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*ADMITTED IN DC ONLY

September 2, 2015

VIA ECFS

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

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

Dear Secretary Dortch:

Global Tel*Link Corporation (“GTL”), through its counsel, hereby submits the attached paper, which reviews the law and record evidence that support the adoption of the Joint Provider Reform Proposal backstop rate caps,¹ and responds to Staff questions concerning the same in the above-referenced proceeding.²

Pursuant to Section 1.1206(b) of the FCC’s rules, a copy of this notice is being filed in the appropriate docket.

¹ WC Docket No. 12-375, Letter from Global Tel*Link Corporation, Securus Technologies, Inc., and Telmate, LLC (filed Sept. 15, 2014).

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*”).

SEPTEMBER 2, 2015

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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

cc (via e-mail): Chairman Tom Wheeler
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Commissioner Michael O’Rielly
Daniel Alvarez
Rebekah Goodheart
Travis Litman
Alison Nemeth
Amy Bender
Madeleine Findley
Pamela Arluk
Lynne Engledow
Rhonda Lien
Bakari Middleton
Thomas Parisi
Gil Strobel

I. THE FCC'S *SECOND ICS FNPRM* SEEKS TO ESTABLISH A NEW, MARKET-BASED APPROACH FOR THE REGULATION OF ICS

The Federal Communications Commission ("FCC") has stated that its goal in this proceeding¹ is to implement "a market-based approach" for the regulation of inmate calling services ("ICS") to encourage competition, promote lower ICS rates, and ensure fair compensation for ICS providers.²

The FCC's *Second ICS FNPRM* seeks to adopt "a simplified, market-based approach focused on aligning the interests of ICS providers and facilities to deliver high quality ICS with advanced security features at the lowest prices for end users."³ The *Second ICS FNPRM* clearly states that it is abandoning rate-of-return, carrier-by-carrier, cost-based regulation of ICS in favor of a regulatory regime that relies on backstop rates.⁴ The FCC now "prefers to allow market forces to ensure that rates are just and reasonable" and seeks to adopt "a more market-based approach to promoting competition and just and reasonable rates and to ensure fair compensation."⁵ The FCC therefore seeks to "adopt[] permanent rate caps" that "will serve as a backstop to the market-based solution."⁶

In response to the FCC's stated goals, the Joint Provider Reform Proposal recommends the adoption of a single set of backstop rate caps for ICS.⁷ The Proposal's backstop rate caps are based on the industry average of ICS provider costs as developed from the record data

¹ *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*").

² *Second ICS FNPRM* ¶ 6.

³ *Second ICS FNPRM* ¶ 6.

⁴ *Second ICS FNPRM* ¶¶ 47-48. As the FCC notes, the D.C. Circuit stayed the FCC's previous rule requiring rates to be based on costs. *See id.* ¶ 12.

⁵ *Second ICS FNPRM* ¶¶ 47, 48.

⁶ *Second ICS FNPRM* ¶ 47; *see also* FCC Supporting Statement for Inmate Calling Service (ICS) One-Time Data Collection at 2 (April 2014) (indicating that the "requested data" was "necessary to evaluate" the FCC's use of "rate cap regulation" of ICS rates).

⁷ WC Docket No. 12-375, Letter from Global Tel*Link Corporation, Securus Technologies, Inc., and Telmate, LLC (filed Sept. 15, 2014) (hereinafter "Joint Provider Reform Proposal" or the "Proposal"). The Proposal's backstop rate caps are \$0.20 per minute for all debit/prepaid calls and \$0.24 per minute for all collect calls. *See id.* at 2. This filing addresses the Proposal's recommended backstop rate caps for ICS, which are only one component of the "three-legged stool" needed to accomplish market-based ICS reform. As GTL has stated on prior occasions, ICS reform requires simultaneous FCC action that establishes non-tiered backstop rate caps for all ICS rates, replaces site commissions with admin-support payments that reflect legitimate costs, and accepts the Joint Provider Reform Proposal backstop rate caps for ancillary charges. *See, e.g.*, WC Docket No. 12-375, Ex Parte Notification from Global Tel*Link Corporation (dated August 21, 2015).

collection submissions required by the FCC.⁸ The Proposal backstop rate caps are set to protect consumers against exorbitant ICS rates and permit the ICS market the flexibility necessary to meet the differing security and communication service needs of correctional facility customers.

The below-cost rate proposals submitted by other parties are untenable.⁹ These proposals would require a significant portion of the ICS market to operate at a loss, leave no room to meet the widely varying individual needs of correctional facilities, and are contrary to well-established law. The FCC must ensure that ICS rate caps account for ICS provider costs and allow the ICS market the rate flexibility necessary to meet correctional facilities' individualized requirements. As the FCC recognized, backstop rate caps meet the FCC's dual goals of "allow[ing] market forces to ensure that rates are just and reasonable"¹⁰ and ensuring ICS providers have "flexibility in how they offer ICS."¹¹ Adoption of the Joint Provider Reform Proposal backstop rate caps will achieve the FCC's goals.

A. The Proposal's Backstop Rate Caps Are Consistent with the *Second ICS FNPRM* to Establish a Market-Based Rate Regime

The FCC's "goal of ICS reform is to move to a market-based solution to reduce rates."¹² The FCC is abandoning the "cost-based approach" from the *ICS Order and First FNPRM* and "moving to a market-based approach to encourage competition," which will "reduce rates to just and reasonable levels" and ensure fair ICS compensation.¹³ This approach "will enable the market to perform properly and encourage selection of ICS providers based on price, technology

⁸ *ICS Order and First FNPRM* ¶¶ 124-25. The FCC required ICS providers to respond to the data collection "to take further action to reform rates, including developing a permanent cap or safe harbor for interstate rates, as well as to inform [its] evaluation of other rate reform options." *See id.* ¶ 124. In support of its data collection requirement, the FCC indicated the data would "enable the Commission to determine what costs ICS providers incur and are necessary in order to guide the Commission as it evaluates its next steps toward permanently reforming ICS rates." *See* FCC Supporting Statement for Inmate Calling Service (ICS) One-Time Data Collection at 1 (April 2014). The data collection was intended to give the FCC "detailed information on the ICS industry as a whole" and "the detailed, industry-wide cost data necessary to develop permanent rate regulation." *See id.* at 3, 4.

