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*ADMITTED IN DC ONLY

September 25, 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 in support of admin-support payments for correctional facilities to recover their costs for inmate access to inmate calling services.

Pursuant to Section 1.1206(b) of the FCC's rules, a copy of this notice 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

cc (via e-mail): Chairman Tom Wheeler
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Commissioner Michael O'Rielly
Jonathan Sallet
Sarah Citrin
Richard D. Mallen
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. GTL SUPPORTS ADMIN-SUPPORT PAYMENTS FOR CORRECTIONAL FACILITIES TO RECOVER THEIR COSTS FOR INMATE ACCESS TO ICS

The goal of the Federal Communications Commission ("FCC") in this proceeding[1] "is to move to a market-based solution to reduce rates" for inmate calling services ("ICS").[2] The market-based solution the FCC seeks hinges largely on correctional institutions, which have the ability to control ICS pricing as they select their ICS provider through a competitive bidding process that often is primarily or exclusively determined by which provider offers the highest site commission payments.[3] As the FCC has determined, "where site commission payments exist, they are a significant factor contributing to high rates."[4]

Consequently, the FCC's "market-based" goals can only be achieved if correctional institutions have market-based incentives to select their ICS provider based on factors other than the amount of site commission to be paid. Currently, the extent to which ICS providers can compete on end user prices depends largely on whether prison and jail administrators value low end user prices when choosing an ICS provider. When site commission payments are no longer the primary criteria for selecting an ICS provider in the competitive bidding process, ICS providers will have to compete on the basis of technology, services, and per-minute rates.[5]

The Joint Provider Reform Proposal[6] acknowledges that correctional facilities may incur some administrative and security costs to provide inmates with access to ICS and therefore proposes the existing site commission regime be transitioned to defined "admin-support payments." The FCC also has recognized the possibility that correctional institutions may incur

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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* ¶ 47; *see also id.* ¶ 6 (seeking "comment on moving to a market-based approach to encourage competition in order to reduce rates to just and reasonable levels and to ensure fair but not excessive ICS compensation").

3 *See, e.g.*, *Second ICS FNPRM* ¶ 24 ("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."); *see also* WC Docket No, 12-375, Letter from Securus Technologies, Inc. at 1 (dated Sept. 26, 2014) ("The methodology [for selecting an ICS provider for a large prison facility] involved granting 83.33% of the points to the bidder with the highest site commission pledge. All other criteria, which include the bidder's security offerings and customer service commitment, were collectively weighted at only 16.66%.").

4 *ICS Order and First FNPRM* ¶ 34.

5 *Second ICS FNPRM* ¶ 21; *see also* WC Docket No. 12-375, Letter from Global Tel*Link Corporation (Sept. 2, 2015) (explaining the individual nature of correctional facility contracts, and how ICS providers and correctional institutions must have the flexibility to determine what is best for their particular facilities).

6 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").

costs to make ICS available in their facilities.[7] Under the regime recommended by GTL and the Proposal, correctional institutions would be permitted to recover their legitimate administrative, investigative, security, and maintenance costs directly related to giving inmates access to ICS in their facilities through an admin-support payment to be added to the per-minute ICS backstop rate caps ultimately adopted by the FCC.[8]

While some parties seek to eliminate site commissions entirely,[9] a majority of the ICS industry as well as the National Sheriffs' Association support the use of a per-minute additive rate as the appropriate means of reimbursing correctional facilities for the costs they incur to provide inmates with access to ICS.[10] This approach also is supported by 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."[11] The Oklahoma Department of Corrections also 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."[12]

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7 *See ICS Order and First FNPRM* at n.203 ("we cannot foreclose the possibility that some portion of payments from ICS providers to some correctional facilities may, in certain circumstances, reimburse correctional facilities for their costs of providing ICS").

