic network that was then useless in providing plain old telephone services but would later become a valuable asset when introducing new and innovative services such as interactive TV and video on demand. To the extent that the investment is (partly) depreciated before the new services are introduced, there may be a cross-subsidy from (current) regulated services to (future) unregulated ones.”).

¹⁴⁰ *Policies and Rules Concerning Operator Service Providers, et al.*, 28 FCC Rcd 13913, n.34 (2013) (“*Securus Declaratory Ruling*”) (“legitimate security concerns may justify ICS providers blocking calls in certain circumstances. For example, for security reasons, ICS providers may block attempts by inmates to call victims, witnesses, prosecutors and judges. . . . This Order should not, however, be interpreted to prevent ICS providers from blocking due to legitimate security concerns.”).

“employ numerous blocking mechanisms,” and limit calls to “certain pre-approved numbers.”¹⁴¹ These concepts should be reconfirmed in the Commission’s upcoming decision. ICS providers must have the ability to block those calls that law enforcement considers a security risk.

VIII. Interstate ICS Rates Charged Prior to the Effective Date of the ICS Order and First FNPRM Were Lawful under the Commission’s Regulatory Regime

Prior to the *ICS Order and First FNPRM*, the Commission did not “regulate interstate ICS rates.”¹⁴² Instead, interstate inmate calling services were treated as competitive, non-dominant services, and were not subject to rate regulation or cost justification requirements pursuant to the Commission’s long standing treatment of competitive, non-dominant services. In the 1980s, the Commission determined that its existing policy requiring non-dominant carriers to support their proposed rates “with extensive cost and other economic data” was no longer necessary.¹⁴³ The Commission found that, “[b]ecause the cost of developing this information is relatively great for a non-dominant carrier, the rates paid by its ultimate users are likely to be higher than if all competitive carriers were free from this unnecessary regulatory burden.”¹⁴⁴ The Commission concluded that the cost justification requirement “serves no useful purpose commensurate with the costs of compliance” and “nullifies many consumer benefits that competition produces.”¹⁴⁵ The decision to eliminate certain regulatory oversight of non-dominant carriers was based on the Commission’s “conclusion that marketplace forces will operate to ensure that the rates and other tariff provisions of non-dominant carriers comply with the objectives of Sections 201 and 202 of the Act.”¹⁴⁶ With respect to ICS specifically, the Commission determined it would be “more efficient and less intrusive to proceed on a case-by-case basis, should the [Commission’s existing oral disclosure] rules . . . not lead to reasonable rates for calls from inmate phones.”¹⁴⁷

In the *ICS Order and First FNPRM*, the Commission found that the “current state of the ICS market” was no longer adequate to ensure just and reasonable rates.¹⁴⁸ The Commission noted that it “traditionally prefers to rely on market forces, rather than regulation, to constrain rates,” but in its view, “*continuing to rely* upon negotiated agreements in this context” was no longer appropriate.¹⁴⁹ The unique environment in which ICS is provided, largely contributed to

¹⁴¹ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 3248, ¶ 9 (2002).

¹⁴² *Rates for Interstate Inmate Calling Services*, 27 FCC Rcd 16629, ¶ 2 (2012) (“*ICS NPRM*”).

¹⁴³ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 FCC 2d 1, ¶ 97 (1980) (“*Competitive Carrier Order*”).

¹⁴⁴ *Competitive Carrier Order* ¶ 99.

¹⁴⁵ *Competitive Carrier Order* ¶¶ 6, 99.

¹⁴⁶ *Competitive Carrier Order* ¶ 48.

¹⁴⁷ *Billed Party Preference for InterLATA 0+ Calls*, 13 FCC Rcd 6122, ¶ 48 (1998) (“*1998 Order*”).

¹⁴⁸ *ICS Order and First FNPRM* ¶ 12.