⁹ The reference to "below-cost" rate proposals herein primarily refers to proposals by Pay Tel, Baker/Woods, HRDC, and the Wright Petitioners. *See* WC Docket No. 12-375, Ex Parte Presentation from Pay Tel Communications, Inc. (dated July 14, 2015); WC Docket No. 12-375, Letter from Darrell Baker (dated July 12, 2015) (amending prior Baker/Wood submissions from July 1, 2015 and July 8, 2015); WC Docket No. 12-375, Letter from Human Rights Defense Center (dated July 29, 2015); WC Docket No. 12-375, Comments of Martha Wright, *et al.* (dated Jan. 12, 2015). Other groups have supported these below-cost proposals. *See e.g.*, Alliance of Baptists January 2015 Comments at 1; Leadership Conference on Civil and Human Rights January 2015 Comments at 1; Illinois Campaign for Prison Phone Justice January 2015 Comments at 3; Legal Services for Prisoners with Children December 2014 Comments at 3; National Lawyers Guild January 2015 Comments at 2-3.

¹⁰ *Second ICS FNPRM* ¶ 48.

¹¹ *ICS Order and FNPRM* at n.416.

¹² *Second ICS FNPRM* ¶ 47.

¹³ *Second ICS FNPRM* ¶¶ 6, 48.

and services” as well as “offer improvements and innovations that benefit users.”¹⁴ At the same time, these “market-based dynamics” will act “to ensure just and reasonable ICS rates and fair ICS compensation.”¹⁵

The FCC has stated that the “permanent rate caps” to be adopted “will serve as a backstop to the market-based solution” it envisions.¹⁶ The use of backstop rate caps reflects the type of incentive-based regulation that has been utilized by the FCC for many years. As the FCC has found, “incentive regulation relies in the first instance on regulating prices. By establishing limits on prices carriers can charge for their services, and placing downward pressure on those limits or ‘caps,’ we create a regulatory environment that requires carriers to become more productive.”¹⁷ Thus, a rate cap does not set the rate that customers will be charged; it simply sets the maximum amount a carrier may charge.¹⁸

When implementing rate caps in the past, the FCC routinely has incorporated “backstop” mechanisms to allow for rate flexibility. For example, in the early 1990s, the FCC implemented backstop measures “to ensure that the basic price cap adjustment formula produces a result fair to both ratepayers and carriers.”¹⁹ In the FCC’s view, it was the “‘backstop’ mechanism that would prevent price cap [carriers] from becoming subject to possibly confiscatory earnings.”²⁰ The FCC further explained:

the price cap plan creates incentives and constraints similar to those in competitive marketplaces, where companies face greater risks, but also can achieve greater profits by operating more efficiently than their rivals. Under price caps, [carriers] similarly bear the risk of lower profits than under cost-plus rate of return regulation, but are given the incentive of potentially higher earnings for efficiency gains they achieve above the historical norm. They are also constrained, and their consumers protected, by the price ceiling, which helps assure that the profit increase

¹⁴ *Second ICS FNPRM* ¶¶ 21, 145.

¹⁵ *Second ICS FNPRM* ¶ 27; *see also id.* ¶ 47 (discussing a “market-based approach to promoting competition and just and reasonable rates and to ensure fair compensation”).

¹⁶ *Second ICS FNPRM* ¶ 47.

¹⁷ *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, ¶ 22 (1990) (“*1990 Order*”). As GTL previously has explained, this is in contrast to rate-of-return regulation, which allows carriers “to set their rates based on the costs - investment and expense - of providing a service.” *See* WC Docket No. 12-375, Written Ex Parte Letter from Global Tel*Link Corporation, at 1-3 (dated Apr. 3, 2015) (“*GTL April 3 Letter*”) (citing *1990 Order* ¶ 22). As stated above, the FCC has indicated it no longer seeks to implement cost-based regulation on ICS providers. *See Second ICS FNPRM* ¶¶ 47-48.

¹⁸ *1990 Order* ¶ 22; *see also* GTL April 3 Letter at 2 (explaining there is no basis in the record for the unfounded belief that ICS providers will always charge at the cap, which would be contrary to the historical success of rate caps and incentive regulation to achieve benefits for consumers and carriers alike).

¹⁹ *1992 Annual Access Tariff Filings*, 7 FCC Rcd 4731, ¶ 4 (1992) (“*1992 Tariff Order*”).

²⁰ *1992 Tariff Order* ¶ 10.

is in fact a result of efficiency gains. . . . This goal is aided by the “backstop” mechanism that provides an additional safeguard against rates that are unreasonably high or low.²¹

The FCC also has used backstop mechanisms in the past when a rate formula “might not prove to be perfectly accurate either for the [carrier] industry or for individual [carriers] or market conditions.”²² The backstop mechanisms were needed “in the event that unanticipated errors in the price cap formula, or circumstances peculiar to a particular company, rendered the formula inaccurate for a company at a given time.”²³ The FCC determined that a “backstop mechanism can help ensure that the [price cap] plan fairly shares the risks and rewards of future productivity gains between the [carriers] and customers, even in the unpredictable and varying circumstances of future years” and “can also serve to ensure that application of the formula does not subject any price cap [carrier] to depressed earnings over an extended period of time that could impair such a [carrier]’s ability to provide quality service to local subscribers.”²⁴ In addition, the FCC has used a backstop as part of a “market-based approach” to rate regulation to ensure all “customers receive the benefits of more efficient prices, even in those places and for those services where competition does not develop quickly.”²⁵

The Proposal’s recommended backstop rate caps satisfy the FCC’s stated goal of reaching a market-based solution to ICS reform.²⁶ The rate caps provide the rate flexibility necessary for market-based rates to develop²⁷ and are consistent with the FCC’s long history of including in rate cap regimes “an additional safeguard against rates that are unreasonably high or low.”²⁸ A rate regime without backstop rate caps would not be accurate either for the ICS industry, individual ICS providers, or market conditions,²⁹ which would defeat the FCC’s goal of market-based reform.