8 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. *See* Proposal at 3-4; *see also, e.g.*, WC Docket No. 12-375, Letter from Global Tel*Link Corporation (dated July 9, 2015), *attaching*, Economists Inc., Further Comparison of Correctional Facility ICS Cost Analyses (dated July 9, 2015); WC Docket No. 12-375, Letter from Global Tel*Link Corporation (dated June 29, 2015), *attaching* Economists Inc. Comparison of Correctional Facility ICS Costs Analyses (dated June 25, 2015); WC Docket No. 12-375, Letter from Global Tel*Link Corporation (dated Sept. 19, 2014), *attaching* Economists Inc. Correctional Facility ICS Cost Analysis for Global Tel*Link Corporation (dated Sept. 18, 2014); *see also* 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 (dated Jan. 12, 2015) ("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"); 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 (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").

9 *See, e.g.*, Illinois Campaign for Prison Phone Justice January 2015 Comments at 3-4; California Immigrant Policy Center January 2015 Comments at 1; Legal Services for Prisoners with Children January 2015 Comments at 1; Minority Media and Telecommunications Council and Rainbow PUSH Coalition January 2015 Comments at 8; Prison Policy Initiative January 2015 Reply Comments to Local Government Comments at 3; American Bar Association January 2015 Reply Comments at 11.

10 *See, e.g.*, WC Docket No. 12-375, Letter from Securus Technologies, Inc. at 3 (dated Sept. 20, 2015); WC Docket No. 12-375, Letter from National Sheriffs' Association at 4-5 (dated June 12, 2015); *see also* Proposal at 3 (representing 85% of the industry revenue in 2013).

11 Oregon DOC December 2014 Comments at 2.

12 Oklahoma DOC January 2015 Comments at 2.

Transitioning from the current system of unconstrained site commission payments to an admin-support payment recovered as an additive to per-minute ICS rates is fundamental to creating a market environment that will be conducive to the FCC's objective of reduced ICS rates. Adoption of an admin-support payment regime is beneficial to all stakeholders, and recognizes the rights and interests of inmates and their families/friends to lower ICS rates, addresses the security and administrative costs of correctional facilities, reflects the business needs of ICS providers, and satisfies the goals outlined by the FCC.

II. THE FCC HAS DETERMINED THAT THE EXISTING SITE COMMISSION SYSTEM IS THE PRIMARY DRIVER OF HIGH ICS RATES

A. Over the Past Thirteen Years the FCC Consistently Has Found the Existing Site Commission System to be an Obstacle to Reducing ICS Rates

The FCC has for years pointed to the negative effect site commission requirements have on the ICS market.[13] Since 2002, the FCC has found that, in "most contracts, the commission is the single largest component affecting the rates for inmate calling service."[14] Record evidence supports that site commission payments are a "significant contributor to high rates" and the "significant driver of increases to rates charged to inmates."[15] According to the FCC, 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 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)."[16]

It is not enough for the FCC to establish backstop rate caps and accept a defined set of ancillary fee caps without also addressing the most significant factor affecting ICS costs – the existing site commission system.[17] This would ignore the individualized nature of ICS offerings, and the rate flexibility needed to meet the varying security and communications needs of correctional facility customers.[18] Site commissions are a key part of the cost structure of ICS.[19]

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13 *See* Attachment, which provides the FCC's prior statements regarding ICS site commissions.

14 *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 3248, ¶ 10 (2002) ("*2002 Order*"); *see also ICS Order and First FNPRM* ¶ 41 (same); *Rates for Interstate Inmate Calling Services*, 27 FCC Rcd 16629, ¶ 37 (2012) ("*ICS NPRM*") (same).

15 *ICS Order and First FNPRM* ¶¶ 33, 38; *see also id.*¶ 34 ("The record makes clear that where site commission payments exist, they are a significant factor contributing to high rates.").

16 *Second ICS FNPRM* ¶ 22.

17 *Cf.* WC Docket No. 12-375, Letter from Martha Wright Petitioners at 5-6 (dated Sept. 8, 2015); WC Docket No. 12-375, Alabama Public Service Commission Ex Parte Presentation at 2 (dated Jan. 16, 2015).