¹⁴⁹ *ICS Order and First FNPRM* ¶ 46 (emphasis added).

the Commission’s finding that “market forces do not appear to constrain ICS rates.”¹⁵⁰ For instance, the Commission found that competition did not exert downward pressure on ICS rates due to the nature of the correctional setting and its corresponding security requirements, the competitive bidding selection process, and the site commission regime.¹⁵¹ The Commission found the presence of site commission payments was “a significant factor contributing to high rates” and undermined the ability of market forces to constrain ICS rates.¹⁵²

In recent months, there have been numerous court complaints regarding the “reasonableness” of interstate ICS rates prior to the issuance of the Commission’s *ICS Order and First FNPRM*, with some plaintiffs arguing that the mere existence of the interim interstate ICS rate caps in the *ICS Order and First FNPRM* constitutes a finding by the Commission that the interstate ICS rates charged by a particular ICS provider prior to the effective date of the *ICS Order and First FNPRM* were unjust and unreasonable.¹⁵³ This is wrong.

Prior to the *ICS Order and First FNPRM*, interstate ICS rates were not required to be supported by cost justification as explained above, and the *ICS Order and First FNPRM* contains no finding that existing interstate ICS rates were *per se* unlawful under the requirements of Section 201.¹⁵⁴ The Commission did not determine that past interstate ICS rates were unjust and unreasonable. The Commission found only that, going forward, it would “create a *new framework* to ensure that interstate ICS rates are just and reasonable.”¹⁵⁵ It is improper to use this “new framework” to attack ICS providers’ historical interstate ICS rates when the Commission specifically contemplated that “any new ICS rules”¹⁵⁶ would be applied on a prospective basis only.¹⁵⁷

¹⁵⁰ *ICS Order and First FNPRM* ¶ 41.

¹⁵¹ *ICS Order and First FNPRM* ¶¶ 40-41.

¹⁵² *ICS Order and First FNPRM* ¶ 34; *see also id.* ¶ 33 (“providers point to ‘site commissions’ as a significant driver of increases to rates charged to inmates”).

¹⁵³ *See, e.g.*, No. 2:13-cv-04989-WJM-MF, *James v. Global Tel*Link Corporation*, Complaint and Demand for Jury Trial (D.N.J. filed Aug. 20, 2013); No. 1:14-cv-456, *Chruby v. Global Tel*Link Corporation*, Complaint (E.D. Va. filed Apr. 24, 2014); No. 14-5275, *Stuart v. Global Tel*Link Corporation*, Class Action Complaint (W.D. Ark. filed Sept. 4, 2014); No. 15-5048-PKH, *Murilla v. Global Tel*Link Corporation*, Class Action Complaint (W.D. Ark. filed Feb. 13, 2015); No. 1:15-cv-0593, *Cooper v. Global Tel*Link Corporation*, Class Action Complaint (N.D. Ga. filed Feb. 27, 2015).

¹⁵⁴ The *ICS Order and First FNPRM* represented the first time the FCC attempted to impose a cost-based rate regime on ICS providers. *See Securus Tech., Inc. v. FCC*, No. 13-1280, Motion of Global Tel*Link for Partial Stay Pending Judicial Review (D.C. Cir. filed Nov. 25, 2013). The Commission’s cost-based rules were stayed by the D.C. Circuit based upon the court’s finding that GTL and the other petitioners “satisfied the stringent requirements for stay pending court review,” which look at whether the petitioners are likely to succeed on the merits, whether the petitioners will suffer irreparable harm absent a stay, and whether the equities favor a stay. *See Securus Tech., Inc. v. FCC*, No. 13-1280, Order (D.C. Cir. Jan. 13, 2014) (staying the Commission’s rules requiring cost-based rates for ICS and ancillary charges, imposing interim safe harbor rates, and creating annual reporting and certification requirements).

¹⁵⁵ *ICS Order and First FNPRM* ¶ 47 (emphasis added); *see also id.* ¶ 98 (explaining that it sought comment on how “any new ICS rules” or “any new Commission rules or obligations” would interact with existing contracts); *id.* ¶ 106 (noting that the FCC “has been examining new ICS regulations for years”).