²¹ *Petition for Waiver of the Commission’s Rules to Recover Network Depreciation Costs*, 9 FCC Rcd 377, ¶ 24 (1993) (“1993 Waiver Order”).

²² *Price Cap Performance Review for Local Exchange Carriers*, 10 FCC Rcd 8961, ¶ 166 (1995) (“1995 Price Cap Order”).

²³ *1995 Price Cap Order* ¶ 203.

²⁴ *1990 Order* ¶ 121.

²⁵ *Access Charge Reform, et al.*, 12 FCC Rcd 15982, ¶ 267 (1997) (“1997 Access Charge Order”).

²⁶ Declaration of Stephen E. Siwek and Christopher C. Holt in Support of Comments of Global Tel*Link Corporation on Second Further Notice of Proposed Rulemaking, ¶¶ 5-10 (dated Jan. 12, 2015) (explaining how the backstop rate caps recommended by the Joint Provider Reform Proposal are “economically reasonable”) (“Siwek/Holt Declaration”), attached to WC Docket No. 12-375, Comments of Global Tel*Link Corporation on Second Further Notice of Proposed Rulemaking (dated Jan. 12, 2015) (“GTL January 2015 Comments”).

²⁷ Siwek/Holt Declaration ¶ 10.

²⁸ *1993 Waiver Order* ¶ 24.

²⁹ *1995 Price Cap Order* ¶ 166.

B. The Proposal's Backstop Rate Caps Allow for Correctional Facility Rate Flexibility and Individualization

The FCC has recognized that “no regulatory rate structure is precise enough to account for the differences between all [ICS] providers let alone all the locations served by each [ICS] provider.”³⁰ For this reason, the FCC noted that its existing interim interstate rate cap “approach is tailored to provide flexibility for the ICS providers.”³¹ It is these “differences” between “locations” served by ICS providers that necessitate continuation of the rate “flexibility” previously acknowledged by the FCC.³²

The FCC repeatedly has acknowledged that correctional facilities have individualized security and communications requirements, which include “important security features, such as call recording and monitoring, that advance the safety and security of the general public, inmates, their loved ones, and correctional facility employees.”³³ Indeed, it is “the legitimate and unique requirements for security and public safety in the provision of inmate phone services” and “the critical security needs of correctional facilities”³⁴ that distinguish ICS from other types of communications.³⁵ Numerous correctional facilities have addressed “the unique needs of each correctional facility,” the “complex and specialized environment in which inmate calling services are offered,” and “the unique nature” of ICS.³⁶

The FCC long has recognized that “ICS providers generally offer their services pursuant to contracts with correctional facilities,” and these contracts vary by correctional facility.³⁷ The

³⁰ *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 15927, ¶ 31 (2013) (“*Order Denying Stay*”).

³¹ *ICS Order and First FNPRM* at n.195.

³² *Order Denying Stay* ¶ 31.

³³ *ICS Order and First FNPRM* ¶ 2.

³⁴ *ICS Order and First FNPRM* ¶¶ 8, 58; *see also Billed Party Preference for InterLATA 0+ Calls*, 13 FCC Rcd 6122, ¶ 46 (1998) (noting “special security requirements applicable to inmate calls”).

³⁵ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 3248, ¶ 9 (2002) (“inmate calling services, largely for security reasons, are quite different from the public payphone services that non-incarcerated individuals use”) (“*2002 Remand Order*”).

³⁶ *See, e.g.*, WC Docket No. 12-375, Petition for Reconsideration of the National Sheriffs’ Association at 2 (filed Dec. 13, 2013) (“Inmate telephone systems are built to reflect the unique needs of each correctional facility and provide a variety of important security components.”); WC Docket No. 12-375, Letter from American Jail Association (filed Nov. 1, 2013) (discussing “the complex and specialized environment in which inmate calling services are offered”); Louisiana Department of Public Safety and Corrections March 2013 Comments at 8 (discussing “the unique nature of the provision of an offender telephone system”); Idaho Department of Correction March 2013 Comments at 1 (noting “the unique nature of corrections and the important need to balance security needs and family contact”).

³⁷ *ICS Order and First FNPRM* ¶ 21; *see also Rates for Interstate Inmate Calling Services*, 27 FCC Rcd 16629, ¶¶ 5, 7 (2012) (discussing the awarding of ICS contracts and the differences in rates among facilities) (“*ICS NPRM*”); *2002 Remand Order* ¶¶ 10-11 (discussing the ICS contract award process and varying rates).

term “individual case basis” or “ICB” offerings “refer to the carrier practice of providing a particular service in response to a specific request from a customer under individualized rates, terms, and conditions.”³⁸ The contracts between ICS providers and correctional facilities are ICB contracts, which “are designed to meet the specific, and often unique, needs of particular customers” and often “include a mix/bundle of both regulated and non-regulated services.”³⁹

Rate flexibility is a natural outgrowth of a rate cap regime - the rate cap regime eliminates the “danger that [carriers] would charge unreasonably high prices” while providing carriers “with the pricing flexibility that would encourage innovation.”⁴⁰ The “primary objective” of a rate cap regime is “protecting ratepayers against unreasonable charges for services” and “giving carriers both the flexibility to introduce new, innovative services quickly and to provide the most efficient mix of services their networks permit and the incentive to do so.”⁴¹ “[P]ermitting flexibility in price-setting generates economic efficiencies that benefit ratepayers through lower rates.”⁴² A fluid rate cap regime provides “flexibility in light of existing market conditions, while protecting against anti-competitive, unreasonably discriminatory or other negative consequences.”⁴³ Without such flexibility, carriers would be limited in their “ability to respond in a timely manner to their customers’ demands for innovative service arrangements tailored to each customer’s individualized needs The better policy for consumers is to allow [carriers] to respond to technological and market developments.”⁴⁴

³⁸ *Local Exchange Carriers’ Individual Case Basis DS3 Service Offerings*, 23 FCC Rcd 569, n.2 (2008) (internal citations omitted). The FCC has explained that “there are two types of ICB offerings: (1) those that provide a new technology for which little demand initially exists, but that later evolve into generally-available offerings as demand grows; and (2) those that are unique service arrangements offered to meet the needs of specific customers and that never evolve into a generally-available offering.” See *Local Exchange Carriers’ Rates, Terms, and Conditions for Expanded Interconnection through Physical Collocation for Special Access and Switched Transport*, 12 FCC Rcd 18730, ¶ 428 (1997).