18 *See, e.g.*, WC Docket No. 12-375, Letter from Global Tel*Link Corporation (Sept. 2, 2015). The FCC has recognized the possibility that correctional institutions incur costs to make ICS available in their facilities (*ICS Order and FNPRM* at n.203), and the FCC should not substitute its judgment for that of each correctional facility on its individual requirements. The Proposal's 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

The comprehensive ICS reform sought by the FCC is not possible without addressing the existing site commission regime. As the record reflects, "unlimited commissions will always inflate calling rates and will prevent competition from operating on the merits and [from] driving down rates."[20]

Reform of the existing site commission system will encourage "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."[21] In New Jersey,[22] Ohio,[23] and Colorado[24] the elimination of site commission payments has resulted in lower ICS rates. In West Virginia, the Division of Corrections 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.[25] Arkansas also selected its ICS vendor using only

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needs of correctional facility customers. Correctional facilities need the same flexibility in recovering their legitimate costs of providing access to ICS.

[19] Lattice Incorporated January 2015 Comments at 5; WC Docket No. 12-375, Andrew D. Lipman Written Ex Parte Presentation at 13 (dated July 21, 2015); *see also* Letter from Martha Wright Petitioners at 8 (dated Sept. 8, 2015) (acknowledging that site commissions are part of the ICS "cost structure").

[20] WC Docket No. 12-375, Letter from Securus Technologies, Inc. at 3 (dated Oct. 6, 2014); *see also, e.g.*, A New Way of Life Reentry Project January 2015 Comments at 1; Alliance of Baptists January 2015 Comments at 1; Human Rights Defense Center January 2015 Comments at 1-3; New Jersey Institute for Social Justice January 2015 Comments at 2-3; Lattice Incorporated January 2015 Comments at 5-7; Verizon and Verizon Wireless January 2015 Comments at 3; 51 Former State Attorneys General January 2015 Comments at 2.

[21] *Second ICS FNPRM* ¶ 27 (stating that "when states such as Missouri, New York and New Mexico eliminated site commission payments, ICS rates decreased significantly").

[22] 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 initially decreased rates to $0.13 per minute. The New Jersey Department of Corrections later awarded a new contract under which ICS rates were reduced to 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.nj.gov/treasury/purchase/noa/contracts/t1934_14-x-22648.shtml. Soon thereafter, the New Jersey Board of Public Utilities 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).

[23] The Ohio Department of Rehabilitation and Correction 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/.

[24] 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).

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

technical criteria, with negotiations on pricing occurring after the selection of the vendor with the highest technical score.[26]

While a few states and correctional institutions have eliminated commissions and lowered rates in light of the FCC's ongoing proceedings, others have responded contrary to the FCC's stated goals. Some have increased the required site commission payment or sought additional in-kind contributions, or upfront payments.[27] FCC action is still necessary to achieve the FCC's goals. The ICS "market will continue responding to the economic interests and demands of the inmate facilities rather than those who pay for . . . services"[28] as long as correctional facilities continue to declare that contract awards will be based on the highest site commission offered.[29] ICS providers must bid consistent with the Request for Proposal issued by a correctional facility to be a contender in the competitive bidding process required to provide ICS.[30] The recent marketplace examples set forth above, however, illustrate that when site commission payments are no longer the main criteria for awarding contracts, ICS provider selection is based on lower ICS rates and technical, customer-focused aspects of ICS. The FCC cannot hope to achieve its goals by ignoring what it has found to be the most significant factor contributing to high ICS rates.

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

27 WC Docket No. 12-375, Global Tel*Link Corporation Ex Parte Notification (dated Aug. 21, 2015); *see also*, *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); WC Docket No. 12-375, Letter from Martha Wright Petitioners (dated Mar. 6, 2015) (explaining that the "amount of revenue earned by the [Arizona Department of Corrections] from its ICS contract steadily increased"); WC Docket No. 12-375, Letter from Securus Technologies, Inc. at 1-3 (dated Sept. 20, 2015) (discussing current marketplace activity on site commissions).

28 WC Docket No. 12-375, Network Communications International Corp. Reply Comments on Written Ex Parte Presentation Andrew D. Lipman (dated June 29, 2015).

29 WC Docket No. 12-375, Letter from Global Tel*Link Corporation (dated July 1, 2015).

30 *See, e.g.*, *ICS NPRM* ¶ 37 ("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.'") (citing *2002 Order* ¶ 10); *ICS Order and First FNPRM* ¶ 41 ("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.") (citing *2002 Order* ¶ 10).