¹⁵⁶ *ICS NPRM* ¶¶ 45-46 (asking about the effect of “any new ICS-related rules,” “any new ICS rules,” or “a new ICS regime” on existing contracts); *id.* ¶ 1 (stating the Commission was seeking comment to “consider whether

A clear, unequivocal statement regarding the status of interstate ICS rates prior to the issuance of the *ICS Order and First FNPRM* is required to quell the numerous court complaints that are attempting to argue otherwise. GTL proposes the following language be included in the Commission’s upcoming decision:

Prior to the initiation of this proceeding, the Commission did not prescribe rates for interstate ICS. Instead, we regulated ICS providers as competitive non-dominant carriers and relied on our existing rules and market forces to ensure just and reasonable interstate ICS rates. The Commission’s decision to adopt interim rate caps for interstate ICS in the *Inmate Calling Report and Order and FNPRM* was not based on a finding that the interstate ICS rates of any individual ICS provider were unjust and unreasonable. Rather, it was based on a finding that the marketplace alone was no longer adequate to ensure just and reasonable rates going forward. We concluded that rate reforms, in addition to market forces, are necessary to ensure interstate ICS rates are just and reasonable as required by section 201(b) and to provide fair compensation to providers and consumers of interstate ICS consistent with section 276.

Inclusion of this language in the Commission’s upcoming decision is consistent with the law and the Commission’s prior statements, and will resolve ongoing controversy in the ICS market.

changes to [the] rules are necessary to ensure just and reasonable ICS rates for interstate, long distance calling at publicly- and privately-administered correctional facilities”); *id.*, Appendix C, ¶ 16 (“Possible new rules could affect all ICS providers, including small entities.”); *id.*, Statement of Commissioner Ajit Pai (“Today we launch a proceeding to consider new rules for interstate inmate calling services. . . .”).

¹⁵⁷ The United States Supreme Court has concluded that “administrative rules will not be construed to have retroactive effect unless their language requires this result.” *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1998); *see also Simmons v. Lockhart*, 931 F.2d 1226, 1230 (8th Cir. 1991) (“we will not retroactively apply statutes or regulations without a clear indication that the legislature or administrative agency intends to diverge from the norm of acting prospectively.”). “[T]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (internal quotation marks omitted).

Pursuant to Section 1.1206(b) of the Commission's rules, a copy of this letter is being filed in the appropriate docket. Please contact me if you have any questions regarding this matter.

Respectfully submitted,

/s/ *Chérie R. Kiser*

Chérie R. Kiser

Counsel for Global Tel*Link Corporation

Attachment

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ATTACHMENT A

Federal Communications Commission Statements Regarding ICS Site Commissions

2012 Notice of Proposed Rulemaking¹

- “Unlike non-incarcerated customers who have access to alternative calling platforms on public payphones, inmates only have access to payphones operated by a single provider for all available services at that payphone. These contracts additionally often include a site commission or location fee paid to the correctional facility. The Commission has previously found that ‘[t]o have a realistic chance of winning a contract, the bidder must include an amount to cover commissions paid to the inmate facility.’ Five years ago Petitioners estimated that ‘commissions add an average of 43 percent . . . to all other costs before commissions.’” (*ICS NPRM* ¶ 5)
- “The record to date indicates a wide disparity in ICS rates between states. These rates reflect the higher security and network costs that are inherent in ICS; the disparity thus may reflect whether the rates in question include site commissions. For instance, correctional facilities located in states that do not require commissions from ICS providers often charge lower ICS rates. For example, New York state prohibited site commissions in state prisons and interstate per-minute rates in such prisons are as low as \$0.048. In contrast, in Colorado, a state that has site commissions, interstate per-minute rates can be as high as \$0.89. However, in Montana, another state with site commissions, the interstate per-minute rate is \$0.12. Such record evidence raises questions about whether ICS rates accurately reflect the costs of providing ICS and whether site commission payments are a reasonable cost of providing ICS that therefore should be recovered in the ICS rates inmates are charged.” (*ICS NPRM* ¶ 7)
- “The FCC has previously found that ‘under most contracts, the commission is the single largest component affecting the rates for inmate calling service’ and ‘because the bidder who charges the highest rates can afford to offer the confinement facilities the largest location commissions, the competitive bidding process may result in higher rates.’” (*ICS NPRM* ¶ 37)