³⁹ *Center for Communications Management Information, Econobill Corporation, and On Line Marketing Inc. v. AT&T Corporation*, 23 FCC Rcd 12249, ¶ 17 (2008). As GTL previously explained, individually negotiated contracts are not unreasonably discriminatory under Section 202(a) when made generally available to other similar situated customers willing and able to meet the contract’s terms. See *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, ¶ 129 (1991); see also GTL August 10 Letter at 9, n.57. An inquiry under Section 202(a) requires a review of: (1) whether the services are “like;” (2) if they are “like,” whether there is a price difference; and (3) if there is a difference whether it is reasonable. *MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296, 1303 (D.C. Cir. 1988).

⁴⁰ *Amendment of Part 69 of the Commission’s Rules Relating to the Creation of Access Charge Sub-Elements for Open Network Architecture Policy and Rules Concerning Rates for Dominant Carriers*, 7 FCC Rcd 5235, ¶ 17 (1992); see also GTL April 3 Letter at 19-20 (explaining the need for ICS rate caps to be set at appropriate levels to encourage innovation and the deployment of new technologies).

⁴¹ *Policy and Rules Concerning Rates for Dominant Carriers*, 2 FCC Rcd 5208, ¶ 47 (1987).

⁴² *1990 Order* ¶ 35.

⁴³ *Price Cap Performance Review for Local Exchange Carriers*, 11 FCC Rcd 858, ¶ 61 (1995).

⁴⁴ *Petition of the Embarq Local Operating Companies for Forbearance under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common Carriage Requirements*, 22 FCC Rcd 19478, ¶ 32 (2007) (discussing the disadvantages of dominant carrier regulation of rates) (“*Embarq Pricing Flexibility Order*”).

The availability of ICB arrangements “serves the public interest by enabling users to purchase services that match their needs in particular ways”⁴⁵ and increases “the ability of customers to negotiate service arrangements that best address their particular needs.”⁴⁶ The FCC has found carriers “offer integrated service packages in response to indications of very real customer demand for such offerings,” which is often characterized as “a ‘turnkey’ approach.”⁴⁷ The pricing flexibility available in ICB arrangements allows the carrier to “develop[] a price for a particular service or facility in response to each customer request for the service or facility.”⁴⁸ The FCC has found customers benefit from that pricing flexibility because “service offerings may be negotiated and tailored to meet customers’ individual needs.”⁴⁹ In the FCC’s view, “[e]conomic logic holds that giving [carriers] increased pricing flexibility will permit them to respond to competitive entry, which will allow prices to move in a way that they would not have moved were the pricing restrictions maintained. This can lead to better operating markets and produce more efficient outcomes.”⁵⁰

The backstop rate cap regime envisioned by the Proposal provides the ICS market with the rate flexibility necessary to respond to market conditions, protects end users from exorbitant rates, and allows the FCC “to reform and modernize interstate and intrastate ICS regulations while ensuring adequate security measures for correctional facilities.”⁵¹ The ICS rate regime to be adopted by the FCC cannot ignore the different service needs of correctional facilities.⁵² Attempting to establish a rate for each type or category of correctional facility “would not be possible, much less practical” as the FCC has recognized.⁵³ The record demonstrates that the per-minute price at many correctional facilities is driven by the specific communications and security needs of the facility regardless of whether it is a jail or prison.⁵⁴ Correctional facilities

⁴⁵ *Competition in the Interstate Interexchange Marketplace*, 10 FCC Rcd 4562, ¶ 24 (1995).

⁴⁶ *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, ¶ 103 (1991).

⁴⁷ *AT&T Communications Revisions to Tariff F.C.C. No. 12*, 4 FCC Rcd 4932, ¶¶ 47, 61 (1989) (subsequent history omitted).

⁴⁸ *Price Cap Performance Review for Local Exchange Carriers*, 11 FCC Rcd 858, ¶ 62 (1995).

⁴⁹ *Embarq Pricing Flexibility Order* ¶ 9 (discussing pricing flexibility relief); *see also Access Charge Reform*, 14 FCC Rcd 14221, ¶ 128 (1999) (allowing access services to be individually negotiated because it would allow carriers “to tailor services to their customers’ individual needs”).

⁵⁰ *1997 Access Charge Order* ¶ 270.

⁵¹ *Second ICS FNPRM* ¶ 19.

⁵² *See, e.g., Adeshina Emmanuel and Olivia Exstrum, Illinois and Cook County reconsider profits from inmate phone calls*, Chicago Reporter (Aug. 19, 2015) (discussing the differences between facilities located in Illinois).

⁵³ *ICS Order and First FNPRM* at n.230.

⁵⁴ As the Idaho Department of Correction explained, it “supports a simple per minute rate structure that allows flexibility for the agencies and ICS providers to construct a program offering that best fits the needs of the agency, ICS provider and end user. The program offering must be able to factor in the geographic/demographic area, age, condition and infrastructure of the facility(ies), and other special or unique needs, when developing a per minute rate structure.” *See Idaho Department of Correction November 2014 Comments at 1; see also ICS NPRM* ¶ 6 (noting disparities between ICS rates that reflect security and network costs).

and providers, not regulators, are in the best position to define the scope of services,⁵⁵ which may be basic voice or broader security and communications services such as video conferencing, enhanced calling features, alerts/notifications, voicemail, and/or messaging.⁵⁶ The ICS market must have the ability to tailor services based on correctional facility requests. The Proposal's backstop rate caps allow for the flexibility previously endorsed by the FCC because those caps provide the ICS market with the ability to price services based on the specific security and communications service needs requested by each correctional facility, while achieving the FCC's dual goals of just and reasonable rates to inmates and their families, and fair compensation to ICS providers.