B. The Record Supports the Use of Admin-Support Payments

If the FCC neglects to tackle what it has termed a "significant contributor to high rates,"[31] the FCC's decision will be vulnerable to "another stay, or even worse, reversal of its entire ICS regulatory scheme."[32] Ongoing regulatory uncertainty only serves to divert funds from research and development to litigation, ultimately at the expense of inmates and their friends and family who would benefit from more robust offerings and new technologies.

The FCC repeatedly has acknowledged that site commissions are "an important aspect" of ICS market failure, and a decision that fails to address the existing site commission system "runs counter to the evidence" before the FCC.[33] Further, the FCC has determined that modifying the current commission regime will benefit the ICS marketplace: "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."[34] The FCC "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[35] An agency rule is "arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[36] In light of the vast record regarding the role of site commissions in the ICS market,[37] addressing ICS rates and ancillary charges without also addressing site commissions would be the hallmark of arbitrary and capricious agency action.[38]

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31 *ICS Order and First FNPRM* ¶¶ 33, 38; *see also id.*¶ 34 ("The record makes clear that where site commission payments exist, they are a significant factor contributing to high rates.").

32 *See generally* WC Docket No. 12-375, Andrew D. Lipman, "How to Save the FCC's Inmate Calling Rules from Being Reversed in Court" (dated June 1, 2015).

33 *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Auto Insurance Co.* 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *see also Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) ("The agency must make findings that support its decision, and those findings must be supported by substantial evidence.").

34 *Second ICS FNPRM* ¶ 27.

35 *Motor Vehicle Manufacturers*, 463 U.S. at 44.

36 *Motor Vehicle Manufacturers*, 463 U.S. at 44.

37 WC Docket No. 12-375, Letter from Andrew D. Lipman at 6 (dated Sept. 21, 2015) ("Allowing the current regime – where the FCC expects a rate cap to reduce site commission payments when to date its caps have proven incapable of having such an effect – would certainly be arbitrary and capricious.").

38 5 U.S.C. § 706(2)(A) (stating an agency's action in promulgating rules may be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *see also Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) ("Under the 'arbitrary and capricious' standard the scope of review is a narrow one. A reviewing court must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . .") (internal citations omitted).

In addition, establishing rate caps based on cost data that excludes site commissions (thus not permitting ICS providers to recover the costs of site commission payments) while taking no action to modify the existing site commission regime would result in rates that are confiscatory.[39] The FCC adopted the interim interstate ICS rate caps based on data from states that eliminated site commissions.[40] The FCC noted it selected those rate caps "because they exclude site commissions," which the FCC found "is the most important factor leading to interstate ICS rates being above cost."[41] In addition, the cost data collected from ICS providers (on which permanent ICS rates are to be based)[42] did not include site commissions as one of the categories of costs to be included in the data.[43]

FCC precedent holds that rates must "enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed." [44] 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."[45] The FCC cannot impose rates so low that ICS providers cannot possibly

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39 *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (finding the Fifth Amendment to the Constitution protects regulated entities from regulations that are "so unjust as to be confiscatory").

40 *ICS Order and First FNPRM* ¶ 62; *see also ICS Order and First FNPRM* at n.273 ("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."). The FCC also granted Pay Tel a waiver of the interim interstate rate caps based on a new rate cap that "reflects, on a per-minute basis, the elimination of interstate commissions from Pay Tel's interstate rates consistent with the [*ICS Order and First FNPRM*]'s determination that site commissions are not a recoverable component of interstate ICS rates." *See Rates for Interstate Inmate Calling Services*, 29 FCC Rcd 1302, ¶ 17 (2014) (internal quotations omitted). As a condition of receiving the waiver, Pay Tel also committed to "the elimination of interstate commissions from Pay Tel's interstate rates." *Id.* ¶ 9.

41 *ICS Order and First FNPRM* at n.229.

42 *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.

43 *ICS Order and First FNPRM* ¶¶ 124-25; *see also* WC Docket No. 12-375, Letter from Securus Technologies, Inc. at 5 (dated Sept. 20, 2015) ("As the Commission required, these per-minute cost figures [from the data collection] exclude the cost of site commission payments.").