2013 Report and Order and Further Notice of Proposed Rulemaking²

- “A significant factor driving these excessive rates is the widespread use of site commission payments – fees paid by ICS providers to correctional facilities or departments of corrections in order to win the exclusive right to provide inmate phone service. These site commission payments, which are often taken directly from provider revenues, have caused inmates and their friends and families to subsidize everything from inmate welfare to salaries and benefits, states’ general revenue funds, and personnel training.” (*ICS Order and First FNPRM* ¶ 3)

¹ *Rates for Interstate Inmate Calling Services*, 27 FCC Rcd 16629 (2012) (internal citations omitted from all quotations) (“*ICS NPRM*”).

² *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 14107 (2013) (internal citations omitted from all quotations) (“*ICS Order and First FNPRM*”).

- “In addition to immediate rate reform, we find that site commission payments and other provider expenditures that are not reasonably related to the provision of ICS are not recoverable through ICS rates, and therefore may not be passed on to inmates and their friends and families.” (*ICS Order and First FNPRM* ¶ 7)
- “Finally, providers point to ‘site commissions’ as a significant driver of increases to rates charged to inmates. Site commissions are payments made from ICS providers to correctional facilities and related state authorities. Since the First Wright Petition was filed in 2003, the record indicates that there has been a significant increase in site commission payments made in connection with the provision of ICS. Such payments can take the form of a percentage of gross revenue, a signing bonus, a monthly fixed amount, yearly fixed amount, or in-kind contributions. Site commission payments are currently prohibited in seven states, as well as at some federal detention facilities including dedicated facilities operated by ICE.” (*ICS Order and First FNPRM* ¶ 33)
- “The record makes clear that where site commission payments exist, they are a significant factor contributing to high rates. Site commission payments are often based on a percentage of revenues ICS providers earn through the provision of ICS, and such percentages can range from 20 to 88 percent. While the record indicates that site commission payments sometimes fund inmate health and welfare programs such as rehabilitation and educational programs; programs to assist inmates once they are released; law libraries; recreation supplies; alcohol and drug treatment programs; transportation vouchers for inmates being released from custody; or other activities, in accordance with the decisions of prison administrators and other local policymakers, such payments are also used for non-inmate needs, including employee salaries and benefits, equipment, building renewal funds, states’ general revenue funds, and personnel training. Thus, it is clear that the level of such payments varies dramatically and their use and purposes differ significantly, from funding roads to purposes that ultimately benefit inmate welfare.” (*ICS Order and First FNPRM* ¶ 34)
- “Site commission payments appear to be a particularly significant contributor to high rates. Several states have eliminated or reduced such payments, and available data indicate that ICS rates in those states are substantially lower than those in states that require commission payments. For example, in New Mexico, after site commissions were prohibited, ICS rates fell from \$10.50 for a 15-minute interstate collect call to \$0.65 for the same 15-minute call based on revised ICS rates—a 94 percent reduction. Similarly, New York ended site commission payments in 2008, ‘taking the position that the state prison system shall not accept or receive revenue in excess of its reasonable operating cost for establishing and administering its ICS, while ensuring that the system provides reasonable security measures to preserve the safety and security of prisoners, correctional staff, and call recipients.’” (*ICS Order and First FNPRM* ¶ 38)
- “Thus, the Commission has previously found that competition during the competitive bidding process for ICS ‘does not exert downward pressure on rates for consumers,’ and that ‘under most contracts the commission is the single largest component affecting the rates for inmate calling service.’ We reaffirm those findings here. Indeed, as the Commission has found, competition for ICS contracts may actually tend to increase the rate levels in ICS contract

bids where site commission size is a factor in evaluating bids.” (*ICS Order and First FNPRM* ¶ 41)