C. The Proposal's Backstop Rate Caps Rely on the FCC's Preferred Method of Using Industry-Wide Average Costs To Set Rates

The FCC has a “long-standing practice of basing prescribed rates on some form of averaged data”⁵⁷ because the “use of averaged rates and data is common in the communications industry and telecommunications regulation.”⁵⁸ The FCC recognized in the *ICS Order and First FNPRM* that a unitary set of ICS rate caps based on the average costs of serving multiple facilities allows for cost variances among correctional facilities and is consistent with past FCC practice.⁵⁹ “It is a given that when a regulatory pricing structure is established, providers subject to those rates will serve higher and lower cost customers or locations and will effectively be required to average its costs among those customers.”⁶⁰ This is no different than wireline or wireless carriers that use regional or nationwide prices to serve end users with a wide range of cost and traffic characteristics.⁶¹ Taking any other approach “would lead to absurd results, requiring the [FCC] to eschew any form of averaging – whether across providers, across facilities, across geographic regions, or across calls – whenever there is some degree of ‘variability’ in the averaged data.”⁶²

⁵⁵ GTL January 2015 Comments at 13-14 (explaining that adoption of a single set of rate caps for all correctional facilities allows the parties with the most knowledge about the correctional facility - correctional officials and the ICS provider - to determine the appropriate rates for ICS at the particular facility based on the security needs of that facility).

⁵⁶ See, e.g., Idaho Department of Correction November 2014 Comments at 1-2 (discussing inmate response to the new enhanced services being offered, including voicemail); see also Prison Policy Initiative January 2015 Advanced Services Comments at 1-2 (recognizing the “value” advanced inmate communications services can provide to inmates and their families, such as offering additional and timelier methods of communication and noting that the nascent technologies offered by ICS providers address “a real need” and provide “a more flexible approach to communication”)

⁵⁷ *ICS Order and First FNPRM* at n.230.

⁵⁸ *ICS Order and First FNPRM* at n.280.

⁵⁹ *ICS Order and First FNPRM* ¶ 62 (noting “the fact that there may be cost variances among correctional facilities”).

⁶⁰ *Order Denying Stay* ¶ 31.

⁶¹ *ICS Order and First FNPRM* at n.280; see also *Order Denying Stay* ¶ 31.

⁶² *ICS Order and First FNPRM* at n.230.

The FCC's findings in the ICS context reflect its prior experience in establishing rate regimes. In the price cap context, the FCC found that using "industry average data" would "improve economic efficiency" as all price cap carriers would "now face the same efficiency incentives."⁶³ In the rate-of-return context, the FCC determined it was best to prescribe rates for logical groupings of carriers when "prescription of individual carrier rates of return threatens a complete breakdown of the administrative process. . . . even though significant economic consequences to individual carriers may result, especially since [it has] provided carriers with the opportunity to seek special relief by requesting exclusion from the group and by requesting individual treatment."⁶⁴

The "use of industry-wide averages in setting rates is not novel" and "the Supreme Court has affirmed ratemaking methodologies employing composite industry data or other averaging methods on more than one occasion."⁶⁵ For example, the Supreme Court "has repeatedly recognized that legislatures and administrative agencies may calculate rates for a regulated class without first evaluating the separate financial position of each member of the class; it has been thought to be sufficient if the agency has before it representative evidence, ample in quantity to measure with appropriate precision the financial and other requirements of the pertinent parties."⁶⁶ Agency ratemaking does not "require that the cost of each company be ascertained and its rates fixed with respect to its own costs."⁶⁷

The "imposition of maximum prices" may not be rejected "merely because 'high cost operators may be more seriously affected . . . than others.'"⁶⁸ Recognizing the need for "more expeditious administrative methods," the Supreme Court found that "rate-making agencies are not bound to the service of any single regulatory formula; they are permitted . . . 'to make the pragmatic adjustments which may be called for by particular circumstances.'"⁶⁹ The FCC "has broad discretion in selecting methods to evaluate the reasonableness of rates,"⁷⁰ and it "is not arbitrary . . . for an industry-wide rate regulatory scheme to use industry-wide average cost data."⁷¹

⁶³ *Price Cap Performance Review for Local Exchange Carriers*, 12 FCC Rcd 16642, ¶¶ 158, 160 (1997); see also WC Docket No. 12-375, Letter from Andrew D. Lipman at 29-30 (dated July 21, 2015).

⁶⁴ *Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers*, 59 Rad. Reg. 2d 651, ¶ 16 (1985).

⁶⁵ *Southwestern Bell Telephone Co. v. FCC*, 168 F.3d 1344, 1352 (D.C. Cir. 1999).

⁶⁶ *Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968).

⁶⁷ *FPC v. Texaco Inc.*, 417 U.S. 380, 387 (1974).

⁶⁸ *Permian Basin*, 390 U.S. at 769 (citing *Bowles v. Willingham*, 321 U.S. 503, 518 (1944)).

⁶⁹ *Permian Basin*, 390 U.S. at 776-77 (citing *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942)).

⁷⁰ *AT&T Corp., Complainant v. Business Telecom, Inc., Defendant*, 16 FCC Rcd 12312, ¶ 25 (2001).

⁷¹ *Edison Elec. Institute v. ICC*, 969 F.2d 1221, 1226 (D.C. Cir. 1992).