44 *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)).

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

recover their costs and cannot adopt rate regulation that effectively guarantees carriers an economic loss,[46] both of which will result from a FCC decision that ignores the primary driver of ICS rates – the existing site commission system.[47] It would be the essence of confiscatory ratemaking for the FCC to establish ICS rate caps based on cost data that excludes site commissions without also addressing the continued demand for site commission payments under the existing system.[48]

III. THE ADMIN-SUPPORT PAYMENTS RECOMMENDED BY GTL REFLECT CORRECTIONAL FACILITIES' LEGITIMATE COSTS OF PROVIDING INMATES ACCESS TO ICS

GTL submitted an analysis that shows ICS-related correctional facility costs to be in the range of $0.005 to $0.016 per intrastate minute of use.[49] The admin-support payments recommended by GTL reflect correctional facilities' legitimate costs and satisfy the FCC's objective of lowering ICS rates. It is "possible for the Commission to develop a cost recovery mechanism that enables Facilities to recoup their ICS costs."[50] However, in doing so the FCC "must use 'the best data available'" in its decision making.[51] 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.'[52] The FCC has a "duty" to "use 'the most reliable data available' to produce

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46 *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").

47 WC Docket No. 12-375, Letter from Andrew D. Lipman at 5 (dated Sept. 21, 2015) ("Some parties, such as the Wright Petitioners, argue that capping ICS rates will limit the site commissions ICS providers without creating a separate cap for recovery of site commissions costs. But the Wright Petitioners ignore the fundamental fact that this approach has already been tried, and didn't work."); *see also* WC Docket No. 12-375, Letter from Global Tel*Link Corporation (Sept. 2, 2015).

48 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); *see also* WC Docket No. 12-375, Andrew D. Lipman, "How to Save the FCC's Inmate Calling Rules from Being Reversed in Court" at 7 (dated June 1, 2015) ("The Commission cannot set rates at levels so low that they make it impossible for service providers to recover their costs *and* provide a reasonable return on capital to their investors. Excluding site commissions from costs, without any offsetting opportunity for recovery, guarantees this prohibited result.") (emphasis in original).

49 GTL January 2015 Reply Comments, Attachment 2; WC Docket No. 12-375, Letter from Global Tel*Link Corporation (dated July 9, 2015), *attaching* Economists Inc., Further Comparison of Correctional Facility ICS Cost Analyses (dated July 9, 2015); WC Docket No. 12-375, Letter from Global Tel*Link Corporation (dated June 29, 2015), *attaching* Economists Inc. Comparison of Correctional Facility ICS Costs Analyses (dated June 25, 2015); *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.").

50 WC Docket No. 12-375, Letter from Praeses LLC at 4 (dated Sept. 9, 2015).

51 *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*.

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

figures that can be considered sufficiently 'accurate.'"[53] As other parties note, "[n]o 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."[54] By contrast, the cost estimates submitted by Praeses[55] and the National Sheriffs' Association[56] are not supported by verifiable data, and should be rejected as unsubstantiated.[57] The FCC requires parties to "provide supporting analysis and facts for [their] assertions, including an explanation of how data were calculated and all underlying assumptions."[58] FCC decisions must be made based on "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."[59] 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."[60]

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53 *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)).

54 WC Docket No. 12-375, Letter filed by Andrew D. Lipman at 4 (dated Feb. 20, 2015).

55 *See, e.g.,* Praeses January 2015 Comments at 34-35; WC Docket No. 12-375, Letter from Praeses LLC at 4 (dated Sept. 9, 2015). As GTL has explained, any request by Praeses regarding payments made to correctional facilities must be viewed in light of its position in the ICS marketplace. *See* WC Docket No. 12-375, Letter from Global Tel*Link Corporation at 2-3 (dated Nov. 20, 2014). Praeses is not an ICS provider or correctional facility; it is a for-profit company that has built its correctional facility services business based on the exchange of services for a flat fee or percentage of the site commissions received by correctional facilities from ICS providers. Praeses' positions regarding site commissions and admin-support payments may be heavily influenced by its self-interest as Praeses needs to preserve payments to correctional institutions in order for Praeses to be paid for the services it provides to its correctional institution customers. *See* WC Docket No. 12-375, Letter from Securus Technologies, Inc. at 1-3 (dated Sept. 20, 2015) ("Praeses' entire business model depends on the site commission model that exists today. . . .The higher the amount of the site commission, the more money Praeses makes.").