- “Site commission payments are not costs that are reasonably and directly related to the provision of ICS because they are payments made to correctional facilities or departments of corrections for a wide range of purposes, most or all of which have no reasonable and direct relation to the provision of ICS. After carefully considering the record, we reaffirm the Commission’s previous holding and conclude that site commission payments are not part of the cost of providing ICS and therefore not compensable in interstate ICS rates.” (*ICS Order and First FNPRM* ¶ 54)
- “We also disagree with ICS providers’ assertion that the Commission must defer to states on any decisions about site commission payments, their amount, and how such revenues are spent. We do not conclude that ICS providers and correctional facilities cannot have arrangements that include site commissions. We conclude only that, under the Act, such commission payments are not costs that can be recovered through interstate ICS rates. Our statutory obligations relate to the rates charged to end users— the inmates and the parties whom they call. We say nothing in this Order about how correctional facilities spend their funds or from where they derive. We state only that site commission payments as a category are not a compensable component of interstate ICS rates. We note that we would similarly treat ‘in-kind’ payment requirements that replace site commission payments in ICS contracts.” (*ICS Order and First FNPRM* ¶ 56)
- “The record reflects that site commission payments may be used for worthwhile causes that benefit inmates by fostering such objectives as education and reintegration into society. Law enforcement and correctional facilities assert that some or all of these programs would cease or be reduced if commission payments were not received as no other funding source would be available.” (*ICS Order and First FNPRM* ¶ 57)
- “We find that this subset of rates, derived from states that have eliminated site commissions and maintained adequate security, is the most relevant to our approach to determining the costs that should still be recoverable through interstate ICS rates. The subset provides a reasonable basis for establishing a conservative proxy for cost-based rates.” (*ICS Order and First FNPRM* ¶ 62)
- “Our use of these states’ data does not indicate that we conclude these interstate rates are necessarily at cost. Instead, we select them because they exclude site commissions, which we find is the most important factor leading to interstate ICS rates being above cost. There may well be other factors driving these rates above what we would consider to be reasonable cost but we nevertheless include these states to make a conservative safe harbor rate level calculation.” (*ICS Order and First FNPRM* at n.229)
- “Because we conclude site commissions are not part of the cost of ICS, we do not include the site commission profits in setting either the debit, prepaid or collect rate caps.” (*ICS Order and First FNPRM* at n.273)

- “We commend states that have undertaken ICS reform. In particular, we encourage more states to eliminate site commissions, adopt rate caps, disallow or reduce per-call charges, or take other steps to reform ICS rates.” (*ICS Order and First FNPRM* ¶ 130)
- “For the same reasons we found that site commission payments are not part of the cost of providing interstate ICS, we tentatively conclude that site commissions should not be recoverable through intrastate rates, and seek comment on this tentative conclusion. Where states have prohibited site commission payments, we seek comment on whether the resulting intrastate ICS rates are just and reasonable and whether an average of such rates would provide a reasonable safe harbor for fair intrastate ICS rates.” (*ICS Order and First FNPRM* ¶ 133)