The Proposal's use of industry-wide, averaged data to recommend backstop rate caps is consistent with FCC practices and precedent. The Proposal's backstop rate caps reflect industry-average costs based on ICS provider data submitted in response to the FCC's mandatory data collection.⁷² The FCC specifically stated that it needed information on ICS providers' costs to "ensure that future ICS regulation uses sufficiently sound data so that it does not results in a taking."⁷³

Record evidence demonstrates that five (5) of the largest ICS providers have overall per-minute costs ranging between \$0.1341 and \$0.1967 depending on the provider.⁷⁴ The ICS provider data further demonstrates that the "combined" average cost per minute across carriers, facility types, and call arrangement types (debit/prepaid and collect) is \$0.150 per minute.⁷⁵ Further, the average overall debit/prepaid costs for 9 out of 12 ICS providers are below the Proposal's backstop rate cap for debit/prepaid calls.⁷⁶ Importantly, the three (3) carriers with average costs above the Joint Provider Reform Proposal's backstop rate cap account for only 0.5 percent (0.5%) of all debit/prepaid minutes of use. The Proposal's backstop rate cap for debit/prepaid calls therefore represents an appropriate and reasonable industry-wide average rate that covers 99.5 percent (99.5%) of all debit/prepaid minutes of use reported by these ICS providers.⁷⁷

The availability of a waiver negates any potential "economic consequences to individual carriers"⁷⁸ that may result from adoption of the Proposal's backstop rate caps. Under the

⁷² *ICS Order and First FNPRM* ¶¶ 124-25; see also WC Docket No. 12-375, *Commission Announces Inmate Calling Services Data Due Date*, Public Notice, DA 14-829 (rel. June 17, 2014); WC Docket No. 12-375, *Instructions for Inmate Calling Services Mandatory Data Collection*, Approved by OMB – 3060-1196.

⁷³ FCC Supporting Statement for Inmate Calling Service (ICS) One-Time Data Collection at 5 (April 2014).

⁷⁴ 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).

⁷⁵ Siwek/Holt Declaration ¶¶ 5, 6, 7; see also GTL April 3 Letter at 1 (discussing how the Proposal's recommended rate caps are supported by ICS provider data, the FCC's own analysis of that data, and the record).

⁷⁶ Stephen E. Siwek and Christopher C. Holt, Further Comments with Regard to Rate Cap Proposals (dated Aug. 10, 2015) ("Siwek/Holt Further Comment on Rate Cap Proposals"), attached to WC Docket No. 12-375, Written Ex Parte Letter from Global Tel*Link Corporation (dated Aug. 10, 2015) ("GTL August 10 Letter").

⁷⁷ The Proposal also recognized that there may be rare instances in which the provision of ICS to individual mental health facilities, youth work camps, and other facilities with unique environments (security, geographic, or otherwise) might increase the cost of providing service beyond the proposed caps, which could be addressed through the waiver process. See Proposal at n.5. This approach is consistent with CenturyLink's proposal that "uniquely high-cost facilities" and jails with less than 100 average daily population not be subject to the uniform rate caps to be established by the FCC. See WC Docket No. 12-375, Written Ex Parte Letter from CenturyLink (Aug. 20, 2015).

⁷⁸ *Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers*, 59 Rad. Reg. 2d 651, ¶ 16 (1985).

Proposal, any ICS provider who believes its costs for a particular correctional facility exceed the backstop rate caps may seek a waiver.⁷⁹ The majority of ICS providers support the ability to seek waivers as necessary for those facilities that may present unique circumstances.⁸⁰ The availability of the waiver procedure eliminates the need to modify the Proposal's backstop rate caps for the possibility that an extremely small share (0.5%) of the ICS market may be served by ICS providers that may have higher costs.

D. The Proposal's Backstop Rate Caps Are Based on the Best Data Available in the Record

The FCC “must use ‘the best data available’” in its decision making.⁸¹ The ICS provider cost data on which the Proposal's backstop rate caps are based represents “the best underlying data available that can be verified by interested parties and the Commission” with “[a]ll data, formulas, and other aspects of the models” being “made available to other parties for their evaluation.”⁸² The Administrative Procedure Act “does not ‘demand the perfect at the expense of the achievable.’ Instead, ‘the accuracy of any particular [data] ... must be evaluated by reference to the data that was available to the agency at the relevant time.’”⁸³ The FCC has a “duty” to “use ‘the most reliable data available’ to produce figures that can be considered sufficiently ‘accurate.’”⁸⁴ The accuracy of any agency determination “cannot be weighed in a vacuum, but instead must be evaluated by reference to the data that was available to the agency at the relevant time.”⁸⁵

Based on these procedural requirements, inconsistencies between the reported data do not mean the “cost data is somehow suspect.”⁸⁶ It means that some ICS providers allocate costs differently than others or reported the data in a different manner, as was recognized by the

⁷⁹ Proposal at 2-3. As noted above, the Proposal contemplated that “waivers could be sought to provide service to individual mental health facilities, youth work camps, and other facilities with unique environments (security or otherwise) that increase the cost of providing service beyond the cap.” *See id.* at n.5.

⁸⁰ *See, e.g.*, GTL January 2015 Comments at 13-14; Securus January 2015 Comments at 40-41; CenturyLink January 2015 Reply Comments at 31; WC Docket No. 12-375, Pay Tel Ethical Proposal for Reform of Inmate Calling Rates and Fees (filed Oct. 3, 2014) (stating its proposed rates would be subject to waiver process for facilities with costs above the proposed rate caps); *see also* Michael Hamden January 2015 Comments at 16-17 (supporting waiver process).

⁸¹ *Association of Private Sector Colleges & Universities v. Department of Education*, No. 14-CV-1870, 2015 WL 3866659, *11 (D.D.C. June 23, 2015) (internal citations omitted), *appeal pending*.

⁸² *WorldCom, Inc.*, 18 FCC Rcd 17722, ¶ 38 (2003).

⁸³ *Association of Private Sector Colleges*, 2015 WL 3866659 at *11.

⁸⁴ *Baystate Medical Center v. Leavitt*, 545 F. Supp. 2d 20, 41 (D.D.C. 2008) (citing *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1230 (D.C. Cir. 1994)).

⁸⁵ *See id.*

⁸⁶ WC Docket No. 12-375, Letter from CenturyLink (dated May 20, 2015).

FCC.⁸⁷ Any perceived variations in the cost data are easily explained by the way in which the FCC designed the data collection and the way in which individual ICS providers retain and report their data. The FCC designed the data collection and ICS providers responded based on their particular business operations with reliance on internal accountants and outside economic consultants as necessary.