56 NSA January 2015 Comments at 3-5. GTL previously has addressed the NSA submission. *See, e.g.*, WC Docket No. 12-375, Letter from Global Tel*Link Corporation (dated July 9, 2015), *attaching*, Economists Inc., Further Comparison of Correctional Facility ICS Cost Analyses (dated July 9, 2015); WC Docket No. 12-375, Letter from Global Tel*Link Corporation (dated June 29, 2015), *attaching* Economists Inc. Comparison of Correctional Facility ICS Costs Analyses (dated June 25, 2015); *see also* WC Docket No. 12-375, Letter from Global Tel*Link Corporation (dated Sept. 19, 2014), *attaching* Economists Inc. Correctional Facility ICS Cost Analysis for Global Tel*Link Corporation (dated Sept. 18, 2014).

57 WC Docket No. 12-375, Letter from Andrew D. Lipman at 33-47 (dated July 21, 2015) (addressing other proposals in the record for correctional facility cost recovery).

58 *Universal Service Contribution Methodology; A National Broadband Plan for Our Future,* 27 FCC Rcd 5357, ¶ 98 (2012); *see also* 47 C.F.R. § 1.363(a) (stating that statistical information offered in common carrier hearing proceedings must "give a comprehensive delineation of the assumptions made, the study plan utilized and the procedures undertaken"); *id.* (requiring for sample surveys, "a clear description of the survey design, including the definition of the universe under study, the sampling frame, and the sampling units; an explanation of the method of selecting the sample and the characteristics measured or counted").

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

60 *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)).

Further, it is important that the transition from the existing site commission system to one based on admin-support payments accomplishes the FCC's goal of lower ICS rates. An admin-support payment of $0.05 per minute as suggested by some parties[61] 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 marketplace."[62]

Any admin-support payment adopted by the FCC 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,[63] 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.[64] The definition of a prohibited site commission payment should include any "in-kind" requirements, equipment funds, exchanges, fees and the like, which is similar to the FCC's ruling regarding its prohibition on the payment of site commissions on interstate ICS revenues.[65] This will ensure the transition

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61 *See, e.g.*, WC Docket No. 12-375, Letter from Human Rights Defense Center (dated July 29, 2015); WC Docket No. 12-375, Letter from CenturyLink at 2 (dated Oct. 10, 2014). As a large incumbent local exchange carrier ("ILEC") with many lines of business, CenturyLink can easily continue to make high site commission payments as it is able to cross-subsidize such payments with its other non-ICS lines of business. *See, e.g.*, WC Docket No. 12-375, Letter from Securus Technologies, Inc. (dated May 4, 2015) ("Securus believes that, under the Rate Caps, it is economically impossible to continue paying commissions while cover the cost of service and without passing through commissions to end users in the calling rates.").

62 *Second ICS FNPRM* ¶ 27.

63 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. 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).

64 Securus January 2015 Comments at 13.

65 *Second ICS FNPRM* ¶ 21 (seeking "comment on prohibiting site commissions as a category, including all

to an admin-support payment system creates a market environment favorable to the FCC's objective of encouraging lower ICS rates.

payments, whether in-kind payments, exchanges, allowances, or other fees"); *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."); *Rates for Interstate Inmate Calling Services,* 29 FCC Rcd 10043, n.4. (2014) ("The Commission also noted that it would treat 'in-kind' payments similar to site commission payments."); *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).

ATTACHMENT

Federal Communications Commission Statements Regarding ICS Site Commissions

2012 Notice of Proposed Rulemaking[1]

- "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)

September 2013 Report and Order and Further Notice of Proposed Rulemaking[2]

- "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

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[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*").

benefits, states' general revenue funds, and personnel training." (*ICS Order and First FNPRM* ¶ 3)

- "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)

October 2014 Second Further Notice of Proposed Rulemaking[3]

- "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)

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

- "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 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)