2014 Second Further Notice of Proposed Rulemaking³

- “Excessive rates are primarily caused by the widespread use of site commission payments – fees paid by ICS providers to correctional facilities or departments of corrections to win the exclusive right to provide inmate calling service at a facility. These site commission payments, which have recently been as high as 96% of gross revenues, inflate rates and fees, as ICS providers must increase rates in order to pay the site commissions. This forces inmates and their friends and families, who use ICS and are forced to absorb the site commissions in the rates they pay, to subsidize everything from inmate welfare programs, to salaries and benefits of correctional facilities, states’ general revenue funds, and personnel training.” (*Second ICS FNPRM* ¶ 3)
- “Interstate reform in some cases has been met by increased intrastate ICS rates and has not discouraged other practices that also increase the costs of ICS to consumers, such as excessive ancillary charges and an increase in the use of single call services. The pressure to pay site commissions that exceed the direct and reasonable costs incurred by the correctional facility in connection with the provision of ICS continues to disrupt and even invert the competitive dynamics of the industry. These and other market failures demonstrate that the interstate-only reforms adopted in the *Order*, while an important first step, did not completely address the problems in the ICS marketplace.” (*Second ICS FNPRM* ¶ 20)
- “The record is clear that site commissions are the primary reason ICS rates are unjust and unreasonable and ICS compensation is unfair, and that such payments have continued to increase since our *Order*. Moreover, where states have eliminated site commissions, rates have fallen dramatically. We therefore predict that prohibiting such payments will enable the market to perform properly and encourage selection of ICS providers based on price, technology and services rather than on the highest site commission payment.” (*Second ICS FNPRM* ¶ 21)
- “The payment of site commissions distorts the ICS marketplace by creating ‘reverse competition’ in which the financial interests of the entity making the buying decision (the

³ *Rates for Interstate Inmate Calling Services*, 29 FCC Rcd 13170 (2014) (internal citations omitted from all quotations) (“*Second ICS FNPRM*”).

correctional institution) are aligned with the seller (the ICS provider) and not the consumer (the incarcerated person or a member of his or her family).” (*Second ICS FNPRM* ¶ 22)

- “Aggregated data from the Mandatory Data Collection from 14 ICS providers show that over \$460 million in site commission payments were paid to facilities in 2013. This means that ICS users and their families, friends and lawyers spent over \$460 million to pay for programs ranging from inmate welfare to roads to correctional facilities’ staff salaries to the state or county’s general budget. These are pass-through payments from the provider to the facility, absent which, rates would be lower. Moreover, the magnitude of payments is significantly higher than previous estimates in the record.” (*Second ICS FNPRM* ¶ 23)
- “Despite their limited overall budget impact, site commission payments are the chief criterion many correctional institutions use to select the ICS provider for their facilities and are thus the main cause of the dysfunction of the ICS marketplace. The demand for site commission payments generates pressure on ICS providers to raise rates and assess additional ancillary charges, which are typically not subject to site commissions. The existing contract proposal process (RFP, or request for proposal) often focuses the competition between bidding ICS providers on who can pay higher site commissions to correctional institutions instead of creating incentives for ICS providers to provide the lowest rates to consumers.” (*Second ICS FNPRM* ¶ 24)
- “Eliminating the competition-distorting role site commissions play in the marketplace should enable correctional institutions to prioritize lower rates and higher service quality as decisional criteria in their RFPs, thereby giving ICS providers an incentive to offer the lowest end-user rates.” (*Second ICS FNPRM* ¶ 27)
- “The record also indicates that when a state acts to prohibit or reduce monetary site commission payments, the ICS contract may instead require other valuable inducements such as wireless telephone blocking systems. The Commission defined site commissions broadly to include ‘payments in money or services from ICS providers to correctional facilities or associated government agencies, regardless of the terminology the parties to the agreement use to describe them.’” (*Second ICS FNPRM* at n.96)
- “Alabama has recently proposed comprehensive regulation of intrastate ICS. However, the vast majority of states have not taken up our repeated calls for ICS reform. In addition, states have inconsistently addressed site commission payments. For example, while the *Order* noted seven states that had eliminated site commissions for intrastate ICS, by implication the vast majority have not. We again encourage states to act on ICS in their jurisdictions and note that state action that is consistent with the regulations that the Commission ultimately adopts would not be subject to preemption.” (*Second ICS FNPRM* ¶ 117)