Despite this, the Wright Petitioners have raised questions as to the accuracy and reliability of the cost data submitted by ICS providers through its consultant Coleman Bazelon.⁸⁸ Many of Mr. Bazelon's criticisms are based on his view that the reported ICS provider costs do not comport with traditional rate-of-return concepts.⁸⁹ Yet the data collection was neither intended to track traditional rate-of-return reporting nor could it because ICS providers are competitive carriers subject to non-dominant carrier regulation.⁹⁰ The FCC specifically has stated that its' interim "rate cap approach . . . is fundamentally different than rate-of-return regulation"⁹¹ and has indicated that it no longer seeks to implement cost-based regulation on ICS providers.⁹² Specific to GTL, Mr. Bazelon criticizes GTL's use of "market" values over "book" values" for the valuation of assets in GTL's cost analysis.⁹³ Book value, however, "represents no standard of value; it is an accounting term not an appraisal term."⁹⁴ Mr. Bazelon's attempt to apply rate-of-return concepts to the ICS provider data is wrong under the law and should be rejected.

⁸⁷ *Second ICS FNPRM* ¶ 52 ("We note that, as a whole, ICS providers allocated common costs among types of facilities and types of services differently as compared to the volumes of traffic those facilities and services experienced.").

⁸⁸ *See, e.g.*, Letter from Martha Wright Petitioners (dated Sept. 17, 2014) (providing "general concerns with the data submissions" based on information from consultant Coleman Bazelon); Letter from Martha Wright Petitioners (dated Aug. 14, 2015) (providing additional evidence of Mr. Bazelon's view on the cost data) ("Bazelon August 14 Memo"). GTL responded to Mr. Bazelon's specific concerns with GTL's data submissions as identified in his September 17, 2014 submission, and will not re-state those all of those responses here. *See* Reply Declaration of Stephen E. Siwek and Christopher C. Holt in Support of Reply Comments of Global Tel*Link Corporation on Second Further Notice of Proposed Rulemaking ¶¶ 4-6 (dated Jan. 27, 2015) ("Siwek/Holt Reply Declaration"), attached to WC Docket No. 12-375, Reply Comments of Global Tel*Link Corporation on Second Further Notice of Proposed Rulemaking (dated Jan. 27, 2015) ("GTL January 2015 Reply Comments").

⁸⁹ Bazelon August 14 Memo at 2 (referring to concepts found in rate-of-return regulation).

⁹⁰ *See, e.g.*, FCC Supporting Statement for Inmate Calling Service (ICS) One-Time Data Collection at 1 (April 2014) (stating that, prior to the *ICS Order and First FNPRM*, "ICS providers, and their rates, were largely unregulated by the Commission"); *id.* at 6 (stating the data request "form provides respondents with adequate flexibility in the manner in which they compile the requested data as long as methodologies and calculations they use are sufficiently explained"); *see also Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 FCC 2d 1, ¶ 97 (1980) (finding competitive carriers were no longer required to support their proposed rates "with extensive cost and other economic data").

⁹¹ *ICS Order and First FNPRM* at n.195.

⁹² *Second ICS FNPRM* ¶¶ 47-48.

⁹³ Bazelon August 14 Memo at 4.

⁹⁴ Shannon Pratt, *Valuing a Business*, at 29 (2nd Edition); *see also, e.g.*, Stephen A. Ross, Randolph W. Westerfield, Jeffrey J. Jaffe, and Bradford D. Jordan, *Corporate Finance*, at 378 (2nd Edition); *see also* Siwek/Holt Reply Declaration ¶¶ 4-6.

Further, there is no evidence that the opinion of the Wright Petitioners' consultant holds any more weight than the opinions of the other highly-qualified and trained consultants and in-house subject-matter experts who provided company-specific information and analyses in this proceeding. Indeed, another outside consultant specifically has said that the filings of "eight ICS providers – Pay Tel Communications, Securus, GTL, NCIC, Lattice, ICSolutions, Telmate, and CenturyLink – provide important and reliable information that should be relied upon by the Commission."⁹⁵ Accordingly, there is no justification for discrediting the ICS provider data upon which the Proposal's backstop rate caps are based.

II. OTHER PARTIES' BELOW-COST RATE PROPOSALS ARE LEGALLY UNSOUND AND WILL NOT ACHIEVE THE FCC'S GOAL OF MARKET-BASED ICS REGULATION

Adoption of the below-cost rate caps proposed by Pay Tel, Baker/Wood, HRDC, and the Wright Petitioners⁹⁶ is contrary to well-established law. As other parties have pointed out, FCC precedent holds that "rates must be based primarily on the cost of service, including a reasonable return on investment (*i.e.*, profit)."⁹⁷ The FCC's policy consistently has been "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."⁹⁸ The ratemaking process "involves a balancing of the investor and the consumer interests . . . the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business."⁹⁹ Thus, the FCC cannot impose rates so low that ICS providers cannot possibly recover their costs¹⁰⁰ and cannot adopt

⁹⁵ WC Docket No. 12-375, Expert Report of Don J. Wood (dated Jan. 12, 2015).

⁹⁶ See WC Docket No. 12-375, Ex Parte Presentation from Pay Tel Communications, Inc. (dated July 14, 2015); WC Docket No. 12-375, Letter from Darrell Baker (dated July 12, 2015) (amending prior Baker/Wood submissions from July 1, 2015 and July 8, 2015); WC Docket No. 12-375, Letter from Human Rights Defense Center (dated July 29, 2015); WC Docket No. 12-375, Comments of Martha Wright, *et al.* (dated Jan. 12, 2015).

⁹⁷ Letter filed by Andrew D. Lipman at 2 (dated Feb. 20, 2015); *Alabama Cable Telecomms. Ass'n v. Alabama Power Co.*, 16 FCC Rcd 12209, ¶ 51 (2001) ("if the end results of the regulations are '[r]ates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed' then the regulations are constitutionally valid") (citing *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944)); see also *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989).

⁹⁸ *AT&T Co., (Long Lines Department) Transmittal No. 11935*, 59 FCC 2d 671, ¶ 13 (1976).

⁹⁹ *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

¹⁰⁰ WC Docket No. 12-375, Letter from Andrew D. Lipman at 2-3 (dated Feb. 20, 2015); WC Docket No. 12-375, Letter from Andrew D. Lipman at 23-27 (dated July 21, 2015).

rate regulation that effectively guarantees carriers an economic loss,¹⁰¹ both of which will result from adoption of the below-cost rate proposals.

The below-cost rate proposals will not achieve the FCC's goal of market-based ICS reform that encourages competition, ensures just and reasonable rates, and provides fair compensation to ICS providers.¹⁰² A higher cap will allow more leeway for market forces to take effect.¹⁰³ The below-cost proposals are unrealistic and unsupported by record evidence. The proposed rates are at or below the average costs per minute reported by ICS providers to varying degrees, would require a significant portion of the ICS market to operate at a loss, and leave no room to meet the individual needs of the wide-variety of correctional facilities.¹⁰⁴ For example, in the case of the proposals made by Pay Tel and the Wright Petitioners, approximately eighty-two percent (82%) of all debit/prepaid prison minutes of use would be provided at below-cost rates; in the case of HRDC's proposal, the percentage below cost jumps to 100%.¹⁰⁵

In support of their below-cost rate, the Wright Petitioners note that recent ICS agreements have contained uniform rates for both prisons and jails that are less than the FCC's interim interstate rate caps and less than the Proposal's recommended backstop rate caps.¹⁰⁶ The per-minute rate at one correctional facility is not evidence that the same rate can be applied to all correctional facilities, or even similar types of correctional facilities. As discussed above, each correctional facility has specific security and communications requirements, which may necessitate different per-minute rates regardless of whether it is a jail or prison. This is demonstrated by the differences in rates between the correctional facilities cited by the Wright Petitioners.¹⁰⁷ The New Jersey Department of Corrections rate is less than \$0.05 per minute,¹⁰⁸ the Ohio Department of Rehabilitation and Correction's rate is \$0.05 per minute, and the

¹⁰¹ *AT&T v. FCC*, 836 F.2d 1386, 1391-92 (D.C. Cir. 1988) (rejecting FCC rule that would “guarantee the regulated company an economic loss”).

¹⁰² *Second ICS FNPRM* ¶¶ 6, 47.

¹⁰³ Siwek/Holt Declaration ¶ 10. As Siwek/Holt explain, “the term ‘backstop’ rate implies some leeway to allow a market-based solution. To borrow a baseball analogy, very few pitches reach the backstop.” *See id.*

¹⁰⁴ Siwek/Holt Further Comment on Rate Cap Proposals at Table 1, Table 2, Figures A, B, and C. CenturyLink reached a similar conclusion, finding that “[w]hen common costs are allocated on a per-minute-of-use basis, excluding site commissions, the average cost for debit/prepaid calls in prisons is \$0.14 per minute and for collect calls is approximately \$0.17 per minute.” *See* WC Docket No. 12-375, Letter from CenturyLink (dated July 20, 2015) (citing *Second ICS FNPRM* ¶ 53).

¹⁰⁵ Siwek/Holt Further Comment on Rate Cap Proposals at 4-5.

¹⁰⁶ WC Docket No. 12-375, Written Ex Parte Letter from Martha Wright Petitioners (dated Aug. 27, 2015).

¹⁰⁷ *See id.* at n.3.

¹⁰⁸ The Wright Petitioners state this rate applies to both state-level facilities as well as county jails, but fail to note that county jails have the option of adopting the state-level rate or entering into their own contract with the ICS provider based on their specific needs. *See, e.g.*, WC Docket No. 12-375, Written Ex Parte from New Jersey Advocates for Immigrant Detainees and NYU Immigrant Rights Clinic (dated June 30, 2015) (noting how Bergen County, New Jersey issued a Request for Proposals soliciting bids for a new ICS contract based on \$0.21 per minute for domestic calling with a 65% commission).

Colorado Department of Corrections rate is \$0.12 per minute even though all of those facilities are state-level departments of correction. This variation in rates is precisely the reason why a backstop rate cap is needed – to ensure all correctional institutions can receive the appropriate level of ICS for their facilities at rates that remain just and reasonable for inmates and their families. The Wright Petitioners’ assumption that the same below-cost rate can be applied to all correctional facilities nationwide ignores the realities of the ICS market and record evidence.¹⁰⁹

III. CONCLUSION

The market-based approach to ICS regulation embraced by the FCC in the *Second ICS FNPRM* will encourage competition, promote lower ICS rates for inmates and their families, and ensure fair compensation for ICS providers. If the permanent rate caps to be adopted by the FCC serve as a backstop to this market-based solution they will protect inmates and their families against exorbitant ICS rates while ensuring the ICS market has the rate flexibility it needs to meet the varying security and communications needs of correctional facility customers. The backstop rate caps set forth in the Joint Provider Reform Proposal satisfy the FCC’s objective of market-based reform. They will safeguard against rates that are unreasonably high (for consumers) or unreasonably low (for providers), allow for the rate flexibility necessary for market-based rates to develop, and are consistent with the FCC’s long history of incorporating backstop measures into rate cap regimes. The Proposal’s backstop rate caps also rely on the FCC’s preferred method of using industry-wide average costs to set rates, and are based on the best data available in the record. By contrast, other parties’ below-cost rate proposals are legally unsound, conflict with record evidence, and will not achieve the FCC’s goal of market-based ICS regulation. Accordingly, the Joint Provider Reform Proposal’s backstop rate caps should be adopted.

¹⁰⁹ It also is important to note that site commissions were eliminated under each of these state-level contracts, which greatly influenced the resulting per-minute rate. See GTL April 3 Letter at 6 (discussing the elimination of site commissions in the Ohio and New Jersey state-level contracts); WC Docket No. 12-375, Ex Parte Notification from Global Tel*Link Corporation (dated Aug. 21, 2015) (explaining the elimination of site commissions at Colorado state-level facilities).